

The Collateral Damage to Nursing Licenses Caused by Nursing Board Disciplinary Actions

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Professional license defense attorneys have a difficult job, and one of the more difficult things to do is not only to recommend to a client to consent to a disciplinary Order but also to explain to them that the Order is only the tip of the iceberg; there are many potential consequences far beyond the Order, many of which involve vague potential harm. The purpose of this article is to reflect on the effects of disciplinary action by a licensing agency beyond the sanction agreed to or imposed on a licensee.

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We have a difficult job—both government attorneys and defense attorneys. There are many reasons this job is a challenge, and we can all share our stories of why we have a love-hate relationship with our chosen profession. One of the more difficult things to do is not only to recommend to a client to consent to a disciplinary Order but also to explain to them that the Order is only the tip of the iceberg; there are many potential consequences far beyond the Order, many of which we can only make educated guesses about. The purpose of this article is to reflect on the effects of disciplinary action by a licensing agency beyond the sanction agreed to or imposed on a licensee.

Crafting just sanctions is the single most difficult thing a regulatory agency does. Government agencies need to keep their mission in mind and frequently evaluate whether a particular action against a nurse will truly protect the public. Too often, there is a tendency for a cookie-cutter approach. Although consistency by a Board of Nursing is desirable and often necessary to instruct nurses on the ramification of actions, the board must be careful not to become so rigid that disciplinary actions become arbitrary and capricious. An example would be requiring a fine for an unintentional act or applying practice restrictions to a nurse without nonpracticing violations and/or evidence of practice

problems. Negotiating with an agency what the client believes is a fair and reasonable outcome is equally difficult. Both parties are attempting to craft a document that both sides can live with. This is obviously a considerable challenge because the genesis of the document typically comes from an adversarial proceeding. We desire to get the best possible resolution for our respective side. When representing a client before an agency, one must consider the Findings of Fact, the Conclusions of Law, and the Order itself not only for the purposes of the agency but also for the purposes of how will this affect the client beyond the agency in various settings.

Aristotle said that *injustice is the practice of treating equal things unequally and unequal things equally*. This implies that the *indicia* of a “just action” is some individualized, case-by-case consideration. (That is the way both sides of the docket negotiate and think of our cases. Operationally, this is frequently not the case.) Reality shows that much of the actual sanction is a function of some published or unpublished rule, policy, matrix, or chart that makes an equivalency between violations but not violators. In many ways, the sanction offered by an agency in both thinking and practice is the idea that violation “X” equals sanction “Y,” which may or may not be subject to minor adjustment for aggravating or mitigating circumstances. The ability to

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use our skills as attorneys comes less in the sanctions but more in the Findings of Fact and Conclusions of Law. It is in these areas that we strive to come to agreement and the consequences of the underlying actions truly take shape.

It is often in shaping the Findings of Fact and Conclusions of Law that the consequences of the disciplinary actions truly impact the licensee beyond the agency. Being able to demonstrate, for example, that a licensee has engaged in significant mitigating activities can limit collateral damage of a disciplinary Order, whereas overly harsh language or a laundry list of Findings of Fact or Charges or a catalog listing of Conclusions of Law can and frequently causes additional consequences to the licensee well beyond the Order. The danger is magnified when a nurse's Order is viewed and/or decisions are made by ill-informed, ignorant, or reactionary individuals/laypeople in the public domain who may have no or limited experience with disciplinary Orders. Regulators and defense attorneys work with Orders so frequently that we tend to forget the layperson's view and understanding of an Order.

It is important for those who represent licensees to be able to effectively communicate to the client how the action by the agency may affect the licensee beyond the agency and into the future. In most instances, the fact that disciplinary action occurred will, in one form or another, last forever. The metaphorical Scarlet Letter can have serious consequences for the licensee. As a virtuous attorney, you want to be able to inform your client of potential harm. As a cautious attorney, you want to be sure that the client fully appreciates the consequences so you do not get sued for malpractice for failing to disclose the potential and often likely collateral damage disciplinary action inflicts on a licensee.

