

# Ethics Complaints

written by Richard Leslie | May 24, 2016

## **Avoiding Liability Bulletin - November 2013**

... Therapists and counselors are (or should be) aware of their possible vulnerability as targets of malpractice claims or lawsuits brought by disgruntled or harmed clients, sometimes resulting in money settlements or judgments (by court or jury) for monetary damages. They should also be aware of their vulnerability to investigations and enforcement actions by regulatory boards, which can lead to the suspension or revocation of one's license, or some lesser form of discipline. Another area of possible vulnerability is the complaint made by a patient or other person to a professional association's ethics committee. Members of professional associations typically agree to abide by the organization's code of ethics upon joining the organization. Members are typically expected to cooperate with ethics committees during the investigation of complaints and in subsequent proceedings. Accordingly, some codes of ethics provide that a failure to cooperate with the ethics committee constitutes a separate and distinct ethical violation.

In each of these areas of vulnerability, the advice from, or representation by, an attorney is usually necessary, even when the licensee believes that he or she has done nothing wrong. While malpractice insurance provides coverage for the costs of representation by an attorney in a malpractice lawsuit or claim, or in a disciplinary proceeding with the licensing board, such is typically not the case with respect to complaints made to an ethics committee. Licensees need to decide whether to consult with a lawyer before responding to an ethics complaint. This decision is usually influenced by a number of factors, including the nature of the allegations, the confidence of the practitioner in his or her treatment of the client, and the costs of the services to be rendered. The licensee may only need consultation with an attorney in order to respond to the complaint by a well-thought out and well-written letter. Some practitioners choose to proceed on their own in appropriate cases. In more complex or serious cases, the practitioner may need ongoing legal assistance.

It is important to know how the process works, who the members of the ethics committee are and how they were selected, and the role that association staff plays in the process. Some ethics committees may have the right or option to interview the witnesses (generally, and at a minimum, the complainant and the accused member) when there is an issue of credibility involved or at other times, while other committees handle these matters essentially through correspondence only. A majority of the complaints are likely either closed with no finding of an ethics violation or by some form of resolution by mutual agreement between the ethics committee and the member. Members are typically allowed to have the assistance of counsel and the right to a hearing before some form of adjudicatory body in the event that the member desires to fully contest the allegations and/or the findings or recommendations of the ethics committee.

In some states, the ethics code of a particular profession may have been codified (to some degree and in some manner) into state law, thus making the state's unprofessional conduct statutes similar to or repetitive of a particular code of ethics. Often, however, many ethical standards are not found in statute because they may be more aspirational rather than regulatory in nature. Some ethical standards may be written as outright prohibitions, while others might involve suggested behavior rather than mandatory behavior. In some states, ethics committees of professional societies (and other peer review bodies) are required to make reports to the licensing board under specified circumstances, thus subjecting the licensee to the possibility of multiple investigations and enforcement actions. In such cases, early representation by an attorney is advisable. When the licensing board and an ethics committee are at the same time pursuing similar allegations, ethics committees will often hold their cases in abeyance while the licensing board proceeds. Ethics committees likely understand that the state, with all of its human resources (e.g., investigators and attorneys) and statutorily granted power (e.g., subpoena power), may be better equipped to investigate most matters.

With respect to the fairness of the procedures, each organization should ensure that the process used by its ethics committee (or other peer review body) to investigate and resolve complaints meets certain minimal due process and fairness requirements. In 1986, Congress enacted the Health Care Quality Improvement Act to encourage physicians to engage in effective professional peer review, but gave each state the opportunity to opt out of some of the provisions of the federal act. Because of deficiencies in the federal act and the possible adverse interpretations by the courts of the federal act, California opted out of the federal act and designed its own peer review system, which is applicable to not only physicians, but to other healing arts practitioners. The intent of these laws is to establish fair hearing procedures for specified peer review bodies. While most ethics complaints do not proceed to the formal hearing stage, it is important for ethical standards or codes to provide for that eventuality.

For those ethics committees covered by these laws (and for others who simply desire to abide by statutory procedures in order to hopefully enjoy a safe harbor for their activities), most of the requirements pertain to the hearing phase of the ethics proceeding rather than the investigative or settlement stages of a case. In California, the statute addresses such areas of the process as the requirement for written notice to the licensee of certain final proposed action by the ethics committee, the right to a hearing before an unbiased panel, the right to inspect and copy any documentary information relevant to the charges which the ethics committee has in its possession, the right to have a record made of the proceedings, the right to call, examine, and cross-examine witnesses, the right to submit a written statement at the close of the hearing, and the right to a written decision by the trier of the fact. Usually, the trier of the fact is not the ethics committee, but rather, a governing board or other designated adjudicatory body. The ethics committee would usually "prosecute" or present the case to the trial body.

While ethics committee investigations and findings or recommendations can result in expulsion or suspension from membership in a professional association, most result in some lesser form of "discipline" or remedial action, often involving supervision, education on clinical or legal/ethical issues, personal psychotherapy, or other forms of "rehabilitation." Expulsion or suspension is typically reserved

for the more egregious violations, such as sex with patient or other extreme exploitation or maltreatment of a client. A large number of cases deal with issues such as breach of confidentiality, dual or multiple relationships of various kinds, fee disputes, including insurance billing issues, alleged bias or other wrongful conduct in custody or visitation disputes, and advertising issues. With respect to the latter, professional associations must be sure that their restrictions on advertising are limited to those that are false, fraudulent, misleading, or deceptive in order for them to avoid antitrust implications.

Members of professional associations are more likely to be familiar with the ethical standards related to the conduct and behavior of the practitioner rather than with those aspects of the organization's code of ethics that deal with the procedures regarding complaints, investigations, hearings, and settlements. It would be wise for those who have not taken the time to review these procedural aspects of the code of ethics to do so soon. Some organizations may not include the procedural provisions within the actual printed code of ethics, and may publish a separate document that governs the conduct of an ethics complaint and investigation. In any event, it is better to read and understand these provisions before one has to deal with an actual inquiry by an ethics committee. Practitioners must be ready to defend themselves, and knowledge of the procedures should help in that regard.