

On The Record . . .

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Should I Contact the Person Who Filed a Disciplinary Complaint Against Me?

by Tony Bertolino, Esq.

Receiving notice that a complaint has been filed against you with your licensing board can be devastating. The fact is that even a single complaint can put your license, livelihood, and reputation at risk. Texas licensing boards can take various disciplinary actions against you, including license revocation, suspension, or probation.



Your emotions are likely to run high when you face a disciplinary complaint, and as a result, you may be under great stress. Our natural inclination as humans is often to explain ourselves when confronted with accusations of wrongdoing. You may think you can persuade them to drop their complaint if you can tell your side of the story, or you may feel the need to express your frustration over their actions. However, regardless of your motivations, you generally should avoid discussing a disciplinary complaint with the person who filed a complaint against you for various reasons.

Confronting the Complainant May Harm Your Defense

The person who filed the disciplinary complaint against you did so for a reason. As a result, that person likely feels anger, hurt, frustration, and other negative emotions toward you at the current time. Therefore, any conversation with the

person will likely be heated and unproductive. Any attempts at conversation could quickly devolve into a heated argument that does your case more harm than good. From that perspective, speaking to the complainant is unlikely to resolve or convince them to withdraw their complaint.

Furthermore, you may make statements against your interest, inadvertently hurt your case, or give the complainant more evidence to use against you. For instance, you may reveal additional information that the complainant, and your disciplinary board, didn't already know about. Divulging this information, no matter how unintentional, can harm your defense. If this situation occurs, you could have a less favorable outcome.

The complainant and your licensing board may view your encounter as an attempt to intimidate or harass the complainant. Even when your intentions are good, emotions can easily get the best of you, and you may say something you regret. If your disciplinary board finds that you have acted inappropriately toward the complaining party, you could face additional disciplinary violations.

Only Conversations with Your Attorney Are Covered by the Attorney-Client Privilege

Discussions about your disciplinary complaint with the complainant - or anyone else, for that matter - are not covered by the attorney-client privilege. Therefore, the complainant or any other third party has no duty to keep your conversation or anything that you say confidential. Anything you say to anyone other than your attorney can be disclosed to your disciplinary board and used against you in your disciplinary proceedings.

In contrast, attorney-client privilege covers anything you say or discuss with your professional license defense lawyer. Confidentiality rules that govern the relationship between lawyer and client

protect you and allow you to say anything to your lawyer without fear of it being divulged or repeated to anyone else. Therefore, even if you admit some misconduct to your lawyer (with a few rare exceptions), they cannot tell anyone else what you said.

If a third-party claims that you must discuss certain information about the incident that is the basis for the disciplinary complaint against you, such as your employer or malpractice insurance carrier, you should talk to your attorney first. Only your lawyer can properly advise you of your rights regarding discussing the incident and what you must and need not disclose.

Hallmark Achievements

Texas Executive Council of Physical Therapy and Occupational Therapy Examiners v. APP

Facts: Our client, APP, hired us to defend him against a complaint filed with the Board by a former employer alleging he had violated minimum professional standards as in his physical therapy practice by logging a treatment session during a period that was inaccurate. The invalid complaint threatened harm to APP's professional reputation, his ability to obtain future work from clients, potential disciplinary action from the Board and a negative impact on his livelihood. All this came from a complaint by an unreasonable employer who had software limitations preventing our client from logging the treatment session during the correct time. Instead of not recording the legitimate session that took place, APP logged it during an earlier period that same day, so the records of the treatment were there and planned to speak with his supervisor about how to better remedy the unusual situation. Before that could happen later in the day though the employer fired APP and filed the complaint with the Council.

Outcome: The Firm evaluated the client's case and collected documentation necessary to fight back against the illegitimate complaint. We prepared a written response demonstrating the Board lacked legal authority to bring these types of allegations against APP and pointing out it was unjust to discipline him considering the software limitations beyond his control. We advocated aggressively on the client's behalf to demonstrate that the complaint had no legitimacy and needed to be dismissed for both legal and equitable reasons. We attended an informal conference with the client to advocate to Board members why they needed to close the complaint. When the Board still wanted to seek discipline, we continued to talk with the staff and convinced the staff to recommend dismissing the case and take no disciplinary action. Ultimately the Board agreed to dismiss our client's complaint in full and took no action against APP's license, leaving his professional reputation

and livelihood unblemished.

Texas Appraiser Licensing and Certification Board v. LP



Facts: Our client, LP, hired us to defend him against a complaint filed with the Board by a quasi-governmental entity alleging he had violated minimum professional standards for real estate appraisers. The deficient complaint threatened harm to his professional reputation, his ability to obtain future work from clients, potential disciplinary action from the Board and a negative impact on his livelihood. All this came from a complaint that never should have been opened by the Board because it lacked jurisdiction over the issue.

