

By David L. Shapiro, Ph.D.

Due process refers to the basic legal rights guaranteed by the Fourteenth Amendment to the U.S. 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

In criminal law, the Fifth Amendment indicates that no individual has to say anything self-incriminating. Out of this grows the famous "right to remain silent." When a police officer states to an individual that he or she has 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 him or her. 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 administrative rules and the hearing panel can often find that the psychologist violated the rule merely by his or her refusal to testify or, to put it another way, exercising 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 is treated as equivalent to an admission of wrongdoing.

Right to challenge evidence, witnesses

In criminal law the prosecution's entire case file, with the exception of internal memoranda, are available for legal discovery. Defense counsel has the right to examine all of the materials and share them with experts. There is no such obligation on the part of licensing boards.

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 defense may well be at a disadvantage by not having the entire file and the state is under no obligation to tell the defense who the witnesses might be. While this varies from

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state to state, generally licensing boards are not required to release their file until the bringing of formal charges. Unlike criminal trials often the defense will not know who witnesses are until the hearing.

In criminal law the defendant has the right to know his or her accusers. The defense then can challenge the credibility or lack thereof of their proposed testimony. In administrative law, though this varies from state to state, the psychologist may not know who made the accusation.

Boards insist that this secrecy is necessary to keep the psychologist from altering records, but where do the constitutional rights of the psychologist enter the picture? Are we totally deprived of our rights in front of a licensing board?

Keep in mind that it is entirely possible that the alleged wrongdoing is totally spurious. When the psychologist does not know about the material that will be presented until the trial, there may not be sufficient time to prepare a defense.

Hearsay testimony

Hearsay evidence is excluded in criminal trials except under very narrow circumstances. In administrative law, hearsay is allowed and witnesses can testify regarding what other people told them.

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 must make the 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 narrowly and strictly. In administrative law everything can come in.

Appellate process

In criminal cases if the defendant is convicted he or 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. The appellate decision is binding upon the trial court.

In an administrative hearing the defendant psychologist may appeal the

board's decision to an 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, the board is serving as both prosecutor and judge and the board has final say.

The defendant can take the decision to a 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 or she would have to demonstrate that there was "not a scintilla of evidence probative of the board's position." This would be very difficult to prove.

Standard of proof

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

Investigations are most often 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. APA, for instance, will have the chair or 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 "minimum standards of professional practice" or was "negligent" in carrying out professional duties – with no definition of what these terms mean.

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 20 years earlier, the question arises whether 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 in fact may have died.

Recommendations

Let me finally talk about some recommendations that I would make considering that there is the potential for significant deprivation of due process.

Encourage your state psychological associations to seek the following changes in administrative procedures to offer greater due process protection to psychologists:

First, increase the level of proof 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 is accused. Currently, most boards are 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 so that the psychologist is not required to defend against matters that occurred many years ago.

Seventh, administrative law judges' findings should be binding rather than advisory to boards. **CE**

David Shapiro, Ph.D., is a professor of psychology at Nova Southeastern University in Fort Lauderdale, Fla., where he teaches courses in ethics, forensic assessment and criminal law. He has served on the ethics committees of APA and ABPP. He can be reached by e-mail at: psjfor@aol.com