



Short question? Long answer

This article was developed from a presentation by attorneys Mark R. Brengelman and Paul J. Welk at the 2013 FSBPT annual meeting.

Determining whether a board can interpret and apply the law may depend on a multitude of factors

When board members are asked a question regarding their practice act, they may need to contemplate the legality of a reply. And the member may have to refer to a Supreme Court ruling for the answer.

The purpose of this presentation was to assist participants in determining whether state licensure boards may give advice regarding the laws governing the practice of physical therapy, to be familiar with how a board may, or may not, issue advisory statements or opinions and to understand the difference between interpreting the law and making new law.

State agencies are creatures of statute with only those powers and authority as expressly granted by a state legislature in state statute. This governs the practice of physical therapy and generally includes licensed physical therapists, physical therapist assistants, supportive personnel and physical therapy technicians or aides.

The workings of a state licensure agency also govern express and implied powers. Express powers need no definition, while implied powers are those necessary to carry out express powers and often require interpretation and application of law. An example of an express disciplinary power is the ability to place a license on probation. Surely that implies there may be terms and conditions of probation included therein.

Each jurisdiction may have a different answer to the following questions.

- Is it an implied power for the board to answer questions – and to whom? Licensees? The public?
- Is it an implied power for the board to apply a set of given facts to its own law?
- Is it an implied power for the board to interpret its law and give advisory statements?
- Can the board or its staff delegate authority – and to whom?
- Who gives advice – and to whom? Licensees? The public?
- Who interprets its law and give advisory statements?
- Who answers questions?

Delegation of authority

Ministerial vs. discretionary acts

Unless expressly granted by statute, the board has the final decision on any matter that involves its uses of professional training, education and experience in physical therapy. The board has the final decision on any matter that involves its use of discretion in applying any part of the physical therapy laws (for example, a felony applicant).

Ministerial acts can be carried out by board staff or even by a single board member. Those involve providing black-and-white information found in the board's statutes and administrative regulations or rules. (For example, 'What's the renewal fee?' or 'How many hours of continuing competency do I need?') Ministerial acts do not involve interpreting the board's statutes and administrative regulations or rules or the application of specific facts to a given law.

Where does this leave the board when it comes to exercising its discretion on substantive issues before the board? Can the full board answer questions, provide advice and interpret its own laws?

To help answer these questions, the following court opinions were offered from Kentucky, Iowa, Missouri and Pennsylvania.

Kentucky

The Kentucky Board of Nursing has a statute that says, "The board may, on petition by an interested party, issue a declaratory ruling relating to the applicability to any person, property or state of facts of a statute, administrative regulation, decision, order or other written statement of law or policy within the jurisdiction of the board." So the board has pretty broad authority to answer questions about nursing.

The statute also says:

- A declaratory ruling shall be binding on the board and all parties to the proceedings on the statement of facts alleged.
- The board may not retroactively change a declaratory ruling, but nothing in this section shall prevent the board from prospectively changing a declaratory ruling.
- The board shall promulgate an administrative regulation in accordance with KRS Chapter 13a on procedures for submission, consideration and disposition of a petition for a declaratory ruling.
- A declaratory ruling of the board may be appealed to the circuit court of the county in which the board's offices are located within 30 days of the date of the final ruling by the board.

In Kentucky, the courts recognize the inherent power of an agency to interpret and apply its law.

Appeal of Hughes & Coleman Supreme Court of Kentucky

This case involved proposed lawyer advertising with the words, 'injury lawyers' which might falsely imply a legal specialty or expertise not recognized by law. In Hughes & Coleman's first submission of an ad that used the term 'injury lawyers,' the Kentucky Bar Association's Advertising Commission took no action within 30 days. In a second submission, the Commission

affirmatively approved a similar advertisement also with the words, 'injury lawyers.' Hughes & Coleman submitted a third advertisement to the Commission, which, this time, denied the use of the words 'injury lawyers.'

In a court challenge, the Kentucky Supreme Court ruled against its own Commission with informative and interesting language about the Commission's prior decisions.

It cited three different results from three different applications, and said, "The Commission did not give any legal analysis for the significance of the prior approvals as contrasted with the ultimate disapproval. The Commission should have considered its prior approvals and explained its departure from them.

"While an agency may re-examine prior decisions and depart from its precedents, to do so it must explicitly and rationally justify its change of position...It is axiomatic that an administrative agency either must conform with its own precedents or explain its departure from them. An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute. Consequently, while the agency may re-examine its prior decisions and depart from its precedents, it must explicitly and rationally justify such a change of position."

In this explanation, Kentucky has been given implied powers to interpret and apply its own law. If the agency must stick to its prior decisions and can't depart from its precedents with a change of position, it must have prior decisions, precedents and positions.

Iowa

Iowa Medical Society and Iowa Society of Anesthesiologists v Iowa Board of Nursing

What was at issue was whether the Iowa Board of Nursing had exceeded its regulatory authority by enacting administrative rules governing ARNPs (Advanced Registered Nurse Practitioners) supervising radiologic technologists using fluoroscopy machines. Was ARNP supervision of this procedure "recognized by the medical and nursing professions" as required by law?

