



This article is based on a presentation by Ron Barbato, PT, Chairman, Kentucky Board of Physical Therapy; Charles D. Brown, Executive Director, Arizona Board of Physical Therapy; Karen Gordon, PT, Physical Therapy Coordinator, Texas Board of Physical Therapy Examiners; and Mark Lane, PT, Vice President, Federation of State Boards of Physical Therapy, at the 2017 FSBPT Annual Meeting.

Is Your Board at Risk? Justifying Your Board's Existence

A wave of governmental de-regulation and cost-cutting moves has put regulatory boards at risk. Some of it stems from the Federal Trade Commission (FTC) vs the North Carolina Dental Board anti-trust case. Some of it stems from the deregulation movement occurring at both the state and federal level. Boards that are unprepared to face these forces will disappear.

Regulatory boards exist to protect the public. But in the minds of the critics of regulation, regulatory boards exist instead to protect the profession. Boards must position themselves to counteract those arguments and prove their efficiency, cost-effectiveness, and proven duty to protect the public.

The whole disciplinary process is a bit suspect because boards are dependent on someone filing a complaint with the board. The complaint system means the patient is, on one hand, the most appropriate person to complain because they're experiencing the ineffective practice or a number of other violations. But patients don't know what the rules and regulations are and they don't know what good physical therapy is. Are boards, therefore, effective at protecting the public, or are they just effective at enforcing rules and regulations?

Shirley Svorny, a professor of economics at California University, Northridge, is among the regulatory board dissenters. In an article titled "Beyond Medical Licensure", published in the CATO Institute's Regulation magazine in 2015, she wrote:

"Instead of vetting physicians, the licensing apparatus provides an avenue for professional influence that has been used to restrict entry, limit competition, and preclude innovation in the provision of healthcare."

If boards respond with inward focus, they will react defensively. Those that take an outward focus would ask what they could be doing differently. If people believe this about boards, perhaps boards aren't demonstrating their effectiveness very well.

Likewise, the federal government is not looking at regulatory boards favorably. Found on the

FTC website in March of 2017 was this statement:

“This is an important moment for economic liberty. Governors, state legislators, and many other stakeholders want to move forward to remove or narrow occupational licensing regulations and open doors to opportunity, enhancing competition and innovation.”

This is the same FTC that went after the North Carolina Dental Board.

Some states also are attempting to rein in regulatory boards, among them Nebraska and Wisconsin.

“Working with my agencies, we were able to identify areas where Nebraska’s licensing requirements were onerous or out-of-step with other states,” Gov. Pete Ricketts said in a statement. “Unnecessary licensing restrictions are a barrier to Nebraskans seeking careers in licensed professions, and especially to those who may be looking for a career change or upward mobility. Removing restrictions will grow job opportunities for Nebraska.”

In his February 2017 Budget Address, Wisconsin Gov. Scott Walker included a proposal to create a panel to review occupational licenses “to determine which are truly needed to protect public health and safety and which of those are just barriers to employment,” and also to make recommendations for reducing or eliminating continuing education requirements for licenses not recommended for elimination.

Morris M. Kleiner, professor and AFL-CIO Chair in Labor Policy at the Humphrey School of Public Affairs at the University of Minnesota, wrote a 129-page paper for the W.E Upjohn Institute for Employment Research titled, *Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing*. In Chapter 1, he uses physical therapists as an example of licensing run amok.

"Nationally, in the 1990s, one could become a physical therapist with just a bachelor’s degree, but by 2016, in order to become a fully licensed physical therapist in most states, a practitioner must have a doctor of physical therapy degree, which requires a four-year college degree plus three years of graduate training and work."

On the other side of the coin, the Professional Licensing Coalition is working on limiting the damages that can be created from lawsuits, such as the FTC vs the South Carolina Dental Board. It’s comprised of many professions, including healthcare, accountants, and several others. The Federation of State Boards of Physical Therapy (FSBPT) is a participant. It is working with Congress to pass legislation protecting licensing boards, but it is a challenge as it does not appear to be a high priority in the midst of many other congressional issues.

