

# **UNDERSTANDING LICENSING BOARD DISCIPLINARY PROCEDURES**

## **CAPP/BPA Task Force**

**Patricia Bricklin, Ph.D.**

**Bruce Bennett, Ph.D.**

**William Carroll, Ph.D., J.D.**

With assistance from

David Nickelson, Psy.D., J.D.

Billie Hinnefeld, J.D., Ph.D.

*APA Practice Directorate*

**Approved by the APA Committee for the Advancement of Psychology (CAPP):**

**March 2003**

**Approved by APA Board of Professional Affairs (BPA):**

**April 2003**

NOTE: Nothing in this document should be construed as legal advice, and that the use of various state laws or regulations throughout this document is for demonstration purposes only and should not be construed as a statement of the current state of the laws or regulations in those jurisdictions.

# UNDERSTANDING LICENSING BOARD DISCIPLINARY PROCEDURES

## *CAPP/BPA Task Force on Responding to a Disciplinary Complaint*

### **Purpose of Licensing Laws and Psychology Disciplinary Boards**

The explicit purpose of psychology licensing laws is to protect the public. Licensing laws frequently state that the appropriate practice of psychology is a matter of public safety and citizen welfare. They may often note in more detail that the purpose of the law is to protect the public from unprofessional, improper, unauthorized and unqualified practice of psychology. It is the duty of the Psychology Regulatory Board to implement the licensing law on behalf of citizen consumers.

### **Purpose of this Document**

This document provides information about the disciplinary process used by the state boards. This legal/administrative process is not always well understood by professionals. The objective is to help psychologists and consumers appreciate the nature of the licensing board disciplinary process and take appropriate action to defend themselves when necessary. It is not intended to defend or attack licensing boards' authority, jurisdiction or disciplinary procedures as they seek to fulfill their legislative mandate. *Please note that nothing in this document should be construed as legal advice, and that the use of various state laws or regulations throughout*

*this document is for demonstration purposes only and should not be construed as a statement of the current state of the laws or regulations in those jurisdictions.*

This document is designed to demystify the disciplinary process by describing the steps of the process, to help psychologists understand their legal rights, and to identify the points at which psychologists may have options. After reading this document, a psychologist should broadly understand disciplinary regulations and procedures. If a complaint is filed, it is hoped that the psychologist will have information helpful when making a balanced judgment about when to seek legal professional assistance, and how to manage an initial contact with a licensing board representative.

## **Introduction**

It goes without saying that practicing with due care and consideration of maintaining ethical conduct while meeting the obligations of state statutes and rules is expected of all psychologists. This document has been written in response to requests from licensed practicing psychologists to help them better understand the disciplinary process – a process that may be upsetting, often seems to be shrouded in mystery, and can have a potentially profound impact on their livelihood. Although most licensed psychologists never experience a disciplinary complaint, the very discussion of the issue may engender fear. Practicing psychologists who learn that they might be the focus of a state psychology licensing board investigation are likely to experience distress.

Anger, confusion, worry, and a mental review of recent patient and professional activities are possible initial reactions, followed closely by concerns about the effect any disciplinary action may have on their practice, income, professional activities and membership on provider panels.

These responses are normal, but psychologists who understand the disciplinary process, have practiced ethically, and seek legal advice can take proactive steps to manage the process, protect their legal rights, and even improve their practice of psychology.

Understanding the disciplinary process and being aware of one's own legal rights are important and necessary steps for everyone. However, in the event of a complaint, few things are more helpful than obtaining experienced professional

### **Choosing an Attorney**

All state laws governing disciplinary proceedings allow a psychologist under investigation to be represented by an attorney. This is not as absolute a right as in criminal proceedings, and an attorney will not be appointed or paid for by the state. However, for a psychologist potentially under investigation by a state or provincial discipline office, the assistance of an attorney with strong administrative hearing experience can be invaluable.

Not all attorneys, even those experienced in tort and criminal defense, are familiar or experienced with practicing before administrative agencies and boards. In fact, successful criminal defense tactics may be ineffective -- or even harmful -- in administrative hearings. The attorney selected should

## **Licensing: Some Background**

Licensing laws in psychology, as well as other professions, are based on two assumptions: 1) It takes special knowledge and skills to practice a profession and 2) The public needs protection from incompetent or unethical practitioners. The effort to accomplish this purpose is usually aimed at a) identifying the minimal standards of education and supervised experience required to enter the profession, and b) establishing procedures for identifying, and when necessary, sanctioning or removing incompetent or unethical practitioners.

Historically, licensing boards used minor sanctions to both educate and rehabilitate practitioners; only major infractions resulted in a license being revoked. However, complaints are now reported to

understand standards of psychological practice, be willing to take your case to the hearing stage if necessary and should have a successful track record with this or very similar discipline offices.

Former administrative law prosecutors, hearing officers who are now in private practice or psychologist/attorneys are often good choices.

An experienced attorney can also evaluate the state's case, form an opinion from past experience as to whether the state would really want to invest in prosecuting a formal charge, and can reasonably assess under what conditions the state might settle. A good resource for finding experienced legal counsel is often the state psychological association (a list of state association addresses and phone numbers can be found at

<http://www.apa.org/practice/refer>).

federal and state disciplinary data banks and the implications of disciplinary action can be significant. Any sanction may have unforeseen professional and economic consequences including: being denied access to managed care provider panels; loss of malpractice insurance; loss of hospital privileges; and loss of membership in or credentials awarded by professional organizations. It is that psychologists can face allegations of misconduct in a number of forums outside of the state licensing board (e.g., ethics committees of national, state or provincial, associations, courts, agencies, institutions. This document only provides general information about the disciplinary process of licensing Boards, and is not a substitute for obtaining professional advice about any other professional, regulatory, or legal wide variability among enforcement procedures of state licensing boards, and this document only provides

Discrete questioning of colleagues may also turn up members willing to provide a referral to competent legal counsel.

