

On The Record . . .

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Informal Conferences in Disciplinary Proceedings: What You Need to Know

by Tony Bertolino, Esq.



After you have spent years attending classes, studying, and passing licensing exams, obtaining your professional license is a major milestone. However, even after achieving your career goals, you still must follow the rules and laws that govern your profession. Violations of those rules or laws can lead to licensing board investigations and, ultimately, disciplinary action against your license.

Any disciplinary complaint alleging a violation of a rule or law can have substantial negative consequences for your professional life. If you are facing allegations such as these, you should consult an experienced **licensing board defense attorney**. Your attorney can represent your interests from the outset of any investigation and during disciplinary proceedings by your licensing board. You can benefit from legal representation throughout this process, including during informal conferences.

Understanding the Role of the Informal Conference

Disciplinary proceedings vary somewhat from one profession or occupation to another. However, most licensing Texas boards, or agencies offer an informal conference at which they attempt to resolve pending disciplinary complaints before resorting to formal disciplinary proceedings and hearings.

Texas Medical Board

For example, when the appropriate investigating

body of the Texas Medical Board investigates a complaint about a physician and determines that a violation of the rules or laws that govern physicians has occurred, it refers the case to the *Litigation Department* for a possible Informal Settlement Conference (ISC). A staff attorney sets the ISC before a Medical Board disciplinary panel to review the information and give the physician who is the subject of the complaint an opportunity to show that they are in compliance with the Texas Medical Practice Act.

Following the ISC, the Texas Medical Board panel either can refer the case for dismissal, offer an *Agreed Order* setting out the potential sanctions and terms for the violation, or offer a non-disciplinary corrective *Remedial Plan* for certain minor violations. If the parties cannot agree through one of these informal options, the case may proceed to the State Office of Administrative Hearings (SOAH) for a formal evidentiary hearing.

Texas State Board of Pharmacy

The Texas State Board of Pharmacy also holds informal settlement conferences as part of its disciplinary proceedings. After an investigation reveals that a licensee has violated a law or rule pertaining to pharmacists, the Pharmacy Board will allow the licensee to attend the informal conference and advise them of the issues it intends to discuss. The complainant also may attend the informal conference if the law permits, although some informal conferences may be confidential.

The licensee has the burden of showing compliance with the law at the informal settlement conference. A panel of the Pharmacy Board, which usually consists of two Board members and Board staff, proposes a recommendation for settlement of the case after hearing evidence from the licensee. Potential dispositions may include dismissal, a formal warning, or a disciplinary sanction. If the panel recommends a sanction and the licensee accepts that recommendation, the parties can sign an Agreed Board Order (ABO). Staff then will present the Order to the Pharmacy Board for approval at their next meeting. However, if the licensee does not accept the proposed ABO, then the case may proceed to a formal hearing before an administrative law judge.

Texas Board of Nursing

The Texas Board of Nursing (BON) also may provide the option of an informal settlement conference to some licensees facing disciplinary complaints. Licensees and their attorneys can attend an informal conference with a BON attorney and staff to present evidence and discuss possible settlement options, usually in the form of an Agreed Order or an informal settlement proposal. Sanctions in an Agreed Order can range from a reprimand to a license suspension.

The parties can negotiate the terms of the Agreed Order. If the parties agree to the conditions and sanctions in a settlement proposal, the parties will sign the Agreed Order. The BON then must review and approve the Agreed Order.

Texas Behavioral Health Executive Council

The Texas Behavioral Health Executive Council (BHEC) administers disciplinary proceedings for marriage and family therapists, professional counselors, psychologists, and social workers. If BHEC receives a complaint about one of these professionals and finds probable cause that a violation has occurred, it refers the case for an informal settlement conference (ISC) before agency staff, or a Disciplinary Review Panel made up of three board members. Staff may send a proposed agreed or settlement offer to the licensee before scheduling an ISC. If the licensee rejects the settlement offer or requests an ISC, BHEC staff will schedule the ISC.

Both the licensee and complainant may appear separately at the ISC and present evidence. After hearing the evidence, BHEC staff or the Disciplinary Review Panel will recommend an informal disposition of the complaint. The recommendation for disposition may be dismissal, remand for further investigation, or disciplinary action. Any recommendation for disciplinary action is sent to the licensee as a settlement offer, which the licensee may accept and sign as an Agreed Order or reject. If the licensee rejects the Agreed Order, the case progresses to formal disciplinary action before the State Office of Administrative Hearings (SOAH).

