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Defending Professional Licensure Complaints

I. The Professional Licensure Complaint

Depending on the state, a professional's first knowledge of a complaint filed against him or her with the state's licensing board could come from a phone call or surprise visit from an investigator. It could be a written complaint provided to the professional or a confidential one. The potential implications of a licensure complaint are broad and concerning to every professional – from fines and education requirements to limitations on practice and suspension or revocation of the license. Further, how the insured/client handles every stage of the licensure investigation can significantly impact pending and future malpractice claims arising out of the same or similar conduct.

A. The Complaint

1. Initial Investigation

After the state licensing board or agency receives a complaint against a professional, it will typically assign an investigator to the matter. The investigator may be experienced and knowledgeable about the profession involved, or the investigator could be more of a pseudo law enforcement type. If the latter, the investigator often engages the assistance of an expert in the field to assist with the investigation.

2. Spoken to Investigator

The first question for your client/insured upon receipt of a licensure claim or defense assignment is: have you spoken with an investigator? If the answer is yes, the conversation starts there. What did you discuss? What did the investigator tell you about the complaint? Did you provide any documents? If the answer is no, proceed with discussing the complaint with your insured/client and initiate communication with the investigator or point of contact from the licensing Board. Even if your client has already spoken to the investigator about the complaint, counsel should set a call or in person meeting with the investigator as soon as possible following notice of the complaint. Because the investigators are not typically the decision-makers, and are charged with compiling information, counsel should do a lot of listening about what the complaint is, particularly in states where the complainant is confidential and the professional does not receive a copy of a written complaint. Counsel should

always ask the investigator if he or she can provide any additional information or documentation, and what the investigator needs from your professional client.

1. Report to Carrier

Upon receipt of the Complaint, defense counsel or the professional should immediately report the complaint to their insurance carrier. The assigned claims specialist will determine if it will provide a defense to the professional based on the information available regarding the complaint. What considerations does the claims specialist look at when determining if it will provide coverage?

Some professional liability policies will have coverage specifically for licensure or disciplinary proceedings. Often a separate and/or different coverage amount is provided in the policy, and it is typically limited to defense costs. It is also possible that coverage will be provided if the licensure complaint is related to pending or threatened litigation.

2. Typical Complaints

Many complaints arise out of allegations of gross negligence, gross incompetence, repeated routine negligence, refusing professional services based on race, creed, color or sexual orientation, providing services beyond the scope of your profession, improperly releasing confidential information, being convicted of a crime, being sexually abusive or practicing under the influence of drugs or alcohol.

However, the more typical complaint arises out of personal differences that may exist between the professional and their client. A client who doesn't want to spend the money to sue, can't find a lawyer to file suit or is simply looking for an opportunity to punish or harass the professional, may simply file a disciplinary complaint instead.

3. Responding to the Complaint/Requirements

Unlike a lawsuit, the complaint itself is not always provided to the client. As such, the formality of providing an Answer or response to the complaint is not the norm and can be a challenge. Instead, much like documentary discovery, the professional client is frequently asked to provide documents, requested by the investigator for the services in issue. The documents requested may be either very narrow or broad in scope, depending on the services in issue that is the subject of the complaint. The request often does not come in the way of a formal item by item demand but will either be made by informal letter request or by phone call.

Once documents are provided to the investigator, they will review the documents and determine if additional information or investigation is required. After reviewing the documents, the investigator may also determine that the complaint cannot be sustained and therefore, must be dismissed. While professionals and their counsel must be careful with investigators, they must also be cooperative. Always keep in mind that the investigators can help you and your client by dismissing the complaint or offering a favorable recommendation to the Board and making it difficult for the investigator to perform his or her duties will certainly not help your professional client's chances for obtaining a dismissal of the disciplinary complaint.

To the extent the investigator determines that there is sufficient evidence to support the complaint, the investigator will issue formal charges and set down a date for a hearing. At this point, depending on the charges, the information to support the charges and the professional's desire to fight the charges, defense counsel will either prepare for the hearing or make efforts to negotiate a favorable resolution.

In other jurisdictions, after reviewing the documentary evidence, the investigator will simply issue charges and advise of the penalty being levied. A hearing will not be set unless the professional decides to fight the charges.

