

# On The Record . . .

Official Newsletter of BERTOLINO LLP

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## Why You Shouldn't Discuss Your Licensing Complaint with Anyone Other Than Your Attorney

by Tony Bertolino, Managing Partner

When you receive a complaint against your professional or occupational license, you may be upset, angry, and overwhelmed by the situation. You have



worked hard to acquire the education and training necessary to get your license, and now a complaint has put it at risk. The last thing that you want to do is lose your license or face disciplinary proceedings over a complaint.

If you find yourself in this situation, you may be tempted to contact the party who filed the complaint against you or your licensing board and try to resolve the matter yourself. You also may want to talk to your colleagues, employees, friends, or family members about the situation. However, you should generally avoid talking about a licensing complaint with anyone other than your attorney.

### Don't Contact the Complaining Party

If a party has gone to the trouble of complaining to the licensing board about you, they likely don't want to or don't feel that they can resolve the matter by contacting you directly. You may think that you can contact the complainant, discuss the matter calmly and rationally, convince them that they are wrong, and get them to withdraw the complaint. But this strategy is seldom successful.

The licensing board could even see you contacting the complainant as an attempt to intimidate or bribe them into dropping the complaint. As a result, you may end up making your situation much worse. So, you should never contact the complainant without consulting your license defense attorney and getting proper legal advice.

### **Don't Contact the Licensing Board**

When you receive a complaint from your licensing board, your first inclination may be to contact the investigator or other staff person from the licensing board to explain your side of the story. As humans, we tend to want to defend ourselves against complaints of wrongdoing to others. Instead, you should contact a lawyer first to get legal advice about responding to a complaint.

Even if you contact the licensing boards with simple questions about procedures, you may be unable to resist getting into the subject matter of the complaint filed against you. However, you must remember that the licensing board is not on your side. No matter how friendly the investigator may seem, their job is to protect the public and investigate the complaint against you. Their job is not represent your interests. The only person who will truly represent your interests is your attorney.

Similarly, if the staff attorney or an investigator contacts you directly to interview you or talk to you about the complaint, you should politely decline unless your attorney is present. While it is understandable that you don't want to appear uncooperative and make yourself look like you have done something wrong, at the same time, you don't want to inadvertently admit to professional misconduct or give the licensing board additional evidence against you.

Therefore, if you contact the licensing board on your own, you may unwittingly give them the information they do not

already have and to which they may otherwise have had access. In addition, they can use anything you say as evidence against you in later disciplinary proceedings. Allowing your lawyer to take the lead in determining the best strategy to respond to the complaint against you is the wisest choice when you receive a complaint from your licensing board.

### **Don't Talk to Third Parties About Your Complaint**

Don't talk to anyone! This advice applies to everyone in your life, including your colleagues, boss, employees, friends, and family members. However, the attorney-client privilege applies only to you and your attorney and no one else. Furthermore, there is no attorney-client privilege if a third person is present when you talk to your attorney.

As a result, if you have conversations with third parties other than your lawyer about your licensing complaint, they can testify against you in your disciplinary proceedings. Even if you trust them, even if you don't think they would testify against you, the licensing board could call them as a witness against you and expect them to tell the truth under oath. In addition, if you said something to a third party against your interest or admitted to a violation of a rule or law, they may have to disclose that information to the licensing board if requested. The same principle applies to communicating such a statement to a third party in writing, whether via text message, email message, or a written document.

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### **Employee Spotlight: Sheri Middlemas**

April 15th marks Sheri's three year "work-iversary" with Bertolino Law Firm. Here are a few fun facts about our Chief Operating Officer.

My nickname at work: "The Sherinator" ... I just found this out from Melissa while completing this survey. I like it, I think it will



stick.

I am skilled at: Can I answer this question in an excel spreadsheet?

On the weekends and in my free time I am often: Traveling to visit or video chatting with my amazing adult offspring, and other family/friends.

Number one on my bucket list: Establishing Bertolino Law Firm as the standard by which all law firms should be measured ... and then a trip to Tuscany.

The best sweet or salty snack: Tears of my enemies

Best movie ever: The Boondock Saints

My favorite candy: Black Jellybeans ... and 'tis the season

My favorite sports teams: I've grown tired of professional sports; I do enjoy attending Texas Stars hockey games.

If I had a theme song that played every time I walk into the office it would be: Some days it's "Let's Get It Started" by Black-Eyed Peas, and others "It's Five O'clock Somewhere" by Alan Jackson and Jimmy Buffett

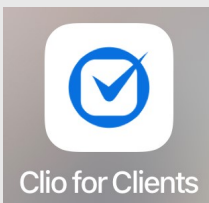
People say I look like: I'm mad or upset, unfortunately, that's just my face.

