The Art of Licensure

by H. Richard Bisbee

Page 74

You are a general practitioner. Your client places an official document in front of you entitled "notice of intent to deny license." This client, who was convicted of a relatively minor drug charge while in college 10 years ago, has for months sought licensure before a state agency to engage in a regulated activity so he could, in his own words, earn a living and support a family. He has already paid the various filing fees (which may range from hundreds to thousands of dollars), and studied for, taken, and passed with flying colors an examination to demonstrate competency. He is now perplexed as to why, after all his effort, he is being denied a license. What could you, as an attorney, have done for this client in terms of providing legal advice and representation while he sought licensure, as well as in response to his receipt of the notice of denial?

From my vantage point as a supervising attorney with a governmental agency responsible for deciding thousands of licensing issues each year, I have observed a wide spectrum of legal skills in the private sector, dealing with licensing cases. Numerous practitioners appear to lack the day-to-day experience for handling such matters with finesse, while some attorneys — by combining both legal and persuasive skills at key points in the licensing process — elevate the quality of their representation to that closely resembling an art form. There are a number of pitfalls, both legal and practical, for the inexperienced attorney who stumbles through the licensing process. While most license applications which reflect no prior disciplinary history speed through the system, those applications revealing criminal convictions, previous license denials, and other similar past disciplinary events may and do become "bogged down" in the bureaucracy.

This article will provide some guidelines for attorneys (and perhaps applicants) when confronted with the latter type of problematic licensing case, so that he or she can adequately and vigorously represent the client's interests, regardless of the type of license sought.

There are essentially three stages to a license application case. The first and perhaps most important step involves the correct and truthful completion of the license application, as attested to by the signature of the applicant, and the proper mailing of the application to the agency, along with the required filing fees. The second step involves the agency's review of the license application, which at times can be a lengthy, drawn-out process. The last stage is the decisional stage, where all previous elements come together, in the form of a preliminary decision by the agency either to grant or deny licensure, based upon the materials collected in its licensing file. A lawyer for the agency may become involved in the decisional stage, depending upon the complexity of the issues. Each step is important in its own right. For the sake of brevity, this article will concentrate mostly on the first two steps.

Most licenses are processed in Florida's capital, Tallahassee. Depending upon the type of license, most, if not all, of the decisionmakers who review the license application live and work in the capital. For those reasons, counsel's knowledge of licensing law and the regulatory climate in the north Florida region are equally important in understanding how to handle a license application.

Usually, when an individual is seeking licensure, he or she is anxious to "get on with his or her life" and begin the newly chosen profession. Any delay in the process — sometimes caused by the applicant or by an attorney representing the applicant — can result in a real loss of dollars to that person affected by the delay. That is why prompt and accurate initial and subsequent responses to the licensing agency during the application stage are vitally important.

F.S. Ch. 120 provides the overall statutory framework for the administrative processing of licenses. Each agency has certain statutes and administrative rules (the latter found in the Florida Administrative Code) specifying the actual requirements for licensure. The practitioner, when asked to assist an individual with processing an application, should be thoroughly familiar with F.S. §120.60, which deals with various statutory time frames that an agency must observe to process the application and the specific statutes under which licensure is being sought. Keep in mind that many application questions may be the subject of legal interpretation (*e.g.,* 10 years ago, did I commit a crime of moral turpitude?) and careful research by counsel before advising a client as to how to respond to a question may mean the difference in receiving or not receiving a license. At times, attorneys become witnesses in license denial cases, depending upon the quality of advice given relative to how to respond to application questions.

Generally, an agency, upon receipt of an application and the proper filing fee, has 30 days to review the application for "completeness."[1] If the application is incomplete in any respect, the agency must send a deficiency letter within that 30-day period, requesting the missing materials or information. Such requests can be in the form of requiring additional documentation relative to past disciplinary events, details concerning time lapses in employment or residency, or any number of other matters which fall within the four corners of the application form itself. The practitioner or applicant, upon receipt of the deficiency letter, should first ascertain the date of the agency's receipt of the application and mathematically verify that the deficiency letter was issued within 30 days from that date. This is an important calculation because, if the agency waited one day beyond the statutory 30-day period to issue the letter (which occasionally does happen), the 90-day time frame an agency normally has by statute to review, approve, or deny an application is not "tolled." If counsel for the applicant is sensitive to this timing issue, the agency may very likely be required to grant a default license if it has not otherwise made a decision before passage of the 90-day application review period.[2]

