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ARTICLE: PROFESSIONAL MISCONDUCT: NEW YORK'S UNIFIED SYSTEM FOR PROFESSIONAL MISCONDUCT AND DISCIPLINE

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TEXT:

[*15] When advising clients who are licensed professionals about the consequences of judgments for malpractice, convictions for criminal activities or a failure to meet child and spousal support obligations, few practitioners take into account the consequences that may result with respect to the ability of the client to retain his or her professional license. In addition, few practitioners are aware of the procedures that come into play when an administrative complaint is made against any licensed professional other than attorneys. These rules are technical and must be understood in planning a defense on behalf of any licensed professional. In this article I will outline the procedures involved and review some of the current legal issues that a practitioner must be aware of when counseling a client.

The Unified System

New York has a Unified System for professional misconduct and discipline that is administered by the state Board of Education. n1 This administrative structure provides remedies and sanctions that are in addition to controls and standards imposed by the criminal law system and civil judgments against professionals for malpractice. Of paramount importance should be the recognition that there can be serious consequences for any licensed professional if there is a conviction for criminal activity, excessive judgments entered for professional malpractice or failures to meet child or spousal support obligations, all of which can result in the suspension of a license and under certain circumstances discussed below, revocation of a license and the imposition of significant fines. Conversely, findings of professional misconduct at the administrative [*16] level maybe admissible in various types of civil litigation n2 as well as in additional administrative proceedings before the state Board of Education.

n1 B B 6504, 6506 and 6507 Education Law.

n2 For a general discussion of the applicability of the doctrines of res judicata and collateral estoppel see *David v. Biondo*, 92 N.Y. 2d 318 (1998); *Ryan v. New York Telephone*, 62 N.Y. 2d 494 (1984); *Stevenson v. Goomar*, 148 A.D. 2d 217 (3d Dept. 1989) motion for leave to appeal dismissed 74 N.Y. 2d 945 (1989). For a discussion as to admissibility under CPLR article 31, see *Aliano v. Lusterman*, 187 misc. 2d 699 (Sup Ct Nassua Cty 2001; aff'd 731 N.Y.S. 2d 738 (2d Dept. 2001)

The system involves supervision of 38 professions as defined by the Education Law. The effected professions are:

- Acupuncture
- Architecture

- Athletic Training
- Audiology
- Certified Shorthand Reporting
- Chiropractic
- Dentistry (dentists, dental anesthesia/sedation, dental hygienists, dental assistants)
- Dietetics-Nutrition
- Engineering
- Interior Design
- Land Surveying
- Landscape Architecture
- Massage Therapy
- Medicine (physicians, physician assistants and specialist assistants) n3
- Midwifery
- Nursing (registered professional nurses, licensed practical nurses, nurse practitioners)
- Occupational Therapy (occupational therapists and occupational therapy assistants)
- Ophthalmic Dispensing
- Optometry
- Pharmacy (pharmacists and pharmacy establishments)
- [*17] - Physical Therapy (physical therapists and physical therapist assistants)
- Podiatry
- Psychology
- Public Accountancy
- Respiratory Therapy
- Social Work
- Speech-Language Pathology
- Veterinary Medicine (veterinarians and veterinary assistants)

n3 Supervision and disciplinary proceedings administered by the New York State Department of Health.

a. Defining Professional Misconduct

Professional misconduct is defined by §§ 6509 and 6509(a)-(c) of the Education Law and the rules of the Board of Regents. n4 The statutory definitions of professional misconduct apply to all regulated professions. Under the statute, professional misconduct includes:

- Obtaining a license fraudulently.
- Practicing any profession
 1. fraudulently
 2. beyond its authorized scope
 3. with gross incompetence
 4. with gross negligence on a particular occasion, or
 5. with negligence or incompetence on more than one occasion.
- Practicing under the influence of alcohol or drugs, or while physically or mentally impaired.
- Being convicted of an act which constitutes a crime under the laws of New York or any other state n5 or Federal Law.
- Refusing to provide professional service to a person because of that person's race, creed, color or national origin.
- Permitting or assisting an unlicensed person to perform activities requiring a license.
- Practicing a profession while the license is suspended.
- Committing unprofessional conduct.