Local bar associations may also be able to provide the names of attorneys who regularly practice before administrative agencies.

The attorney chosen should be willing to make the psychologist a partner in the defense strategy. Listening to the psychologist's concerns with various defense strategies is important, because even careful, experienced attorneys may not appreciate the ethical standards guiding the practice of psychology, the rationale underlying them, and what conduct a hearing panel of psychologists might view as an actionable violation in the profession.

**NOTE:** Many attorneys hire a psychologist/consultant with expertise in

general information not necessarily applicable in all jurisdictions.

**Key Points**

- Licensing was created as a public protection mechanism to assure the public that a person calling him or herself a “psychologist” and/or “engaging in the practice of psychology” has met certain educational, training, and practice standards.
- The authority to initiate disciplinary procedures stems from a Board’s public protection mandate and the process is designed to identify and remedy incompetent, unethical, and unlicensed practice.
- Any sanction by a licensing board may have significant economic and professional consequences.
- A licensing board is only one of many forums where misconduct allegations can be raised and sanctions imposed.

ethics to assist them in understanding the ethical standards guiding the particular action in question.

**Key Point**

Because any Board sanction can have a significant impact on a psychologist’s professional future, and because administrative rules and procedures are complex, psychologists who learn that they are under investigation by the Board are urged to seek experienced legal counsel immediately.

## **Disciplinary Procedures: General Considerations**

Administrative law is a body of law and procedures that evolved to help government agencies enforce regulations. Administrative actions -- such as Board disciplinary actions -- were traditionally viewed as dealing with routine regulatory matters, and the rights (e.g., restriction on an independent license to practice) were not thought to be as significant as those at stake in criminal law (e.g., liberty and imprisonment) or civil law (e.g., property forfeiture or a money judgment).<sup>1</sup>

Board disciplinary procedures are one of a number of ways that allegations of misconduct can be pursued by consumers. Allegations of misconduct (e.g. sexual misconduct; failure to report child abuse; fraudulent or deceptive billing practice) may be addressed by administrative, civil, and criminal systems simultaneously. When this occurs, administrative proceedings by a licensing board may be paused or suspended until other systems resolve the issues that are within their jurisdiction.

Unlike civil and criminal court, the authority of licensing boards and the disciplinary procedures they follow are taken from a state's administrative law and regulations. For example, Florida's statute on the "Regulation of Professions and Occupations: General Provisions" gives the Department of Health the authority to license and regulate health professions, and outlines the general administrative and disciplinary procedures (e.g., investigations, hearings, etc.) that the Department and all health profession licensing

---

<sup>1</sup> For more information about criminal and civil law procedures, please see the Legal Issues in the Professional Practice of Psychology (LIPPP) document from the Committee on Professional Practice and Standards (COPPS) (to be published).

boards must follow (See Fla. Stat. ch. 45 (1997)). The Florida State Board of Psychology is given more specific guidance on which actions warrant administrative action, and the penalties to be applied, in a separate statute (Fl. Stat. 490 et. seq.) and series of regulations (Fl. Admin. Code Ann. R 64B19 (1997)).

Another example comes from Maine, where complaints are filed against any Maine state license holder (e.g. psychologists, plumbers, arborists, etc.) using a standard form and procedure entitled “Standard Complaint Procedure of the Division of Licensing and Enforcement, Maine State Department of Professional and Financial Regulation”. While the Maine State Board of Examiners of Psychologists is given some discretion to adopt its own rules of practice regarding disciplinary proceedings (Me. Rev. Stat. Ann. tit. 5§8051 (1999)), the Board’s rules and procedures must track the broad procedural requirements of the Maine Administrative Procedures Act (Me. Rev. Stat. Ann. tit. 5§§8001 - 11008 (1999)). More specific examples of applicable parts of the Florida and Maine statutes and regulations will be provided throughout this document. (Note: the Florida and Maine statutes and regulation are provided only to illustrate specific points, and their inclusion should not be considered an endorsement or criticism of the statutes or regulations themselves or legal advice regarding the law in those jurisdictions.)

***It is important to note that the procedures regulating the practice of psychology, although similar in written form, may be implemented differently from state to state.*** This may be a source of confusion when psychologists in one state discuss disciplinary issues with psychologists in another state. All licensed psychologists are

expected to read and understand the state laws, regulations, and procedures that govern practice in their state, and seek guidance from the Board if they do not completely understand those laws, regulations, and procedures. Copies of the relevant laws, regulations, and procedures can be obtained by calling or writing the Board in your state, and the ASPPB web site (see: <http://www.asppb.org/roster.htm>).

In order to ensure that psychologists charged with an offense can effectively present their case and get a fair hearing, all administrative laws and regulations provide certain substantive and procedural rights. These procedural rights are termed “due process.” Due process is a legal term of art that describes the balancing of fairness, accuracy, procedural efficiency and acceptability to all involved parties; generally any disciplinary proceeding must afford the accused some degree of due process. In this case, the parties would include the psychologist and the licensing board – with the licensing board acting on behalf of the state for a complaining citizen/consumer.