Let's assume that the agency did timely issue a deficiency letter. What next? The attorney, in order to fully protect the client's interests, must promptly and fully respond and complete the deficiencies listed. Keep in mind that the agency is not allowed to "add on" items it had not thought of previously and failed to list in the deficiency letter.[3]

In all responsive communications with agency personnel, the attorney should be courteous and understanding of the massive workload of applications crossing agency desks on any given day. Counsel should send the requested items by certified mail, return receipt requested, along with a transmittal letter detailing what is being provided to the agency and mentioning that upon receipt of the materials applicant's counsel will consider the application "complete" for processing. Whether what is supplied the agency truly does "complete" the application is a somewhat subjective decision, usually made by an analyst or, in a close case, by the analyst's supervisor. The decision normally will be documented on chronological time sheets prepared for each application. That decision, however, may later be subject to challenge in an F.S. §120.57 (1) administrative hearing if it is based on facetious or erroneous observations or conclusions of the analyst.

Ater supplying the missing materials or information, it is important for the practitioner to make follow-up calls to the agency analyst, based upon the "squeaky wheel" principle. These calls are important, not only to check on the status of the application processing, but also to probe the examiner for potential red flags which might signal an eventual decision to deny the license. The wise practitioner knows that before the agency makes its decision to deny a license there are many opportunities which may serve to overcome the agency's initial reservations.

Usually, the attorney should ask if there is anything else that the analyst needs to make a decision. If there is

a vague or inconclusive answer, consider that to be a red flag. If the analyst doesn't wish to speak with the attorney, consider that to be a red flag as well. If the attorney is routed to the examiner's supervisor, this is definitely indicative of a future problem. In these instances, short of waiting for issuance of the agency's preliminary decision to deny a license (known as a "notice of intent"), what steps can an attorney take to put the client's best interests forward?[4]

Assuming that the client has a troubling disciplinary history, counsel may consider requesting a personal conference with the division director. A meeting with someone lower in authority may be a waste of time and the client's money because usually licensing denials are not delegated down but rather up the chain of agency command. The reason for this is to grant an air of authority to the agency decision in the event that there is litigation over the denial. Frequently, the division director will be receptive to such a meeting, particularly if the agency is governed by an elected official who is sensitive to public access perceptions. Preparation for this meeting is much like grooming a client for a courtroom appearance. First impressions are important, particularly in the eyes of the Tallahasseans who will usually make up the audience. What may be common and acceptable dress in other parts of Florida may very likely be viewed differently in the capital area. For that reason, advise the client to take off the Rolex watch, change from expensive Italian shoes to Hushpuppies, and wear conservative clothes. Gold neck chains are a definite no-no as well as low-cut open shirts. Basically, you want to portray to decisionmakers that they would not be "going out on a limb" granting the client — a fine, upstanding citizen — a license. One should attempt to humanize the applicant, so that a decision is not made solely from a cold, documented record, such as the licensing file. During the interview, be advised that any comments from the client, no matter how innocent, may be turned against him or her as "misrepresentations to the agency" in a later denial letter.[5] Thus, it is very important that the applicant be as truthful and sincere as possible. Arrogance does not aid this process. If counsel and client are persuasive, they should get a signal at that meeting as to whether the division will consider licensure. Vague answers suggest otherwise.

When discussing possible resolutions, counsel should be creative in proposing a settlement which meets the agency's need to protect the public health, safety, and welfare, as well as which permits the client to engage in the regulated profession. Normally, agencies have fairly standardized form stipulations with final orders, which are utilized in many of the licensing cases. Generally, however, there is no "one form fits all" stipulation and counsel for the applicant should feel free to suggest alterations. For example, if the client in a past disciplinary matter had difficulty with bookkeeping matters which led to disciplinary action, counsel might suggest a provision in a stipulation which would place some controls over that aspect of the newly regulated professional (*e.g.*, an independent and periodic review of the books and records by an accountant at the licensee's expense). If the agency's concern is that the person may not be properly supervised, counsel should consider suggesting a provision which would require supervision and allow the agency to approve the supervisor. Counsel should also consider suggesting time frames for expiration of those specialized provisions, absent intervening disciplinary history. In brief, counsel should be proactive in suggesting stipulation terms which would meet the objectives of both parties.

