



Advice Regarding Advice

By Dale J. Atkinson, Esq., Atkinson & Atkinson, LLC

Should we commence a magazine article with a Shakespearean quote? For instance, Dick the butcher's comment to Jack Cade in response to the suggested initiation of a social revolution? "The first thing we do, let's kill all the lawyers." (King Henry VI, Act 4 scene 2). This infamous line is likely misperceived by most as indicating a desire to eradicate the profession from the perspective of a frustrated person, fed up with the complications of law and scholarly analyses. In reality, Dick the butcher is suggesting that lawyers provide rational thinking and a basis for order and control over what would otherwise be chaos.

This article will address the relationship between a regulatory board and its lawyer(s) and, consistent with the intended Shakespearean praise of lawyers, suggest and impress upon the regulatory boards the importance of regular and consistent legal representation, while at the same time maintaining board autonomy in decision-making. The relationship between the board and its legal representative is crucial to ensure the efficient and effective operations of the board.

As a customary reminder and to place into the perspective of a governmental regulatory scheme, regulatory boards are legislatively created and empowered to protect the public through, among other things, the regulation of the profession via the enforcement of the practice act.

Complicating these encompassing regulatory responsibilities is the applicability of many additional laws and constitutional principles. Laws including the state Administrative Procedures Acts, the federal Americans with Disabilities Act and its amendments, other applicable laws related to disabled individuals, the United States and state constitutions, open meetings laws, open records laws, ethics laws, and the like.

The numerous and varied responsibilities of a regulatory board create equally numerous and varied legal issues confronting virtually all aspects of the board activities. Essential to the efficient and effective operations of the board is the regular presence of and consistent advice from knowledgeable legal

counsel. For purposes of this article, the term board will be used to describe the regulatory agency, understanding that many varied regulatory schemes exist.

The consequences of sporadic or inconsistent legal representation can be significant to all parties involved, from the applicant/licensee, to the board or department charged with regulating the profession, to the consuming public. Regulatory schemes involve government, on behalf of the people, to enforce the law.

Regulatory enforcement will likely result in certain applicants being denied licensure, as well as the licensure removal of practitioners who do not comply with the laws and regulations. As a consequence, such persons will be prohibited from pursuing their chosen profession by virtue of the activities of a governmental board. Government involvement in regulating a profession triggers constitutional and statutory rights which add layers of complex legal issues.

In addition to the enforcement obligations, regulatory boards undertake numerous other tasks related to promulgating regulations, interacting with the legislature and academia, publicizing board activities, employment of personnel, conducting regular board meetings, communications with staff, and more.

Physical therapy boards have an obligation to the public, and the public includes recipients of physical therapy services, as well as the licensees and applicants. Legal and practical advice can preemptively anticipate legal questions and challenges and ensure tough decisions will be sustained if challenged.

In spite of this importance, however, regulatory boards must maintain their decision-making authority and use their expertise and experience to govern the profession. The lynchpin of a relationship between client and lawyer is that clients have lawyers, lawyers do not have clients. Lawyers are asked (or sometimes volunteer) issues and provide analyses and advice related to the matters before the board. Legal and practical advice is intended to ensure compliance with the law and added foresight of consequences, both intended and unintended.

Regulatory boards are often in the position of accepting representation from the attorney general's office (AG), with little or no choice as to the appointed lawyer. Fees are often billed back to the attorney general's office and impact board budgetary decisions and financial constraints sometimes dictate whether advice is actually requested. Further, turnover of board attorneys can be frustrating and lead to inconsistent advice. Some boards employ counsel from the private sector, negotiating and funding the fees associated therewith.

In its simplest observation, regulatory boards employ lawyers who work for such board. Regardless of whether the legal representation is from the attorney general's office or from outside private counsel, the board "employs" such legal representative and seeks advice and guidance, rather than attorneys dictating board action.

The role and influence of the board attorney is the subject of many discussions and debate in the regulatory community and it is recommended that board members consistently ask for an overview of the relationship between the parties. Of course, the magnitude of the issue at stake should influence the ultimate board action and reaction to legal advice. The refusal to follow advice from the attorney general representative is not without peril. In some jurisdictions, failure to follow advice may result in the state questioning whether immunity protections for board action contrary to AG advice are available to the individual board members. The determination of immunity protections is likely dependent upon the

question at issue and the advice given by the AG representative and is not easily subject to a broad definition or bright line test.

Perhaps legal representation questions arise most often in the disciplinary context. As readers know, the disciplinary processes differ from jurisdiction to jurisdiction involving probable cause panels, investigations, AG advice, hearing officers/administrative law judges, and, in some cases, hearing commissions which adjudicate administrative matters for all boards within a particular state. In many jurisdictions, board attorneys may differ from prosecuting attorneys, although both may be representatives from the AG's office. Board attorneys advise the board in its operational and procedural aspects related to the board operations. Attorneys involved in administrative prosecutions participate in the investigations and prosecutions of licensees and persons accused of violating the act and/or regulations. Along the prosecutorial way, consent agreements/consent orders may be negotiated and suggested to the board. In jurisdictions where the board is the ultimate decision-maker, board members are encouraged to use their regulatory expertise and analyze the outcome with the board public protection mission in mind.

Questions as to a consent agreement and suggested sanction should be vetted and determined to coincide with the wishes of the board. In cases where board members are uncomfortable with the suggested outcome, reasoned discussions and negotiation must take place. Suggested dispositions that do not meet with board approval can be rejected and either renegotiated or proceed to hearing. While board attorneys may have considerable experience and suggestions regarding administrative resolutions, boards or departments are empowered to make the ultimate decision. Of course, all board members are in touch with the financial impact of contested administrative hearings and its impact on board activities and will take such into consideration.

The very nature of legal advice is "advice" itself. Lawyers provide advice and guidance for boards to consider in making the final determination(s). Board members may be intimidated by legal recommendations but must adhere to the principle that the board is the authoritative governmental body created by statute to regulate the profession and carry out the regulatory mission. Ostensibly, board members are appointed based upon the knowledge they can bring to the regulatory process.

It is recommended that board members receive focused training on the duties and responsibilities of the board. This training should also cover the proper use of staff, investigators, and attorneys and identify current legal issues and consequences of legal advice. To the extent disagreements may exist between the board and its attorney, protocols for second opinions and recommendations from superiors are available. Also, board activities will be documented through minutes and other memoranda and, to the extent the board declines to follow legal advice, the records will reflect such declination.

Physical therapy boards are statutorily created and empowered governmental agencies which must maintain their independence and decision-making authority. Involvement of staff, investigators, attorneys and others are intended to advise and support the mission of the board.

This board independence is premised upon well trained board members who understand the public protection mission of the agency. Informed board members will be better equipped to understand and follow legal advice. Further, informed members will understand when to question board options and attorney advice in the face of difficult legal issues.

Dale J. Atkinson, who received his law degree from Northwestern School of Law, Portland, Oregon, is the sole, managing member of the Northbrook, Illinois law firm of Atkinson & Atkinson, LLC which represents various associations of regulatory boards.



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.

Mr. Atkinson also serves as Executive Director of FARB, a not for profit association whose full members consist of associations of regulatory boards, which facilitates cross- profession interaction, provides educational programs for board members, staff, investigators, and attorneys related to regulation in the interest of public protection.