One consequence of the principle that rights of an accused psychologist in an administrative hearing are not as significant as in criminal law or civil hearings is that administrative law generally provides fewer due process protections. An example of how the same personal right is given different due process protection in different settings is the right not to testify against oneself. In a criminal court, this right means that defendants cannot be forced to take the stand to defend themselves, and a jury cannot use the refusal to testify as evidence of guilt or innocence. In a civil court, a defendant with relevant evidence can be compelled to testify; if they refuse, they can be

held in contempt and the jury can often weigh their refusal with other evidence presented. In an administrative hearing, refusing to testify may be used as evidence of a violation of an administrative rule, often compelling the hearing panel to find that the defending party in fact did violate the rule. Similarly, the right not to be penalized for refusing to answer questions, the right to obtain and challenge the state's evidence and witnesses, the right to know who has raised an accusation of misconduct, the exclusion of hearsay evidence and other testimony, the standard of proof required for conviction – all these and more are subject to very different rules in administrative proceedings than in courts of law. These rights also vary across jurisdictions, and rights available in one state may not be available in another.

The “burden of proof” is also generally much lower for the state in an administrative versus criminal or civil hearing. This means the state does not have to prove its case “beyond a reasonable doubt”. The state need only prove its case by a “preponderance” of the evidence, or in some instances by “clear and convincing” evidence. This means that the decision maker for the licensing board must only believe the evidence is greater on the side of the state's case – in fact, it only needs to be just slightly greater. Using a scale of justice metaphor, the scales only need to be tipped just slightly in the state's direction for the state to prevail. This is the standard for preponderance of the evidence: clear and convincing would require a higher level of proof. While the burden of proof will be further discussed later in this document, a psychologist and his/her attorney should keep this in mind from the very beginning because it may affect a decision to proceed with or settle the case.

When coupled with the fewer due process procedures available in administrative hearings, another consequence of licensure's historic "public protection" function is that often the rules are more favorable to the rights of the public (the Board) than is the case in a criminal or civil proceeding.

In addition to the state regulatory procedures, professions police themselves through the development and enforcement of ethics codes. A professional association may postpone its own disciplinary action until all other investigations (criminal, civil actions and the results of the licensing board investigation) are complete. (For more information on the disciplinary procedures followed for potential violations of the Ethical Principles of Psychologists and Code of Conduct, (APA, 2002), visit <http://www.apa.org/ethics>, or contact the APA Ethics Office at 202-336-5930).

Psychologists should also be aware that in states where professional ethics actions are not suspended, defendants with civil lawsuits pending against the psychologist may file a complaint with the licensing board in a strategic effort to gain additional information to support that lawsuit. A psychologist that believes a particular complaint has been filed for this reason should seek assistance from a qualified attorney if they have not already done so. In addition, a person may file a complaint with an ethics committee or licensing board to determine the potential merit the case may have for future litigation.

The major professional liability policies provide reimbursement for legal expenses for licensing board complaints, an innovation first implemented by the APA Insurance Trust (see: <http://www.apait.com>). Many policies allow practitioners to purchase additional coverage for a modest premium. Most policies require psychologists to report promptly any potential disciplinary action when they become aware of it. Psychologists should ask their insurance carrier about the dollar amount of coverage provided by the policy for legal fees and possible additional coverage when they purchase their insurance policy.

### **Key Points**

- Procedures set down in licensing board rules and procedures are consistent with the state administrative procedures act and regulations. These rules often specifically refer to the APA Ethics Code or other practice standards.
- Administrative rules and procedures have fewer due process protections than civil or criminal rules and procedures.
- Consider purchasing insurance that provides reimbursement for legal expenses incurred when defending against a licensing board complaint.
- Proactively manage risk: be familiar with your state's administrative rules and procedures. Recognize that careful attention and adherence to ethical standards, state statutes and rules may provide significant protection if a complaint is filed.

- If you find out that you may be the focus of a disciplinary investigation, seek qualified legal counsel and contact your insurance carrier.

### **Brief Overview of a Discipline Action**

Disciplinary matters may be handled differently by each state, and it is helpful for a psychologist to seek experienced legal consultation regarding the procedures used in their state.

However, a recent survey of selected states across different regions found some commonalities and it is possible to provide some general comments about a process that applies across many jurisdictions.

In many states, the agency or office of the state government that issues the license also investigates complaints and enforces disciplinary actions. In other states, the attorney general's office or

### **The Range of Possible Sanctions**

**Letter of Caution** – This is the lowest level of action by a disciplinary board. This sort of letter typically conveys that the behavior may not clearly be a violation, or may be a minor violation, but that the psychologist may want to be careful about such behavior. This may also be called an educational letter. This level of discipline need not be reported to ASPPB's disciplinary database.

**Reprimand** – This is the next level of disciplinary action and is more suggestive that the behavior is problematic. In some jurisdictions this still may not be made public record, and will not be reported to ASPPB's disciplinary database.

**Censure** – This is a term not often used in many jurisdictions. (In some jurisdictions it

another state enforcement agency supervises the investigators and staff, and the licensing board is consulted for guidance at process. For ease of discussion, the enforcing agency in the state will be referred to as the “discipline office,” although actual names may differ. Each of the stages described in this section are presented in more detail in the remaining sections.

