Due Process Procedures in Licensing Board Hearings

By

David L. Shapiro, Ph.D.

Due process refers to the basic legal rights guaranteed to us by the Fourteenth Amendment to the United States Constitution. All administrative laws and regulations provide certain procedural rights. Any disciplinary proceeding must provide some due process; the question is how much. In fact, administrative law provides fewer due process protections than either the civil or criminal law.

Right not to testify against oneself

In criminal law, the Fifth Amendment to the United States Constitution indicates that no individual has to say anything which would incriminate himself/herself. Out of this grows the famous "right to remain silent". When a police officer states to an individual that they have the right to remain silent and what they say can be used against them in a court of law, the implication is clear that what one does not say cannot be used against you. A refusal to talk to authorities cannot be held against you, nor used to presume guilt. In the criminal justice system, a defendant cannot be forced to testify and the jury cannot use a refusal to testify as evidence of guilt. Courts have very strictly interpreted this. Clearly, in criminal cases, since the stakes are so high, the defendant has the most protections. The least due process protections occur in administrative proceedings, of which licensing board hearings are one. Refusal to testify can be used as evidence of the violation of the administrative rules and the hearing panel can often find that the psychologist did violate the rule, merely by his/her refusal to testify, or to put it another way, the exercising of one's Constitutional rights results in a hearing panel holding one in violation of the Psychology Licensing Act. The refusal to answer questions in an administrative hearing will be treated as equivalent to an admission of wrongdoing.

Right to obtain and challenge the state's evidence and witnesses

In criminal law, the prosecution's entire case file, with the exception of internal memoranda (sometimes called case impression memoranda), are available for legal discovery. Defense counsel has the right to examine all of the materials and share with his/her experts all such materials. There is no such obligation on the part of licensing boards. In other words, if the board has "a mixed bag" (some witnesses indicating that the psychologist engaged in wrongdoing and others stating that the psychologist did not) the board can suppress the exculpatory evidence and not provide it to the defense. In administrative law, the state has the discretion to decide what to share and what not to share and the defense may well be at a disadvantage because they do not have the entire file and do not know who all of the witnesses might be. The state is under no obligation to tell the defense who the witnesses might be. While this does vary from state to state, generally licensing boards are not required to release their file until the bringing of formal charges. Unlike criminal trials, very often the defense will not know who the witnesses are until the time of the actual hearing. In criminal law, the defendant has the right to know his/her accusers. The defense then can challenge them based on credibility or lack of credibility of their proposed testimony. In administrative law, though this does vary from state to state, the psychologist may not know who made the accusation. Boards insist that this secrecy is necessary in order to keep the psychologist from altering his/her records, but where do the individual Constitutional rights of the psychologist enter the picture? Are we totally deprived of our Constitutional rights when accused of some wrongdoing in front of a licensing board? Keep in mind that it is entirely possible that the alleged wrongdoing is totally spurious. When a psychologist does not know about the material which will be presented against him/her until the time of the trial, he/she may not have sufficient time to prepare a defense.

Hearsay evidence

Hearsay evidence is excluded, for the most part, in criminal trials except under very narrow circumstances. In administrative law, hearsay is allowed in and witnesses are allowed to testify regarding what other people told them about the defendant.

Prior bad acts

This refers to previous crimes with which the defendant has been charged or convicted. These are generally excluded in criminal trials as prejudicial. The prosecution, in other words, must make their case based on evidence in the current situation. The prosecution can only introduce what are called prior bad acts if the defense somehow "opens the door" or there is a clear "pattern", but what is and is not a pattern is defined very narrowly and strictly in criminal proceedings. In administrative law, everything can come in.

The appellate process

In criminal cases, if the defendant is convicted, he/she can always appeal. An appellate court will review the records, hear oral arguments and can sustain or remand for a new proceeding. If reversed and remanded, the defendant is entitled to a new proceeding. In other words, the appellate decision is binding upon the trial court. In an administrative hearing, the defendant psychologist may appeal the board's decision to the Administrative Law Judge, who will hold a hearing, but the opinion of the Administrative Law Judge can be accepted, rejected or modified by the board. Essentially, then, the board is serving as both prosecutor and judge and the board has the final say. Serving in these two roles would clearly be a dual relationship prohibited by the A.P.A. Code of Ethics. The defendant can then take the decision to a regular civil court and sue the board. However,

the board as a state agency enjoys sovereign immunity. Courts have recognized a great amount of discretionary authority on the part of boards and the defendant psychologist would actually have to prove that the board was unequivocally acting in bad faith. This basically amounts to the psychologist needing to prove that the board ignored and distorted evidence; he/she would have to demonstrate that there was "not a scintilla of evidence probative of the board's position". This would be very difficult for any defendant psychologist to prove.

Standard of proof required for conviction

In criminal cases, the standard of proof is beyond a reasonable doubt; if a trier of fact in a criminal case, that is a judge or a jury, still entertains any reasonable doubt that the defendant committed the crime, they must acquit him. On the other hand, in licensing board hearings, the board only needs a preponderance of evidence, which is defined as "slightly more certain than not". Considering the fact that the Board brings the charges, does not have to provide all of the evidence to the defense and decides the outcome, that preponderance standard is pretty easily met.

The investigations most often are conducted by non-psychologists, who have little or no training in mental health and frequently have no idea what the more subtle psychological issues may be. These investigators frequently will bend over backward to avoid overlooking something that might be a violation. Interestingly, ethics committees generally use psychologists to review complaints against psychologists. A.P.A., for instance, will have the chair or the vice-chair of the ethics committee screen complaints to see whether or not, if proven to be true, they would represent clear violation of the Code of Ethics. This layer of expertise is frequently lacking in psychology licensing board proceedings. State boards, unfortunately, use rather vague phrases like whether or

not the psychologist "met the minimal standards of professional practice", or that the psychologist was "negligent" in carrying out their professional duties, with no definition of what these terms are.

Statute of limitations

Statutes of limitations exist in criminal law. There is only a certain period of time after the commission of a crime that an individual may be charged. This is not true for many licensing boards. Clearly, if a licensing board decides to charge a psychologist with something that happened twenty years earlier, the question arises whether or not the psychologist can prepare a defense based on events occurring so many years ago. Records may not be available, witnesses may have moved, be unavailable or may, in fact, have died. On other occasions, these previous behaviors may be resurrected to demonstrate a "pattern" of misconduct.

Recommendations

Let me finally talk about some recommendations that I would make, considering the fact that, in my opinion, there is the potential for significant deprivation of due process. First, encourage your state psychological associations to lobby for changes in the state administrative procedures. Offer greater due process protection to psychologists and increase the level of proof necessary from preponderance of evidence to, at the very least, clear and convincing evidence. Second, form coalitions with other professions who have equally arbitrary licensing procedures. Third, define terms more precisely, such as "competence", "minimal levels of practice", "negligent practice", etc. Fourth, expand the right of Discovery and the right to depose adverse witnesses. Fifth, limit licensing board investigations only to matters of which the psychologist has been accused. Currently, the board is allowed to "add charges" if during the course of their investigation they feel

that additional matters have come up. Sixth, define a reasonable statute of limitations, such that the psychologist is not required to defend himself/herself against matters that occurred many years ago and, seventh, Administrative Law Judges' findings should be binding, rather than advisory to boards.