

State Proposal Raises Stakes for Not Cooperating With License Board Investigations

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Darren M. Gelber of Wilentz, Goldman & Spitzer. Courtesy photo

A proposal from the New Jersey Attorney General's Office and Division of Consumer Affairs tweaking the rules for how professionals should cooperate with licensing board investigations may lead to additional hurdles in cases where confidentiality agreements or parallel criminal investigations are at play.

On Monday, Attorney General Jennifer Davenport and acting DCA Director Christopher Peterson [jointly announced](#) a proposed amendment to the state administrative code which would require

more full cooperation from professionals being investigated for sexual abuse or wrongdoing. Specifically, the amendment would prevent licensed professionals from refusing to answer questions or attempting to cite confidentiality or non-disparagement agreements to prevent witness testimony. Under the proposed new rules, licensees engaging in those actions would be found responsible for misconduct and subject to mandatory disciplinary action.

Davenport championed the proposal, saying “no licensee in this state should be able to avoid the consequences of their misconduct by silencing victims, intimidating witnesses, or otherwise interfering with a board investigation.”

“The rules we’re proposing today will help break down the barriers that prevent victims and witnesses from coming forward and ensure boards have access to the information they need to fully investigate misconduct and hold violators accountable,” Davenport said in a press release.

While confidentiality and non-disparagement agreements are routinely part of settlement agreements, one attorney said those who have such agreements in play should pay careful attention to the proposal and proceed carefully.

“If there is a pre-existing confidentiality provision, licensees would do well to consider the regulations’ language about needing to waive it, in order to comply with their licensing obligations to respond to requests for information,” Darren M. Gelber, chair of the criminal law team at Wilentz, Goldman & Spitzer, said.

Gelber said a licensed professional could face disciplinary action for refusing to comply with an investigation—even if the misconduct allegation at issue is found to be unproven.

“I can tell you from experience that professional licensees who ignore or deliberately don’t respond to requests for information from their licensing boards, are almost certainly going to face some sort of discipline,” Gelber said. “It may not be a revocation for the first offense, it may be a public reprimand, it may be a suspension, [but] if willful non-compliance continues, I would expect licensing boards to actually revoke somebody’s license if it comes to that.”

As a result, Gelber said one potential legal challenge to the proposed new rules could arise if a parallel criminal investigation into a given misconduct allegation was also taking place. That situation may force professional licensees into a difficult gambit between their constitutional rights against self-incrimination under the Fifth Amendment and keeping their license, according to Gelber.

“If a professional licensee wants to claim their right to remain silent, because of a fear that any information provided might be used in a criminal investigation, they certainly would have the right to remain silent and not answer questions,” Gelber said. “And that fear cannot be used against

them in a criminal case, but the law is very clear that a refusal to answer questions can be used as evidence in other settings, including a professional licensing setting.”

Ultimately, Gelber added he doesn’t think the proposal represents “a major shift” since licensed professionals are already obligated to cooperate with investigations as a condition of their license, or face a board’s disciplinary action.

“I think these amendments to the regulations just clarify and puts licensees on notice more clearly, about what things might be considered ‘not cooperating,’” Gelber said. “Clearly, these regulations must have been proposed because some licensee somewhere, in some sort of investigation, had attempted to invoke a confidentiality provision.”

According to Gelber, plumbers, real estate agents, social workers, dentists, engineers and land surveyors would all potentially be impacted if the proposed amendment were approved.

Gelber added he didn’t think the proposal would either “encourage or discourage” victims of, or witnesses to, alleged misconduct from coming forward and sharing their stories, but it could remove a barrier to compliance with licensing boards investigating misconduct complaints.

If the new rules are approved, Gelber said licensees facing an investigation related to their professional duties would do well to consult an attorney familiar with the licensing process.

Per New Jersey’s rulemaking process, members of the public may submit written comment on the proposal during the next 60 days. After the public comment period closes on Oct. 16, the DCA will review all comments and publish both a summary of those comments and the agency’s response in a Notice of Adoption next year.

When the Notice of Adoption is published, the rule will take effect.

Comments may be submitted through the DCA’s website [here](#).

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