



## **How to Work Better with your AG**

*This article is based on a presentation at the 2014 FSBPT annual meeting by R. Kenneth Gordon, JD and Barbara Safriet, JD, LL.M., FAANP(H) following the review of more than 500 responses to a board-attorney relations survey.*

Jurisdiction licensing boards and their attorneys have a complicated dance as partners. They need to know the steps, communicate well with their partner, and trust that each knows their own part well.

Boards, administrators and agencies all have a need at some time to work with an attorney, either with an Assistant Attorney General (AG) or a private attorney. The relationship developed by the board and the attorney can be as important as the issues they handle. You should always look toward how to make the relationship “better.”

Both sides need to remember that the board/agency/etc. is the client and the attorney is the employee.

The attorney has responsibilities as does the board and they are different.

What is the role of the board’s own attorney, or the Assistant AG assigned to it?

The attorney is the interpreter of the statute such as the practice act that gives the board its powers, responsibilities and rule-making authority. The board must know if the rule it is promulgating is within its authority. The attorney must interpret and review this issue using doctrines of interpretation of the law and its parameters.

The attorney also needs to make sure rules, policies and procedures have been followed. Mainly the attorney should look at whether the procedure is fair and authorized by such things as the board’s statutes, the administration procedures act, state and federal constitutions, due process, and state procedures on the licensing function.

The attorney is a procedural monitor and a rational analyst, assisting the board in articulating some justifiable basis for the board's action. This may result in friction between boards, administrations and their attorneys. Still, boards should appreciate the attorney's role as a superintendent of rational analysis in which reasoned articulation is most important.

Some boards say they can do certain functions because they know other boards have set a precedent. However, that can't be the entire basis. In addition, saying "We always did it this way" is not a rational reason. It is up to the attorney to make certain the board articulates its reason clearly and fully.

One might find two extreme types of board attorneys:

- The Policy Partisan who is a cautious killjoy in which the attorney is adamant that the board is prohibited from doing a certain action.
- The Radical Interventionist in which the attorney strongly advocates that the board "must" take a certain action.

Hopefully the attorney falls somewhere between these two extremes.

The board should always ask the attorney to explain why they are urging caution or action. Communication is paramount. The attorney has a role to play in counseling more or less action, but the board is the ultimate decision maker. The attorney also should explain the difference between a legal analysis and a policy analysis - what is permitted legally and what policy may be right in this instance. The attorney should support a board decision, unless it is blatantly illegal. Remember that the final decision is the board's responsibility.

There are many types of boards. There are independent, autonomous boards that can hire their own attorney; boards that are part of an umbrella board; or divisions within an agency.

The formal relationship between boards and their attorney also varies from state to state. Is your Assistant AG assigned to your board? Do they stay with the AG's office? Do they rotate? Do they represent competing boards such as the medical board or the chiropractic board? Is your attorney full-time or part-time? All these may affect the role the attorney has with your board.

But there are principles that apply over all structures of agencies in all states.

1. The attorney has a duty to instruct the board on duties, responsibilities, obligations and procedures, along with a list of things the board should never do.

2. The attorney has duty to query the board on proposed actions and what the reasoned basis is for the actions. There must be a clear, articulated reason.

3. The board has an obligation to inform its attorney as to developments that may affect the board or similar boards around the country. These may include scope of practice, educational requirements, and licensing requirements.

For instance, there may be a proliferation of needs for increases in allied healthcare workers who are post-high school /pre-baccalaureate with earned certifications. These people would not be licensed, but essential to fill this need. A recent report estimated that 190,000 new allied health professionals will be needed in California in the next decade. This will affect PTAs and home health care. Boards should inform their attorneys about such possibilities and how Medicare and Medicaid rules may play out in such situations.

Another significant issue is the reemergence of the intrusion of corporate practice of medicine doctrine in many states. Issues will include who may own practices and who may hold managerial roles in practices. The only ones who can own a healthcare provider group, which may include many types of professional services, is physicians, along with HMOs, hospitals and others with statutory exceptions.

Some want coordinated, team-based care and participation in Accountable Care Organizations, such as primary care medical homes. The doctrine can affect your licensees and be used against your licensees by other health providers and professions. Your attorney can be your ally if informed of developments in these areas.

Boards should use clarity, communication, collaboration and candidness in seeking advice from an attorney.

A trusted relationship between the board and its attorney is essential and that can only be accomplished with quality communication. Board members should consider learning about the interests of the attorney, maybe planning a lunch together. If the board develops a more personal relationship with the attorney, the attorney will care more about the board and may provide better service.

#### Plan Ahead

Boards should plan ahead so the attorney knows what issues or actions may be on the horizon and they can prepare for them. But make certain that when you warn your attorney of an upcoming problem or issue that you are right. Wasting time and energy by “crying wolf” may prevent a good working relationship in the future.

Make your attorney an expert in physical therapy practice and regulatory issues so that they have knowledge based on both the agency and the industry. This allows the attorney to provide advice based on more than just sharing what is the law. The board attorney will be able to give real, practical advice in context.

#### Practice Prevention

Many issues can be resolved easily and quietly if handled early before it can become a lawsuit. If it goes into litigation, work with the attorney on the documentation early in the process. Documentation should not be written in a way that needs to be explained, distracting the judge and jury and thus having them miss the point.

Be sure to use the attorney's contacts with, for example, nurses or accountants, when appropriate and always use the attorneys' breadth of knowledge from working with other boards.

Finally work with the attorney on a deadline arranged in advance, along with budget concerns. Give the attorney the pertinent facts, even the inconvenient or embarrassing ones, so the attorney can decide what is relevant. Also, ask the attorney the right questions, but first think about what you really need to know. Sometimes by thinking about it, you will find that the problem can be resolved easily, early and quietly, even without an attorney.

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**R. Kenneth (Ken) Gordon, JD** retired from Baker & McKenzie LLP as the Chair and Founding Member of the Global and North America Pharmaceutical and Healthcare Industry Groups in 2009. Ken currently serves on various boards and has 20 years of experience serving on healthcare, corporate, civic and professional boards, including serving as Chairman of the Board of Community Hospital Corporation. He currently serves as the Public Member on the FSBPT Board of Delegates. His undergraduate degree is from Tufts University, and he holds a JD and an MBA from Northwestern University.



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