And sometimes Licensing Boards are not helping themselves. At a recent FSBPT Leadership Issues Forum, board members broke into small group discussions to look at the challenge of board effectiveness and the causes. Board members were quick to blame deregulation on the public or the political system. It was not easy to take an inward mindset saying, "We aren't being as effective as we could be at protecting the public. How could we improve our effectiveness and then demonstrate that effectiveness?"

The Arizona Story

Successive Arizona administrations have considered consolidating medical boards into an umbrella board, taking funding from boards, challenging regulations, or a combination.

It began with a push to cut as many of the professional and occupational boards as possible. The idea was just to consolidate 25 different health agencies into one giant board and have one person from each board represented. That idea died because the governor moved into national politics. Another chief executive took his place and the economic recession soon followed. His position became: we're not going to eliminate; we're going to slash your funding.

With that came a higher scrutiny of Sunset reviews. Boards had to justify what they were doing and explain how they were doing it better. The mindset of the newest administration is similar to that of the FTC. It's just an assumption that professional occupation regulation is very expensive. It's burdensome, it keeps people out, and let's just deregulate. One of the recent initiatives by the governor was to eliminate 500 regulations. Boards were required to survey their regulated groups and other stakeholders. If someone responded that they want a specific regulation eliminated, boards were required to prove the regulation is necessary, no matter how obvious the regulation is to protect the public.

The Texas Story

The Texas Sunset process started in June of 2015 when the Board of Physical Therapy Examiners was called upon to develop its self-evaluation report. The board was able to show its cost-effectiveness and efficiencies in every measure put forth by the Legislative Budget Board and the Governor's Office of Budget, Planning and Policy. The board went through a year's worth of Sunset staff attending meetings and a retreat, which was attended by three FSBPT representatives and three Sunset staffers. The Sunset staff issued a positive report to the Sunset Commission that showed all the board's efficiencies and showed that the final recommendation was to continue the Texas Board of Physical Therapy Examiners for another 12 years.

The Sunset process continued through the hearing phase, and at the Sunset Commission's decision meeting in August 2017, the recommendation for continuation was pulled until the Sunset staff could finish their project on healthcare licensing consolidation. The PT board was put into a pool with nine other small independent boards with the ultimate desire to consolidate the boards into a new medical and health-related division of the Texas Department of Licensure and Regulation (TDLR).

The TDLR is a big umbrella agency with a seven-member commission, none of whom have ever had anything to do with healthcare. This commission has the final authority to regulate a vast range of professions including tow truck drivers, barbers, cosmetologists, and massage therapists, to name a few. If consolidated, the boards would no longer exist, but would be relegated to advisory committees.

So once again, the PT board started the process of defending its existence. Quotes from the Sunset staff's original report (where they praised the board for being cost-efficient and having a stable staff) were used along with a comparison of its metrics with those of the Texas Department of Licensure and Regulation to justify continuation of the board. They were able to prove it made no sense to uproot them and put them into this larger, consolidated umbrella agency for no more efficiencies and no more cost savings. In January 2017, the Sunset

Commission made the favorable recommendation to the Legislature to continue the PT Board in its current structure as one of the autonomous boards within the Executive Council of Physical Therapy and Occupational Therapy Examiners for 12 more years.

The Kentucky Story

The Kentucky Board of Physical Therapy (KBPT) remains in a state of uncertainty regarding reorganization.

In December of 2016, Governor Bevin, through executive order, made it very clear that the reason behind his scrutiny of regulatory boards in Kentucky was a result of the South Carolina anti-trust issue. The preamble to a House bill that passed alluded to the fact that immediate action was needed to not only promote more efficiency and to cut costs, but primarily to protect board members from anti-trust liability.

