



Proactive Regulation: Does Your Board Attack or React?

This article is based on a presentation by David Bertone, PT, DPT, OCS, President, db Orthopedic Physical Therapy – NJ and Beth Sarfaty, PT, MBA, VP of Clinical Services and Quality Management, Select Medical, at the 2016 FSBPT Annual Meeting.

Licensing boards often take a reactive stance to issues. Their focus is to protect the public and they often find issues come to them requiring a response. Boards traditionally have not been proactive discussing significant current issues of practice and how they affect the public the board is obligated to protect. A reactive stance is often late and slow to respond to the situations to which the public unknowingly may be exposed. How can boards be more proactive, forward thinking, anticipating issues of regulatory interest and concern? A board that “attacks” potential issues is on the forefront of regulatory response and provides the best opportunity to protect the public by anticipating the issues that potentially may harm the consumer.

This session discussed how to organize a board meeting to permit proactive discussions of regulatory issues in the public session. The discussion included how to engage the public in raising issues of concern and how to work within the constraints of the board organization and comfort level of your legal counsel.

The first subject discussed was how an agenda is developed. Most agendas are built around licensee inquiries on clarification of rules and regulations, by consumer complaints, disciplinary actions, continuing education requirements, fraud or misrepresentation, other boards attacking scope of practices, new legislation being discussed, continuing education approvals, and determining licensure for foreign-trained therapists.

Most of the board’s time is generally spent on consumer complaints, which end up being disciplinary actions the board takes. The next most time-consuming agenda item is usually licensee inquiries on rules and regulations, on which the board takes little action other than repeating information that can be found elsewhere. Next is other boards attacking the scope of practice, which generates a lot of reactive and defensive discussion. But, depending on state laws and regulations, it also doesn’t generally spark a lot of action, though it could lend itself to being proactive. Next is new regulations and new legislation being introduced.

The licensing board is the only body with access to each and every licensee in its jurisdiction. In New Jersey, that’s more than 11,000 licensees. Fewer than 2,500 are American Physical Therapist Association New Jersey (APTANJ) members. Mentoring,

educating, and coaching are often pushed off to the associations, but at least in New Jersey, that only reaches about one-fifth of the licensees in the state. Boards have the opportunity to educate and empower far more. The question is how a regulatory body can move the profession and the skill sets of the clinicians forward to achieve high skills in the right environment.

If disciplinary action from consumer complaints, licensee inquiries, and other boards attacking scope of practice take up most of the board's time, how does the board move from a reactive posture to a proactive one? Boards see the same issue arise in consumer complaints time after time. The hope is the board will be efficient in resolving the complaint. But it's also an opportunity to be proactive and mitigate the problem occurring over and over again in a mentoring, educational, coaching way.

Boards should have the ability to have discussions. Currently, there is not a lot of opportunity to discuss how the board can move forward with licensees, with practices, with hospital departments and other issues. That's because boards are always on the defensive, very reactive, and dealing more often than not with negative issues. Shouldn't being proactive be equally as important for how boards spend their time? Is there an opportunity for the board to identify areas of growth and development for the profession to continue to enhance patient safety and the public's well-being?

The majority of licensees called before the board are not happy to be there. Even those who come to testify before the board voluntarily are not necessarily there with a positive attitude toward the board. There is an opportunity to change that and have the licensees become part of the discussion of what the profession is about. Instead of being just a disciplinary body that only interacts with the public when there are issues, the goal would be to have more meaningful and proactive and engaging conversations with the licensees and public and to be able to make some meaningful changes.

The goal is not just to stop the moving train before it hits the car and only be reactive to negative behaviors and disciplinary actions. In addition to stopping the train, boards should act to empower clinicians, licensees, and boards with regulatory processes to promote the profession, promote patient safety, and promote the well-being of licensees. Understand, however, there are huge legislative barriers to doing that.

The regulatory environment in New Jersey is unlike a lot of states. When Board members take on a coaching stance to help those who come before the board, the assistant attorney general doesn't like it. Collaborating with the professional association is an important first step to mitigate that opposition. When asked who doesn't have a professional association representative at board meetings, only 10 to 15% of the audience raised their hands. In New Jersey, the association brings questions forward that open the line of communication with the regulatory board and starts causing board members to think more proactively, which has been very beneficial. Licensees should also be encouraged to submit questions in writing they think might be an issue. When discussing scope questions, the New Jersey Board of Physical Therapy Examiners (NJBPTEx) receives a lot of pushback from the regulatory analyst and deputy attorney general regarding existing regulations and statutes,

but the Board needs to make some interpretations and decide what's there to protect the consumer and what is there to help the clinician.

Schmitt and Shimberg set up the guidelines for regulatory boards in 1996. They are: to ensure public protection, to assure the public of competency, and to discipline those not adhering to standards. Ensuring public protection can be reactive and proactive in nature. Proactive can include scope clarification while reactive includes responding to consumer complaints. Assurance to public of competency is proactive through audits. Discipline is obviously reactive.

Turf battles often occur between professional associations, such as acupuncturists and PTs over dry needling. Turf battles are fought publicly in legislative committee meetings, which the associations attend, but there is very little, if any, public input. A proactive board receives issues from the public and professionals and, after reviewing the regulations and statutes, determines if there is an opportunity to take a position. One way to get the information out to the public and professionals is by taking and disseminating detailed minutes on some of the board discussions and positions. Some of the issues that lend themselves to proactive teaching are documentation, scope questions, permissible business structure, and inappropriate professional behavior.

Win, lose, and draw examples from New Jersey were presented. On April 25, 2016, Wisconsin Governor Scott Walker signed into law the ability for PTs to order X-rays. Coincidentally, the NJBPTE was meeting the next day and discussed the issue. After reviewing New Jersey's statutes and regulations, the Board determined "that a PT can refer a patient for diagnostic testing such as imaging, neurodiagnostic testing, and any other tests to verify the etiology of a functional impairment provided the results of the test(s) are evaluated by a healthcare provider who is qualified and permitted to interpret the results." This is clearly a win for a proactive board.

The Board also drafted and tested a sample referral form PTs could use to request an imaging study from a radiologist. The form cites the statute and regulation language pertaining to allowing the request. There has been no pushback to date, though it's still not in wide circulation.

In the loss category was PTs treating animals, an issue that arises in New Jersey every few months. But the statutory language is clear that PT is for the "citizens" of the state, which leaves no wiggle room for the Board. Every state has frequently asked questions, but how many post frequently asked questions on their websites? That would be a proactive way to help PTs and lessen the board's and staff's time answering repeated questions. It's been found that a lot of licensees do not know the FAQs exist because the Board is seen as a disciplinary body and not there to help them. North Carolina posts position statements on its website, which have been called FAQs by a different name.

Dry needling in New Jersey has been a battle. The NJBPTE does not consider dry needling to be acupuncture and takes the position that New Jersey statutes and regulations do not preclude its practice by PTs trained and competent in the technique. The New Jersey Acupuncture Examining Board disagrees and was able to move a bill into law making the

unlicensed practice of acupuncture a third-degree crime. The NJBPTE has requested an attorney general opinion, but nothing happens quickly in New Jersey and currently the boards are at a stalemate.

Another example of proactivity came in Maryland, where the Board divided the state into four sections and conducted forums to inform and receive feedback from the licensees about the projected changes to continuing competence requirements.



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and relationship building is paramount in strong working teams.