The court looked at the power to interpret. It concluded, "Without a grant of interpretive authority to the agency, we interpret the statute do novo. The Iowa legislature expressly granted interpretive authority to Chapter 152. Such a grant of interpretive authority requires deferential review of an agency's interpretation of the statute and its application of law to fact."

Who ultimately prevailed? The administrative rules of the Iowa Board of Nursing were upheld by the Iowa Supreme Court. The Supreme Court deferred to the agency's own expertise in applying and interpreting its own laws and the Iowa legislature had expressly granted this power.

There was strong deference in this Iowa case of a board with an express authority to regulate its licensees.

Missouri

Missouri Association of Nurse Anesthetists v. State Board of Registration for the Healing Arts

The licensing board for physicians received various inquiries regarding whether a physician may delegate certain pain management procedures to advanced practice nurses, specifically, injecting therapeutic agents under fluoroscopic control. A board member and legal counsel reviewed the matter.

The board's opinion was issued in a letter that stated, advanced practice nurses may not perform these injections based on its state statute requiring any such delegated procedures to be appropriate based on "qualification by training, skill, competency, age, experience or licensure." The board also published a summary in its newsletter.

A lawsuit followed alleging the physician licensing board had issued a new rule via its letter opinion and the board had exceeded the scope of its authority over physicians by deciding what a nurse could or could not do.

The board didn't fight the fact that this was not a rule. Essentially, the board acknowledged it was non-binding statement.

Based on the definition of rule under the state's administrative procedures act, the Supreme Court of Missouri held against the board and threw out its letter. The court held the letter could not be applied because it was a general statement of future applicability, that basically said, "no physician may delegate this to any nurse."

The court continued that, "Whatever the board's intent, its letter was written with language that is generally applicable to all physicians and APNs. The letter's language was not confined to a specific set of facts, but instead has a future effect and potential impact on any physician wishing to delegate the procedure to an APN and, in turn, on any APN wishing to engage in the procedure."

Two other statements from the opinion:

- The board's letter is a statement of general applicability that interpreted the law and the prescribed policy.
- Therefore it had to be promulgated as an administrative regulation or rule.

The court said you can't regulate the nursing profession this way because you are the physician board.

Pennsylvania

There are some very strict rules in Pennsylvania. Essentially, the practice act talks about the powers and duties of the board to appoint hearing examiners and to conduct investigations and hearings upon charges for discipline of a licensee or certificate holder or for violation of this act. Absent is the ability to interpret. There is no implied ability to interpret based on three key court cases.

Avis Rent-A-Car v Commonwealth of Pennsylvania.

In this case, Avis sought pre-approval from the Vehicle Manufacturer's Board to sell its used car fleet. The board denied the request as it thought it was in violation of the statute. Avis petitioned the court. The court said, "In the absence of statutory language giving a board pre-approval power, the subsection allows investigations into wrongful acts but here no wrongful acts have allegedly been committed. The (manufacturing) board did not have the power to decide in advance whether Avis's proposed action was or was not permissible." Pennsylvania Commonwealth Court found that an order given by the board was "in the nature of an advisory opinion and was a nullity."

Lyness v Commonwealth of Pennsylvania, State Board of Medicine.

The issue on appeal was whether violation of due process occurs under the Pennsylvania Constitution when an administrative board determines that a licensing prosecution should be initiated and then acts as the finder of fact in determining the violation occurred.

The Court found that co-mingling prosecutorial and adjudicative functions within a single multi-member administrative board is not consistent with due process under the Pennsylvania Constitution.

The case is frequently cited as a rationale for the inability of a Pennsylvania administrative board to issue advisory statements.

Morrison v. State Board of Medicine

A physician sent letters to the board requesting that she be permitted to perform a specific nutritional program to treat patients. Morrison did not receive a response and filed a court action seeking a declaratory statement. The court said, "The authority to pre-approve the treatment method, although not a patient-specific treatment, is outside the scope of power granted by the legislation. The act does not provide for pre-approval of treatment programs. The board's authority to decide issues, concerning a doctor's adherence to accepted ethical and quality standards, arises only in the context of a disciplinary action."

So what are the options?

- Amend applicable statute.
- Request that the board issue regulations.
- Analyze the conduct under the practice act and regulations, proceed and risk the consequences.
- Not perform actions or activities not clearly within the scope of physical therapy.
- Seek to secure ability for board to issue advisories – "The board may issue advisory opinions as deemed necessary by the board." (PPTA proposed additional language to practice act, but it was rejected.)

The conclusion is that as the agency with authority over the practice of physical therapy, you may have implied powers to interpret, apply and give advisory opinions in a way that does not 'make new law' but simply answers a question regarding a specific fact pattern. And when you do so, you must stick to those answers unless you specifically explain why in a future answer.



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Mark became interested in the law when he graduated with both Bachelor's and Master's degrees in Philosophy from Emory University in Atlanta. He then earned a Juris Doctorate from the University of Kentucky College of Law. In 1995, Mark became an Assistant Attorney General and focused in the area of administrative and professional law. He represented multiple boards as General Counsel and Prosecuting Attorney, including the Kentucky Board of Physical Therapy, until he retired from state government in the summer of 2012.



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