



This article is based on a presentation by Diana Godwin, Attorney at Law, at the 2017 FSBPT Annual Meeting.

Tales from the Other Side: Why Rules Rule. Representation of Individual Physical Therapists before Licensing Boards from the Perspective of a Private Practice Attorney

The administrative rules adopted by a regulatory board are important to their job of protecting the public. They must be fair, detailed, and applied uniformly.

A rule is any agency or board directive, standard, regulation, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the agency's or board's procedure or practice requirements. Inner agency internal statements, FAQs, policy guidelines, and board member opinions are not rules.

Oregon's administrative rules are organized orderly in chapters. It starts with administrative rules of the board. Fees, licensing rules, practice rules, rules for physical therapist assistance, rules for using aids, and disciplinary rules follow.

Rules need to be clear to both the PT who must follow them and boards that are regulating by them. A board's general authority to enact rules is usually found in the statutes governing the practice and licensing of physical therapists. A PT cannot be disciplined for an action not covered by a rule promulgated appropriately pursuant to an enabling statute. A board member cannot say, "Well, I think that's what it should say. I think that's what we think the problem was," and discipline on that basis.

An enabling statute would likely say something to the effect of, "The board shall have power to adopt rules necessary to carry out and enforce the provision of these statutes." The last phrase is important, that a board's rulemaking is always governed by the enabling statutes — the scope of practice of physical therapy that a state legislature has adopted and put into law. Legislators are persons of general knowledge, but they know a licensing board has specific knowledge and experience. Therefore, sometimes the statute may direct boards to adopt specific rules on certain topics because the legislature doesn't want to go into all that detail.

The Oregon Board has consistently used a Rules Advisory Committee, which is usually made up of members of the profession, one or two members of the board, the executive director, and an attorney. Having members of the profession on the committee is important because the board receives input from people who will be practicing under the rules and working

with patients in accordance with the rules. They bring real-world experience to the issue of how the rules should read, because they know they will be subject to them and possibly subject to discipline under them. At times they'll also point out a current rule that's outdated and doesn't make sense in today's current practice.

Boards need to keep in mind that the purpose of rules is protection of the public. Having members of the profession on the Rules Advisory Committees promotes greater acceptance and knowledge of the rules. It's important that practitioners aren't resisting, fighting, and arguing about the rules. There is less likelihood of that occurring if they or members of their profession have actively participated in discussing proposed rules with the board and had opportunity for input.

Value of Detailed Rules

When Oregon was undergoing a complete revision of the administrative rules, the Advisory Committee wanted to start with an almost clean slate and organize them in an orderly and understandable fashion, moving from one subject to another under different chapters. And at that time, the assistant attorney general representing the board questioned why the committee would consider putting into the rules some specific language that was already in the statutes.

The advisory committee came to the conclusion that it wanted to create a one stop-shopping set of rules for the licensees, not just for the benefit of the licensees, but more importantly for the protection of the public. If a physical therapist can look in one place and understand what the rules are, they're more likely to understand them, reference them, and be educated about them. Therefore, they are more likely to comply with them. For example, the statutes — not the rules — state that a licensee has an obligation to keep their contact information current with the board. Physical therapists are not lawyers. They don't have a copy of the statutes at hand.

Grounds for discipline also are set out in statute, but the committee also put them into the rules and added some additional language in the rules to make sure PTs understand what they mean. Even if the PT reads and understands the PT statute, other statutes apply they probably are not aware of. For example, a statute requires all licensed medical professionals to notify a licensing board when they have reasonable cause to believe that another medical licensee has engaged in wrongful or unprofessional conduct. That's not in the physical therapy statutes. It's in a general statute that applies to all licensed medical professionals.

It serves the interest of protection of the public if the rules educate the PT.

Words Matter

Words and their definitions matter. Some boards, for example, may have a rule that states a physical therapist can be disciplined for engaging in sexual conduct with a patient. But, under that wording, can a board discipline a PT who engages in a sexual relationship with a patient's spouse? Say a male PT is treating a male patient. When PTs treat patients for a long time, sometimes they exchange friendly personal information. The patient may say, my marriage isn't working and I'm thinking of divorcing my wife. If the PT knows who the patient's wife is and engages in a sexual relationship with her, is that a violation of the disciplinary rules? A lawyer would argue that the answer is no, because the PT did not engage in that relationship with a patient, who is separately defined.