Equally, the attorney for the regulator needs to understand the consequences. To begin with, when you are dealing with a pro se licensee, you are ethically obligated to advise of some of the likely consequences of agency action. For example, some board staff offer a voluntary surrender as a resolution to the investigation. The staff tells the nurse, the nurse may request reinstatement of the license after a set period. This presentation does not point out the hazards of voluntary surrenders and the nurse sees a voluntary surrender as a quick and easy way to end a stressful investigation. What is not told to the nurse is that a voluntary surrender results in the nurse being placed on the Office of the Inspector General's exclusion list, which means he or she cannot work for an entity that accepts Medicare, Medicaid, and all other Federal health care programs. The nurse is also not told that when he or

she attempts reinstatement of the license, the original allegations that led to the voluntary surrender will again be addressed by the Board of Nursing, and he or she will again be subject to disciplinary action. Another reason to understand the consequence is that it may help understand why the licensee cannot agree to certain elements of a proposed agreement. Often for the licensee, Findings of Fact and Conclusions of Law are more important than the sanction itself. Often, the requests for changes to an Order have little to do with the licensee's ego but more to do with real or potential fallout from the disciplinary Order. It is not necessary to list every possible Conclusion of Law to justify an Order. Likewise, if the Findings of Fact and Conclusions of Law are viewed as draconian, the licensee is going to perceive the proposed action by the agency as a de facto revocation of his or her license, even if the Order section is far from it.

Defense attorneys cringe when hearing agencies refer to settlement agreements as being merely "speeding tickets." When an agency commissioner, board member, or even staff says that they are not being flippanant; they are merely suggesting that the consequences are not too bad in the context of all the disciplinary actions they see over time. But the analogy is sound in terms of consequence. For example, a 17-year-old male driver is significantly more likely to have his insurance rate increase if saddled with a speeding ticket. The young driver may also receive ramifications from the family, which then can impact the teen's social life. We argue that even the smallest action by a regulatory agency has some potential consequences. The more strident the tone of the action, the more likely that collateral damage is inflicted.

PUBLIC DISCLOSURE OF INFORMATION AQ3

Professional license defense attorneys have discovered that the public disclosure of the violation(s) is one of the major concerns of nurses, and if there was no requirement for public disclosure of the disciplinary history, many nurses may resolve their disciplinary allegations quicker. In the past, confidential Board of Nursing disciplinary actions were not uncommon, but with the growth of public information, most actions against nurses are deemed available to the public. The disclosure of the disciplinary actions to the public causes immense concern for the nurse and it is one of the more common reasons cited by nurses under investigation as a reason why the nurse does not want to settle an investigation with an agreed disciplinary Order; the nurse is willing to accept the remediation as

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long as no one knows about the action. Nursing Board disciplinary actions are typically disclosed in one or more of the following venues.

Board of Nursing Website

The first and foremost consequence of any action by a state agency is that disciplinary action is a matter of public record. In the age of the Internet, disciplinary action by the agency is usually easy to locate on the web, most particularly at the agency’s own website. For the defense attorney, it is critical to know how the Board of Nursing website discloses Orders: does the website have immediate access to the disciplinary action, how long is the information on the website, and how easy is it for the information to be found.

As a regulator, public information is not a bad thing. The state’s role is to “protect the public.” By providing the public information that the agency has taken disciplinary action is a public service and typically legislatively mandated. It demonstrates the agency is doing its job. Some boards have a specified time frame that a disciplinary action will remain listed on their website, although many other agencies mandate that any disciplinary action remains on a licensee’s record permanently. But even those disciplinary actions that remain active on a nurse’s license for a limited amount of time because of the permanence of the Internet, a disciplinary action may always be found with even a basic search.

Board of Nursing Newsletter

Does the board have a document that reports disciplinary action against nurses? Many boards have newsletters, which provide information to licensees about the boards including rule changes and helpful practice tips. A large part of such newsletters are the public disciplinary actions. Typically, the nurse’s name, license number, violation, and disciplinary sanction are listed. The circulation of the newsletter is generally limited to licensees and people otherwise interested in the agency. Newsletters may be mailed or posted on the web page or both. Defense attorneys have found that the client’s embarrassment from having his or her name listed in the newsletter to be one of the top concerns viewed by nurses as a reason not to readily agree to a disciplinary Order. The nurse typically faces prejudice from coworkers who are unforgiving of errors or do not understand the fact that good nurses get reported to the Board of Nursing.

