

Alternatives to Self-Regulation May have their Own Issues

By Julie Maciura
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There is no doubt that the concept of self-regulation of professions is under scrutiny. However, assuming that society still intends to regulate a profession, what are the alternatives? The most likely ones are for government to appoint its own agency or to directly regulate the profession through civil servants. However, these approaches have their own challenges including developing and maintaining expertise in the nuances of the profession and retaining a basic level of acceptance and support from the profession itself.

California's 421,000 registered nurses are regulated by a Board operating within the Department of Consumer Affairs. Recently the Board of Registered Nursing (BRN) was the subject of a report by the California State Auditor. This report identified some concerns that are less frequently found in self-regulating professions, some concerns that are common to all regulators of professions (particularly large regulators) and some intriguing ideas generally.

While most self-regulating bodies have budget issues, they can generally control their own revenue by setting the fees charged to members. However, government agencies are to a larger extent constrained by a jurisdiction-wide budgeting process. In the BRN situation, this was evident in concerns identified by the Auditor relating to BRN's attempts to save money to address a budget shortfall. For example, the BRN was directed to refer serious conduct cases to a division of the Department of Consumer Affairs that used trained peace officers to conduct the investigations. The BRN

instead kept many of these investigations in-house (where the costs were less than half of those of peace officers). The BRN did this in order to save funds for staff training and to raise the hourly rate for expert witnesses (which the BRN had difficulty retaining). The Auditor found that re-allocating resources in this way jeopardized public safety by contributing to delayed, and less expert, investigations.

Such budgetary manipulations and bureaucratic rivalries are likely much less common in self-regulating bodies.

The main finding of the audit was that the BRN took much too long to investigate complaints, especially serious complaints:

During our review of 40 investigated complaints resolved between January 1, 2013, and June 30, 2016, we found that BRN struggled to promptly resolve complaints, which potentially placed patients at additional risk. Specifically, BRN failed to resolve 31 of the 40 complaints within the 18-month goal, and 15 of those 31 complaints took longer than 36 months to resolve—more than twice as long as Consumer Affairs' goal. Further, BRN took longer than 48 months to resolve seven of those 15 complaints, six of which included allegations of patient harm resulting from a nurse's actions.

The Auditor found a number of causes for these delays, the primary one being the delay in assigning cases for investigation. The report gives an example of where an allegation of a serious medication error resulting in a toddler's death was not assigned for 18 months and

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disciplinary action was only taken 39 months after the complaint was made.

In addition, the failure of the BRN to ensure that data is accurately inputted into the Department's case management database on a timely basis made it difficult to supervise investigations. Additionally, these inputting errors made it challenging to analyze the success of the investigations process. And, of course, the reluctance of the BRN to use the Department's investigators for serious investigations added to the delays.

Another factor contributing to the delays was inadequate investigations by both the Department's and the BRN's investigators. About 20% of cases included referrals back for additional investigation before a decision could be made. Some of those additional investigations involved correcting fairly fundamental omissions such as failing to interview the patient and the patient's spouse who witnessed the events in issue. The Auditor noted that most BRN staff did not have formal skills training and generally learned by shadowing existing staff.

These delays contributed to an extensive backlog in processing complaints. The Auditor commented that: "Unnecessary delays in the complaint resolution process enable nurses who are the subject of serious allegations to continue practicing and may risk patient safety."

One intriguing aspect of the report was that all BRN members were supposed to be fingerprinted upon registration so that the BRN would be informed automatically should a member be charged with or found guilty of an offence. The Auditor was concerned that in fact many members were registered without the

BRN first obtaining their fingerprints. While one could debate the intrusiveness of requiring every registrant to be fingerprinted, routine notification by authorities of charges and findings would certainly help regulators better protect the public.

The Auditor's recommendations included:

1. Implementing policies and procedures requiring timelines for every stage of the investigation, especially for the assigning of investigators;
2. Monitoring compliance with the timelines;
3. Developing input controls to ensure that accurate information is entered into the case management database on a timely basis;
4. Complying with the duty to assign serious cases to Department investigators;
5. Tracking investigations that are sent back because insufficient information was obtained during the initial investigation;
6. Formal training of all investigators including on techniques for gathering appropriate evidence (and to develop a procedural guide on this topic as well); and
7. Tracking compliance of investigative staff with their formal training requirements.

A copy of the full report is available at:

<https://www.bsa.ca.gov/pdfs/reports/2016-046.pdf>.