However, if the rule stated a PT could be disciplined for "engaging in exploitation of a patient by failing to maintain an appropriate patient-therapist relationship," it leaves the board open to more subjective judgement. If the PT's relationship with the patient's spouse interferes with the appropriate patient-therapist relationship and breaks the bond of trust, there may well be valid grounds for discipline.

Most rules contain terms like "reasonable" and "appropriate." Those are terms of art. As boards adopt and review their rules, they quickly realize they cannot detail every single possible circumstance in the world that might constitute inappropriate, unprofessional, or wrongful conduct. Statutes also use those phrases. In Oregon, when a pharmacist has reasonable grounds to believe there has been a significant drug loss, the pharmacist shall notify the board within one business day. "Significant" is another term of art.

Every case will be different as to what is unreasonable or reasonable grounds. It will rely on the circumstances. What if, for example, the physical therapist did not learn anything about the state of the patient's marriage from the patient and therefore did not use that information as a basis to enter into a relationship with the patient's spouse? Instead, he met the patient's spouse through a separate volunteer, church, or educational activity and the PT never used any information gathered from the patient. That's a different circumstance. Digging in deeper, the board may still find the PT's conduct was inappropriate under the rule, or it may decide the rule was not violated.

Definitions Matter

Definitions are critically important, right down to definition of a patient. Oregon's rules contain a section of definitions. Recently, the Oregon board was wrestling with some issues about whether or not spinal manipulation was within the scope of practice. As a result, the PT board specifically amended, in its rules, the definition of scope of practice. A law school professor once urged his students, "Read the statute, but start with the definitions, 'cause that's going to control everything."

But be careful not to over-define. Oregon used to have a very long definition of sexual impropriety. It was too detailed, with a list of not-dos. They found they had issues with practitioners who would do something sexually inappropriate and would point out that it's not on the list. Oregon then shortened the definition to take out the detail.

When developing definitions, it is best practice to look first at the definition the legislature put into place, to be sure the board doesn't exceed it. The Oregon board also consulted the American Physical Therapy Association (APTA) Guide to Physical Therapist Practice for definition guidance when it was contemplating expanding the definition of physical therapy practice in its rules.

Boards Must Enforce Rules Fairly and Equitably

Boards must not favor one licensee over another for the same kind of violation. Rules and policies must discipline everyone uniformly. For example, the Oregon board has adopted a schedule of fines for physical therapists who forget or overlook renewing their license by March 31 of every other year. If practitioners do not renew by one or two days, the fine is one amount, but if they don't renew their license for six months, the fine will be greater. So, one PT who fails to renew their license for six months is treated exactly as another PT who failed to renew their license for six months.

It's also a due process matter. PTs who hold professional licenses or any medical professional are entitled to due process and fair and uniform treatment and to be made aware of what the rules are or aware of what the schedule of fines would be. Once boards adopt the rule, they're bound to follow its terms. If boards decide they do not want to apply it, they need to go through the rulemaking process and change it. In the instance where a PT fails to renew their license, the fine schedule is very objective.

It can be a little trickier depending on the nature of the violation. In cases of an inappropriate relationship, a DUI, and similar violations, the amount of the fine or probation, suspension, or letter of reprimand can be different depending on the circumstances. But generally it has to pass due process muster. State courts have jurisdiction to review the validity of a rule adopted by a board and any disciplinary actions.

For example, one key basis for challenging a rule is that the board exceeded the scope of rulemaking authority granted by the relevant statutes or that the rule conflicts with the statute. It could be a rule imposing disciplinary penalties greater than the penalties allowed under the statute. Boards cannot impose a \$10,000 fine for an egregious violation by a physical therapist if the statute states the board can impose a maximum fine of \$5,000.

Rules also must not violate the state or U.S constitution. Boards cannot establish a rule allowing the right to a contested case hearing when a physical therapist license is being revoked, but not when it's being suspended, restricted, or put on probation. A physical therapy, MD, or a nursing license is the licensee's property and is protected under the 14th Amendment to the U.S. Constitution. Under due process, states cannot deprive a person of property, and boards are state agents. Regulatory boards cannot put somebody's license on suspension or probation without granting them the right to a contested case hearing or an administrative hearing.

