

## Conviction of a Crime

### Avoiding Liability Bulletin – September 2018

Do you believe that a licensed mental health professional should lose his or her license (and perhaps a successful career) after the licensee has pleaded guilty or “no contest” to one charge of petty theft – the result of a shoplifting incident? What if the conviction was for the misdemeanor of driving under the influence of alcohol or drugs? What if the crime committed was the misdemeanor of simple battery – the pushing of a next door neighbor during a boundary dispute? What if the battery was against the licensee’s spouse? Should a former gang member with multiple convictions for armed robbery and residential burglary be allowed to obtain a license to practice psychotherapy? What if the licensee is convicted of the crime of failure to report child abuse or elder abuse? What about a conviction for insurance fraud or sexual contact with a patient? What if a licensee has failed to pay court-ordered child support – should his or her license to practice be suspended? Do these different offenses require different analyses and actions?

Licensing boards, and thus applicants for the license and those already licensed, may find themselves dealing with issues involving criminal law – that is, the commission of a crime – something that most practitioners think will not be affecting them. However, the national licensee population is diverse and numerous - and licensees suffer from the same faults, temptations, frailties, or “bad luck” as nurses, physicians, lawyers, accountants and politicians. Applicants for licensure must deal with criminal convictions that were committed in years past and that are now relevant to the issue of suitability for licensure – that is, to work with the public, for remuneration, and to provide mental health services in a competent and safe manner. Licensed persons will deal with this issue when a new or recent criminal conviction is disclosed to the licensing board – either by the licensee or by a clerk of the court. A failure to disclose a conviction, either by an applicant or an already licensed person, provides the licensing board with separate grounds to deny the application for licensure or to seek a suspension or revocation of a license already issued.

Whatever the situation, and whatever the specific crime alleged, the first priority for a licensee is typically to protect his or her personal and professional interests. Thus, for those already licensed, care must be taken to avoid a conviction (including a plea of *nolo contendere*, a/k/a “no contest”) wherever possible. As a former public defender, I can attest to the fact that many cases may be properly, ethically, and successfully defended even when the defendant is actually guilty of committing the crime alleged by the prosecution. One clear example of such a case is where the police obtain the evidence (for example, the marijuana, cocaine, or heroin) as the result of an unreasonable search – a not uncommon occurrence. Criminal charges may be dismissed following a motion to suppress the evidence based upon the bad search. Some cases can be won at trial, and others might be reduced to infractions. Competent and effective representation in the criminal matter is critical. An appeal of a verdict of guilty may delay enforcement action by the board and result in a reversal of the conviction. Although such appeals are rare, the continued viability of a successful private practice may warrant leaving no stone unturned – despite the financial burden of

pursuing a vigorous and thorough defense.

The standard language found in state statutes related to disciplinary action on the basis of the conviction of a crime (misdemeanor or felony) is that the crime must be substantially related to the qualifications, functions, or duties of the regulated profession. The interpretation of such a statute is critical. State licensing boards, some argue, seemingly consider all crimes to be related. But not all crimes are *substantially related* and the board may be prohibited by statute (as in California) from revoking or suspending a license on grounds of the lack of a good moral character or any similar ground related to character, reputation, personality, or habits. Licensing boards often lean toward finding a connection to the license since the media and the attendant public scrutiny, as well as their mission to protect the public, influences them to interpret the standard liberally or broadly. State law may require, as in California, that the licensing board develop criteria to aid it when considering the denial, suspension, or revocation of a license, to determine whether a crime is *substantially related* to the qualifications, functions, or duties of the profession. A vigorous defense, including the use of expert witnesses, is often necessary in order to protect against overreach by the board.

With respect to applicants for the license, it is important to remember that licensure is not a right, but rather, a privilege granted by the state. The state is expected to act with great care before issuing a license – and anyone with a criminal conviction will be scrutinized carefully. This does not mean that one criminal conviction, or more, will or should prevent an applicant from obtaining a license – whether on a probationary basis with terms and conditions or without condition or limitation. I assisted an applicant who had been a gang member and who had multiple convictions for crimes, including felonies. The applicant ultimately received a license because the board was convinced that complete rehabilitation was achieved and because the convictions were sufficiently aged. Had the board (staff) refused to issue a license, the applicant would have been entitled to an administrative hearing before an administrative law judge. With good representation and advocacy, much can be accomplished. Even though courts generally give deference to the judgments and determinations of administrative agencies, there are times when a board's overreach can and should be corrected by the court.

With respect to those already licensed, any new or recent conviction of a crime will likely have to be disclosed to the board – either immediately or upon renewal of the license (most, if not all, state laws require such disclosure). Convictions related to or involving alcohol or drugs are especially problematic for licensees, since the licensing board will look carefully at the licensee's possible problem with respect to substance abuse. Boards will usually be reluctant to take no action – they will at least investigate. Even where a license is not actually revoked or suspended, the probation imposed as a condition of continued licensure (and practice with the public) will contain rigorous terms and conditions regarding frequent drug or alcohol testing and treatment regimens. A conviction related to theft or fraud is also problematic for licensees since they relate to the honesty and integrity of a person who will be working with the public, some of whom may be vulnerable to exploitation. Practitioners who face this issue are often surprised to learn that crimes that are not

directly involved with patient care or professional business practices are nevertheless closely scrutinized by the licensing agency.

Many states have passed laws that expressly provide for license suspension for a licensee's failure to pay child support or for failure to pay state taxes owed, regardless of whether such actions result in criminal charges. The detailed provisions and the terms and conditions of such statutes vary from state to state. These kinds of statutes simply represent the public policy of the state and are examples of the principle stated above – that professional licensure is a privilege granted by the state – not an absolute right. Conviction of a crime that is clearly related to the qualifications, functions or duties of a mental health licensee, such as sex with a patient, failure to report child abuse, or insurance fraud, generally present little controversy as to the need for disciplinary action by the state. A single conviction for driving under the influence, possession of an illegal drug, or battery may present more arguable cases – depending upon the particular facts and circumstances involved.

Boards that have not published clear guidelines or rules as to what constitutes “substantially related to the qualifications, functions, or duties” of the license involved might fail in their efforts to take disciplinary action if and when a case is vigorously and thoroughly fought. When considering a criminal conviction, boards will typically consider such things as (but not limited to) the nature and severity of the crime, the harm caused to the public or a client, any prior criminal or disciplinary history in any state or territory, compliance with any probationary terms and conditions imposed by a court, the efforts made or actions taken to prevent recurrence, and the age of the prior criminal act(s). One of the most important things that boards look at is the degree of recognition and acceptance by a licensee of his or her prior wrongdoing. For many practitioners, the failure to readily admit to the prior wrongdoing or the harm caused to others will be the primary reason for a bad outcome.

For those who believe that licensing boards are overzealous in their denial of licensure or their imposed disciplinary action on the basis of the conviction of a crime, the most effective way for a profession to deal with such board overreach is through the legislative approach. Laws can be passed that impose limits on the board's ability to take action in particular situations (for example, but not limited to, misdemeanor convictions that occurred a number of years prior are “off-limits” to the board) or that define or specify what is meant by a conviction that is “substantially related” to the qualifications, functions, or duties of the particular profession involved. Even when a legislative effort is not successful (e.g., a bill dies), much benefit can be achieved by bringing the issue to public debate and by exposing government overreach and unfairness. Protecting hard-earned professional careers from arbitrary or overzealous state action is important and challenging – requiring bold and informed advocacy.