n4 8 NYCRR, Part 29

n5 If under the laws of a state other than New York, the act must also constitute a crime under New York state law. *See Greenwald v. Board of Regents*, 144 A.D. 2d 841 (3d Dept. 1988). *Compare Dragan v. Commissioner of Education*, 142 A.D. 2d 846 (3d Dept. 1988); *Matter of Ricci v. Chasin*, 220 A.D. 2d 828 (3d Dept. 1995)

[*18] Unprofessional conduct is defined by the rules of the Board of Regents. The general provisions of the rules apply to all regulated professions. In addition, there are rules that define unprofessional conduct within the context of the specific activities of each of the regulated professions. The general provisions defining unprofessional conduct include:

- Willfully making or filing a false report required by the Education Law.
- Failing to release or provide copies of records on request.
- Releasing confidential information without authorization.
- Performing professional services that haven't been authorized.
- False advertising.
- Exercising undue influence on a patient or client.

Professional misconduct also includes being in arrears in the payment of child and/or spousal support obligations.

b. How a complaint against a licensed individual is handled

Complaints are investigated by the Education Department. An investigator may contact the licensee seeking an interview and an opportunity to inspect the licensee's records. Sworn statements are taken from the complainant(s). The results of an investigation are referred to a professional conduct officer designated by the Board of Regents. State Boards for each of the regulated professions, also appointed by the Board of Regents, assist the professional conduct officer. In an appropriate case, and upon recommendation of the professional conduct officer, disciplinary proceedings are initiated by the Education Department. The licensee must be served with notice and with a statement of charges that allege professional misconduct. The charges must concisely state the material facts but will not include the evidence by which the charges are to be proved.

1. Adversary Proceedings

Adversary proceedings n6 are conducted by a hearing panel composed of three or more members, at least two of whom must be members of the [*19] appropriate State Board as well as one member who is designated a public representative. n7 Most hearing panels are composed of five members, four of whom are members of the applicable State Board. The proceedings are under the control of a chairperson appointed by the Executive Secretary for the appropriate State Board. The Education Department designates an Administrative Officer, who must be an attorney admitted to practice in New York. The Administrative Officer has the authority to rule on motions, procedures and other legal objections, but the Administrative Officer is not entitled to vote. An attorney for the Education Department acts as prosecutor. While the panel is not bound by the rules of evidence, any determination of guilt must be based on substantial legal evidence. A stenographic record of the hearing is made. As noted earlier, the licensee is entitled to notice of the hearing, is entitled to file an answer to the charges prior to the hearing and is entitled to be represented by counsel. A licensee is also entitled to present witnesses and evidence on his or her behalf and to issue subpoenas as provided in the CPLR. Upon conclusion the hearing panel must render a written report stating (1) its findings of fact, (2) a determination of guilt on each charge and (3) in the event of a determination of guilt, recommend a penalty. In making a determination of guilt, at least two out of three of the voting members of the hearing panel must vote for such determination. n8 The licensee is entitled to a copy of the hearing panel report.

n6 Expedited procedures are provided for in cases involving violations which are defined as professional misconduct of a minor or technical nature. *See* § 6510 (2) Education Law.

n7 The public is a person who is a consumer of the services provided by the license. § 6508 (1)(b). *Compare* § 6510 (3)(b) Education Law.

n8 Where there is a panel of five, at least 4 must vote in favor of a finding of guilt.