Another basis for challenge would be that the board had no authority under the statutes to adopt the rule. Oregon recently experienced such a challenge on dry needling. The Oregon Board of Chiropractic Examiners, at the request of the profession, adopted an administrative rule specifying that chiropractors were allowed to do the intervention of dry needling. The Oregon Association for Acupuncture and Oriental Medicine (OAAOM), the acupuncture professional association, challenged the administrative rule, claiming it was outside the scope of practice of a chiropractor and that the Chiropractic Board had no authority under the statute to allow dry needling.

The case was heard by the Court of Appeals, which overturned the Chiropractic Board rule. Under the terms of the statute, the court ruled, the definition of chiropractic practice did not encompass dry needling. The board had no authority under the enabling statute to adopt that rule.

Other grounds for challenging a rule include that the rule was adopted without compliance with required rulemaking procedures. If a board doesn't provide public notice of intent to adopt the rule, doesn't follow the rulemaking procedure, or just declares it a policy without adopting a rule, it's not a rule in the eyes of the court.

Rules can be challenged by a direct petition to a court, usually an appellate level court. The challenge to the Chiropractic Board rule on dry needling went from the board directly to the

Court of Appeals, where it was challenged on the basis of facial validity. Facial validity means whether the rule is valid on its face under the enabling statute. The person need not be an acupuncturist, a chiropractor, or a physical therapist to challenge the Chiropractic Board rule on dry needling as invalid on its face. Any person can challenge the rule on this basis; the person doesn't need to show any particular personal interest in the rule, to establish what's called standing.

Another way a rule can be challenged is in a contested case proceeding, where a licensee is being disciplined for violation of the rule. In this case, again, the validity of the rule can be challenged on its face or how it's being applied. It can look valid on its face, but if a board is applying it in a discriminatory or an inappropriate manner, the rule can be challenged on its application to a particular licensee.

The Good, the Problematic, the Ugly, and the Catch-All Rule

An example of a good rule would be that the licensee must notify the board in writing within 15 days, or 10 days, or 30 days of any change in email address, employment location, or residence address. That's a perfectly valid rule, and all boards likely have it. However, it can be improved by stating whether it's business days or calendar days. Because that can make a difference in whether or not a licensee is subject to discipline.

It might be a very minor discipline for not reporting a change of address or contact information. But if, in fact, the licensee renewed within 16 calendar days, but the board rule just said 15 days, a lawyer might argue that the language was vague and her client did not know if it was calendar days or business days. It can make a difference, particularly when you consider that even a minor disciplinary action can have an impact on a licensee because it's reported to the National Practitioner Data Bank (NPDB). It's there forever. And every time a PT goes to renew their malpractice insurance, get re-credentialed with either Medicare or a third-party payer, they must answer the question on the out-of-station questionnaire, "Have you been subject to discipline?" They must answer yes and provide an explanation. The specificity of a rule is important, and the more specific it can be made, the better it's going to be.

An example of a problematic rule would be: "Licensee shall obtain a patient's lawful consent before any information related to the patient is released." It's problematic because it fails to reflect, and maybe even contradicts, current HIPPA rules on release of protected health information. Physical therapists can release protected health information pursuant to a subpoena, to a third-party payer for purposes of payment, for purposes of healthcare administration and practice, they can release it to the patient's doctor, and they can release it for other reasons.

An ugly rule would be: "A licensee shall not engage in any conduct or take any action which the board determines is or should be grounds for discipline." Physical therapists are not mind readers.

The pharmacists have a catch-all rule that states, "A pharmacist while on duty must ensure that the pharmacy itself, their employer, complies with all state and federal rules and rules governing the practice of pharmacy." A pharmacist may be familiar with all state statutes and rules, but they also need to know all the federal laws and rules governing the practice of pharmacy in the pharmacy where they're employed. It's a scary rule but, if challenged, is probably legitimate.

In Conclusion

A regulatory board is granted the authority to write rules from its state's enabling statutes. It is strongly suggested that rules be written by a rules advisory committee that includes members of the profession who would be subject to and disciplined by the rules. Rules should be detailed but written in some cases to allow subjectivity by the board. They should be organized in an orderly and understandable fashion. The rule book should include all rules the practitioner is subject to, including PT-specific and more general state statutes. The rule book also should include a section on definitions, because words matter.

Boards must enforce rules fairly and equitably. They must not exceed the board's scope of practice or violate the state's or U.S. constitutions. Finally, the state courts are the final arbiters of the validity of rules and disciplinary actions.



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