Again, most licensing Texas boards, or agencies offer an informal conference of some type. If I failed to address your specific licensing agency in this newsletter article, chances are that your

agency follows a very similar settlement conference procedure as described above.

Employee Spotlight:



Save Money on Legal Fees: Additional Communications

A series by London de la Teja, AR Manager

As hard as it might be sometimes, it's important to understand when you need to communicate to your legal team. By limiting your calls and e-mails, it can greatly reduce your fees. The legal team is here to work for you, so if there are new developments or any work that needs to be communicated, we will do so. Limit your calls and texts by writing down all your questions prior to calling so you don't forget anything. Send one message in the portal with your attachment and information, instead of several e-mails. This helps the legal team to have everything in one spot which makes it easier for them to access and takes less time for them to review. We are working hard to try to make transactions and communication easy and seamless. We want to make sure we guide you on the best way to do that, so it saves you time and money.

Hallmark Achievements

Texas State Department of Health v. JH

Facts: Our client, JH, hired us to help him with renewing his paramedic certification in Texas. The client had an issue in his youth that could have negatively impacted his certification renewal. He was concerned about disclosing the matter appropriately to renew the certification without incident.



Outcome: The firm gathered the client's background records and drafted the necessary disclosure documentation, explaining to the state agency the circumstances and outcome of the matters and why no action by the state was appropriate. We worked to make sure the required records were included as part of the submission to the state agency. After proper disclosure of the client's matter, his renewal application was approved without incident, and he was able to move on with his career.

Texas Department of Licensing & Regulation v. LZ

Facts: Our client, LZ, a licensed Massage Therapist, hired the firm to defend against allegations by the Texas Department of Licensing and Regulation that she had multiple violations after a periodic inspection of Client's massage facility. The



complaint alleged failure to maintain separation between the massage establishment and a sleeping room, failure to maintain accurate client records for types of massage services and billing information, and failure to specify types of massage therapy services that licensee anticipates using during the massage therapy session.

Outcome: The firm submitted a thorough written response addressing the claims and included photographic evidence of new locked doors separating the massage rooms and the resting/sleeping rooms, new record logs established containing dates and types of massage service and billing information, statements added to the customer form regarding draping of customer and statements regarding cessation of massage anytime customer becomes uncomfortable. As a result of the response and attached exhibits, the complaint investigation was closed with a warning letter, and the case dismissed without any sanction against LZ's license.

Texas Medical Board v. SG, MD

Facts: Our client, SG, MD, hired the firm to defend against allegations by the Texas Medical Board that he violated a standard of care with a patient. Client has been a licensed medical doctor since 5/15/2013 with no disciplinary issues.

The complaint alleges client perforated patient's bowel during colonoscopy that caused severe rectal bleeding, caused a delay in post-surgical care and client did not call an ambulance to transport the patient to the hospital.

Outcome: The firm submitted a thorough written response addressing the allegations and included a narrative by the client with attached patient medical records and a map that showed the hospital was 300 ft. away across a parking lot from the surgical center. As a result of the response and attached exhibits, client's care was noted to be informed, timely and professional the complaint investigation was closed, and the case dismissed without any action against our client's license.



The Criminal Law Connection to Your State Regulator

by Troy Beaulieu, Esq.



Most people do not realize that many state regulatory agencies have a strong connection to criminal law enforcement matters and the interplay it has with your regulator's jurisdiction. If someone files a complaint raising allegations which could be construed as criminal conduct, it may be assigned or referred to a law enforcement officer for criminal investigation in addition to being addressed as a regulatory matter. Some agencies have explicit law enforcement jurisdiction over matters within the industry they regulate and many state regulatory statutes contain provisions that criminalize certain types of license holder misconduct. Many such agencies have certified peace officers on their staff who conduct criminal investigations and present their findings to local criminal prosecutors,

requesting criminal charges be brought against license holders. For example, the Texas Department of Insurance, the Texas State Board of Pharmacy, and the Texas Medical Board have licensed peace officers on their staff. The Texas Department of Insurance even has criminal prosecutors on their payroll who are assigned to prosecute criminal matters involving insurance fraud allegations in certain counties and the State Securities Board frequently has their staff appointed as special prosecutors in state and federal criminal prosecutions. Other agencies which do not have direct criminal investigative authority or staff, have legally recognized working groups, assistance, or cooperation obligations with criminal law enforcement entities, and frequently interact with them, asking them to pursue criminal investigations and prosecutions against license holders. These investigations may be based upon less common and unique criminal laws often embedded in regulatory-focused statutes. I saw this happen often during my time as a state regulator in the real estate industry amidst the 2008 financial crisis. While your livelihood requires solid legal representation when facing attack, the need for exceptional legal counsel is even more important when you also face a closely connected criminal matter impacting your freedom.