Generally, when the discipline office receives a report of misconduct, an initial evaluation is made by office staff or a member of the Board to determine if any action should be taken. At this stage, some complaints are dismissed after review with no further inquiry, often because they do not allege a violation of the state’s professional standards or the focus of the complaint is not within the board’s jurisdiction. More frequently, the discipline office requests further

is used interchangeably with “reprimand” and in other jurisdictions as a more severe form of reprimand.

**Suspension** – When a psychologist’s license is suspended, the psychologist cannot practice at all during the time of suspension, though he or she still maintains the license. Toward the end of a suspension, a psychologist may be put on probation, which might include supervision. Also, in order to be reinstated, the psychologist may need to meet certain terms and conditions designated by the Board. This level of discipline is reported to ASPPB’s disciplinary database.

**Revocation** – This is the most severe disciplinary action, and is when a psychologist’s license is actually taken away. In some cases revocation may be permanent. In psychologist’s license is actually taken away. In some cases revocation may be permanent. In other

information from the complainant, from potential witnesses, and from perhaps even the psychologist – usually by phone or correspondence. In some cases, investigators are assigned to conduct interviews, obtain “release of information”

cases the person may be able to re-apply after a certain number of years, but there is no guarantee that the revocation will be lifted. This action is reported to ASPPB’s disciplinary database.

authorizations, and sometimes deliver subpoenas to produce records or other documents.

Depending on state law, regulations, and discipline office procedures, the psychologist may or may not be informed that this initial investigation is underway. While an accused psychologist has a right to receive notice about an official disciplinary hearing or action, a licensing board may not be required to give notice that it has merely begun an informal investigation. The interests at stake in this era are more significant, and many psychologists feel that not receiving notice of the investigation as soon as it begins may put them at a disadvantage if they are later asked to defend themselves (e.g., they have little time to review records or assess the complaint once they are officially notified).

If the report of misconduct appears to be a potential violation of the rules or statutes regulating the profession, the psychologist may be asked or even required to respond to the allegation, often in writing. Before responding, a psychologist should obtain and review a copy of the licensing board’s rules and procedures. When developing a response, psychologists should provide only facts related to the specific allegations,

avoid inflammatory or impulsive statements, and consult and retain qualified legal counsel before formally responding.

If the response does not prompt the state to dismiss the allegation, the discipline office may begin to negotiate with the psychologist in an effort to close the case. In such a negotiation, the discipline office tries to determine if the psychologist is willing to admit to one or more violations and accept the imposition of some form of discipline. Any admission or acceptance of a licensing board sanction could have significant economic and professional consequences. The psychologist should not negotiate with the discipline office without legal representation present.

If negotiations are not successful, and the discipline office believes there is a probable violation, a *formal charge* is filed against the psychologist. A formal charge outlines the allegations in detail. At this point the accused psychologist is entitled to a *formal hearing* on the charge before any sanction is imposed. Hearings are conducted under the rules of procedure provided by the administrative law statutes of the state. In some states, it is only at this stage that psychologists learn the specifics of the accusation made against them and have an opportunity to discover and weigh the evidence in support of the accusation.

Once the formal charge has been filed – but before the matter goes to a hearing – there usually is another attempt to negotiate a settlement. The state may again ask the psychologist to accept a lesser sanction than might be imposed should the

psychologist be found guilty of the pending charges after a formal hearing. If strategically appropriate, the psychologist's attorney may also initiate settlement discussions for the same reason. If psychologists receive an adverse ruling at the formal hearing, in many cases they have the option of appealing the ruling to an administrative or other state court.

The remaining sections of this document discuss each stage of the disciplinary process in detail.

### **Key Points**

- Disciplinary actions start with an initial complaint or multiple complaints, and proceed through a series of investigative and adjudicative stages.
- Each stage progressively gathers information. At the end of each stage the complaint is dismissed, settled, or moved along to the next stage.
- At a number of stages, a psychologist may be given the opportunity to accept a lesser sanction or to settle or close the case. It is important to retain legal counsel throughout the process.

## **The Initial Report of Misconduct**

Most potential misconduct cases come to the attention of the licensing board and discipline office when someone telephones or writes to complain about the behavior of a particular psychologist. The complainant could be a patient, another psychologist, or anyone with information about a potential violation. In most states, the individual reporting the misconduct must file an initial report in writing before the discipline office will act upon it (e.g., Fla. Stat. ch. 455 621(1)(1997)). However, states commonly allow discipline offices to initiate investigations on their own, should they become aware of possible misconduct, regardless of how they learn of it. In some states a source may even remain anonymous, provided the complaint is submitted in writing. In other states discipline offices are also allowed to add additional charges they learn of during the course of an investigation.

If the state uses a standard complaint form, a copy of that form is sent to the complainant with instructions on how to complete it. Some states require the complainant to fill out both a standard form and enclose a separate, written description of the conduct complained of in the complainant's own words. A few states also provide the complainant with a list of conduct that is subject to sanction under the licensing act, and in general states require a signed release of information from the complainant in order to proceed to investigate.

## **Key Points**

- Many different parties, including the licensing board itself, can file initial complaints.
- Initial complaints must generally be filed in writing.
- Some jurisdictions allow the complainant to file a written complaint anonymously. Most states require a signed complaint.
- Some jurisdictions allow additional charges to be filed during the course of an investigation; others do not.