The best part of my job: Working with this awesome team, each employee of Bertolino Law Firm gives 100% with a "let's roll up our sleeves and get it done" work ethic.

[Click here to read more about Sheri](#)

## Client Survey: Your Opinion Matters

Bertolino LLP strives to be a 100% client-centered law firm. Each month, we pose a quick, client-focused survey in this section of our newsletter. We asked our clients to please assist us by taking this survey, as your feedback is essential in our on-going efforts to deliver an amazing client experience.



Effective April 1, 2022, all case matter updates are provided to Firm clients using the secure client portal, Clio for Clients.

What is your experience so far with Clio for Clients?



I have only received correspondence

Select

I have received and sent correspondence

Select

I have not yet utilized the client portal

Select

## Hallmark Achievements

### Texas State Board of Professional Engineers v. GS



**Facts:** Our client GS, hired firm to assist her in disclosing a recent criminal conviction to the Board. The firm drafted and submitted a disclosure of the conviction along with witness statements and other character evidence that showed that GS was still fit to practice in Texas. The firm further argued that this conviction was an isolated incident and not indicative of future conduct.

**Outcome:** After the self-disclosure was received by the Board, GS's matter went through the standard process. Based on the self-disclosure and the other character evidence, the Board determined that GS's matter did not warrant disciplinary action. An investigation was never initiated, and GS's license was never sanctioned.

### Texas Board of Nursing v. UL



**Facts:** Our client UL, hired firm to represent her against a complaint filed against her license by the Board. The complaint was initiated by her former employer. The complaint alleged that she misappropriated morphine. After an investigation was completed by her employer she resigned. Her resignation was not accepted, and she was terminated.

**Outcome:** The firm submitted a response packet to the allegations which detailed how UL did not misappropriate morphine. The firm argued that the evidence was not sufficient to prove that she took the morphine for self-use or that she failed to administer the morphine. The firm provided evidence that UL simply failed to timely document this single administration. Based on the arguments, the Board issued UL a corrective action. This action is not public and is not subject to an open records request. The action is also non-disciplinary. After UL completes her action, the matter will be dismissed.

### Texas Medical Board v. MG



**Facts:** Our client M.G., faced a complaint by the Texas Medical Board ("TMB") regarding adverse peer review, failure to meet the standard of care and problematic practices regarding

professionalism and behavior towards hospital staff. M.G. had 14 patient cases where TMB felt she had violated the code. TMB alleged that she was a danger to her patients and the public and recommended sanctions and an evaluation.

**Outcome:** After TMB's investigation, an informal settlement conference was held. Bertolino LLP presented evidence in the form of an expert report, by a 3<sup>rd</sup> party expert, who disagreed with TMB's initial findings that M.G. fell below the standard of care. They further argued that her behavioral violations were insignificant based on her 20-year career as a physician. Based on their arguments, TMB offered M.G. a non-disciplinary plan. This meant that her matter was essentially dismissed and would not result in disciplinary action by TMB so long as she completed the plan.

## How Do I Answer Questions About My Criminal History Accurately?

by Troy Beaulieu, Esq.



People often do not know how to answer the questions about their criminal history on their license application or renewal. Legal matters are complicated, and most people did not go to law school, nor are interested in reading the tedious laws that dictate how to respond correctly. On top of that, these indiscretions occurred some time ago, and people do not retain the paperwork nor have a clear memory of how the case was resolved. People often have lots of questions and confusion. Were they arrested, but never charged? Charged, but never convicted? What if you were given a pre-trial diversion program or a deferred adjudication? And what happens if afterwards the matter was expunged, or you received an order of non-disclosure? How do you answer license application questions correctly and what are the consequences? As we discussed in [last month's edition](#), failing to disclose criminal history matters can have significant impact on your license application and result in disciplinary action. In this article we will discuss some criminal case basics to remember when answering licensing agency application questions. Of course, it is always a good idea to consult an attorney with the knowledge and experience to assist you with answering these important questions correctly. The Bertolino LLP team is ready to assist you if you need help.

### Where you Arrested, Charged and Convicted?

The first thing to keep in mind is that many licensing agencies will ask you if you have ever been arrested. Being arrested typically involves being handcuffed and taken by law enforcement to the police station, or jail, fingerprinted and processed and placed in jail until you make bail. Be careful not to confuse this with being charged with a crime. The police may have arrested you, but the prosecutor may look at the case and decide not to file criminal charges. When in doubt, it's always best to disclose a situation if you are unsure about the outcome.

