

Risk Management: An FAQ Approach: Part Two
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So, what does one do when and if the dreaded malpractice suit/ethics or licensing Board complaint comes up? First, I suggest you *do* panic. Let's face it; you're going to do it anyway. Go ahead, spin out the most tragic fantasy, and visualize yourself homeless and abandoned and begging for a burger-flipping career at the local grease shack.

Now that you've done that, the truth is, the likely outcome is going to be much less severe, and you can dial the tragedy volume control down a bunch of notches and get realistic. For the majority of licensing board ethics complaints, the typical outcome *even when the practitioner is found to have done something wrong* is either required continued education; a period of supervision of the licensee, or both. This was true of some 80% of complaints adjudicated in a recent 5 year state-wide audit of the Board of Mental Health Practice in New Hampshire. Over this 5 year period, only some 20% of all complaints led to disciplinary action and the great majority of these were resolved by supervision and CE. National statistics show smaller percentages of complaints leading to disciplinary action, something in the 5% range. And in California, home to about 55,000 licensed non-physician therapists, there are about 1600 complaints/year, triggering about 200 investigations, leading to "Accusations" (oy!) in about 40-65 cases. So, what the complaint likely means realistically is *one to two years of uncertainty while the process grinds out* to an outcome, typically less tragic than you feared. License suspension or revocation is the rare rather than the normative event. So, use this frame to manage the anxiety that will well up now and again.

How should you handle a complaint or lawsuit? Here are some common questions.

1. Do I really need a lawyer? I don't have any money and they're so expensive.

The author has rarely seen a case handled without a lawyer ("pro-se") that has not gone disastrously. Your malpractice carrier likely provides some amount of legal counsel and possibly also consultation for difficult ethical issues. Start there. Look for an attorney who is experienced in *administrative law*. This is different from both civil and criminal law and involves practice before state regulatory agencies. You do not want to pay to train your attorney. Many malpractice insurance policies provide either no coverage or very little (\$5,000-\$10,000) coverage for administrative law, but many also provide for riders that offer \$50,000-\$75,000 coverage for very low premiums.

It is important to have the consultation of the attorney *in your answer to the initial complaint*. Persons without training can sometimes damage their own cases via either a defensive or guilty response to the initial filing. "I only loaned him money one time."

“As a professor at Prestige U, I teach the psychotherapy of such patients and doubt that the Board has the expertise to evaluate my work.”

2. What should the lawyer do initially?

Initially the lawyer should review the complaint and your case file and narrow for you the issues the complaint raises. The attorney should give you an honest appraisal of where and whether there are weaknesses in your defense. The lawyer should either already be familiar with the most recent statutes in your state or be able to get up to speed on these very quickly. A good legal consultation will likely give you an analysis such as “The issues raised in the complaint can be adequately answered here and here. On point X we have the following potential vulnerability. There is a question of whether the choices here meet the standard of care.”

3. What is a standard of care?

The standard of care for treating any particular disorder is typically what the reasonably well trained practitioner would do in a similar case in similar circumstances. Standards of care are most often found in professional society ethics codes and state laws/regulations. It involves the application of the ‘modal’ treatment. It does not require perfect care, nor the care that a person would receive from someone at the pinnacle of the professions. There is room for considered professional judgment and informed disagreement. However, one cannot practice far beyond what is typically done and prescribed for the disorder and what has been found effective and endorsed by professional review bodies. You may, for example, choose to treat flashbacks using hypnotherapy, anxiolytic medications, and/or SSRI’s, or any combination of these, depending on your best judgment. You cannot decide that the application of warm cheese sandwiches to the forehead would work as well and tell the patient to do this instead.

4. What is the process a typical complaint goes through and why does it take so long?

A citizen or other entity (insurance company, hospital) files a complaint with the licensing board. Administrative procedures ensue—opening a file, docketing the complaint, etc. Typically these are done within 30 days. The complaint is processed differently in large vs. small states. In larger states there is often an administrative prosecutions unit, often in the Consumer Protection division of the state Attorney General’s Office, or in the Department of Professional Regulation. In states with this setup, all conduct complaints may be handled here up to the hearing phase. In smaller states, the Boards and their subcommittees more typically handle complaints. If you receive a complaint, ask the Board for a clear explanation of the procedure in your state. Whichever setup your state has, the common phases after the file is opened include:

- a. You are sent a copy of the complaint and asked to comment on it and to supply the Board with your records in the case. You have 30-60 days to respond. This time is often lengthened to allow you to obtain legal counsel and work up a response.
- b. You provide a written response to the complaint, typically in two parts – a clinical summary of why you did what you did and your thinking at the time; and a set of legal arguments about why your behaviors were not unethical when compared to the requirements of your professions code of ethics and your state law.
- c. Some complaints will never get beyond this stage. For example, if a new client called for an appointment and your response was you had no openings, or you chose to not offer services after a phone conversation, and the client became enraged and filed an abandonment charge, just a letter with these facts likely leads to a dismissal right here.
- d. If the charges and your response are more complex, your response is then reviewed by an *investigator* for the Board. This may be a member of the profession or a person with law enforcement background working for the professional regulatory agency. This investigator will prepare a report which will determine whether a prosecution goes forward. *I urge you to have your attorney present or on a conference call or live meeting where you speak to an investigator.* Their report will be crucial.
- e. The investigator's report is a careful analysis of whether your behavior violated specific sections of the law or ethics code and will consist of statements such as 'when Dr. X terminated treatment with patient Y because of annoyance over his/her lack of payment, this constituted abandonment under section X and Y and Principle Z of the code of ethics, which Dr. X must uphold under Statue Q.' It is similar to a line by line indictment in criminal matters. Of course, it can also say 'there is no violation of Principle A' and the investigator recommends dismissal.
- f. The recommendations of the investigator usually go to a professional conduct subcommittee or "board expert" for review, modification, and adoption. Once the report is adopted, it will then be sent to the full licensing board, which has the legal authority to bring charges. Just the process of complaint, response, investigation, review by the conduct committee, can take a year. This is because everybody gets 30-60 days to do their work. You have 60 days to respond. The investigator has 60-90 days to do the investigation. The conduct committee meets monthly with a crowded agenda. Maybe they get to your report and maybe they don't. It