HB 433 set the framework for what the governor determined the reorganization of all the boards in Kentucky would look like. By invitation only and on short notice, board representatives were called to a meeting in the state capital where the new board structure was unveiled. It was an invite-only meeting. Only the affected board chairs and executive directors were in attendance. Legal counsels and lobbyists were excluded. The structure was to place all boards into seven umbrella boards, combined for the most part by common work agendas.

The board initially got its hackles up and was opposed to the new plan. After all, the KBPT did win the FSBPT regulation award in 2016 for regulatory excellence— the first one ever. Their first thought was to fight it tooth and nail, make a stink, and try to raise support to oppose the action. Once the professional association caught wind of it, the membership also became upset and wanted to join the fight. But then the board met and discussed an initiative that switched gears into more of an outward mindset. They determined that it was going to happen and there was little they could do to stop it. Their main concern switched to public protection: How were they going to be able to continue to do the good work they did — turning around licensee requests quickly, handling serious offenses to the Practice Act in an efficient manner, and maintaining an efficient budget?

The board started to reach out in various ways, as board members, individually and collectively, to those in the governor's office, legislators and to the public protection cabinet lending support to the initiative and suggesting ways they could help. The board took the position that if this is going to happen they don't just want to be a part of it, they want to lead the change.

The KBPT made known the value of its staff and promoted each of their skill sets as being valuable in the reorganization effort. Although it seems as though the full reorganization has been put on hold at this time, the Board has been assured that their individuals (staff) would be utilized in capacities still being determined.

For now, there is some thought this could be settled in the next legislative session. But in the meantime, the board continues to function. Membership was down from seven board members to four as reappointments were not made during this time; however, and seemingly out of the blue, two new board members were assigned in November.

Whatever happens, the Kentucky PT board has pledged to embrace the reorganization initiative. They are a good example of inward to outward mindset, and leading from the front.

How Boards Can Protect Themselves

Arizona's take from its experience is that there was lack of connectivity between the administrations, the legislators, and the boards. There was little understanding of what boards do. The only time government officials hear from board constituent groups is when there's a problem. They don't hear from boards on a regular basis about what they're doing, what they're trying to do, and the things they want to do.

Arizona had a problem with leadership not engaging legislative and executive leaders at the beginning stages of planning reforms or planning to do better projects. Boards only approached state leaders with a completed package of reforms and projects, saying the association supports this and the state should implement it. A better approach would be to engage them with a problem from the beginning and reach out to other stakeholders to find the root of the problem and discuss how to fix it collectively. There always will be political motivations, but much of the problems boards faced in Arizona most likely stemmed from not engaging state leaders at the right steps and at the right places.

In response, boards across the state formed a group of executive directors who meet monthly. They share information with each other, best practices, and things that aren't working. But they also bring in legislators, their staff, and governor's office staff and appointees to speak to the group. Even the people who say very nasty, mean things about the boards in the newspapers are invited to talk to the group. The executive directors listen to the things the speakers hear from the public and profession and don't like and then engage on those matters.

That has led to a collaboration among the directors and government officials to work on projects, including five of the state's goal councils. The five goal councils now have an executive director of a very small healthcare regulatory body sitting on them, providing advice. Every one of them present to the governor and his cabinet about initiatives. As a result, government officials see regulatory officials working on overall state goals and initiatives.

In addition, boards are assigned a regulatory advisor that works directly with the executive director. That relationship helps smooth through problems. For instance, the board was working on an online licensing system requested by the governor. He also decided to waive licensing fees for those within a certain level of the federal poverty line. The attorney general advised it could not be done, but apparently that word never reached the governor's office. After some time of hanging in limbo, the executive director reached out to the regulatory advisor to have the governor and attorney general work out their differences so the project can move forward.

In addition to reaching out to legislators and the governor's staff when times are not confrontational, boards should be gathering their data to show their efficiencies and cost-effectiveness vs. umbrella boards before they need them. Just to be prepared. That's what saved the Texas board.