Nursys/National Practitioners/Healthcare Integrity

These data banks consist of disciplinary action reported to and shared with the users of those data banks. Some,

such as the National Practitioners Data Bank and the Healthcare Integrity Data Banks are federally funded bodies that the general public does not have access to. Various health-related entities do have access to these data banks and query them to ensure the licensure status of people within their systems. Each year, there is legislation seeking to open to the public the federal data banks. Thus far, this has been unsuccessful. It is foreseeable that one day given the push to more open records, such data banks may have greater public access.

The National Council of State Boards of Nursing is made up of sister agencies from around the country that share information to protect against licensees who may jump from state to state because of their suspect practice. Nursys is open to the public.

For some of these data banks, the respondent is permitted to submit a limited, published rebuttal. It is critical to educate clients on which data banks have rebuttal sections. There is frequently a narrow window to publish rebuttal information. As most of these rebuttal sections are limiting the number of characters, it is imperative that you work with the client on the wording of the statements to ensure the individual’s story is told.

The Media

The media certainly is a player in considering the consequences of an Order. Some issues draw more press than others—sex, criminal actions, drugs, and death. Factors both parties need to consider is what Findings of Fact and Conclusions of Law would draw media to a particular action of the board. It is possible that the parties will have conflicting goals as it relates to those issues. For the licensee, the goal is to avoid media exposure as much as possible. For agency, media exposure is not always a good thing either.

In some instances, it will be unlikely or outright impossible to avoid media exposure. The defense attorney should have some indication that a particular case will be more interesting to the media than others. It is critical to prepare the client regarding what to say and do and what not to say and do prior to the media onslaught.

Agencies that issue press releases should coordinate with the staff attorneys to ensure that the press release is factually correct. Moreover, agencies should be careful with the press during ongoing settlement negotiations. Speaking to the press too soon can negatively impact the respondent’s willingness to work with the agency.

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Credit Reporting Agencies

Background screening companies gather information on nurses and provide a background report on the nurse to requesting employers for a fee. This background report covers areas like licensure information, including disciplinary actions, criminal information, and employment (including terminations) information. As a credit reporting agency, these companies are subject to the Fair Credit Act.

JOB

The biggest fear for many licensees is that they will lose their job or not be able to find one while under a disciplinary Order. Some nurses have contracts, or the facility has policies or job descriptions that require nurses to have unencumbered and unrestricted licenses. Sometimes employers will strictly interpret any type of Order as a “restriction” on the employee’s license. Clearly, the loss of employment is a significant matter for nurses. Understanding what can lead to the loss of a job is critical as a defense attorney for the client.

When presented with information that a person is likely to lose a job as a result of a disciplinary action, a person is more likely to fight the board rather than settle. Citing to half a dozen Conclusions of Law, when all it takes is one to have a sanctionable act is a consideration in reaching a settlement. A fair and judicious recitation of Findings of Fact (rather than going for the jugular or breaking one incident into separate paragraphs for each violation and listing every allegation, even those that were proven untrue) lessens the fear of a loss of a job. The more strident the proposed Order is, the more likely an employer may react and then the more likely the nurse will want to fight.

AQ4 For some nurses, especially advanced practice registered nurses (APRNs), they live and die with provider contracts. For these nurses, the fear is the loss of a contract. Many agreements may require full, unrestricted licensure. A minor disciplinary action, basically the equivalent of a regulatory speeding ticket, from a licensing agency or regulatory body may be sufficient grounds to terminate a contract because such contracts can be cancelled for cause as a result of disciplinary action. It is wise to educate clients on these very real and frequently painful results. Some companies such as Blue Cross/Blue Shield are prone to cancelling provider agreements because of disciplinary action. It is further necessary to educate the client that cancellation of these contracts have a Due Process element and even an appeals process, which will result in more hearings and expense.

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In addition, boards often forget that there are broad applications to protect the public. For example, if a violation has nothing to do with a nurse’s home health job, the act of restricting the nurse from working home health results only in limiting the pool of nurses available to care for home health patients. Patients are further harmed if the nurse restricted from home health is experienced or has long-term patients. Likewise, forcing a home health nurse to work in a new nursing practice area can potentially harm patients by virtue of the inexperience.

