

# On The Record . . .

Official Newsletter of BERTOLINO LLP

August 2022



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## Can't I Just Call and Explain Myself to My Licensing Board When I Receive Notice of a Complaint?

by Tony Bertolino, Esq.

You completed your education and earned your professional or occupational license. However, a complaint against you now has the potential to threaten your career. You have too much at stake to try and handle a complaint and potential disciplinary action on your own.



You may think that the complaint notice you have received from your licensing board is a big misunderstanding or that you can easily explain your side of the story to resolve the matter. However, resolving disciplinary complaints that implicate your license is rarely that simple. Once a licensing regulatory agency has gone to the trouble of giving you Notice of a Complaint, they are unlikely to dismiss it unless you can back up your version of events with competent evidence and compelling arguments based on the laws and rules that govern the board.

## You Need Legal Counsel to Present Evidence on Your Behalf

Objectively presenting evidence is difficult, if not impossible, to do when you are emotionally involved with the matter you are facing. For example, in a disciplinary complaint, your license and your ability to earn a living are on the line. You will likely be upset, angry,

stressed, and generally personally involved with your case. Making objective arguments based on evidence and the law while keeping your emotions in check can be challenging and likely unsuccessful. Allowing your attorney to present evidence on your behalf objectively will likely put you in the best position to defend yourself successfully and your license.

Furthermore, while you may be a highly educated professional, you are not a lawyer (in most cases). Therefore, you do not necessarily have the in-depth understanding of laws, rules, and procedures necessary to convince a disciplinary board that you have committed no violations. Even if you are an attorney defending yourself against a disciplinary complaint, while you may have the legal skills necessary to defend yourself, you may not have the objectivity needed to present a successful defense.

### **You Risk Revealing Evidence to Be Used Against You or Further Violations**

In your efforts to be honest and completely transparent with your licensing board, you may risk inadvertently admitting to violating a law or rule. You may also provide additional evidence that is detrimental to your case that the licensing board previously did not have. In other words, by talking directly to your licensing board and attempting to explain your actions, you may unwittingly make your situation worse.

By engaging legal counsel, you can ensure that you do not volunteer any information that would endanger your case or lead to further findings of violations. You also can avoid making statements that the licensing board may construe as inconsistent, partially dishonest, or non-responsive. With an experienced license defense lawyer to assist you, you can control the narrative of your defense and avoid common missteps that may drag out or worsen your disciplinary proceedings.

## The Licensing Board is Not on Your Side

It is not unusual for a licensing board investigator to tell you that they just want to get to the truth, that it will be better if you cooperate, and that telling your story will resolve the matter more quickly. However, your licensing board is not a neutral party. The board investigates complaints and prosecutes any rule or law violations through disciplinary proceedings. Simply put, they are not on your side, no matter how nice they are to you or how helpful they seem.

Only an attorney of your choice is truly in your corner and ready to represent your best interests in disciplinary proceedings. You cannot rely on board investigators to advocate for you, take your side, or interpret evidence in your favor. They are doing their jobs, which is not to represent or benefit you in any way.

Investigators also may mislead you during the investigative process, whether intentionally or unintentionally. Remember, they are not there to advise, explain the rules and procedures, or answer questions about what you can expect. Plus, the more time you spend speaking to investigators and other board staff members, the higher the risk of inadvertently divulging information that can harm your case. Therefore, you cannot and should not rely on any representations they make about your case. The only source of valid information and advice is your attorney, who can guide you through the complex process of disciplinary proceedings before your licensing board.

## Employee Spotlight



Please join us in congratulating Associate Attorney  
**Kerry Bloodsaw**  
on 3 years of service with Bertolino Law Firm!

# Hallmark Achievements



## Texas Education Agency v. MT

**Facts:** Our client, MT, hired us to defend against allegations of unprofessional conduct towards other employees. The claims had been filed by staff members who were retaliating against our client for doing his job and meeting his obligations. The complaint was negatively impacting our client's ability to continue in his chosen profession.

**Outcome:** The firm submitted a written response addressing the claims, demonstrating how the accusations lacked merit and how they were levied against our client simply for doing his job properly. We then represented the client at an informal settlement conference with agency staff to address any questions. At the conference we stressed the agency needed to close the case because the complaint lacked any merit. We demonstrated that the retaliatory complaint was filed by disgruntled staff members with ulterior motives and no evidence. As a result, the investigation was closed, and the case dismissed without any action against our client's license.

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## Texas Department of Insurance v. EB

**Facts:** Independent Insurance Agent EB hired the Bertolino Law Firm to respond to a complaint filed by Allstate Insurance with Texas Department of Insurance. This complaint was that Client answered "No" to a question about whether the policy-holder was a previous Allstate customer. Client responded that it was because her initial Allstate trainer trained her to do that.