## **Initial Screening of Misconduct Reports**

It is in the initial stages that the procedures of each state are most likely to differ. In some states, Boards are involved at every stage of the process. In other states Boards are not involved in investigation: they become involved only during adjudication. For example, when the discipline office has received a complaint, a staff person in the discipline office, a member of the licensing board, or a committee named by the licensing board may be designated to evaluate it. A large number of complaints are dismissed out of hand at this stage because they allege complaints over which the Board has no jurisdiction. It is also at this stage that frivolous or unwarranted complaints that do not allege violations of the licensing law are dismissed. If the

discipline office staff determines the complaint warrants an investigation, the staff person will make a recommendation to the licensing board. The licensing board then usually assigns the case to an investigator, although in some states, the licensing board is not consulted or informed and the staff alone assigns an investigator.

### **Key Point**

- Initial complaints may be screened by a number of different parties, including an individual investigator. While further detail is provided below, often the investigator will be the only staff person who stays with the case from beginning to end, and it is prudent at all times to treat an investigator with professional courtesy and respect.

### **The Preliminary Investigation of a Report of Misconduct**

The decision to investigate a report of misconduct is a sensitive stage in the disciplinary process. It is during this stage that, if contacted, psychologists should be cautious about making statements or taking action that unintentionally may make it difficult for them later if the case moves forward. Appropriate legal consultation is critical even at this early stage.

Investigations follow different paths in different states. Some states immediately send psychologists the complaint in the same form it was received by the discipline office.

Other states send only the executed standard complaint form or a brief summary of the accusation. Some states enclose a subpoena or an order requesting records from the accused psychologist. Finally, in a few states, the statutorily determined administrative procedures may not even at this point require the discipline office or licensing board to alert psychologists to the investigation and/or inform them of the nature of the complaint.

In fact, in some states an investigator may interview the complainant and witnesses, gather documents, and begin to put together a case file before contacting the accused psychologist. In these states, the first notice that the psychologist may have that an investigation is underway may be the abrupt appearance of an investigator in the psychologist's office, announcing that he/she would like to speak with the psychologist. The investigator might not reveal that a complaint has been filed – he/she may simply ask questions about the psychologist's practice, ask to see his/her appointment book, etc. Sometimes the investigator will appear with a subpoena for certain records and will not offer any further explanation. At other times the notice may come in the form of a telephone call, setting a date for an interview "on some matters" either at the discipline office or at the office of the psychologist, and little additional information is provided.

What can psychologists do when an investigator suddenly appears or calls on the phone? Psychologists should be polite. However, because the investigator's appearance in the middle of a psychologist's busy day is unexpected, it is unlikely that the psychologist will have the time either to contact his/her attorney, gather the

materials requested, or answer a series of questions posed by the investigator without seriously inconveniencing waiting patients or clients. While the natural inclination in such a situation is to try to defend oneself or try to gather information about the accusation or the party making it, honoring a psychologist's commitment to his/her current patients and clients means the best course of action may be to simply get the investigator's contact information and politely offer to arrange a later time to talk or meet.

### **Key Points**

- In the initial stages, depending on the state, psychologists may or may not be told that they are being investigated. They sometimes first learn this when an investigator calls or visits the psychologist's office.
- Psychologists have a right to consult with an attorney before producing documents or submitting to an interview. If psychologists want to consult with an attorney, they should politely offer to schedule a future time to talk with the investigator.
- Seek experienced legal counsel immediately.

### **Responding to the Preliminary Investigation**

Many psychologists are unaware that some licensing boards have the discretion to charge psychologists with any regulatory violation that comes to light during the investigation of a specific complaint, even if that violation is not the original basis for the investigation. All too often, psychologists anxious to defend themselves from a serious accusation inadvertently make concessions or disclosures about potentially less serious but nonetheless actionable failings in the handling of a case. The discipline office can then also pursue these admissions, which may lead to additional sanctions. Such pitfalls highlight why it is important to consult an experienced, attorney who has handled administrative complaints against health professionals before responding. (See “Choosing an Attorney” on page 4). While the right to be represented by an attorney at a formal licensing board hearing was discussed earlier, it is less clear how far this right extends to contacts with the licensing board's agents during the investigative stages of the process. A psychologist potentially faced with having to respond personally or in writing to an investigator's inquiries is encouraged to explore early on just what role an attorney is allowed to take during an investigation. For example, while the governing law often requires psychologists to respond personally, psychologists' rights would likely be best protected if their attorney was involved at all stages.

In many states psychologists receive minimal information about a complaint before being interviewed by an investigator. Investigators for discipline offices are often former law enforcement personnel, and may, at times, seem to have a “prosecutorial” approach to the interview, as well as the overall investigation of a complaint. Often an investigator is responsible for conducting interviews and investigations for several different

professions and may not yet have a clear understanding of what is standard procedure between psychologist and patient.

When the investigation is complete, depending on the procedures of the individual state, the case is reviewed by the licensing board, the Attorney General, or other designated persons to determine if there are reasonable grounds for bringing a formal charge.

### **Key Points**

- Licensing boards can often pursue other violations uncovered during the course of an investigation. It is important to answer only the specific charges and to provide information that directly refutes or responds to the charges. Recognize that if there have been additional incidents or evidence of misconduct and they are disclosed during an investigation, additional charges may be added to the complaint.
- Even though psychologists are often required to respond personally to the investigator or the licensing board, it is crucial to have legal counsel present (as an advisor) during any interaction.