ACTIONS BY OTHER GOVERNMENTAL AGENCIES INCLUDING OTHER BOARDS OF NURSING

Nurses with licenses in other states are likely to face disciplinary action in the other state merely because of the action in one state. A big issue with a nurse licensed in more than one state is facing multiple disciplinary Orders based on one initial Board of Nursing’s disciplinary Order. States may “mirror” the initial disciplinary Order, institute their own disciplinary action, or take no action. Whether the states mirroring the original Order will also consider the nurse’s completion of probation in the original state as completion of their disciplinary actions as well. To explain: A nurse is licensed in state A, B, C, and D. An incident occurred in State A. State B looks at the disciplinary Order and determines the conduct that led to the Order is not considered a violation in their state. Furthermore, although State B could take action purely because the nurse was disciplined by another state, State B decides to take no action and the nurse’s license remains unencumbered. States C and D decide to take the exact same action against the nurse. When the nurse completes the stipulations/probation in State A, State C applies those acts to its Order as well and the nurse’s license is unencumbered. State D, however, decides their Order will remain in effect until the nurse returns to State D and completes State D’s restrictions. The nurse’s Order in State D remains encumbered for an unknown time based on the allegations, which means that for the nurse, there is no end to the disciplinary action.

Licensees need to be cautioned regarding offers of voluntary surrender to resolve allegations. A voluntary surrender results in the nurse being placed on the Office of the Inspector General’s exclusion list. Possible exceptions where voluntary surrender may be warranted—an addicted nurse who is unable to maintain sobriety where a voluntary surrender is more desirable than a revocation while the nurse establishes recovery or

when a person wants to leave nursing altogether and never work as a nurse again. However, even in these cases, the nurse needs to remember there will still be further consequences. In addition, the nurse must understand that removal from the Office of the Inspector General's exclusion list is not automatic.

A nurse must know the reporting requirements for each state. Some require a nurse to notify the Board of Nursing of a disciplinary action by another state within a certain period, whereas others request disclosure at the time of renewal of the license.

Therefore, the calculus for the client is whether to drop the license in the other state prior to agreeing to any formal disciplinary action. If the client does not want to or is not permitted to relinquish the license as some states maintain jurisdiction over licensees even if they relinquished their license many years prior, it is necessary to determine what impact the disciplinary action will have on the other license or regulatory agency. If the sanction is for a state-specific issue, for example, a narrowly tailored administrative regulation, other states may not be as concerned. However, on other issues, one can anticipate disciplinary action by the sister state. In addition, there may be other entities within a state that care about the actions of the Board of Nursing. Depending on the client and the circumstances, there could be consequences with other state agencies or local and county governments too.

NOTIFICATION REQUIREMENTS

Depending on the profession and what the client does, the client may have to notify third parties within a limited time, usually less than 30 days, of disciplinary action taken by a state agency. These notifications could be contractual relationships, insurance requirements, job related, associations, other state boards, and others. It is critical for the representing attorney to inform the client prior to a formal disciplinary action to alert the client if any notification requirements must occur.

The attorney can work with the client to prepare a template to inform third parties about the agency action and the licensee's perception of the situation. It is usually necessary to attach a copy of the disciplinary action to whatever explanation is sent.

CERTIFICATION

Many nursing specialties have specialty certification. These certifications are based on professional skill, knowledge, and professionalism. If a licensee is subject to disciplinary action that calls into question one's

skill, knowledge, and professionalism, these certification programs do have mechanisms to decertify individuals. The difficulty for the attorney is to first determine whether the agency action rises to the level of something the certification program would want to take action against. Second, most of these bodies will not speculate whether certain actions by the agencies are sufficient to cause action by the certification body. Third, several certification organizations do not make it clear what grounds is mandatory versus discretionary to decertify a member.

It is important to communicate to the client that many certification organizations have their own process on internal disciplinary actions. The fact an agency took action does not equate that the certifying organization will too. However, most do have Due Process and even an appeals process. These are organization specific. Most will require additional costs for defense, travel, and the hearing. The costs for continued defense can be significant. Some outcomes can result in complete loss of certification or some additional disciplinary sanction.

INSURANCE

Disciplinary action by a state agency often may increase the cost of liability and professional insurance. This is true even if the client did not use insurance to cover the cost of the state's investigation and legal action. Because of disclosure questions, as a proactive measure, it may be wise to contact the insurance agent or company to determine the type of impact certain disciplinary actions may have. Depending on the situation, the client may suddenly become uninsurable. Although a rare consequence, it is possible.