**Outcome:** After the firm responded with a robust answer showing that Client had never written an improper policy, Texas Department of Insurance closed EB's matter without any sanction on her license and kept confidential the details of the investigation from the public. She was issued a confidential written warning regarding her insurance activities and was advised to comply with all Insurance regulations in the future.

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## Texas Health and Human Services Commission v. BP

**Facts:** Our client BP, rehired firm to represent her on a secondary matter stemming from her original matter she hired us for back in June of 2021. In the summer of 2021, BP's daycare was shut down by HHSC for a variety of deficiencies. Due to the shutdown, BP was not allowed to operate the daycare in any capacity.

In the winter of 2022, HHSC accused BP of operating her daycare in direct violation of her prior adverse action. An HHSC investigator reported that she



saw BP and several children exit BP's daycare one morning and enter BP's van. When the investigator approached, BP allegedly became hostile. Moments later, several more children were dropped off at the daycare and entered BP's van. Over the course of HHSC's investigation, the investigator reported that several parents and one child reported that the daycare was still operational. BP received a second notice of adverse action. The firm requested an administrative review of HHSC's finding.

**Outcome:** Prior to the administrative review, BERTOLINO LLP, submitted several parent statements contradicting and more specifically, correcting the parents' prior statements to HHSC investigators. Further, the firm provided additional statements from BP's neighbors around the daycare stating that they had not seen any children inside the daycare and that they believed the daycare to be closed. Lastly, the firm provided evidence that the daycare had not even had any electricity since January of 2021. Statements from BP's electrician noted that he did not fix the issue until April of 2022 and when he entered the daycare to remedy the issue, the daycare was uninhabitable due to the absence of power for so many months.

In addition to the evidence presented and argued during the review, the firm also noted that a majority of the witnesses that HHSC spoke to during their investigation spoke primarily Spanish. Further, one of the children that HHSC noted in their report as stating that the daycare was operational was five years old, nonverbal and who primarily understood Spanish not English. Therefore, the firm argued that their statements were not only misinterpreted but were not provided with full context in that children were allowed to be around the daycare, just not inside the daycare. This very specific detail was lost in translation by many witnesses and used to HHSC's advantage. In closing the firm argued that the one incident where HHSC saw children coming out of the daycare was isolated in nature and that BP was merely transporting children to and from school. After the review, HHSC overruled their original finding and the matter was dismissed.

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## Texas Behavioral Health Executive Council v. BB

**Facts:** Our client BB, hired firm to represent her legal interests during a scheduled informal conference. An informal conference was scheduled after a complaint was received and BB submitted her own response. The complaint alleged a variety of allegations relating to BB's employment at a county jail. The complaint alleged through hearsay that BB was bringing drugs into the jail, having inappropriate relationships with inmates, failing to document case notes, concealing case notes and that she was essentially under investigation with the jail for these actions.



**Outcome:** During the informal conference BERTOLINO LLP showed through several witness statements that all of the allegations were unfounded and consisted of confused, third party statements. The firm argued that if any of the allegations within the complaint were true, the jail would have actual physical evidence of the allegations and BB would have been criminally charged for her conduct. However, no physical evidence was provided. After the conference, Behavioral Health Executive Council spoke to several witnesses regarding the complaint. After such action Behavioral Health Executive Council found that

they could not sustain the allegations and dismissed the matter.

## Do's and Don'ts for Talking to Your Regulator When You Have a Complaint

by Troy Beaulieu, Esq.



It can be difficult to keep a cool head and remember important things when you have just learned your regulator is accusing you of misconduct and investigating a complaint against you. Feeling like you are under attack by a former client, consumer, or the public and then having your regulator barrage you with questions, requests for information and written responses can be overwhelming. Often, they are requesting information within limited timeframes, and you feel rushed. That is why it's crucial to remember these important communication tips ahead of time. Following these simple guidelines will help improve the outcome of your case and protect your legal interests.

### **Minimize Contact with Your Regulator Until You Have Obtained Legal Counsel**

Investigators are tasked with obtaining information from witnesses. They may seem friendly, non-confrontational and appear to be helpful, but their goal is to develop a rapport with you so they can solicit information to further their investigation. You should avoid contact with regulatory staff until you have hired a lawyer to talk directly with the agency staff, so your interests are protected.

### **Refrain from Responding to Allegations Until You Hire an Attorney**

Providing statements to a regulatory investigator before you have the benefit of legal counsel can create significant problems in defending your case. Even seemingly innocuous discussions, e-mails or phone calls with the investigator can end up impacting your case negatively. Those oral conversations might be recorded, and your e-mails or other written statements may be used against you later in the courtroom. Wait to obtain competent advice and direction from a knowledgeable attorney about whether you should talk to your regulator and if so, the best way to go about it.