takes a couple of months. There's a month for their report to get to the full Board. There's a month or two for the full Board to reach it on their Agenda—and so the seasons pass.

- g. Once the Report of Investigation is adopted by the licensing board, their legal counsel or the Administrative Prosecutions Department prepares a Notice of Hearing—the formal statement of the facts and charges as the Board sees them.

5. What is a hearing and should I want one?

A hearing is a formal legal proceeding that is conducted as if it were a trial, with sworn witnesses, the taking of evidence, direct and cross examination of you and any experts you may use, as well as any called by the other side, and the making of oral and written clinical and ethical arguments. Unless you are looking at a revocation of your license, you likely would prefer not to have one of these. Time and costs are prohibitive. The author was hearing officer for one such hearing that took 11 work days. The cost of the defense was well over \$50,000.00. There are alternatives such as consent agreements or settlement agreements.

6. What is a consent agreement or a settlement agreement?

In a way, these are similar to a plea bargain in criminal law. You typically agree that the Board could prove certain facts—you lost your temper with the patient and yelled at them—and you are not going to contest this. In return, the Board specifies certain corrective actions such as continued education on certain topics and/or a period of supervision with an approved supervisor.

In certain states you may be able to obtain a settlement agreement that is considered a 'reprimand' or a 'letter of concern' and that do not amount to a finding of professional misconduct. It is your attorney's job to know whether this is available in your state. This is a highly desirable outcome because often this level of finding does not require reports to other state licensing boards, hospitals, managed care companies etc. Such a reprimand likely preserves your ability to practice while ensuring the protection of the public through appropriate education and supervision. The author strongly suggests that persons brought up on ethical charges attempt to resolve the matters through such a settlement agreement or consent degree if at all possible.

7. What will happen if I have a hearing?

The proceeding will look like a trial. Depending on the State, there will be a hearing officer or an Administrative Law Judge. The hearing officer may be someone with very limited legal training such as a member of the profession advised by someone from the

Attorney General's Office, or someone with both legal and professional training who works for the Department of Professional Regulation. Or, there may be special judges who hear only cases before state agencies, Administrative Law Judges. Such judges may know very little about the specifics of any profession, hearing a medical case one day, a barbering and cosmetology one the next, and a real-estate proceeding the following day. Here, the performance of your attorney in making the issues clear to the judge will be vital.

The final outcome of the hearing will be a set of findings of fact and conclusions of law. Typically, at the end of the proceeding, each side submits their suggested findings of fact and conclusions of law. Then, either the hearing officer, the administrative law judge, or the full board sitting as a type of jury, issue their own formal findings of fact and conclusions. Boards are often free to adopt or "non-adopt" recommended decisions of administrative law judges.

8. What are findings of fact?

Classically, law is about applying 'the law' to 'the facts.' So, the deciding body first determines what 'the facts' are. These findings typically look like some uncontroversial factual findings—Ms. X entered treatment date A and ended date B—and some that are the meat of the controversy:

- a. "The Board finds that in the session of date X, Dr. Z screamed at patient Y, called him/her irresponsible, told him/her that he was sick of being taken advantage of, and demanded the patient leave the office and not return for further treatment until their bill was paid." (This could be one finding of fact or several, depending on how they are broken up.)

9. What are conclusions of law?

Once the Board has determined what the facts are, they decide whether these facts violate particular sections of the law:

- a. "In yelling at the patient and behaving as described under finding of fact # 1 above, the Board finds that Dr. X violated Principle A of the Code of the American Psychological Association, Beneficence and Nonmaleficence, and specifically Section 10.09, Interruption of Therapy."

10. What then?

- a. The Board prescribes a penalty for the violations. "Dr. X shall pay a fine of so many dollars by a certain date. He shall take 15 CE units in ethical relations with patients by date Y. He shall provide the Board with evidence

of satisfactory completion of these CE units. He shall obtain a Board approved supervisor with whom he shall meet weekly at his own expense and with whom he shall review all clients with diagnosis Z for a period of 1 year. Such supervisor shall provide reports to the Board on a quarterly basis at the supervisee's expense.”

11. What should my records look like to aid in facing such a proceeding?

The issue of how to keep records that adequately document treatment, that keep careful account of the interpersonal struggles that regularly occur in our work with highly traumatized patients, and that provide fact-finders with sufficient information not only about what was done, but why these clinical choices were made, will be the subject of a future column.

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