The Texas board was able to demonstrate, not just anecdotally, but with facts that its process is more efficient than what was being proposed. Boards need to collect the data and conduct the performance metrics so that boards can, when challenged, demonstrate their effectiveness.

It doesn't have to be board-specific data either. The differences between the border states of Oregon and Washington provide a telling story. Washington PTs function under an umbrella board while the PT board in Oregon is independent. It takes a lot longer in Washington to earn a license than it does in Oregon, to the point that Washington is losing PTs to Oregon. This is the kind of information that could be provided by FSBPT.

Institutes pushing deregulation certainly have data showing that regulations impede small businesses and that boards create barriers to economic growth. To counteract that, boards need data to show they are efficient, cost-effective, and — most importantly — protecting the public.

Some jurisdictions currently do not have online databases. It takes time to enter data manually and time to create an online database. Arizona is in the process of creating an online database. When it's fully functional, it is estimated it will free up 40% of staff time.

Bottom Line: Protecting the Public

The purpose of a board is to protect the public from harm: physical, social, psychological, and financial. If boards have few disciplinary actions, is that a sign of the board doing a good job and being effective in protecting the public? Or does it mean the Board is not doing its job and the public is being harmed without consequence? Boards need to come up with additional ways to demonstrate effectiveness other than number of disciplinary actions. It is clear that physical therapy provided by incompetent practitioners can do significant harm to the public. Are regulatory boards doing everything they can to prevent this without preventing qualified practitioners from doing their job effectively? These are challenging questions that every board should be asking.

It's very important to distinguish between two quality control regimes. One is malpractice, but that's always after the fact. Studies have shown it has very little effect on improving the practice of others. Licensing and regulation could be not only reactive but also preventive. Most disciplinary actions center on substance abuse, boundary issues, and fraud. If boards can prove they track those issues and take countermeasures to lessen them, then that is prevention.

The time to prepare those arguments and collect the data that tells the board's story is now. The trend toward consolidation and deregulation is not going away anytime soon.



Ron Barbato, PT, has been a practicing physical therapist for 38 years. He is active on a state and national level in both physical therapy regulations and ethics. He currently serves as the Chairman of the Kentucky Board of Physical Therapy and is a member of the Board of Directors of the Federation of State Boards of Physical Therapy.



Charles D. Brown is Executive Director of the Arizona Board of Physical Therapy and Director of the Federation of State Boards of Physical Therapy. He graduated in 2008 from Grand Canyon University with a Bachelor of Science in Business Administration. He is also a former Marine. Chuck has worked in the licensing and regulating of healthcare providers since 2001. During his time with the Arizona Boards he has served at the levels of Investigator, Deputy Director, and Executive Director. Chuck actively participates in the CBA and served as Chair and Vice Chair from 2010-2011. He has served as Chair of the Exam Administration Committee and as a member on the Education Committee, Finance Committee, as well as other task forces and focus groups.



Karen Gordon, PT, is the PT Coordinator at the Executive Council of Physical Therapy & Occupational Therapy Examiners (ECPTOTE). Her responsibilities include coordinating the activities of the Texas Board of Physical Therapy Examiners (TBPE) and the physical therapy-related activities within the agency. Prior to accepting the position, Karen was appointed to and served on the TBPE for 12 years. Clinically, she practiced in a variety of settings, including private practice, hospital, home health, and compliance auditing/peer reviewing.



Mark Lane, PT, is Vice President on staff with the Federation of State Boards of Physical Therapy and has held that position since 1998. Mark received his Master of Physical Therapy degree from the University of Washington in Seattle, Washington. Prior to his current position, Mark practiced physical therapy as a staff physical therapist and a director of a large physical therapy department in a rehabilitation hospital. His duties include assisting state licensing boards with various legislative practice act and ethics and compliance issues, including professional standards and assessing ongoing competence. Mark has also worked on mobility and access issues, as well as developing standards for delivery of care via telehealth. In the last few years, Mark has helped coordinate the development of the Physical Therapy Compact.

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