Violation of Ethics Code – Notification of Licensing Board?

written by Richard Leslie | October 1, 2018

Avoiding Liability Bulletin – October 2018

Can your license be revoked or otherwise disciplined by the state licensing board for a violation of the code of ethics of the professional association that you belong to (assume the code of ethics is not incorporated by reference into the law or regulations, but is a separate and distinct document)? In considering this question, one possible scenario is that an aggrieved patient has chosen not to file a complaint with the licensing board, but rather, has filed a complaint (alleging a violation of the ethics code) solely with the ethics committee of a state or national professional association or society. A different scenario occurs when the patient has filed a complaint with the licensing board, alleging, among other things, a violation of one or more provisions of the professional association's code of ethics. In either case, the licensing board could revoke (or otherwise discipline) your license for conduct that violates one or more provisions of the association's code of ethics – but it depends upon a variety of factors, including, most importantly, the particular provision(s) of the ethical standards alleged to have been violated and the applicable laws and regulations involved.

The ethical standards of the several relevant state and national professional associations may vary in significant ways, as may the processes involved with investigating an ethics complaint, charging violations, making findings, and taking or recommending final action. State laws may affect some of the operations of a professional association's ethics committee and may, among other things, provide various due process protections for the accused member. In the first scenario described above, some may ask how a state licensing board would find out about an ethics complaint being investigated by the ethics committee of a private professional association, which generally is handled in a confidential manner – for the protection of both the patient and the practitioner. Some patients do not want their personal matters, especially those regarding mental health treatment, to be revealed to the state – they simply want to address their concerns in a supposedly less punitive or threatening manner.

Depending upon the professional association or society (for example, national or state, and the percentage of licentiates that are members) and the applicable law, a chief executive of the association (or other specified person) may be required to file a report with the licensing board after certain final action has been taken affecting a practitioner's membership in the association. For example, in California, if a practitioner's membership in the professional association is revoked or terminated as the result of the ethics committee's actions, or if restrictions are imposed (or voluntarily accepted) upon membership for a cumulative total of 30 days or more for any twelve month period (for example, a suspension of membership or perhaps the imposition of probation), a report to the licensing board may be required. When a report is required (see below), the law requires that the licensee be notified of the

right to submit additional statements or other information – for example, information that may be explanatory or exculpatory.

The California statute requires a report to be made to the licensing board in the circumstances specified above (revocation, termination, or specified restrictions upon membership in the association) if the action taken was for a "medical disciplinary cause or reason." This phrase is defined as "that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care." A failure to make a required report can result in a substantial fine (up to $100,000 in certain cases). Thus, those involved with the administration of an affected ethics committee must have a clear understanding of the meaning of this phrase in order to determine when a report is required and when a report should not be made. As one example, they might have to determine whether a report is required if the final action taken pursuant to the ethics process results in a year of probation (with terms and conditions) based upon a finding of insurance fraud. In some cases, the determination of whether a report to the state is required is not easily ascertained.

Licensing boards may only take disciplinary action as provided for in law and regulation. Most licensing laws, and some regulations, will define the kinds of conduct (often described as "unprofessional conduct") that can result in a revocation or suspension of a license, or some other form of disciplinary action. Ethics committees take actions for violations of an association's code of ethics (the ethical standards that practitioners agree to abide by as a condition of membership). Some ethical standards may be substantially the same as applicable law (such as breach of confidentiality or sexual contact with a patient) and may expressly declare certain conduct to be unethical. Other standards may be more aspirational in nature or may be mere "recommendations" or "guidelines" rather than mandates. In some states, the differences between the laws regarding unprofessional conduct and an association's code of ethics may be blurred. I see this is as problematic, because there should generally be a distinction between ethical standards and laws that allow for revocation of one's license.

It is one thing when action is taken by the licensing board or an ethics committee against a licensee or member of a professional association for an intentional violation of a patient's confidentiality and quite another thing when a person violates or ignores an ethical code provision that encourages members of the association to participate in activities that contribute to a better community and society, including the provision of pro bono services. In the latter situation, the licensing board would likely not have any authority to take action. Some ethics code provisions, like those that address dual or multiple relationships, may not be specifically addressed in, or prohibited by, state law. Yet licensing boards may nevertheless take action by alleging that the licensee engaged in conduct that was grossly negligent or incompetent, or that the licensee intentionally or recklessly caused emotional harm to the client/patient. The licensing board must do more than allege – they must prove by clear or convincing evidence (or a similar standard) that the dual relationship was in fact prohibited and that the conduct was, for example, grossly negligent (as opposed to negligent).

Peer review bodies, such as certain professional association ethics committees, may also be required to file a report with the licensing board when there are final findings or recommendations by the peer

review body for the imposition of specified disciplinary action (similar to those actions mentioned above) as the result of the practitioner's incompetence, use of drugs or alcohol to a specified extent, and sexual misconduct with one or more patients during a course of treatment. The report to the state in such circumstances (serious violations which affect public safety) may have to be made even though the member has not yet had the opportunity to contest the ethics committee findings and recommendations at a hearing before an independent body (those who have not acted as an accuser, investigator, or fact finder).

When faced with an ethics complaint, and otherwise, It is important to know whether your professional association is required by state or federal law to make a report to the licensing board based upon, among other things, the nature of the final action taken against a licentiate's membership as a result of an ethics complaint and the nature or type of conduct involved. If a report might ultimately be required in a given situation, perhaps there will be an opportunity to reach a voluntary settlement that can avoid, in appropriate cases, notification of the licensing board.