

On The Record . . .

Official Newsletter of BERTOLINO LLP

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What are the Functions of Texas Licensing Boards, Agencies, and Commissions?

by Tony Bertolino, Esq.

In creating licensing boards as government agencies, the Texas legislature gives them authority over all aspects of licensure and other functions. Generally, these boards aim to protect the public from unprofessional or harmful conduct by professionals. Therefore, these boards, along with the legislature, establish standards for licensure that individuals must meet to obtain and maintain licenses. They also set continuing standards for individuals to keep their licenses, such as periodic renewal and completion of continuing education courses.



Licensing boards also receive, investigate, and take any necessary action on complaints received about licensed individuals, with some exceptions. For example, some agencies have specific divisions within them that are designed to handle enforcement of the rules and laws that pertain to those occupations. If a licensing agency discovers through an investigation and collection of evidence that a violation has occurred, then formal disciplinary proceedings may commence. In that case, the licensee is always afforded proper notice, due process, including a fair opportunity to respond to the allegations against them in the complaint and the right to have legal counsel at all stages of the proceedings.

You should always keep the true purpose of licensing boards in mind, particularly in communicating or dealing with them. **Their goal is to protect the public, not you as a licensee.** As a result, even if their representatives act as if they are friendly and, on your side, divulging details to them, particularly about disciplinary matters, is likely not to your benefit. You may inadvertently give the licensing board information that they can and will use against you in your case. When you are facing a licensing board complaint, your best means of protection is to immediately retain legal counsel to represent your interests from the outset of the proceedings.

Finally, if formal disciplinary proceedings ensue from a complaint that a licensee contests, a licensing agency often will transfer the case to the State Office of Administrative Hearings (SOAH) for review. SOAH is an independent state agency that will assign an administrative law judge (ALJ) to hear the case and, in most cases, issue a proposal for decision to the relevant licensing agency. Ultimately, it is usually up to the licensing agency or board to determine whether to accept or reject the ALJ's proposal for decision.

Employee Spotlight



Team Bertolino Welcomes Cimone Murphree

You may have already had a chance to speak with "the first voice of the Firm" since Cimone joined the Bertolino Team in late May. Here are a few fun facts about our new Administrative Assistant.

My nickname at work: Cimone

I am skilled at: Motherhood and patience

On the weekends and in my free time I am often: Outside with my family or curled up in a blanket

Number one on my bucket list: Experience the Northern Lights in person!

The best sweet or salty snack: Chocolate covered acai berries

Best movie ever: Any Wes Anderson film

My favorite candy: Sweet and sour gummies

My favorite sports teams: UT Longhorns

If I had a theme song that played every time I walk into the office it would be: "Don't Stop Me Now" by Queen

People say I look like: My mom

The best part of my job: Fostering lasting relationships with prospective and existing clients

[Click](#) to learn more about Team Bertolino

Hallmark Achievement

Texas Department of Insurance v. TT

Facts: Our client, TT, hired us to combat a complaint filed with the Texas Department of Insurance by a former colleague and friend. She needed us to protect her professional reputation, livelihood, and career from disciplinary action. The Department provided notice of the complaint and asked her to respond to the allegations.



Outcome: The Firm met with TT to understand the complaint allegations and develop evidence that our client had not violated the law. The assigned firm attorney spoke to Department staff to understand the situation. We then drafted a well-crafted written response demonstrating how the complaint was deficient and provided evidence to support dismissing the case. The evidence showed TT had not violated the law and that the complaint lacked merit. After the staff evaluated the Firm's arguments, the Department of Insurance agreed the complaint against TT lacked merit, dismissed the case against her and took no action against her license.

What Health Care License Holders Need to Consider About Timekeeping and Billing Practices to Avoid Legal Trouble

by Troy Beaulieu, Esq.

As a licensed health care provider, you are constantly providing services to clients and those services are billed to the clients, their insurance, a government program (Medicare, Medicaid etc.) or some other third-party provider. Your billing and your employee's timekeeping practices can have a



significant impact on your license and expose you to liability if not handled correctly. This article will discuss various aspects of billing and timekeeping practices, how they can impact your regulatory liability, civil and even criminal liability.

What Exposure Can You Face with Your Regulator?

Most state regulators have legal provisions which impose liability on license holders for time keeping or billing records which are inaccurate, false, misrepresentative, misleading or even outright fraudulent. Some regulators explicitly prohibit such conduct while others prohibit “unprofessional conduct” and then define these sorts of billing and time keeping deficiencies as “unprofessional conduct” under their rules. Depending on the nature of the entry and circumstances, this can lead to disciplinary action, including suspension or revocation of your license in more severe cases. There are even generic statutes that apply to most healthcare professionals and provide for revocation of licenses in cases involving deliberate falsification of billing records. Tex. Occ. Code § 105.002 and Tex. Health and Safety Code § 311.0025. In addition to imposing administrative penalties payable to the government for any misconduct, many agencies also have authority to require license holders to pay restitution. In serious cases involving allegations of fraud, the agency may be able to use their temporary license suspension powers to unilaterally suspend your license without notice if they can demonstrate an ongoing, imminent harm to the public welfare.

What Type of Risk for Criminal Liability Is There?