After being arrested, the prosecutor's office will look at the police report and any related evidence to decide whether to charge you with a crime. This occurs in one of two ways - either through a written document called an information or an indictment. An information is a written document prepared by the prosecutor's office for more minor offenses (misdemeanors) and does not have to be presented to a grand jury of your peers. More serious offenses (felonies) are charged through a written document called an indictment. The prosecutor's office will have to present their evidence to a grand jury of community citizens who are empaneled to evaluate whether there is probable cause to believe a crime was committed. If they agree, they sign the indictment, formally charging the person with a felony criminal offense. If the grand jury does not believe sufficient evidence exists to charge someone, they "no bill" the person and the case ends there due to insufficient evidence. The best way to determine if you were charged with a crime is to confirm whether there is a written information or indictment formally charging you with a crime. If you were never charged through one of these signed and dated documents, then you were not charged with a crime.

Once formally charged, a person is still innocent until convicted of a crime. This can occur two ways: either you agree to plead guilty or no contest to a particular charge or you are convicted after a trial. If you choose to plead guilty or no contest to a criminal charge, this will usually result in a conviction. If you choose to plead not guilty, you will have a trial and if the judge or jury in your trial finds you are guilty of the offense, you will have a criminal conviction on your record.

### **Were you Given Deferred Adjudication or Pre-Trial Diversion?**

Sometimes after being formally charged with a crime, the prosecutor's office will give people the opportunity to avoid the consequences of a criminal conviction on their record. This can occur in one of two main ways. First, a person can be placed on deferred adjudication. What this means is that the judge agrees to suspend further activity in the case and often will place the person under supervision for a period with certain conditions. If the person complies with all the terms and conditions during this deferral period, the judge will dismiss the case without ever deciding whether the person is guilty of the charged crime. Similarly, sometimes people are offered the opportunity to complete a specialized program for certain types of offenses. If the person successfully completes the program, then their case is dismissed without any determination of whether a crime was committed. While similar, pre-trial diversion and deferred adjudication are different, particularly regarding eligibility for expunction versus non-disclosure (discussed below). In both instances, the result is a dismissal of the case without a determination of whether a crime was committed. Be careful with these types of outcomes; many times, the licensing agency will specifically ask about cases involving deferred adjudication or pre-trial diversion. So, while you might think it's something that does not need to be disclosed since it was dismissed without any finding of guilt, you still may need to disclose the case in your application because agencies are sometimes allowed to consider it in evaluating your application.

### **Were you Granted an Order of Non-Disclosure or an Expunction?**

After your case is completed, sometimes you may be able to apply for an order



of non-disclosure or expunction. While these two items are different, they both have an impact on the public visibility and availability of your criminal records. Expunction is a process where the court removes any record of a person's arrest, charge or conviction from their permanent records and the person can then legally deny the incident ever occurred. Not all cases are eligible for expunction and the proper process for obtaining an expunction must be followed carefully. Expunction is different from obtaining an order of non-disclosure. Non-disclosure orders do not remove the criminal records but limit their availability to the public. Just like expunctions, there are eligibility requirements for non-disclosure orders and the proper process for obtaining one must be adhered to carefully. If your matter was expunged from your record, then you are legally permitted to deny the incident ever took place. Be careful though; many people incorrectly think their criminal record was expunged when it was not and answering license application questions incorrectly can result in disciplinary action or denial of your application. Unlike expunctions, you cannot deny the event took place in cases with an order of non-disclosure, so it's important to answer any licensing agency questions accurately. Your regulatory agency will often have access to cases which have an order of non-disclosure even though the matter will be inaccessible to the general public.

## Side Bar ...

### **Real People with Real Problems and Real Needs: Why Good Client Service and Centeredness is So Important to the Bertolino Law Firm**

The Bertolino Law firm is a unique niche practice. Among other things, our law firm primarily helps working professionals (i.e., doctors, nurses, pharmacists, teachers, real estate agents/brokers, lawyers, etc.) defend themselves against threats of license revocation, suspension, or other sanctions and encumbrances. Often, our clients are wrongfully accused of professional misconduct by a licensing agency.

Our clients are going through one of the most stressful, and lowest moments in their lives. They face the real threat of losing their livelihoods, careers, and employment so that they can financially support themselves and their families, which is even more critical considering the devastation that the Covid-19 pandemic has brought to this country. Some of our clients are single moms with careers and families to support. Some of them are newly licensed professionals who made a simple human mistake and now are desperate for help because their license is now under attack. Some of them are seasoned, career-oriented, business owners with a professional license that directly impacts their employees. But all of our clients share one commonality: a deep fear of losing their livelihood and careers that they worked so hard to build. As such, good client service is important to our law firm because we are dealing with real people with real problems, and with real needs.

At the end of the day, our clients are entrusting us to empathetically advise, counsel, and work hard to find solutions to their problems. Not only is this the right thing to do, but this outlook benefit's our law firm in terms of returning



clients, referrals, and maintaining a good professional reputation. Since we strive to be a 100% client-centered law firm, we integrate this approach and core value into everything that we do as a team.



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