Discipline And Due Process

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – June 2010

Licensing by the state is not a right, but rather, a privilege. Those who are licensed, whether as marriage and family therapists, professional or mental health counselors, psychologists, or others, work hard and sacrifice much to attain licensure. While each state has its own requirements, the applicant for licensure will typically have to attain specified education, supervised experience, and pass one or more examinations. They will typically be fingerprinted and a background check of some kind will be conducted. Never again will the licensee be under as much scrutiny by the state, unless and until the licensee is the subject of a complaint to the licensing board by a former patient, or until the licensing board is otherwise informed of information that will trigger action.

States are often under increasing pressure to do more in the way of disciplining licensed health professionals, usually because of news stories about the failures of a particular licensing board or the bad acts of one or more of its licensees. News stories aside, licensing boards exist primarily to protect the public. Professional associations typically exist to represent the common business and professional interests of its members. It has been my view, and it seems to me inarguable, that a licensee is entitled to fundamental fairness when dealing with the state in response to a consumer complaint. Fundamental fairness is essentially another way of saying “due process.” Due process is of critical importance in criminal proceedings because the U. S. Constitution requires it before a person’s liberty (or life) is taken away by state or federal government. Those who are licensed are entitled to administrative due process, which is something less than the due process afforded to those who are accused of felonies and misdemeanors.

Once licensed, the licensee has a vested property interest in that license. It allows him or her to pursue a career. Anyone else, unless similarly licensed or otherwise exempt, may not engage in that activity for a fee. Since a state license to practice a mental health or other profession is a valuable property interest, it should not (and cannot) be taken away on whim or caprice, or in an unfair manner. That is why states have passed laws and/or regulations that specify what constitutes administrative due process. Two fundamental elements of due process are notice and a hearing. Each state’s process will be different in a variety of ways, both at the investigation stage and at the hearing stage. It is important for licensees to be aware of the disciplinary process. It is also important for associations that represent the interests of the various professions to monitor this process, to resist changes that would jeopardize the fairness of the process, and to suggest changes to the current process as may be warranted.

The licensed mental health professions in California, and many other health care licensees, have recently lobbied intensively to kill a bill that was pushed by the current administration (the Governor, through the Department of Consumer Affairs). This effort by the administration was in part the result of

an investigative newspaper article regarding nurses who were convicted of sex crimes and attempted murder but who nevertheless retained their licenses. The article additionally indicated that nurses with histories of drug abuse, negligence, violence, and incompetence continue to provide care, and that the Board of Registered Nursing often takes more than three years on average to investigate and discipline errant nurses. The bill proposed a variety of changes to the disciplinary process. Some of the proposed changes were not objectionable, but others were, in my view, draconian. There was a clear intent to limit and erode the due process protections that have been a part of the law for many years. Particularly disturbing was the fact that many of the proposed limitations and erosions were unrelated to the reasons why some licensing boards were taking so long to act or not acting at all.

With respect to the issue of notice, most (if not all) state laws or regulations allow health care licensing boards to suspend a license without prior notice to the licensee only in more serious or extreme cases. This would typically be allowed in cases where serious injury would result to the public if quick action is not taken (before the matter could be heard on notice). After the license is suspended, the licensee will typically be notified in a short period of time and will be entitled to a limited hearing to contest this "interim suspension." In other cases, the interim order of suspension will be sought with prior notice to the licensee. In California, the hearing to determine whether an interim order of suspension should issue would typically be held before an Administrative Law Judge. An adverse decision may be immediately appealed by the licensee and heard in a court of law. The full administrative hearing on the formal accusation or charging documents would be held in a fairly short period of time, especially if the administrative decision was to suspend the license in the interim.

In the standard or usual situation, the licensee will have ample prior written notice of the alleged violations that constitute unprofessional conduct and will have an opportunity to hire an attorney and mount a defense. Some cases proceed to a hearing, while most are settled. It is important to remember that your malpractice insurance policy may contain coverage for the legal expenses incurred in responding to a licensing board investigation and enforcement action. For example, the professional and supplemental liability insurance policy offered to allied healthcare providers through CPH Insurance covers the reasonable expenses (e.g., hiring a lawyer) that an insured incurs resulting from an investigation or proceeding by a state licensing board or other regulatory body, provided that the investigation or proceeding arises out of events which could result in claims (demands for damages) covered by the policy. The amount of coverage provided is $35,000* (this is the maximum aggregate amount).**Updated June 2017*

Since your right to practice is potentially threatened anytime you are being investigated by the board, it is wise to consult with or be represented by an attorney as early as possible – at least in most cases. I have seen some complaints that are so comical or outrageous, or simply so lacking in merit, that a knowledgeable therapist or counselor, after getting some help or advice (perhaps from their state professional association), might be able to respond to an inquiry without representation and obtain a quick and favorable result – that is, a closing of the case with no finding of wrongdoing of any kind. In California, and I suspect in other states, the vast majority of consumer complaints do not result in disciplinary action by the licensing board. We have found that many of such cases emanate from

divorce, custody, and visitation proceedings. Nevertheless, and as I have stated on many occasions, although you may think that you have done nothing wrong and have nothing to hide, this is not necessarily reason enough to forego consultation or representation.

The burden of proof in an administrative proceeding to revoke, suspend, or otherwise discipline a licensee in California is “clear and convincing evidence.” This burden of proof, which is more difficult to attain than the “preponderance of the evidence” standard, requires a finding of high probability. It is evidence so clear as to leave no substantial doubt. Stated otherwise by the courts, it is “…sufficiently strong evidence to commend the unhesitating assent of every reasonable mind.” The Administrative Law Judge (ALJ) issues a proposed decision after the administrative hearing, and the licensing board has the option of adopting the decision, modifying it, or rejecting it. Ultimately, the board can decide the case as they deem appropriate, can make its own findings, and impose those sanctions that it thinks appropriate. Much of the time, however, the Board adopts the ALJ’s decision either as is proposed or with minor modifications. Since licensees can appeal adverse decisions to the courts, the Board’s actions in direct contradistinction to the ALJ’s findings and recommendations will likely engender more scrutiny from the courts and may be more likely to be set aside.

What is the standard of proof required by the law in your state? What due process protections exist for licensees in your state? What efforts, if any, are being made in your state to make it easier for the licensing board to impose discipline? What involvement, if any, does your professional association have in trying to protect the due process rights of licensees? It is common for me to speak with a licensee who has been contacted by the licensing board, or who has had an Accusation filed against him or her, and for the licensee to complain about the process or the actions of the licensing board or an investigator. The licensee may ask – “what is the Association doing about this seeming unfairness?” I usually ask the licensee if he or she was concerned about the process before being the target of the investigation, or if he or she was aware of the related legislation that the association recently sponsored. The message is – be concerned before you are the target of an investigation!