



A look at the current regulatory climate



By Dale Atkinson, Partner,
Atkinson & Atkinson

Dale Atkinson is a partner with the Illinois law firm that is counsel to ASWB. He is also executive director of the Federation of Associations of Regulatory Boards (FARB).

The political and legal climates are promoting challenges to the state-based regulatory systems to which “we” are all accustomed. (Defining the “we” is critical to this discussion and will be addressed below.) Politicians are introducing legislation intended to address “barriers” to entry into a profession or occupation and citing these barriers as thwarting economic growth. Examples of regulated occupations that politicians cite as unnecessary or that contain excessive criteria to entry are often used to paint all regulated professions with the same brush as unnecessary or anti-competitive.

Lawyers are now emboldened by the 2015 United States Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*. Based on this judicial decision, lawyers are challenging state-based regulation of the professions under the antitrust laws. In fact, since that decision, more than 25 cases have been filed challenging regulatory structures under antitrust theories. The simple basis for such legal challenges involves the fact that licensees (referred to by the Supreme Court as “active market participants”) are unable or cannot be trusted to act in the best interest of the public when undertaking their regulatory responsibilities.

This form of “self-regulation” has prompted the current climate and triggered a review of regulation in general. In addition, states are reacting to the opinion by creating state government oversight to enhance or preserve defenses to antitrust claims.

As regulators—not social workers, not licensees with a vested interest in protecting their own turf—state board members should welcome this intense scrutiny and embrace the fact that regulation must be justified. The first and most fundamental question that must be asked is: Why is government involved in regulation? Some may quickly opine that the answer is public protection. While accurate, there is much more to government regulation of the professions. An in-depth discussion as to government involvement is missing from the debate. Indeed, the need for government regulation, which was once presumed when duly enacted through legislative action, has now shifted to a presumption that government regulation is not needed and whose existence must be justified to continue to exist.

This shift in presumptions involves both an economic approach to regulation and a legal approach to the responsible party responsible for carrying the burden of

proof. Rather than focus on the need for public protection, the current climate emphasizes on economic factors. In short, the government-imposed need for education, entry-level competence testing, applications, licensure fees, renewals, and continuing education may not be an efficient approach to public protection. Under some circumstances, advocates of deregulation question whether public harm is even at stake. Where there is no or little potential for public harm, why should government be involved? In other circumstances, advocates will question the eligibility criteria for licensure. Why do applicants for licensure in certain occupations need thousands of hours of education? Critics compare the education criteria for one occupation to other occupations and use such discrepancies as a basis for challenge. These approaches ignore the rights of the states to make such determinations—a right fundamental to the United States Constitution.

Others argue that the approach should be left to the consumer to enforce; that is, “buyer beware.” Some would rather leave decisions to the consumer and rely upon a “Yelp” approach to consumer choice. Consumers can research the professional(s) and self-determine what choice makes sense. In the event of harm, consumers can enforce their rights through a litigious approach.

Further, a strict economic approach is also being propounded by advocates. This market-driven approach attempts to use studies to illustrate the economic impact of regulation. These economic studies are used to identify the barriers to becoming licensed and how regulation keeps

persons interested in entering the market from actually realizing their employment potential. Layered into these arguments are questions about whether regulation of a particular occupation is necessary to protect the public. While there are numerous articles from libertarian-based organizations that argue the economic indicators, recent research establishes that state-based licensure actually provides criteria to increase access to jobs for minorities.

As a reaction to these deregulation efforts, numerous options are being promoted, ranging from deregulation to modifications of *how* states regulate. Deregulation simply removes government from the equation and places responsibility on the consumers and the private sector. Such an approach will stimulate private-sector certification programs, which may or may not promote consumer and public protection. Modifications to how states regulate include efforts to consolidate boards for economic efficiencies, combine boards to remove the influence that active market participants have on decision-making, or departmentalize regulation under a bureaucracy that places decision-making in state bureaucrats. Keep in mind that changes in law encompass both state and federal proposed legislative initiatives. Under some theories, the effect on interstate commerce justifies federalization of licensure of the professions and occupations.

One such federal effort currently in committee, the Restoring Board Immunity Act (referred to as the RBI Act) involves providing state boards with immunization from antitrust liability in exchange for

state oversight and the creation of private causes of action for persons who wish to challenge the regulatory scheme. Under the RBI Act, legal challenges related to the scope of board authority may result in a shifting of the burden to require the board to substantiate its existence in the interest of public protection, rather than requiring the plaintiff to prove inappropriate government action. The legal theory requires heightened scrutiny from a rational basis to intermediate scrutiny. This increases the burden on government when the need for regulation is challenged.

Returning to the theme of this article, why is government involved in the regulation of the professions? This fundamental question will provide social work boards and board members with a basis for continued justification for state-based regulation. State boards should have a mission statement that accurately describes the basis for board existence, and this statement should be front and center on their website. Board members should have their “elevator speech” prepared so that they can easily and consistently articulate this perspective. These mission statements and elevator speeches can provide a unified message and set forth the basis for regulation of the profession.

Elements of the mission statement should include the involvement of government through legislatively enacted statutes. These statutes will set forth the intent of the legislature, the scope of practice, the criteria for licensure and the delegated authority of enforcement. Enforcement encompasses licensure, renewal, investigations, administrative prosecutions, and

board operations. Through the promulgation of rules/regulation, boards, through expertise of board members, add specificity to the laws. Expertise on boards is necessary to provide an efficient means of enforcing laws related to a specific profession and eliminate the need for expert testimony. In short, the regulation of the profession is premised on government actions that can be uniformly applied.

Equally important, and not mentioned often enough, is the administrative structure in place to provide a mechanism for consumers harmed by licensees (or unlicensed persons engaging in practice). This administrative prosecution functions similarly to a criminal justice system. On

behalf of the citizens of the specific jurisdiction, the board administratively prosecutes respondents and, if determined necessary to protect the health, safety, and welfare of the public, administers sanctions. These sanctions can range from removal of licensure to letters of reprimand. Administrative prosecutions are pursued at no cost to the complainant and are intended to protect society as a whole.

This article merely scratches the surface of what constitutes government regulation and why it exists. Boards of social work are encouraged to reflect upon these issues and develop talking points to anticipate political and legal scrutiny.