### **Once You Have Counsel Let the Attorney Talk On Your Behalf**

When you do have a lawyer, make sure to rely on their expertise and skill and let them talk to your regulator on your behalf. Your lawyer will typically send a letter of representation to the regulatory agency notifying them that you have an attorney and instructing them to only contact your lawyer about the case and not you directly. Most of the time the interactions and conversations with your regulator are best handled by your lawyer. However, sometimes the agency wants you to make a formal statement, written response or provide other information. Make sure to discuss these types of requests with your lawyer and carefully consider your options. Only after discussing with your lawyer the dangers and benefits of talking to state regulators are you equipped

to decide whether to make a statement or speak with the investigator. Many state regulators have rule provisions that penalize license holders for failing to cooperate with a request for information; however, each case is unique and sometimes there may be more serious consequences to consider. For example, in cases involving allegations which may lead to criminal charges, it may be wiser to remain silent despite potential impact on your license because the statement or information can be used against you in criminal proceedings. Here again, talking with your knowledgeable lawyer is crucial since every case is different.

### **If Someone Contacts You After Hiring an Attorney, Don't Talk to Them and Refer Them to Your Attorney**

Sometimes, despite receiving a letter of representation from your legal counsel, agency staff will still try to speak with you. Make sure to inform your lawyer of any such attempts immediately and provide them with the correspondence so the attorney can respond. If the staff members have an oral conversation with you by phone or in person, refer them to your lawyer and do not talk with them about your case. Most regulatory agency staff are experienced and trained to know that when you hire an attorney, they need to cease communicating with you and talk to the lawyer directly. Oversights will happen and the occasional staff member will disregard this, so it's important you to remember how to handle these situations to help your lawyer protect your interests.

### **Conclusion**

Remember to take your time to find a lawyer that you can trust to protect your livelihood and your rights. If you rush to make a statement or provide information that paints a poor picture of your case, it may be difficult for your lawyer to help protect you because of the wrong impression your regulator has already gotten. Once you've hired a lawyer, rely on that person to serve as your representative to the licensing agency. Talk with your attorney carefully about the benefits and consequences of providing information or making statements to your regulator when they are investigating a complaint filed against you.

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### **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.

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A fun survey for end of summer. Some look at August as the last month of summer, squeezing out as much fun in the sun as possible. Others look at August as "Pumpkin Spice Eve", just a few short weeks until fall.

How do you prefer to spend August?



I squeeze out as much fun as possible in the last days of summer.

Select

I've already unpacked my fall decor and want "pumpkin spice" everything.

Select

I don't care, just get the kids back to school.

Select

Wishing Managing Partner Tony Bertolino the happiest of birthdays!

Select

## Side Bar ...

### Thoughtful Lawyers Aggressively Defending Clients Use All the Available Tools: Jurisdiction and Frivolous Agency Claims

The obvious starting point for protecting your livelihood in a regulatory complaint is to demonstrate the allegations lack merit because you did not do what you are being accused of. However, sometimes there are other tools that competent lawyers will use to get cases dismissed. Two important tools you should be aware of involve agency jurisdiction and frivolous agency claims. We will briefly discuss how these two concepts can be used to address your complaint.

### Use a Plea to the Jurisdiction to Show the Agency Lacks Jurisdiction Over Your Case

All regulatory agencies must demonstrate they have jurisdiction over the complaint matter that

### Consider Seeking Attorney's Fees and Costs for Frivolous Agency Claims

In 2019 the Legislature amended the Texas Government Code to provide private citizens the right to recover their reasonable and necessary attorney's fees and court costs if they demonstrate the claims a regulatory agency pursued were frivolous. Tex. Gov't Code § 2001.903. Determining a claim is frivolous is no small matter because society generally wants our regulatory bodies to investigate plausible allegations of wrongdoing. In addition, under Texas law is that people usually cannot recover their attorney's fees from the other party in litigation. However, if the evidence, circumstances, or law reveals there is no legal or factual basis for the allegations filed by the complainant, the agency should dismiss the case. Instead, if the agency continues to pursue those claims which lack any factual or legal basis, they can be held accountable for paying your reasonable attorney's fees and court related costs.



someone filed with them. The Legislature has outlined the boundaries of the agency's responsibilities, duties and regulatory authority. Cases involving issues beyond those bounds may be outside the agency's jurisdiction and not actionable by your regulator regardless of the merits of the claims. Good lawyers will consider the agency's jurisdiction given the specific allegations to ascertain whether a challenge to agency jurisdiction needs to be raised. If a jurisdictional argument should be raised, the lawyer can raise this in a plea to the jurisdiction - a document formally challenging the agency's jurisdiction over your case and asking the judge to dismiss it on that basis.

Knowledgeable administrative law attorneys look beyond the facts and leverage important legal concepts to achieve results in your case. Jurisdiction and frivolous agency claims are two important avenues a competent lawyer should consider when protecting your livelihood during a regulatory complaint. At Bertolino LLP our lawyers use these and other legal tools to maximize advocacy efforts on our clients' behalf and achieve positive case outcomes.



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