PROFESSIONAL ORGANIZATIONS

Unlike specialty certification, anyone can be members of professional organizations or associations. These bodies promote the welfare, usually economic welfare of the members. Most such organizations have professional conduct or good citizen requirements. Depending on the action taken by the agency, it is possible that such an organization may want to remove or at least discipline a sanctioned nurse. These groups usually have a quasi-due process procedure in place to consider these matters. Like with certification, these can result in loss of members to disciplinary action.

CRIMINAL SANCTIONS

If Findings of Facts or Stipulations are drafted and agreed to, one could find himself or herself needing

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a criminal attorney because the actions by the board may lead to criminal investigations and prosecution. Depending on the agreement with the agency, the nurse could be making an admission of guilt. If you are approaching the line where administrative law and criminal intersect, it may be in your client's best interest to consult with a criminal attorney before any agreement is made. In addition, you may have to insist on language stating that the consent or agreed Order is for settlement purposes only and the nurse does not admit that the allegations are true.

EXCLUSION LISTS

All levels of government, especially the federal government, have exclusion lists. These lists exclude certain individuals from participation in certain programs, usually where there is money involved. Examples include Medicare and Medicaid (both at a state and federal level). Licensure actions can result in placement on these exclusion lists. This means the nurse cannot work for an employer who receives Medicare, Medicaid, and other Federal health care programs.

Depending on the types of licensure action, removal from the list will require some type of proof that the offending licensure action has been resolved. For example, a nurse surrendering her license while under investigation faces placement on exclusion lists. To be removed from the list, the nurse will have to most likely get the original license reinstated or removed from suspension.

CIVIL SUITS

If the client is embroiled in civil litigation or anticipates litigation, a settlement agreement or the existence of a disciplinary action could be used in the civil case, certainly as leverage in settlement negotiations, even if it is inadmissible at trial. For some licensees, if it is not their first disciplinary action, the Order could be admissible in a subsequent civil suit.

CONCLUSION

Both sides need to be aware of these and other potential consequences. The defense attorney obviously needs to provide the best information so the client can decide

whether to accept disciplinary action by an agency or to fight the Order. For the Board attorney, it will help you understand why the other side is seeking particular changes to a proposed Order. Attempting to get a just outcome, the agency should factor in the collateral effects of the agency's actions. Often, the sanction by the licensing agency is merely the first domino to fall in a long row of falling dominos. The client must understand that even though the underlying action from the agency may be acceptable, the risk of collateral damage may be too serious to consider accepting an Order.

Biographical Data. Jon Porter is a partner of the law firm of McDonald, Mackay & Weitz, LLP, Austin, Texas, since 2003. Licensed in Texas since 1999, he has worked as an appellate attorney, a legislative aide for a Texas House Representative and for the Texas Medical Board as a licensure investigator, a prosecuting attorney, and the director of Enforcement and Compliance. His current practice focuses primarily on physician licensure defense, health law, general administrative law, and professional licensing for health care providers. He works with health care professionals who are experiencing chemical or mental impairment, standard of care issues, licensure matters, and boundary issues. Mr. Porter speaks on topics of medical regulation and medical-ethical issues. Taralynn R. Mackay, RN, JD, is a founding partner in the law firm of McDonald, Mackay & Weitz, LLP where her practice focus since 1997 has been administrative/regulatory law, health care law, and professional licensing issues with a primary focus on representing nurses before the Texas Board of Nursing (formally known as the Texas Board of Nurse Examiners). Ms. Mackay is Board Certified in Administrative Law by the Texas Board of Legal Specializations and she has practiced administrative law since 1994. Prior to starting a private practice, Ms. Mackay worked as an assistant general counsel and staff attorney for the Texas State Board of Medical Examiners and the Texas State Board of Physician Assistant Examiners. After gaining invaluable insight into the functioning of regulatory boards in areas such as litigation, hearings, mediation, and negotiation, Ms. Mackay became a partner in the law firm of McDonald, Mackay & Weitz, LLP and turned her focus to the representation of licensed professionals in disciplinary proceedings before their respective licensing boards and administrative agencies.

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AQ2: Per style sheet, there should only be four to six keywords; please reconcile.

AQ3: Please verify level of heads assigned.

AQ4: Please verify if the supplied spelled out form of the abbreviation is correct.