Beyond the threat to your license, criminal liability for knowing or intentional billing and time entry misrepresentations is also possible. Both Texas and the federal government have criminal statutes that address health care fraud. 18 U.S.C. § 1347 and Tex. Penal Code [§ 35A.02](#). Texas also has an insurance fraud statute, which may apply if misrepresentations are made to an insurance company as part of the invoicing process. Tex. Penal Code § 35.02. State and federal legislators have also provided enhanced or additional criminal consequences for violations involving financial abuse of minors or the elderly, conspiracies where 2 or more people are involved in the activity or may have simply received some benefit from it, such as use of funds obtained from the misconduct (money laundering, tax fraud or evasion charges). These additional provisions can often widen the circle of people potentially facing criminal consequences, increase the offense level and range of punishment, and provide for civil asset forfeiture and restitution.

Also remember that regulatory and law enforcement agencies do coordinate, and often work together on common case matters and will refer matters to each other for action. Some regulatory agencies even have law enforcement components and staff within the larger regulatory agency. Others have formal or informal working groups, task forces and other relationships.

Lastly, one important concept to be aware of is the required records doctrine. Normally people have a constitutional right under the 5th amendment against self-incrimination and can remain silent and not answer questions posed by the government that tend to incriminate them. However, the required records doctrine is an important exception to that general legal principle. First recognized by the United States Supreme Court in *Shapiro v.*

United States, 335 U.S. 1 (1948), the required records doctrine says that if there are records you as a license holder are required to keep and provide to your regulator on request, you cannot avoid providing those records based on 5th amendment self-incrimination claims. So, if there are financial, billing, timekeeping or invoicing records that demonstrate financial wrongdoing, those can be obtained by your regulator or law enforcement and used against you despite any assertions of your constitutional right against self-incrimination. You may not have to answer direct questions posted to you about those records, but the records themselves can be obtained and used against you by the government in making their case for criminal liability.

What Is the Potential for Civil Liability in These Types Of Cases?

Finally, practitioners should always be mindful of the potential for civil liability. Patients, insurance companies, the government itself or other third-party payors can always file a civil lawsuit and allege billing or time keeping irregularities, deficiencies, or misstatements, which expose you to liability for negligent misrepresentation, deceptive trade practices or intentional tort claims such as fraud. Many of these legal provisions provide for recovery of the other party's attorney's fees and may allow for recovery of punitive (exemplary) damages beyond just what the financial losses are.

What Should Health Professionals Do to Reduce Legal Risks?

1. Make Sure Billing, Timekeeping and Invoicing Are Correct and Legitimate

In general, make sure your billing entries, time entries and invoices are accurate, and correct. Overcharges or invoices that do not reflect the true time spent or services rendered should be immediately corrected and a revised invoice should be provided. Also make sure the billing and timekeeping documentation reflects legitimate work performed on the patient's behalf and that it was performed by a properly licensed person. Illegitimate or unnecessary services or work performed by unlicensed practitioners (even if previously licensed) expose you to increased risk of liability.

2. Make Sure Your Practice Has Proper Safeguards and Policies in Place to Monitor Employee Time Entries, Billing Activities, and Invoices

Having a robust and effective quality control process with built-in safeguards and written policies provided to all employees or contractors is an important protection for you. If a problem does arise, you want to be able to demonstrate you exercised due diligence to minimize the risk of any errors. Having auditing and quality control functions that regularly evaluate invoicing, billing and timekeeping activities is key to catching any issues and demonstrating due diligence efforts on your part.

3. Take Prompt and Appropriate Action to Rectify Errors and Address Employee Misconduct

If you discover problems with time entries or invoices, do not ignore the issue and fix it immediately. If the errors involve employee misconduct, you should swiftly address those personnel matters by taking appropriate corrective action. In cases involving intentional misconduct or fraudulent practices, you should terminate the employee and will want to report the misconduct to law

enforcement and your employee's state regulator (if they hold a state-issued license). Taking these important actions will help demonstrate due diligence on your part and distinguish you from the employee who engaged in the bad conduct.

Conclusion: What Health Professionals Should Remember

Overall, billing and timekeeping are important facets of a healthcare provider's practice, which come with risk of legal liability. Keeping correct, and thoroughly documented records is foundational to avoiding these issues. Remember that the required records doctrine makes these documents available to the government as part of their investigation. The risk of exposure to liability can be mitigated by maintaining awareness of your practice's billing and timekeeping activities. Employ proactive measures to monitor and audit your practice and its employees. Keep employees and contractors aware of policies, legal obligations, and expectations via written documentation. Finally, when problems do arise, address them swiftly, correct erroneous invoices and report any serious employee misconduct to regulators and law enforcement to reduce your risk of liability and help demonstrate you are not involved in any intentional wrongdoing.

Side Bar ...

BERTOLINO LLP participated in the TexMed 23 conference held in Fort Worth, TX, on May 19-20. This annual conference is organized by the Texas Medical Association and is one of the largest gatherings of Texas medical professionals during the year. Managing Partner Tony Bertolino and Director of Legal Services Troy Beaulieu spoke about "The Do's and Don'ts to Avoid a Texas Medical Board Complaint in the Post-Pandemic World".



Mr. Bertolino has been defending license holders for some 20 years and Mr. Beaulieu has a background as a former state regulator, so the audience got insights, and tips from both perspectives. The Firm appreciated the chance to speak with physicians and other medical professionals about the complaint process and share thoughts on how to reduce the risks associated with a complaint from the Texas Medical Board.

Did you know that Bertolino LLP provides free trade group presentations? If you are a license holder in healthcare, real estate, insurance, accounting, education, or another industry and want to learn more about topics that impact people licensed and regulated by the government, BERTOLINO LLP can provide your group with free legal education. **Contact us** to speak with a team member about this free opportunity to get educated on the regulatory world that impacts your industry and license.



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