### **The Pre-Formal Charge Conference: Negotiations**

All states provide for a procedure for an informal disposition of a case before a formal charge is filed (See, e.g., Me. Rev. Stat. Ann. tit. 5§9053 “Disposition without full

hearing,” (1997)). In fact, most cases are disposed of informally prior to a hearing. If an attorney for a psychologist has not been successful in persuading the discipline office to dismiss the charge and the evidence suggests misconduct, the goal of the pre-formal charge conference will be to plea-bargain.

An experienced attorney is invaluable at this stage. He/she will know what kinds of alternatives are available, and which alternatives the discipline office is most likely to accept. He/she will also be able to offer advice on the possible outcomes and sanctions should the case go to the next step – a formal hearing – and can provide information on the pros and cons of settling at this stage. For example, in some cases, not settling at this stage is a strategic decision made in an effort to force the discipline office to file a formal charge and disclose more evidence. Such information is helpful when considering whether to proceed to the formal hearing stage, and may better clarify what bargaining power the psychologist has if he or she decides to consider an informal disposition and sanction.

During negotiations at this and any other stage, psychologists should consider the consequences of accepting even a minor sanction. Psychologists will want to know who will receive notice of the sanction imposed. In today’s rapidly changing health care system, even a minor sanction may have serious consequences for insurance, employment, hospital privileges and managed care affiliations. These considerations must be weighed against the cost of defending oneself at a formal hearing, the relatively low level of proof necessary for conviction in an administrative hearing, and the stress

and possible publicity that may result from a hearing. When the choice is between accepting a lesser sanction that would prevent loss or suspension of license and taking the chance of losing at the formal hearing, the decision of whether to go forward can be intimidating.

Before psychologists enter any agreement, they should be clear about what admissions will be admissible as evidence of wrongdoing in any subsequent criminal or civil hearing or organizational credentialing process (e.g. hospital, insurer or managed care organization), and who will receive notice of the sanction. Some states provide that the complainant must be consulted about the proposed settlement, but in most cases they do not have the ability to veto a settlement (See, e.g., Fla. Stat. tit. 455.62(9) (1997)). Finally, any settlement agreed upon is often not official until it is approved or endorsed by the licensing board.

### **Key Points**

- Experienced counsel may prove invaluable in negotiating a settlement during informal talks with the discipline office and the licensing board.
- Accepting any sanction, even a minor one, could have a significant impact on a psychologist's ability to practice. Psychologists and their attorneys should carefully consider the pros and cons of admitting to a lesser violation and accepting a sanction.

- Before agreeing to any settlement, make sure all parties understand which admissions will or will not be admissible as evidence of possible wrongdoing in other forums.

### **The Adjudication Stage: The Formal Charge**

If a case has not been dismissed or settled informally, the next step in most states is for the discipline office to file a *formal charge*. The formal charge identifies the rules or statutes that have allegedly been violated, and should clearly state the acts or omissions that form the basis of the charge. The psychologist may be required to respond to this document and can generally admit, deny, or plead an inability to admit or deny a specific allegation on grounds that he/she lacks sufficient information to do so.

At this stage of the disciplinary proceedings, more information about the state's case will often become available to the defending psychologist. The licensing board may be required to automatically release evidence or may be required to do so in response to a motion by the defendant-psychologist. Some states provide that the discipline office must open its case file to the accused, usually through his/her attorney, so that he/she has a fair chance to prepare a defense. If a state does not have such a provision, the psychologist's attorney would likely argue for such disclosure (however, the file may contain only summaries of interviews or other limited evidence). State statutes or regulations usually provide a means for the defense to subpoena witnesses to appear at

the hearing on its behalf and to cross-examine the licensing board's witnesses. In almost every state, the law governing administrative proceedings gives agencies discretion in the amount of discovery allowed. For example, deposing adverse witnesses prior to the hearing is only rarely allowed.

### **Key Points**

- Often the formal charge stage is the first time the accused psychologist is allowed to examine the complaint and all supporting evidence.
- The formal charge stage may also be the first time the accused psychologist can formally respond to the complaint -- usually in writing.

### **Pre-Hearing Negotiations**

After the formal charge has been filed and sent to an accused psychologist and any additional investigation is completed, the psychologist may have a better grasp of what he/she is facing and may wish to resume negotiations, because the additional information may reveal that the state has a weaker or stronger case than was believed earlier. If a settlement offer is made and rejected at this stage, the matter proceeds to a formal hearing.

Although still legal in some states, the practice of including a licensing board member or members who have participated in the pre-hearing and pre-charge negotiations among the ultimate determiners of guilt is no longer frequently done. One problem with this practice is that it may be difficult for such licensing board members to put aside information, impressions, and feelings that were generated during the earlier exchanges. The Psychologist's Legal Handbook points out:

“Challenges to the fairness of a disciplinary proceeding have been raised when an attorney, such as an assistant state attorney general, serves simultaneously as the “prosecuting attorney” in the matter and as attorney-advisor to the licensing board. In a number of states, courts have ruled that such arrangements create an impermissible appearance of possible prejudice, particularly when the attorney aids the licensing board in reaching its final decision. Perhaps paradoxically, it is well-established that the licensing board members themselves may act as both investigators and decisionmakers. As the Supreme Court has stated: “[t]he mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the licensing board members at a later adversary hearing.”<sup>2</sup>

The role the Board members play at different steps of the process varies from state to state. For example, some states have several Board members participate in the

---

<sup>2</sup> Clifford D. Stromberg, The Psychologist's Legal Handbook, 28-29. The Council for the National Register of Health Service Providers in Psychology, 1988, (quoting Withrow v. Larkin, 421 U.S. 35, 55 (1974)).

investigative process and then recuse themselves from any further participation such as the hearing. Another state does not permit the Board to participate in the investigation; they participate only as Finders of Fact in the adjudication process including the hearing.