B. Resolution/Outcomes

1. Consent Agreement

After charges are issued and/or a penalty is proposed, defense counsel can attempt to negotiate a more favorable resolution than the proposed penalty. Investigators are typically willing to engage in such negotiations. If a resolution can be agreed upon, it will often require that the professional agree to certain admissions and acknowledgements regarding the complaint in exchange for a lesser agreed upon penalty. This is formalized in a written consent agreement executed by the professional and a member of the professional disciplinary agency.

2. Memorandum of Understanding

In some states, the professional Board may offer a Memorandum of Understanding or a hybrid agreement. The professional and the Board might agree on the facts but not the penalty or punishment. In this scenario, the Board and professional streamline the hearing process by stipulating to facts about the conduct, and the professional appears before the Board to beg for forgiveness and otherwise demonstrate to the Board actions the professional has taken in its profession and personal life to warrant the Board to be lenient when issuing its penalty.

3. Formal Hearing

A formal hearing is typically held before a panel of several members of the applicable state board for the profession in issue. In the hearing, evidence will be presented by the prosecuting attorney and defense counsel will present evidence in response on behalf of the professional. A transcript will be taken of the hearing and the rules of evidence used may be less formal than the rules of evidence at a trial. In support of its defense, the professional may present witnesses, have the right to cross-examine witnesses and retain an expert to testify at the hearing on behalf of the professional. Unlike a trial, counsel and witnesses should be prepared to field questions from the Board.

Ultimately, the panel will issue a written decision of its findings determining guilt with respect to the individual charges. If guilt is found, the decision will also frequently include a recommendation for the penalty to be imposed. Like arbitration, the decision does not have to be unanimous but can be based on the determination of a majority of the panel. The standard used by the panel to reach its determination is typically based on a preponderance of evidence.

Thereafter, the finding and recommendation of the panel will be referred to the state licensing board for ultimate determination of the penalty and the professional will have the opportunity to be present at the meeting. At that time, the licensing board will issue a final decision and order which will include its determination on the guilt of the professional and will set down the penalty to be imposed.

4. Revocation/Suspension/Fines/Reinstatement

The most severe penalty is revocation of the professional's license. With such a penalty comes significant angst and anxiety for the professional because they lose their ability to earn a living in their chosen profession. For this reason, if revocation is a potential penalty, it may be worthwhile to negotiate a lesser penalty (such as a suspension or a fine) and enter into a consent agreement in order to avoid the uncertainty of a hearing.

Suspensions may also be issued for various lengths of time from several months to several years. During this time, a certain portion of the suspension may be stayed in connection with probation. For example, the professional may be issued a two-year suspension with 18 months of that suspension stayed subject to the professional being on probation during the 18-month period of time. During the probationary period of time, the professional may be required to attend ethics or educational classes for that profession.

Fines may be issued in conjunction with either revocation, suspension or by itself and could vary from negligible up to \$10,000 or more.

Even after revocation, a professional can apply for reinstatement. Typically, professionals can apply for reinstatement after several years of being away from the profession and after making overtures at showing they have made amends and changes to address the reasons that the license was revoked. This too could include educational or ethical classes. Similarly, if the license was revoked for either alcohol or drug abuse, it could involve demonstrating that the individual participated in drug or alcohol rehabilitations programs or counseling before being eligible for reinstatement.

5. Public/Private

Typically, records and information are available to the public as a matter of public record. For this reason, it is important to consider whether the order issued or agreed to will be public or private. For professionals, a public reprimand might be worth opposing, while a private reprimand, even with a fine or continuing education could be appealing, depending on the circumstances.

In some states, professionals can voluntarily surrender their license when the professional believes that alcohol or drugs have affected their ability to carry out the duties of their profession so long as it has not adversely impacted a client. The Board may accept the voluntary surrender without penalty so long as the professional complies with conditions before they can be reinstated. The professional may apply for reinstatement after demonstrating that they have gone through rehabilitation or counselling to address these issues. When such a scenario arises, due to the sensitive, medical and personal nature of the information, the suspension and related information would be kept confidential.

II. Related Malpractice Litigation and Claims

A. The Licensure Complaint After A Resolved Malpractice Claim

1. Benefit/Detriment

If a related malpractice claim has resolved and a licensure complaint arises after or arose during the malpractice claim, it could prove to either be extremely helpful or problematic. In the event the malpractice case was tried, the testimony and the finding of either the judge or jury may be introduced at the hearing in the disciplinary matter. If the malpractice case was resolved by way of settlement, there would be no finding for the hearing panel to rely on in making its determination. However, deposition testimony obtained during the course of the litigation may still be used during the hearing which may be impactful since the investigator might not have otherwise obtained prior sworn statements from the professional in advance of the hearing had it not been for the malpractice action.

