

Laws, Regulations and the Attorney Generals' Opinions

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... There are various kinds of legal authority that affect counselors and therapists. It is important and useful to understand and recognize what these sources of legal authority are, that each of these sources of authority impacts your profession in a variety of ways, and that participation in the process of making and shaping public policy is important. Here are some basics – perhaps for a refresher or a reminder.

Generally, “laws” are passed by the Legislature. They are alternatively called “statutes.” These laws, simply put, are statements of public policy. The legislative process generally allows for the involvement of interested individuals and special interest groups, like professional associations. “Regulations” are passed by administrative agencies, like licensing boards, and are supposed to explain or define a particular law – not to expand or contract the law. A regulation has the force and effect of law. Administrative agencies are granted the power to pass regulations by statute. Licensing boards and other agencies are generally required to allow for public participation at regulatory hearings and otherwise. If a regulation conflicts with the law that it is implementing, the regulation may be declared by a court to be void.

Despite efforts to write laws that are clear, interpretations will vary and ambiguities will arise. Often, the exact meaning of a law is unclear. In most states, certain government officials, such as legislators, can seek an opinion from the state’s Attorney General regarding the meaning of a statute. These written legal opinions are generally entitled to great weight and respect by the courts, but they are usually not considered to be controlling authority. What this actually means is that the courts will usually side with an interpretation of the law in accordance with the Attorney General’s opinion – but not always.

In some cases, the courts will ultimately determine what a particular law means. Trial court decisions are often appealed and appellate courts write decisions that often include discussions about the meaning of a particular law. Appellate courts often consider legislative intent when the meaning of a law is at issue. Collectively, these court decisions are referred to as “case law.” Sometimes, however, obtaining an opinion from the Attorney General will help to resolve a particular issue and therefore avoid the need for litigation. In the profession of marriage and family therapy, for instance, a state Attorney General has been asked for (and has rendered) opinions on such important questions about the licensing law as: a) may an MFT practice psychotherapy; b) may an MFT diagnose and treat mental disorder; and c) may an MFT construct, administer and interpret psychological tests. I suspect these or similar questions arise or will arise in more than one state and for more than one profession.

Generally, therapists and counselors, through their respective professional associations, have the opportunity to influence public policy by participating in the legislative and regulatory processes. Some ethical standards encourage such involvement. Professional associations can also be influential in seeking an Attorney General's opinion to clarify the meaning of a particular law. Failure of an association (and members) to take an active role in the making of public policy affecting their profession could lead to consequences that negatively affect counselors or therapists (or their patients/clients) many years later. I remember circumstances where therapists would call to complain about particular laws or regulations that were now negatively affecting their practices or perhaps threatening their careers. They would ask: "What is the Association doing about this?"

My answer was sometimes as follows: "We sponsored a bill to address this problem two years ago and we asked for members to write and call their legislators about this important issue, but the response was limited and the bill died because of heavy opposition." I then would engage in a frank conversation with the member and explain, in the starkest of terms I could, that many members don't get interested in an issue until it affects them personally, and then it may be too late. For example, membership involvement with a bill that would establish a statute of limitations for licensing board disciplinary actions was minimal. But, when a member later called and was outraged over the fact that the licensing board was investigating an allegation about events taking place ten years earlier, that member would be the one who asks - what are you doing about this?

Now that we have briefly discussed laws, regulations and Attorney Generals' opinions as sources of legal authority, it is important to note that when someone is trying to ascertain what "the law" is with regard to a particular subject, "the law" governing that subject matter may be shaped by one or more laws (statutes), by regulations passed by an administrative agency of the government, and/or by opinions of the state's Attorney General (or other-named state official). "The law" about a particular subject matter may also be shaped by judicial decisions (case law) that may interpret a particular statute or establish public policy in an area that is not covered by statute or regulation.