Assume leaving the meeting with no assurances. In that instance, there are two other options: First, depending upon the client's disciplinary history, counsel can either withdraw the application (or request withdrawal, in case the agency operates under a statute which requires its permission to withdraw), thereby ensuring no new "disciplinary information" arises to cloud the client's record (*e.g.*, on many applications, a question will ask whether an applicant had a "license previously denied or otherwise acted against"); second, counsel may decide to stand firm, allow the agency to enter the notice of intent to deny, and choose to litigate the matter before an administrative hearing officer. This judgment call depends upon a variety of factors, such as the age and severity of the applicant's past disciplinary history in question, the client's general

credibility, the strength of the agency's case for denial, and whether it is in the client's best interests to run the risk of creating a new disciplinary record vis-à-vis a license denial proceeding.[6]
Perhaps the most common oversight in these middle to latter stages of the license denial case is the failure of the applicant's attorney to be familiar with the agency's precedents in cases similar to that of his or her client. Agencies operate under a loose form of stare decisis.[7] For that reason, the agency is required by law to maintain a meaningful index to all of its precedential administrative orders.[8] Many agencies keep such indexes on computers which have word-search capability. If, for example, the client has a conviction for possession of cocaine with intent to distribute, the key words "cocaine," "possession," and "intent to distribute" should be searched to find common cases, and from a review of those cases counsel should be able to assess the general success of the agency in making its denial "stick," how the agency has settled similar cases after issuing a notice of denial and on what terms, and lastly, what common evidentiary and strategy ploys are common, both from defense and plaintiff standpoints, in terms of case preparation and presentation. If asked, the agency clerk might conduct the search for counsel if parameters are specified and reasonable costs of copying are paid.

Having taken all of the above steps, the client has now walked into counsel's office with the agency's "notice of intent to deny license." Review it carefully. Does it fully and adequately spell out the alleged facts and legal conclusions upon which the agency is basing its denial? Does it contain a notice of rights informing the applicant of the right to file a petition for hearing, challenging the intended agency action?[9] Document when the client received the notice and from the information provided in the notice of rights, calendar the response due date (important for default purposes). Carefully review the Uniform Rules of Procedure located in Ch. 28 of the Florida Administrative Code, particularly Rule 28-106.201 which contains instructions on the preparation of a petition for hearing. Become very familiar with all of the procedural rules which apply in such administrative cases.[10] The client and counsel must decide up front if the client will deny the underlying facts contained in the notice, and thereby request a formal hearing pursuant to F.S. §120.57(1), or not contest such facts and instead seek an informal hearing under F.S. §120.57(2). In the latter situation, the client will usually appear before an agency hearing officer (usually a staff attorney) and only be permitted to offer evidence in mitigation of the penalty (denial of license) sought to be imposed. If counsel believes that a fully independent arbiter is crucial, then he or she must demonstrate in the petition that facts are in dispute and *timely* request a formal hearing.[11] Whatever decision is made, I would suggest promptly filing a petition for hearing and confirming its receipt by the agency clerk, simply to avoid a default.[12] Upon the agency's receipt of the petition, the agency has 15 days to either grant or deny the request for hearing and forward it to the Division of Administrative Hearings.[13] Again, time is money, so make sure that the agency or its attorney doesn't stuff the petition in his or her file and let time drag on (to ease or pace their heavy workload). A simple demand letter for referral to the Hearings Division should be sufficient to motivate the procrastinator.

While the actual preparation for and presentation of an administrative hearing involving licensure is too extensive to be covered in this brief article, a few simple fundamentals can be summarized quickly. First, upon receipt of the notice of denial, counsel should make a public records request for the agency's licensing files, pursuant to F.S. Ch. 119. This is an expeditious way of obtaining the licensing file at the inception, without resorting to a protracted request to produce during the litigation. Second, counsel should initiate and conduct discovery in the case much like any other civil case, since Fla. Admin. Code rule 28-106.206 permits discovery in the manner provided by Fla. R. Civ. P. rules 1.280 through 1.400. Usually, the greater pressure that counsel applies in the discovery area, the greater the inclination of the agency to settle the case by offering a restricted or probationary license. Lastly, and most importantly, remember that the client seeking licensure has the burden of proof — by a preponderance of the evidence — to demonstrate his or her

worthiness for licensure, both before a hearing officer and ultimately to the agency, so thorough preparation and zealous advocacy is crucial.[14]

The representation of a client in a licensing case is as much a matter involving the practice of law as the art of persuasion on the client's behalf before the licensing agency. A number of licensing cases which at first appear hopeless can, with careful and methodical legal work and creative solutions, have a mutually beneficial ending for both the client and the agency. The careful practitioner should be constantly alert to opportunities at various key points in the licensing process to suggest creative alternatives to the agency's preliminary decision to issue an outright license denial. Counsel's appreciation of these principles during these key points may make a significant difference as to the results that are ultimately obtained for the client. q

[1] Fla. Stat. §120.60(1) (Supp. 1996).

