

Common Mistakes to Avoid When Appealing a North Carolina Occupational Licensing Board Decision

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Ed. Note: This is the third in a series of three articles examining disciplinary and appeals processes in front of North Carolina professional and occupational licensing boards. See the first article here and the second here.

In North Carolina, the professional or occupational licensing board is responsible for preparing the official record of a disciplinary matter against a license holder.

This record is of primary importance to any future appeal and can be easily mishandled by those who do not understand its importance.

Like a bad reputation, a bad record will follow, haunt, and limit a licensee's options, including the options available to challenge or appeal the outcome of the board's decision. Even if a license holder has good facts and law on his or her side, the failure to properly create and preserve the record at the initial hearing can adversely affect the licensees' chances of success on appeal to the superior or appellate courts.

No license holder wants to see any of the following statements in a superior or appellate court decision regarding his/her case:

- "Petitioner waived the right to object to the procedures used by the board";
- "Petitioner offered no specific facts or evidence to support his positions";
- "Petitioner did not raise this argument during the hearing"; or,
- "Petitioner failed to meet his burden."

Many good cases have been lost on appeal due to the failure to properly create and preserve the record. Fortunately, a properly preserved record can be achieved by avoiding common mistakes.

Here are seven common mistakes people involved in a disciplinary action before a North Carolina occupational or professional licensing board should avoid:

Failing to contact legal counsel promptly

At times, professionals may wait to hire counsel based on whether or not their "malpractice" or "professional liability coverage" will "cover it." Waiting is generally a mistake. Whether or not you have insurance, you should contact a lawyer immediately, preferably one with experience in administrative law and/or professional license defense. Your attorney should be familiar with licensing boards and the disciplinary process.

A good defense attorney will be able to advise you as to what facts, evidence, and arguments should be presented to the board. A good attorney also can help craft responses to the Board's investigation that serve to protect your interests without disclosing confidential or privileged information. Having experienced counsel guide you through the initial stages of the disciplinary process may result in a quicker resolution of the matter and help you avoid a hearing before the board.

Failing to comply with deadlines

Failing to respond to a board notice, complaint, motion, or another pleading in a timely manner may result in a waiver of important legal rights. Missing a deadline may also result in sanctions or some other disciplinary action that may not have otherwise been imposed.

Many North Carolina licensing boards have rules that make failure to respond to a board notice, complaint, motion, or another pleading on time a violation of the board's rules, which can give rise to additional sanctions. Your legal counsel will take steps to ensure that all filing deadlines are met so that you are not barred from pursuing critical claims or defenses or otherwise found in default.

Failing to object to procedures used by the board

A board disciplinary hearing must be conducted in a fair and impartial manner. A license holder has the right to challenge the procedural fairness of the hearing held by the board. In other words, the license holder may not remain quiet in a board hearing, await the board's decision, and, if it is unfavorable, then attack the fairness of the decision based on procedural defects which were not brought to the board's attention during the hearing when, if they were in fact defects, they could have been corrected.

A professional licensing defense attorney will ensure that the procedures the board follows are fair and, if needed, will assert a timely objection to any procedures that violate the due process rights of the license holder.

Failing to file or object to pre-hearing motions

A licensee has the right to file and object to motions that are made before the disciplinary hearing. Certain motions must be made or objected to prior to the hearing. Filing timely pre-hearing motions, such as motions regarding the admission of evidence, motions to dismiss the complaint or certain allegations, motions for summary judgment when the material facts are not in dispute, etc., are important to creating and preserving issues for appeal.

A well-written motion might force counsel for the board to respond in a manner that will be helpful to the defense. A well-drafted motion might also create an opportunity for settlement or mediation discussions prior to a hearing in front of the board. The motions may be denied, but issues raised in the motions will be preserved in the record. An experienced attorney will pursue and defend against pre-hearing motions as part of an overall defense strategy.

Failing to offer or object to evidence presented to the board

A board must base its decision on substantial, admissible evidence. The only evidence that is properly

admitted can be considered by the board in making its decision. Likewise, only proper and timely objections to inadmissible evidence will protect the record. If an objection is made and a ruling is not obtained from the board, the record will not be properly preserved for appeal on that issue.

Experienced legal counsel will consider when and how to offer or object to evidence submitted to the board.

Failing to raise defenses or other arguments during the hearing

Ordinarily, the superior court and North Carolina Court of Appeals will not review an issue that was not properly raised or preserved for appeal during the disciplinary hearing before the board.

In order to preserve an issue for review, a license holder must present to the board a timely request stating the specific grounds for the ruling the party desired the board to make. It also is necessary for the license holder to obtain a ruling upon the request, objection, or motion.

While this general rule requiring the parties to make an objection or raise an issue during the hearing may seem harsh, it plays an integral role in preserving the efficiency and integrity of the appeals process because it allows the board to correct an error that is timely brought to its attention, thereby preventing unnecessary appellate review.

An experienced professional licensing attorney will develop evidence to support applicable defenses and will properly raise and preserve issues and objections for appeal.

Failing to make offers of proof and obtain rulings on them

A license holder may claim that the board erred in a ruling to admit or exclude evidence made before or during the disciplinary hearing. If the ruling excludes evidence, the license holder must inform the board of its substance by offering proof to preserve the issue for appeal. For example, if the board rules that a witness will not be able to testify, the license holder must create a record of what the witness would have said by making an offer of proof to the board.

A formal offer of proof is not required to preserve the error, but the license holder must at least inform the board of what the evidence would have shown and why the evidence should have been admitted. In making a proffer to preserve the record, an experienced defense attorney will give (i) a detailed summary of the substance of the excluded evidence; (ii) all the things expected to be shown or proved by the evidence; and (iii) all the grounds on which the evidence should be admitted.

Conclusion

Properly preserving issues for appeal and making a complete record at the board hearing involves more than just objecting to and raising issues in a timely manner. It involves an assessment of the whole case, applicable laws and agency rules, and strategic decisions regarding issues that should and should not be pursued at the board hearing.

Licensees who represent themselves during the early stages of a disciplinary action may severely hurt their case by not properly objecting, failing to raise vital issues in a timely manner, or making other strategic errors that cannot be overcome.

Promptly engaging an attorney who has experience in administrative law or professional license defense may increase a licensee's chances of successfully defending an action initiated by a professional licensing board.

Ward and Smith has a dedicated **Professional Licensing Group** comprised of a team of attorneys with a

wealth of experience representing licensees through investigatory and disciplinary proceedings before the State's various licensing boards.

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