Administrative reviews, which are in essence an appeal, are automatic. A Regents Review Committee conducts the first review. A Regents Review Committee consists of three members. At least one must be a Regent. The review is based exclusively upon the stenographic transcript of the hearing and the report of the hearing panel. No new evidence is admissible during the review process. The parties are entitled to be represented by counsel and they may file statements concerning the hearing and the report of the hearing panel. The Regents Review Committee renders a written report that is forwarded to the Board of Regents for consideration along with the stenographic transcript of the hearing and the report of the hearing panel. The Regents Review Committee can recommend a penalty that is different from that [*20] contained in the report of the hearing panel. The Regents Review Committee can also order a new hearing if it determines that there were technical or legal mistakes made by the hearing panel. Final action in the form of an order is taken by the Board of Regents which must determine if the licensee is guilty or not guilty on each charge and shall decide on whether or not to impose a penalty. Any determination by the Board of Regents requires an affirmative vote of a majority of all the members of the Board of Regents. If the Board of Regents disagrees with any finding by the hearing panel that the licensee is not guilty, the matter is automatically remanded for a new hearing and the finding of the new hearing panel that the licensee is not guilty is final. The licensee is entitled to a copy of the Board's order. Decisions of the Board of Regents are subject to review under article 78 of the CPLR before the Appellate Division of the Third Judicial Department.

2. Direct Referrals

Two types of cases are referred directly to a Regents Review Committee. They are:

a. Cases involving professional misconduct by reason of prior criminal convictions or administrative violations. n9

[*21] b. Referrals to the Board of Regents by a court pursuant to § 245 (c) of the Domestic Relations Law or § 458 - b of the Family Court Act arising from findings that a licensee is in arrears in payment of child support, spousal support or combined child support and spousal support. n10

n9 See § 6509 (5) Education Law:

"(5) (a) Being convicted of committing an act constituting a crime under;

(i) New York State law or,

(ii) Federal law or,

(iii) The law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York State law;

(b) Having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state;

(c) Having been found by the commissioner of health to be in violation of article thirty-three of the public health law.

(d) (Added, L 1984) Having his license to practice medicine revoked, suspended or having other disciplinary action taken, or having his application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state."

n10 See § 6509-b (1) and (5) Education Law.

In cases involving professional misconduct by reason of criminal convictions or administrative violations, the Regents Review Committee acts as a hearing panel. The licensee's rights are essentially the same as those discussed above in Adversary Proceedings. While the licensee has the right to file an answer, affidavits, briefs and offer sworn testimony, there is a significant limitation. Evidence presented is limited to the issue of any penalty to be imposed. The licensee may not offer evidence seeking to disprove the prior factual findings of criminal conduct or administrative violation. n11 Without prejudice the licensee can also make a recommendation to the Regents Review Committee as to an appropriate penalty. A stenographic record of the hearing is made. Upon completion of the hearing, the Regents Review Committee issues a written report that is then reviewed by the Board of Regents in the same manner as any other report from a Regents Review Committee. In an appropriate case, in lieu of referring the matter to the Board of Regents, the Regents Review Committee can refer the matter to a hearing panel for further proceedings. n12

n11 *Compare* § 6510 (2) (d) and § 6510 (4) (b) Education Law.

n12 § 6510 (2) (d) Education Law.

Where a court refers a matter as prescribed by statute citing as unprofessional conduct arrearages for child and/or spousal support, a Regents Review Committee is required to meet within a prescribed time frame for the sole purpose of determining if payment of the arrearages has been made. The only evidence that can be considered are certified checks made to the proper party or a notice issued by the court or by the support or collection unit where an order for support is payable indicating that payment in full has been made. No evidence as to the appropriateness of the underlying order can be considered. n13 The licensee is entitled to notice of the hearing and is entitled to representation by counsel. If the licensee fails to provide proof of payment, his or her [*22] license is automatically suspended and remains suspended until such time as the Regents Review Committee receives notice from the court that payment in full has been made. n14

n13 § 6509-b (2) Education Law.

n14 § 6509-b (3) Education Law.