[2] If, upon demand, the agency refuses to grant a default license, then an action for mandamus may be appropriate, assuming the statutory time frames have clearly passed. *See World Bank v. Lewis*, 406 So. 2d 541 (Fla. 1st D.C.A. 1981).

[3] "An application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was *timely* notified or when the time for such notification has expired." Fla. Stat. §120.60(1) (Supp. 1996) (emphasis supplied).

[4] Fla. Stat. §120.60(3) (Supp. 1996).

[5] The practitioner should review Fla. Stat. §90.408 (1995) concerning statements made during compromise and settlement and reach an understanding between all participants as to its applicability before the meeting. Otherwise, your client's verbal statements may resurface in a denial letter as misrepresentations to the agency. Counsel should also consider moving to strike such statements if same are detailed in the letter.

[6] In some regulated professions, such as securities dealers, new disciplinary orders become "reportable acts" which require affirmative responses on applications and create "red flags" on future license applications. Fla. Stat. §517.12(7)(b) (1995). This new disciplinary information is then placed into a national computer databank (the "Central Registration Depository") which is used to track disciplinary histories. Counsel should be sensitive to this and other similar situations, in order to properly advise the client as to the ramifications of creating a new disciplinary record if withdrawal of a pending application is instead a viable alternative.

[7] *Gessler v. Department of Business and Professional Regulation*, 627 So. 2d 501 (Fla. 4th D.C.A. 1993).

[8] Fla. Stat. §120.53 (Supp. 1996).

[9] Fla. Stat. §120.60(3) (Supp. 1996) requires that the agency provide notice to the applicant of any available administrative or judicial review of the notice.

[10] For example, in administrative cases, unlike in circuit court, most motions are ruled upon after timely filed written responses to the motion; motion hearings are the exception rather than the rule. Fla. Admin. Code r. 28-106.204(1).

[11] The failure to timely request a hearing, usually within 21 days of receipt of the notice, may result in the issuance of a default final order of denial, subject only to appellate review. *See* Fla. Stat. §§120.569(2)(j) and 120.68 (Supp. 1996).

[12] Usually, the filing of such a petition will result in the appointment of a staff attorney and thus provide another point of contact with the agency, in the hope of persuading the decisionmakers to reverse the decision to deny. Here is an additional opportunity for the practitioner to request a probationary license or some relief short of an outright denial. Such a request may even be to ask that the applicant be able to withdraw his or her application and that the agency thereupon vacate the notice of denial *ab initio* (thus potentially erasing any newly created reportable disciplinary history).

[13] Fla. Stat. §120.57(1)(b)1 (Supp. 1996) states, "A request for hearing shall be granted or denied within 15 days of receipt." Note that there is no statutory penalty imposed on the agency for failure to observe this requirement.

[14] *Osborne Stern & Co. v Department of Banking and Finance*, 647 So. 2d 245 (Fla. 1st D.C.A. 1994), *rev'd and remanded*, 670 So. 2d 932 (Fla. 1996).

H. Richard Bisbee *began practicing as a private attorney in 1981 in Sarasota, becoming a senior attorney for the Florida Comptroller, Department of Banking and Finance in 1986 and deputy general counsel in 1990. During this tenure, he litigated numerous banking, securities, and finance-related licensing cases and issues. Mr. Bisbee is now with Blank, Rigsby & Meenan, P.A., Tallahassee, practicing administrative law. He received his B.A.,* cum laude, *from Stetson University and his J.D. from that university's College of Law.*

The views expressed are solely those of its author and are not to be attributed to the Comptroller's office or any other agency or person.

This column is submitted on behalf of the General Practice, Solo and Small Firm Section, L. Michael Roffino, chair, and David A. Donet, editor.

Journal HOME
[Revised: 05-31-2005]