Depending on the testimony, it could serve to either help or hurt the professional at the hearing. This is a scenario where a hybrid agreement, if available, could be beneficial to the professional. Because testimony was taken in the malpractice case, the professional can likely agree to certain facts. By streamlining the hearing process, the professional can focus on requesting minimal disciplinary action, taking the position that retribution has been made in the form of settlement.

2. Confidentiality

A confidentiality provision in a prior malpractice settlement must be considered in a subsequent licensure matter. If the professional believes the details of the settlement could be helpful in negotiating a better resolution to the disciplinary action, it may be worth attempting to obtain consent to disclosing settlement details. On the other hand, the details of the settlement might be better left confidential, if the payment amount was large, there were multiple plaintiffs, or any other circumstances that would make the malpractice litigation appear worse and potentially color the view of the disciplinary action.

B. Handling the Licensure Complaint Concurrent with a Malpractice Claim

1. Move Forward Simultaneously or Seek a Stay

Malpractice lawsuits and licensure complaints are often filed contemporaneously or close enough in time that there is significant overlap. Many licensing Boards do not want to impact litigation and will be inclined to stay the proceedings while the litigation proceeds. Others proceed regardless of a lawsuit. Understanding the dynamic and options to your professional client are critical in evaluating all available strategies.

2. Different Standards

One challenge with handling a lawsuit and licensure matter simultaneously is the different standards applicable to each. In a licensure complaint, ethical rules, administrative regulations, and the catch-all “protection of the public” standard will often govern. On the other hand, a malpractice suit involves the standard of care and related causes of action. Defense

counsel and claims specialists must have a well-thought out approach for communicating these differences to their insured/client and developing their strategy for handling.

3. Different Exposure

On a basic level, a lawsuit is about money, and a licensure complaint is about the ability to engage in professional duties on behalf of clients. While fines are possible in disciplinary proceedings, the potential to lose one's license or face a suspension carries the most significant risk for the professional. For counsel, this can present competing interests between the carrier and the client and balancing how decisions in one area affect the other, and vice-versa, is a unique task.

4. Resolution

A lawsuit and a disciplinary proceeding will rarely resolve at the same time. Thus, the resolution of one will undoubtedly impact the other. As discussed previously, confidentiality provisions in settlement agreements must be carefully considered and can be beneficial or detrimental depending on the circumstances. Likewise, whether a disciplinary order is public or private can significantly impact ongoing litigation.

5. Reporting Requirements

Some states have reporting requirements for lawsuits. While most licensing agencies will ask about claims and lawsuits, the professional may not have to provide details about the claim and settlement. However, certain states have reporting requirements based on the amount of the settlement, and that can be helpful in resolving a malpractice case. Insurers and their insureds can use the reporting requirement as a line in the sand and force settlement for an amount just under the reporting requirement. Likewise, professionals can attempt to include licensure complaints in settlement agreements and releases. While an existing complaint with a licensing board probably can't be withdrawn, a future complaint can be released in many states.

III. Coverage Considerations

A. Coverage Availability and Limits

As discussed, many professional liability insurance policies will include coverage for disciplinary action and licensure complaints or it may be available as a rider or option coverage. When coverage is provided under the policy, the coverage is typically limited to defense costs up to a limit.

B. Does a Licensure Complaint Constitute a Claim Under the Policy?

It depends. A professional who receives notice of a licensure complaint should always notify his or her malpractice insurer to be safe.

C. Impact of Resolution on Coverage in Associated Malpractice Case

In the event the disciplinary matter is resolved first, coverage could be impacted based on findings of a hearing or admissions made in a consent order. If the professional admits to some facts which adversely impact coverage, the carrier could rescind coverage or issue a reservation of rights in the malpractice action based upon the admissions made. For this reason, to the extent you are able to stay the disciplinary proceeding, it may be helpful to resolve it after the malpractice case is resolved.

While it is true that admissions made during the malpractice case may also impact coverage for the defense of the licensure matter, insurance companies provide a defense for the licensure matter but do not provide indemnification for fines levied pursuant to an adverse decision. Therefore, if a malpractice action resolves first, the professional could stand to lose defense only in the licensure matter. However, if the licensure matter resolves first and adversely impacts coverage for the related malpractice action, the professional could lose both defense and indemnification being provided by the carrier.