Potential Criminal Charges Complicate Your Legal Defense

People often are unaware of the challenge that parallel regulatory and criminal investigations/proceedings bring to defending yourself. A matter that threatens your livelihood and professional/occupational reputation now presents a threat to your freedom, with the possibility of a criminal conviction that includes confinement in jail or prison. A regulatory matter may require you to respond and provide documentation, cooperate in the Board's regulatory investigation, or even testify under oath, but a criminal matter affords you the right to remain silent and avoid self-incrimination, only producing evidence if a warrant demonstrating probable cause of a crime has been issued. In a regulatory matter, invoking your right against self-incrimination can be used against you as evidence of your guilt, but cannot be used against you in a criminal case. As you can see, the interplay between the two distinct, but significantly connected cases is huge and a detailed understanding of the matter is pivotal to successfully navigating both.

Potential Criminal Charges are Often Driven by Industry Specific Details

Criminal investigations emanating from a regulatory complaint typically involve facts and circumstances unique to the occupational or professional license people hold in a specific industry (e.g., real estate, insurance, legal, medical field professionals). In selecting legal representation to protect your interests, you want to make sure the law firm you retain has knowledge about the industry and the regulatory universe you operate in as a license holder. A keen understanding of the standard of care, laws, regulations, and other minimum standards enforced by your regulator will be a huge asset to defending you against allegations of wrongdoing because those lawyers will recognize and appreciate the important elements at play in your licensed profession / occupation, which are often different than typical civil or criminal cases.

Potential Criminal Charges are Often Impacted by Regulatory Working Groups and Assistance Provisions

Many times, regulators work with other government agencies and develop a synergy surrounding cases that share common themes, evidence, circumstances, or individuals. During my time as a regulator, I saw many

instances where government investigators working in isolation discovered their sister agency counterparts working the same, similar, or common cases and pooled their investigative and prosecutorial resources, leading to expanded charges against a larger group of people. For example, I was involved in many mortgage fraud cases where previously unknown real estate appraisers were added to multi-agency investigations because of working group cooperation and assistance provisions, which many times led to criminal charges being brought against the appraiser.

Conclusion

People holding a professional or occupational license from their state regulator typically are unaware that their regulator may have the authority to investigate or refer criminal misconduct allegations. While allegations may implicate regulatory requirements, they might also connect to state or federal criminal laws. The complaint filed against you could trigger an investigation into both. These investigations can be complicated, industry-specific inquiries that create challenging legal dynamics for defending yourself and may involve coordinated, multi-agency investigations. These regulatory / criminal law dynamics increase the stakes at issue when confronting a complaint from your regulator and make having exceptional legal counsel who knows the crossroads between these two key areas essential to any successful defense. Thankfully, this is exactly the type of work that Bertolino LLP and its skilled lawyers have the experience, knowledge and understanding in so they are able to aggressively protect your license, your livelihood and your reputation.

Side Bar ...



A Quick Peek at November!

Below are a few events the Bertolino team will be participating in this month!

We try to help out our communities as much as possible, whether it's a food bank, or running a few miles here and there. There are endless ways to help out, and below are just a few things that are coming up for Bertolino and the gang!

November 7, 2022 – Central Texas Food Bank

The Central Texas Food Bank is a leader in the fight against hunger, with over 40 years of service to the community. With the help of private organizations, charitable partners, and the government, they have successfully brought nearly 54 million meals across the state of Texas in the last year. These meals have been distributed to whoever needed the help, from local families to nonprofit organizations.

November 12th, 2022 – 5K Run

The Veterans Day 5K is an annual fun run to show our appreciation for the men and women who have served in our nation's military. The event will also

be collecting toys for Orange Santa and food for the Round Rock Area Serving Center to assist families in need during the holidays.

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