### **Key Point**

- If a member of the investigative panel is also included in the formal hearing panel, psychologists may wish to ask if someone with no previous contact with the case can replace that individual. Should such a request not be granted, this issue could be raised on appeal.

### **The Pre-Hearing Conference**

The person who will conduct the hearing – frequently an attorney appointed by the licensing board, the department, or an administrative law judge – will often call a meeting of the parties prior to the hearing in an effort to narrow down issues to be addressed and shorten the hearing (See, e.g., Me. Rev. Stat. Ann. tit. 5§9053 (1997)). Psychologists will often be asked to stipulate that certain facts are true or the profession requires certain norms of behavior. Psychologists and their attorneys should carefully consider the impact that such stipulations could have at the hearing.

**Key Point**

- With the assistance of counsel, carefully consider the impact that any stipulations or admissions might have on the hearing outcome before agreeing to them.

**The Hearing**

A typical hearing proceeds with the discipline office (prosecution) and psychologist (defense) offering opening statements in which each presents what he/she anticipates the evidence will be and what he/she contends it will prove or disprove. The discipline office, because it has the burden of proof, goes first in all steps of the hearing. Witnesses for both sides will be called to testify and be cross-examined under oath. Following the presentation of witnesses and other

**ADVOCACY**

Administrative law and procedures developed many years ago may be inadequate today. It may be worthwhile for practitioners to discuss with state psychological associations the attributes of their particular state's procedures. It would be important to find out which procedures are part of the Board's rules and regulations and which are part of administrative law. It may be possible to work with other psychological associations to make changes in problematic procedures. It must also be noted that the procedures followed for psychological disciplinary proceedings may also be those for all disciplinary proceedings in a state and therefore not the licensing board's authority to modify. This may mean that a legislative change in the state administrative procedures act may be

evidence, the discipline office and defense present their final summations and

needed and the various professions may wish to form a coalition to argue this issue.

An administrative hearing may not always be

completed in one sitting. A hearing officer or other Trier of Fact (e.g. the Board or panel of the Board) may have discretion to declare a recess to allow one or both parties time to review and respond to surprise evidence. Moreover, a state may allow for a rehearing on a showing that important new evidence has recently been uncovered.

As stated earlier, because it is an administrative (rather than civil or criminal) hearing, the rules of evidence will be relaxed. For example: 1) evidence that would not be admissible in a civil or criminal trial is more likely to be allowed (See, e.g., Me. Rev. Stat. Ann. tit. 5§9057 (1997)); 2) the manner of questioning a witness is likely to be looser, (e.g. “leading” questions may be allowed, which means the question put to a witness may actually be a statement of fact or belief which the questioner simply asks the witness to affirm or deny); 3) members of the licensing board may be allowed to do their own questioning in addition to the prosecutor; 4) hearsay evidence may be allowed into evidence (e.g., witnesses may be allowed to testify to things they have heard people who are not present at the hearing say); and 5) documents may be allowed into evidence that are not originals or certifiable as authentic. These rules apply equally to both parties but differ considerably from state to state.

The one or ones who are to be persuaded by the evidence as to what are the facts, (the “Finder of Fact”) are often a hearing officer, an administrative law judge, and/or one or more of the licensing board members, or the entire board itself. At the conclusion of the hearing, the hearing officer or the panel sends the full licensing board its findings of facts and conclusions of law. The licensing board reviews the findings and either approves or rejects what has been submitted. In some states, Boards review a verbatim transcript of the entire hearing and prepare their own adjudication and order. Some states do not require the licensing board approval vote to be unanimous and those members who attended the actual hearing may be allowed to vote on, and potentially have a significant impact on, the licensing board’s final decision.

### **Key Points**

- Administrative law does not rely on criminal or civil rules of evidence -- leading questions, hearsay, and copies of original documents are sometimes allowed.
- The hearing panel is sometimes composed of a small number of members of the full licensing board; at other times the entire Board presides. In some states the hearing may be held before an administrative law judge.
- Until a final ruling is reached, administrative hearings can be interrupted, postponed, and even reopened if the discipline office acquires new facts. There is usually a time limit on how long a hearing can remain open.

## **The Burden of Proof**

As previously discussed, the measure of proof necessary to sustain a charge of violation of a statute or rule in an administrative hearing is significantly less than that required in a criminal prosecution. In a criminal prosecution, the evidence must persuade the finders of fact that there is no reasonable doubt about the defendant's guilt. In disciplinary actions, guilt can be established by either a preponderance of the evidence or by evidence that is clear and convincing. The preponderance test, as stated earlier, means that the state need only tip the scales a bit in its favor. Some would describe this as 51% of the evidence favoring conviction. The clear and convincing test is hard to define. It is something more rigorous than mere preponderance but does not approach the criminal standard of beyond reasonable doubt. Clearly, the combination of looser standards of admissibility of evidence and the lower burden of proof significantly favors the prosecution in a disciplinary action when compared to a criminal/civil trial. This is often disconcerting to the psychologist defendant for whom the possible consequences of a finding of guilt are significant.