Outcome: The Firm collected and evaluated the client's appraisal report and work file necessary to fight back against the defective claims. We prepared a written response demonstrating the Board lacked a valid complaint and the jurisdiction to pursue the matter. We advocated aggressively on the client's behalf to demonstrate that the complaint had no legitimacy and lacked evidence of any violations of professional standards. We demonstrated to the Board staff why the client had not violated the law and why the complaint needed to be immediately dismissed. After the Board completed an investigation, the investigator agreed the complaint had no merit, and needed to be dismissed. The Board dismissed our client's complaint in full. The Board took no action against LP's license, leaving his professional reputation and livelihood unblemished.

Texas Medical Board v. MM



Facts: Client was arrested for DWI and misdemeanor possession. He plead guilty to a modified misdemeanor offense. This was client's second arrest for DWI and he had one prior conviction for DWI. TMB initiated an investigation and sent client a referral to a substance abuse program. Client ignored the referral, and the matter was sent to Enforcement.

Outcome: Client was granted an ISC and retained the firm. During the ISC the firm argued that client was not in need of a substance abuse program as there was no evidence of a substance abuse problem. The firm provided argument as to why client plead guilty and how the incident was an isolated event. A single isolated event, regarding substances, does not equate to a substance abuse concern. They also provided evidence that client was not working under his license at the time of the event or presently and that he was only working under his RN license. Evidence was provided that BON was not taking any action based on the conviction. After deliberation, TMB dismissed the matter and terminated the referral.

What Can I Expect When Hiring an Administrative Law Attorney



Your professional or occupational license is a huge asset to your career, livelihood, and business. It deserves aggressive representation and knowledgeable attorneys fighting on your behalf. When a complaint alleging misconduct has been made to your state regulator you cannot afford to skimp on having an advocate in your corner, especially when the government has lawyers pushing hard on their side. But what can you expect once you've hired an administrative law attorney to help you fight for your license and protect your reputation, livelihood and career? This article will discuss what to expect and things to keep in mind once you have hired a lawyer to fight for you.

The View at the Front End of Your Complaint

When you first get a complaint, it can be stressful, anxiety-provoking, overwhelming and aggravating. You know you are outstanding in your field and have not engaged in misconduct, but you are now stuck with responding to a complaint full of incorrect accusations. You are faced with spending your hard-earned money to fight back. Keep perspective, though. Yes, in the short term you will have to spend some money to defend your license, reputation, livelihood and career. But remember the long-term earning potential having this license brings. You should think of fighting a regulatory complaint as a marathon and not a sprint. You should be prepared for an extended period of fighting. Keeping your license and avoiding discipline will enable greater earning potential than if you lose that license or have a disciplinary black mark on your public record that follows you to future job applications, clients and employers.

Read the Attorney-Client Fee Agreement, Understand it and Ask Questions

Before you sign up with a law firm you must make sure to read the legal services contract. This document will define the terms, conditions, obligations and nature of the relationship with the law firm you hire. If there are questions you have, terms you do not understand or clarifications you need, get answers *before* you sign the contract. People who sign contracts in Texas are presumed under the law to have read and understood the contents of the agreement. Claiming ignorance after the fact will not prevent the contract terms from being binding on you so it's important to read it thoroughly and get your questions answered up front. If you are not comfortable with the contract terms, see if they can be adjusted or consider looking elsewhere for legal services if you are not comfortable with the agreement. Determine whether charges accrue hourly and if so, in what increments. Look at the contract to understand the billing rates for different employees at the firm. Understand what types of legal work, communication, research and other activities you will be charged for when you will not. Generally, if you are communicating with your legal team professionals or need them to evaluate documents, do research, advocate on your behalf, draft legal documents or develop recommendations, it will likely be billable time. Understand your obligations for paying invoices and when you may have to provide additional funds and make sure you are comfortable with those terms. Do not forget to assess how much work may need to be completed early on and what that

could look like in terms of costs to make sure you are comfortable with the arrangement. If you have an upcoming deadline or lots of documents or issues, there may be lots of legal work necessary to protect your interests. Check to see how the law firm primarily communicates with clients and make sure to check for any communications and respond promptly so there are no delays when time can be critical. You do not want to be surprised after you get your first invoice because you did not familiarize yourself with the terms of the agreement and how the legal services will be provided. Bertolino LLP provides a non-billable accounts receivable phone call with the firm's accounts receivable manager to discuss and answer financial questions early in the process so there is no confusion.

