



Let's Have a Moratorium on Moratoriums

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The separation of and interaction among the branches of government can be crucial to the success of any regulatory structure. The legislative, judicial, and executive branches of government were created to allow for the separation of powers and to provide a “checks and balances” approach to governance.

Indeed, the separation of powers approach undertaken by the states was modeled after the federal government and its recognition of the three branches. Further, the 10th Amendment to the United States Constitution reserves to the states those powers not specifically granted to the federal government.

Under the three branches of government at the state level, there exists an executive branch, a legislative branch, and a judicial branch.

The *executive branch* of government is headed by a governor who is elected by the people. The executive branch/governor serves as the chief executive officer of the state and is responsible for carrying out the laws of the jurisdiction.

The *legislative branch* is composed of a smaller upper chamber called a senate and a larger lower chamber called a house of representatives. The legislature considers laws brought forth for enactment and generally approves the state budget.

Finally, the *judicial branch* is the arm of government that interprets and decides how the laws should be applied. There is an appeal process of judicial decisions that allows for an appellate court to address allegations of errors made by the lower courts.

The interaction and separation of authority among the branches of government can be quite complex. Regulatory boards, although created and empowered via legislative action, generally fall under the executive branch of government.

Governors appoint members of the regulatory boards, sometimes with ratification from the legislative branch. As readers are aware, board appointments can be recalled with new appointees selected as replacements. Politics and elections, of course, play a role.

Most regulatory boards are empowered through the enabling legislation (practice acts) to promulgate rules (sometimes referred to as regulations) following the applicable administrative procedures acts. These rules provide specificity to the skeletal structure of the regulatory scheme using the expertise of the professional and consumer members of the board. Thus, the regulatory board appointed by the governor is exercising the authority granted by the enabling legislation to promulgate the rules necessary to effectuate the regulatory scheme.

The legislative role of the governor is generally limited to calling special legislative sessions and the authority to veto legislation. However, and because regulatory boards fall under the executive branch of government, certain authority exists to limit or control the actions of the regulatory boards.

Such control can be exercised through the use of executive orders whereby a governor, among other actions, triggers emergency powers, creates advisory committees, addresses administrative issues or effectuates reform. The authority to issue an executive order is found either in the state constitution, statutes, or case law and is effectuated without the need for any legislative action. While not a statute, executive orders do have the force of law and may be subject to interpretation of authority and scope through legal challenge.

Relevant to the Federation of State Boards of Physical Therapy (FSBPT), governors have issued executive orders prohibiting the further promulgation of rules by regulatory boards. On many occasions, these executive orders apply to all or a great number of the regulatory boards, including boards of physical therapy.

Regardless of the motivation, executive orders that prohibit the promulgation of rules can have a chilling affect on the important public protection missions of the boards. Often undertaken as a means to promote economic growth, the balance of the executive order against the board mission of public protection must be considered.

Past executive orders suspending the rulemaking authority of regulatory boards appear to be motivated by efforts to promote job growth and establish accountability of government. Academic scholars can debate the economic impact of regulations on jobs and any such argument likely deteriorates into a political debate separated by partisanship.

The regulation of any profession should be sustained by the need for government control where the marketplace cannot or will not provide the necessary consumer protections.

To that end, regulatory boards must learn to promote themselves in a manner that is not perceived as self-promotion or turf protection. Regulatory boards must understand the need for cooperation and overlapping scopes of practice, so long as the practitioners are qualified to provide such services. The very heart of regulation is based upon the needs of society to be

protected in an arena where consumers of services may not be able to assess the qualifications of practitioners.

If boards are adhering to their public protection mandate and not engaging in self-regulation and/or self-promotion, perhaps the need for suspension of rulemaking would be diminished. Indeed, a clearly articulated state policy of statutory regulation in the interest of public protection by its very nature calls for and requires regulations that continue to evolve and shape the regulated profession.

Governmental control over a profession, that is a requirement for licensure as a prerequisite to practice, should not inhibit economic growth. In fact, licensure of professionals based upon statutory criteria not only promotes public protection, but stimulates other areas of economic growth and ensures qualified practitioners.

Conversely, unregulated professions are governed by a buyer beware mentality that is reactive and addresses after the fact circumstances. Consumers that are harmed are required to pursue, on an individual basis, action against the practitioner and are acting on behalf of themselves, rather than the public at large.

Attempts by a governor to limit or prohibit the promulgation of rules in a regulated profession through executive orders undermine the legislatively determined and statutorily enacted recognition of the need for licensure.

At the same time, such an executive order hamstring the board, resulting in a statutorily regulated profession without the board authority to add specificity to the governing law. To emphasize, this article's position opposing such executive branch authority is premised upon an assumption that the board, in promulgating the rules to add specificity to the statute, maintains a public protection perspective. Unfortunately, the public protection perspective is sometimes lost in the turf battles and the protectionism approach to the professions.

If regulatory boards are approaching regulation from the public protection viewpoint, there should be no need for the suspension of rulemaking.

Boards that operate in an effective, efficient, and transparent manner, recognize their mission and role, are accountable to the public, and substantiate the need for regulation of the profession do not need to have their authority undermined. Perhaps understandably, each profession asked these questions gravitates toward a view of economic preservation: professional promotion. Separation of these roles by board members is critical in a state based licensure scheme.

The most important issue to this topic is perception. The public's perception of the regulatory boards may not coincide with why boards exist. The political perception of the boards also may not coincide with why boards exist. When questions are asked, boards must have answers. In fact, boards should answer such questions before they are asked. A proactive approach to promoting the boards and the bases for regulation of the professions is essential to the consuming public and will assist in creating a political climate that will not always approach economic issues with executive orders prohibiting the promulgation of rules.



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Mr. Atkinson represents the referenced associations in all matters relating to their operations as not for profit corporations, including regulatory activities, education and accreditation, disciplinary actions, model legislation and applications, and all phases of the development and administration of licensure examination programs, licensure transfer programs, licensure credentials verification and storage. He is a frequent speaker before these association clients as well as other regulatory groups and also produces numerous writings on these subjects for publications.

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