Disciplinary Actions

written by Richard Leslie | May 24, 2016

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…Licensing (as a mental health professional) by the state is a privilege, not a right. Once licensed, however, the license is in the nature of a vested property interest. Licensees work hard to obtain a license and licensees want to keep their licenses in order to earn a livelihood. Licensing boards are charged with the duty of protecting the public, and they have the authority to impose discipline pursuant to procedures and standards usually set out in law. Each state has its own system, and some states provide more "due process" protections for licensees than others. For example, some states may have a statute of limitations that applies to (and bars) "stale" complaints, while others may place no limits on the Board's ability to pursue complaints involving actions or behaviors occurring many years earlier. There may be no statute of limitations for certain offenses, such as is typical with respect to procurement of a license by fraud or misrepresentation. If an alleged act or omission involves a minor, the limitations period may be tolled until the minor reaches the age of majority. Thus, such complaints might well be stale, but they will nevertheless result in an investigation and possible disciplinary action.

When a health care practitioner (hereinafter called "you") is investigated by a licensing board for the first time, it is only then that it may be realized that everything you worked for, and all of the good that you have done and will do, and your very livelihood, is on the line. It is only then, that you may realize that the exposure you have as a result of a complaint from an angry patient is significant. It is only then that you may realize, especially because you did nothing wrong when working with this troubled patient, that you are up against the State of _____, with all of its power and virtually unlimited financial and human resources. It is then that you will want to know – what are my rights? How do I protect myself? Will I be treated fairly by the investigator? Will the investigator be on a search for the truth, or will the investigator be looking to "make a case?" Will I have an opportunity to defend myself? What are my "due process" protections?

I have spoken with many therapists, who, upon finding out about the awesome power of the state, have asked if their due process rights are as extensive as those possessed by criminal defendants. The short answer is "no." In a disciplinary proceeding a licensee is generally entitled to "administrative due process," and what that precisely means depends upon the particulars of state law. The basic tenet of administrative due process, however, is that the licensee is entitled to notice and a hearing. Beyond that, one must refer to the provisions of state law to fully and precisely answer the questions asked above.

When first notified of a complaint, practitioners ask whether or not they need an attorney. Some proclaim their "innocence" and think they can resolve the matter with a letter of explanation. When I was active as a criminal defense attorney many years ago, I would emphasize that when you are in fact

innocent of any wrongdoing, that is the very time when you need an attorney. An innocent person going to prison is worse than a similar fate for a guilty person. Thus, in the context of disciplinary proceedings, it will come as no surprise that I generally have advised licensees to hire an attorney as early in the process as possible. There may be complaints that are so bizarre and preposterous, where the complainant is clearly not credible, that the practitioner may feel comfortable providing a simple explanation in order to dispose of the complaint. Of course, that is a matter of judgment for the individual practitioner based upon the totality of circumstances.

It must be understood that in a disciplinary proceeding, unlike in a criminal proceeding, there is no presumption of innocence and no jury of one's peers. Additionally, and as mentioned in prior articles, the burden of proof on the state is not as great as the burden of proof in a criminal case. Thus, the state doesn't have to prove you guilty "beyond any reasonable doubt." Its burden of proof is generally either by a "preponderance of the evidence" or by "clear and convincing evidence." Another advantage that the licensing board may have, depending upon state law, is that even after a favorable decision (for the practitioner) by an administrative law judge or a similarly titled official, the board may have the authority, at least to some degree, to non-adopt the administrative law judge's decision. Licensees typically have the right to appeal an adverse administrative decision to a court of law.

I must caution that my comments will not necessarily apply in each state – because the investigative, notice, and hearing stages of such disciplinary actions and proceedings may vary in significant ways.