## **Key Point**

- The combination of a low burden of proof and easy admission of evidence make defending a complaint challenging.

- Given the increase in the potential for significant negative consequences resulting from a disciplinary action, psychologists may wish to encourage their professional association to seek changes in the state's administrative procedures act to increase the burden of proof or otherwise offer greater due process protection in such procedures.

### **Administrative Ruling:**

At the conclusion of the hearing, the Finder of Fact may in some states immediately rule in favor of the Board or the psychologist. In other states, the Finder of Fact may not rule immediately, and may develop a written ruling that will be made available at a later date. In either case, the psychologist will receive a written ruling, or finding of fact, from the adjudicatory body. In some states, the ruling may be immediately binding, and can be enforced without an endorsement or acceptance of the finding by the actual Board. In other states, the finding is not official and enforceable until the Board has endorsed or accepted the adjudicatory body's ruling or creates its own ruling.

### **Key Points**

- After an administrative formal hearing and the findings of fact and conclusions of law are reviewed, a finder of fact will make a ruling. The ruling will be written and may take effect immediate or may occur at a later date.

- The ruling, once handed down, may be enforceable immediately, or may require endorsement or acceptance by the Board; check your state Board's rules and procedures.

### **Appeal From an Administrative Ruling**

The final ruling of an administrative hearing may be appealed for review by an administrative court (see, e.g., Me. Rev. Stat. Ann. tit. 5§10051 (1997)) or regular civil court of the state. This will not be a new hearing about whether a psychologist, in fact, violated the law or regulations. Instead, the court looks to see if all the relevant procedures were followed, and the outcome reasonable, based on the evidence presented. This does not mean that the appeals court will look at the relevant procedures and apply civil law to them. It only will review the proceedings to see if the relevant administrative law was followed appropriately.

As mentioned, this may be the place to raise any issues of possible bias on the part of licensing board members, for example, if they have participated in both investigative and adjudicative activities. Sometimes an attorney for the psychologist may allege to the appeals court that a particular administrative procedure is somehow in violation of public policy or other law. However, this is a difficult argument to make. Even when an appeals court does overturn an administrative decision, the remedy may only be to send it back to the administrative decision maker for another hearing.

## **Key Point**

- The right and scope of appeal to an adverse administrative ruling varies by state – check your local state laws and regulations.

## **Summary**

In summary, this document has been an attempt to provide practicing psychologists with a basic understanding of the disciplinary process. Clearly, disciplinary actions are complicated, vary from state to state, and provide less due process than criminal or civil proceedings. Because of the potential impact of disciplinary actions, the most important actions a practitioner can take are twofold. From a preventive perspective, psychologists should always make every effort to conduct an ethical and risk-managed practice. This is an active and continuing process. However, in the event of a complaint before a licensing board, in addition to being knowledgeable about the disciplinary procedures in your state, the most important and immediate action to take is seek experienced legal consultation.

The current health care marketplace has raised the stakes for a psychologist in a disciplinary hearing. Any disciplinary action can have a significant impact on psychologists' professional and practice opportunities. Practitioners need to become aware of the procedures followed in their own state well in advance of any disciplinary involvement. Psychologists should also be aware of the severe impact their unethical

behavior may have on their patients. Although the impact on an individual of disciplinary procedures by a licensing board can be stressful and have long-term consequences, many psychologists are unaware of the disciplinary procedures in their state and the administrative law that governs them. This paper has presented basic factual information covering disciplinary procedures by licensing boards and has attempted to walk psychologists through the process step by step. This information is general since laws and procedures differ from jurisdiction to jurisdiction. This document encourages individuals to become knowledgeable about law and procedures used in their states in advance of any complaint lodged against them.

One final note: Psychologists should not perceive themselves as helpless in the disciplinary process. An informed psychologist best protects patients by proactively managing the legal and ethical risks inherent in professional practice. On the one hand, no one wishes to see psychologists who have violated the law continue to practice without appropriate sanctions and remediation. This is the function of the licensing boards. On the other hand, no process is without flaw, and knowledge is necessary to navigate the process and to advocate for change when the process breaks down. Psychologists need to continue learning more about how their state boards function and their rights under administrative law as they are continuing their education in providing ethical and psychological services to consumers. We hope that this document is helpful in this regard.

**Resources**

**American Psychological Association (APA)**

Practice Directorate

Legal & Regulatory Affairs Program

750 First Street, NE

Washington, DC 20002

202-336-5800

202-336-5797 (fax)

<http://www.apa.org/practice>

[praclegal@apa.org](mailto:praclegal@apa.org)

**American Psychological Association Insurance Trust (APAIT)**

750 First Street, NE

Washington, DC 20002-4242

800-477-1200

202-336-6170

<http://www.apait.org/main.htm>

**Association of State and Provincial Psychology Boards (ASPPB)**

P.O. Box 4389

Montgomery, AL 36103

800-448-4069

6/27/2003

<http://www.asppb.org>

**National Register of Health Service Providers in Psychology**

1120 G Street, NW, Suite 330

Washington, DC 20005

(202) 783-7663

<http://www.nationalregister.org>

## **References**

Association of State and Provincial Psychology Board (1995). Professional Conduct & Discipline in Psychology. Washington, DC: APA

American Psychological Association (December, 2002). Ethical Principles of Psychologist and Code of Conduct. Washington, DC: Author. (See <http://www.apa.org/ethics/code.html>).