c. Penalties that can be imposed

The penalties that can be imposed on any licensee found guilty of unprofessional conduct are:

1. Censure and reprimand
2. Suspension of license
 - a. wholly, for a fixed period of time
 - b. partially, until the licensee successfully completes a course of retraining in the area to which the suspension applies
 - c. wholly, until the licensee successfully completes a course of therapy or treatment prescribed by the Board of Regents
3. Revocation of license
4. Annulment of license or registration
5. Limitation on registration or issuance of any further license
6. A fine not to exceed \$ 10,000, upon each specification of charges of which the licensee is found to be guilty n15
7. A requirement that a licensee pursue a course of education or training
8. A requirement that a licensee perform up to 100 hours of public service, in a manner and at a time and place as directed by the Board of Regents.

More than one penalty can be imposed for any one or more acts of professional misconduct.

n15 Any fine so imposed may be sued for in an action brought by the Attorney General. In such an action, the findings of the Board of Regents are admissible evidence and are conclusive proof of the penalty assessed.

Practical Considerations

Cooperation with the Department of Education during the [*23] investigative phase is most important. In many cases the licensee's explanation will suffice to resolve the complaint in an informal manner. The licensee is required to cooperate with requests by investigators to inspect records required by law. Violations involving professional misconduct of a minor or technical nature can be resolved using expedited procedures. n16 Minor or technical violations are defined to include "isolated instances of violations concerning professional advertising n17 or record keeping, and other isolated violations which do not affect or impair the public health, welfare or safety." n18 First time minor or technical violations can be punished by an administrative warning the terms of which are not an adjudication of guilt and cannot be used as evidence of guilt. Subsequent instances of similar violations occurring within three years of the original administrative warning are subject to a hearing before a violations panel of the appropriate State Board that has the authority to impose fines of up to \$ 500 for each violation. Even more serious charges can be settled without the need for a formal determination of guilt.

n16 B 6510 (2) a-c Education Law

n17 Rules governing advertising are found at 8 NYCRR B 29.1 (b) 12 (ii - iv).

n18 B 6510 (2) a Education Law

The costs involved in the investigation and disposition of any claim against a licensee can be significant. One court has held that proceedings before the Board of Education for professional misconduct are not automatically covered by malpractice insurance policies. n19 The licensee should be made aware of this reality as early as possible.

n19 *Revisner v. Vigilant Insurance Co.*, 138 misc 2d 542 (Sup Ct Westchester Cty 1987)

During any direct referral proceeding before a Regents Review Committee, the licensee has the right to present evidence and provide written statements. The licensee also has the right, but not the obligation, to testify on his or her own behalf. When so testifying, the licensee is subject to cross-examination by the prosecutor. In any proceeding under the Education Law, the licensee has the right to challenge jurisdiction.

In all disciplinary proceedings before the Board of Education, a Regents Review Committee and the Board of Regents, the record and [*24] reports are normally considered public information. n20 However, files of the Department of Education relating to the investigation of possible instances of professional misconduct are confidential and not subject to disclosure except upon an order of a court in a pending action or proceeding. n21 Decisions of the Board of Regents in professional misconduct proceedings are reported and are available through the Board of Education and can be cited as precedent.

n20 B 6510 (1) e Education Law. Summaries of disciplinary cases since 1994 are available online at www.op.nysed.gov/raresearch.htm

n21 B 6510 (8) Education Law

Each licensed profession is subject to situation specific rules and regulations promulgated by the Board of Regents that define professional misconduct unique to a given profession. When advising a licensee the practitioner should familiarize himself with these rules and regulations. n22

n22 *see* 8 NYCRR B B 29.2-14

Conclusion

Disciplinary proceedings for professional misconduct are a part of a tri-part system for the regulation of professional activities in New York. Determinations made by the courts and the Board of Education have the potential to impact the licensee's ability to retain his or her professional standing and this must be considered whenever a practitioner counsels a licensed professional.