Remember that clients often hire lawyers at critical junctures with looming deadlines and lots of documents to review, legal research to perform and legal strategy to develop. The law is constantly changing (new laws, agency rules, new court decisions and agency interpretations are issued daily) and each case is unique. This means a fair amount of research and analysis will need to take place to represent you effectively, so be prepared for that work. It's a stressful time and you feel like your hair is on fire and you need help immediately to address these pressing issues, which is understandable. As a result, there is often a significant amount of work your lawyer and the legal support staff will do early in your case. Many times, that'll involve work even before the lawyer has the first meeting with you, so they are knowledgeable about your situation and prepared to have a productive discussion about your matter. Just like you want a surgeon to come prepared for surgery, familiar with your health matters, a lawyer must also be prepared. Anything less would mean they are unprepared and not providing the best service to clients.

What to Expect When Your Regulator Finishes Investigating

Do not forget that there are no guarantees in the law because each case is unique. Advocating before state agencies and in the courtroom comes with a degree of uncertainty even when good facts and legal arguments are available. When the regulatory investigation is complete, the agency may not agree to dismiss your case even if you know you are right, and your lawyer has done a good job advocating for you. Sometimes agencies will not budge from their position, and you will have to either accept a disciplinary proposal from the agency or fight them in court to convince a judge you are right. This takes more time and money. Again, in the long term, your license is an important generator of income so do not flinch just because further negotiation or fighting in the courtroom may be necessary. Sometimes there may be ways your lawyer can attempt to recover your attorney's fees from the other side, but you should be prepared for an extended battle to protect your livelihood and there is no guarantee you can recover those costs.

The Tough Decision to Settle Your Case or Keep Fighting in the Courtroom

If you cannot get your case dismissed and must choose between accepting disciplinary action or fighting your regulator in court, talk with your lawyer about your options and the prospects of success. Sometimes your lawyer can negotiate concessions, changes in language, changes in the sanctions or terms or ask for other changes to an agreed discipline with the agency. This may make agreeing to the discipline a palatable outcome and a reasonable alternative to fighting in court with an uncertain outcome and more legal

costs. Your lawyer should advise you on the evidence and witnesses in your case and the legal arguments at play. They should counsel you about the strong and weak aspects of your case and the road ahead. This will give you a good roadmap to make an informed decision about whether to continue fighting or accept an offer from the agency to settle the complaint with some disciplinary action.

Conclusion

When you hire a lawyer, you need to understand the legal services contract you are signing and what to expect about the legal process and the amount of work that will need to be done to protect your license. Legal services can be expensive, but investing in protecting your license is key to the long-term income potential that state-issued licenses bring. You have invested years of education and training to acquire it, so you need help to protect it. Ask questions and understand what the financial costs will be for your lawyer to fight aggressively for you. Recognize fighting your regulator has uncertainties and costs associated with protecting your license. The data shows that people who hire a lawyer generally have better outcomes than those who try to handle things on their own. Your license is valuable, and important to your career and livelihood. It is worth the financial investment to protect when facing attack from your regulator.



“Know Your Regulator” A Free, Informational Bulletin Tailored to Your Regulated Industry

Your industry is constantly changing, and you need to be in the know to stay ahead of your competition. To help license holders meet this challenge, Bertolino LLP is excited to announce it has launched a free, educational update to keep license holders informed of the ever-changing laws, rules, regulations and legal interpretations that impact their livelihood and businesses.

Professional Recognition Days: January Calendar

Team Bertolino is grateful for the expertise and dedication of these professionals. Thank you for your outstanding contributions to your respective industries.

January 2:

- National Personal Trainer Day

January 12:

- National Pharmacist Day

January 15:

- Elementary School Teacher Day

January 23:

- National Certified Registered Nurse Anesthetist Week

January 25:

- National IV Nurse Day

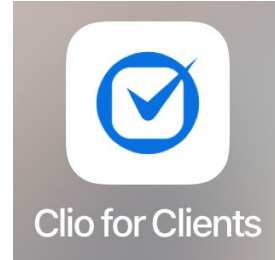
January 28:

- National Pediatrician Day

[Subscribe](#) for this free, periodic, informational service to stay current on what's happening in the regulatory world impacting your industry.

Side Bar ...

Bertolino LLP strives to stay client-centered in providing legal services so that clients have a seamless experience during an already stressful time. Continuing with this commitment, we are excited to introduce a new, self-scheduling option for clients. The next time you want to speak with your assigned attorney for something that cannot be addressed via the *Clio for Clients* portal, you do not need to contact the firm's support staff. You can simply click on a link and schedule the meeting yourself. By self-scheduling you will save time, money, and resources. More details on this new flexibility will be sent to our clients in the *Clio for Clients* portal. Bertolino LLP is excited to provide this additional convenience and we look forward to continuing to innovate so we make our client's legal services experience seamless and stay 100% client centered.



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