

## **How to Think Like a Regulator**

By Charles R. Franklin<sup>i</sup> and Craig M. Capilla<sup>ii</sup>

In our practice, we deal with a lot of regulators at both the state and federal levels. From a licensing standpoint, regulatory agencies have significant control over your license and your ability to earn a living and practice as a professional. While we live in a world of many shades of gray, a regulator deals in one where things are supposedly only black and white; where rules are written to be obeyed or followed and compliance is supposed to be an absolute.

Frequently when professionals are contacted by a regulator, called in for a conference, or an inquiry has been made concerning their license, their initial reaction and response is: “But I did nothing wrong” or “But I got the right answer” or “But nobody was hurt” – all of which may be accurate, reasonable, and appropriate when they have been accused of malpractice. But those responses are not necessarily responsive or relevant to the regulator’s query. With regulators, the question usually is not whether the license holder has committed malpractice. Rather, the questions they have concern whether the professional has complied with the rules and regulations of the profession and/or should the licensed professional be allowed to practice or continue to practice at all?

This is a subtle but important distinction from any accusation of malpractice. As the old cliché goes, even broken clocks are correct twice a day. Regulators are there to ensure the applicant or license holder has had sufficient training or education to have satisfied (or demonstrated) some minimum standard of competence and compliance which all practitioners in that specific licensed profession must have or follow. Regulators do not guarantee performance for a particular job or event. For many practical reasons, they should not because then every

gripe or complaint, trivial, significant, or in between, would be submitted to the regulator to act as an arbiter. Though it sometimes seems like that is exactly what happens, non-specific gripes from a disgruntled consumer are often closed without further inquiry by the regulator if the gripe or complaint has nothing to do with the rules and regulations for the profession.

Remember, the issuance of a license by a regulatory authority is not a warranty that the license holder will excel or even just be good at his or her job. Nor is their review an endorsement of the quality of his or her performance at any one time. While it is certainly more difficult to get a professional license, on a very basic level it is similar to getting or keeping a driver's license. To get one, at the time you apply for one, you need to be able to show you can operate and drive a car safely. You need to pass a driver's test and demonstrate you know the rules of the road -- You pass, you get a license. It does not mean you are or will always be a good driver or that you will always parallel park without tapping the car in front or behind you. And if you get too many tickets, your license can be taken away even if you've never been in an accident. Getting a professional license means you have permission to work; you have demonstrated sufficient skill to be deemed competent. You can proceed. That someone else may not like what you did (or thinks you are a bad driver) is not really relevant or important to the regulator.

Mistakes happen and no one is perfect. To practice, no profession requires perfection or that you always be perfect. Rather, to practice requires only a baseline of competence or skill that all professionals in that field must meet and maintain. Regulators want to know if you know what you are doing and they want you to demonstrate that. If you find yourself under the microscope of a regulator's examination or review, it is critical that you are prepared to demonstrate that competence on their demand. Whether that opportunity will come at the first

response to an investigation, at a conference, or at trial on the merits of the complaint, you must be fully prepared to address the regulator's concerns and not what you think those concerns should be.

For that reason, it is never too early to get help when dealing with regulators. Your first instinct when you receive notice of an inquiry may be to ignore it and then hope for the best. Your first proactive step, however, should be to seek assistance. Reach out to your professional associations. Speak with a lawyer – hopefully one with experience in dealing with the regulator. Contact your liability insurer. Reach out to those resources that have more experience than you in dealing with regulators. Knowing how to maneuver through the regulatory investigation and complaint process can make all the difference in addressing the regulator's concerns and maintaining your license and sustaining your livelihood.

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