# Ethics – Enforcement

written by Richard Leslie | January 2, 2024

Avoiding Liability Bulletin – January 2024

***Note: This article was first published on the CPH and Associates' website in December 2016. It appears below with minor changes. The article published last month (December 2023) also addressed ethics issues. When read together, these articles address important aspects of practice that are sometimes overlooked by practitioners. Laws and regulations are of course an important focus for practitioners. Ethical standards and enforcement of those standards should not be forgotten.***

**ETHICS – ENFORCEMENT**

What is the difference between an ethics violation and a violation of a state law or regulation governing professional conduct? If your client or someone else alleged that you did something wrong, would you rather be involved with the system set up to handle ethics complaints, or would you rather be dealing with the state licensing board? The instinctive answer to the latter question might be that you would prefer not to be involved with the licensing board – assuming you had a choice between an ethics complaint and a complaint to the board. In a worst case scenario, the licensing board can suspend or revoke your license to practice, while an ethics committee or the final adjudicatory body of a professional association can revoke or suspend your membership in the organization; your right to practice continues. But the instinctive answer to the question might not always be the right answer.

Practitioners may engage in conduct that could result in all of the following: an ethics complaint, an enforcement action by the licensing board, a civil law suit for monetary damages, and criminal charges. An example of such broad exposure might involve an act involving "consensual" sexual intercourse or sexual misconduct with a patient. Another example of such exposure might involve the commission of insurance fraud. On the other end of the spectrum, there are cases that might "only" involve an alleged violation of the ethical standards of a professional association. In such cases, licensees come into contact with the internal workings of the trade organization they pay their dues to – and they are typically "judged" or affected, at least to some degree, by their "colleagues" on an ethics committee, by association staff, and in some cases, by the board of directors of the organization.

When therapists and counselors are involved in the judicial system, whether in criminal or civil court, there are built in protections – both constitutional and statutory. The likelihood and perceived necessity of being represented by a lawyer is very high, and in many civil cases involving a patient complaint, there is likely to be an insurer that is obligated to cover the costs of a defense (including attorney fees) and to pay damages on behalf of the insured in the event that negligence or fault is proven. Most malpractice cases are settled, hopefully for nuisance value! With respect to an enforcement action by

the licensing board, most states have a statutory scheme that assures, to some extent, a fair procedure. Licensees are entitled to administrative due process – which at its core, and at a minimum, assures reasonable notice of the charges and a right to be heard (e.g., by an administrative law judge at a public hearing). Professional liability policies may cover some or all of the costs of a legal defense before the licensing board.

If an ethics complaint is filed by a patient or other person (for example, a jealous or vindictive colleague), things may be a bit different, sometimes to the surprise of the licensee who is the target of the complaint. First, there likely is no insurance coverage that will pay for a defense before the ethics committee – the practitioner will be "out of pocket" if an attorney is hired. Secondly, the practitioner may not get the opportunity to appear personally before the ethics committee and to fully explain and justify his or her actions. Further, the people who are investigating the ethics complaint are probably not specially qualified or trained to judge the practitioner's actions from either a clinical or ethical/legal perspective – they are peers. Those peers may sometimes be supercritical or overly judgmental and may not be able to distinguish between minimal or average competence and unethical behavior. Finally, there may be a state law that applies to the professional association involved that requires it to report *certain final findings or actions* to the licensing board, thus subjecting the licensee to further scrutiny and jeopardy. Such reports would typically be made only after a final adjudication of the matter that hopefully complied with fair hearing standards established by, or based upon, state or federal law.

Most licensees know that if they are charged with a crime or they are threatened with a civil lawsuit for malpractice or a licensing board enforcement action, consultation and representation by an attorney is usually both wise and necessary. Some practitioners may be under the impression that legal representation is not needed for an ethics complaint, but they may discover otherwise. Legal consultation (but not representation) may suffice in some circumstances, but that decision is determined by the facts involved, the confidence and abilities of the practitioner, and financial considerations. I am aware of many cases where an attorney was not used, but most of those either involved matters that were relatively minor and would not result in a mandatory report to the licensing board, or they involved complaints that were certain to be closed or rejected by any reasonable committee of peers once made aware of the full story. Other cases may be settled in one manner or another.

In some states, ethical standards are incorporated into the licensing law in some manner or to some degree. In other states, there are laws and regulations that define unprofessional conduct, and there are ethical standards of a professional association that separately "regulate" or inform professional conduct. Some ethics code provisions are intended to be aspirational while others are "regulatory" (e.g., a violation of the latter is deemed or stated to be unethical behavior). Some ethical standards may mirror state law or regulation, so there is likely to be some overlap. Those who advocate for the end of ethics enforcement by professional associations cite several reasons, most of which involve concerns about fairness and redundancy (multiplicity of possible actions regarding the same conduct).

Are you familiar with the written guidelines of the ethics process in your professional association? Some

of the questions that you should be able to answer: In an ethics proceeding in your association, are you entitled to be represented by an attorney at every stage of the investigation and proceeding? Are you entitled as a matter of right to personally appear before the ethics committee in order to effectively defend yourself? Can the ethics committee refuse to meet with you and to handle everything by mail? Will you have a chance to impeach the credibility of the complainant? Are you entitled to a hearing before an adjudicatory body? Are you able to challenge for cause those who will be hearing and deciding the matter? Do you have the right to appeal? Will the final result be made public in a particular manner or under particular circumstances?