



Expunging Disciplinary Actions

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The Kentucky Board of Nursing, which was established in 1914 and reports directly to the governor's office, is not a very popular group. In addition to its 16 members, there are 47 staff members who deal with discipline of nurses and regulate dialysis technicians. Our branch is divided into the investigation/discipline and compliance sections. The latter deals with nurses put on probation for a violation of the law or those who have been admitted to our alternative discipline program. That's one reason we're not very popular.

Our purpose for discipline is no different than that in physical therapy - to protect and safeguard the health and safety of the public. But we also feel very strongly that what we do maintains the integrity of the nursing profession. Many years ago, we decided the board should develop a philosophy on discipline, so we convened a crash course. The resulting philosophy was to investigate new nurses in a way that maximizes safety and balances individual and system accountability. We believe individuals can change their behavior and be safe practitioners.

There are 74,000 licensed nurses in Kentucky and the number of disciplinary actions is small by comparison. We currently are monitoring 247 on limitation probation - they have to practice under supervision of the board with many license restrictions. We are also monitoring 91 nurses in our alternative discipline program, and we currently have approximately 300 nurses under investigation. In Kentucky, if you see a violation or know of a violation by a nurse or someone we license, you are required to report it. That includes workers, colleagues, co-workers, family members, physicians, dentists and even the violators themselves. It is basically a self-imposed whistleblower statute.

It includes any and all violations of the code of nursing, of which felony convictions can result from a fraud or deceit in procuring or attempting to procure a license, and willful and negligent actions or inconsistency with the practice of nursing. It is a broad and all-encompassing disciplinary statute that deals with conviction of a misdemeanor or a felony that would bear on the practice of nursing, and provides discipline for acts of omission and commission. You can be disciplined for failing to put into the record something that is essential to note but you can also be disciplined for putting it in incorrectly or in a manner that is inconsistent and that cannot be read by the next person.

In Kentucky, you must disclose the fact that there is an investigation, but you cannot disclose the nature of the potential interaction involved in an investigation. That is a great incentive for nurses

who have had minor interactions to resolve the issue. It is a very interesting philosophy in that the open records act for the first and only time works in the prosecutor's benefit.

Most complaints are minor and relatively simple. Each is given a number and assigned to one of our five investigators, each of whom is given a limit to settle or resolve matters. So there is a guideline for resolution. The board president also has the authority to grant immediate temporary suspension by signing a letter and giving it to the executive director of the board. This temporary suspension is for anything that could do harm to the public or affect public safety. But there are also some other items. If you don't pay your student loan, there is a specific statute in Kentucky that all boards, not just the board of nursing have the authority to discipline and revoke licenses until the loan is paid. So there is a broad range of discipline that can occur at this stage. We can't do anything that statutes do not allow, so we can't, for example, collect a bill. We don't have that authority.

Our investigators have extensive training and are very knowledgeable of the practice of the laws governing nursing. They make a determination whether an interaction violates the nursing law. If it doesn't, it is filed away, dismissed and not disclosed. It is closed, but it is held for statistical purposes; if you get 15 letters on someone, something is wrong and we may need to dig a little deeper into the investigation process. Next the investigator meets with the credential review panel of four nurses, which makes recommendations based on professional expertise. The panel can issue any type of discipline it believes is appropriate.

A board member review occurs when there is a violation out of state or in another jurisdiction; the board member determines whether the action taken in that jurisdiction would in fact violate Kentucky nursing laws.

A letter of concern is the lowest form of all of those filed away. The person hasn't yet crossed the line but is getting close. Often, that occurs because of systemic problems within the institutions. If someone is working in a nursing home that has very bad protocols, the nurse follows the protocols, but it is really not good practice. We can't discipline the nursing home or the hospital or any other facility. But we can send them a letter of concern saying the board of nursing is concerned that they are putting our nurses at risk and offer some suggestions or corrective action plan. It has been extremely well received.

A consent decree is for non-intentional and minor violations. The competent, capable nurse pays the fine, but it doesn't interrupt the practice of nursing. A decree order, which is the next step up, is a settlement agreement. The nurse agrees to accept a revocation, suspension, fine or continuing education; there are no limits to the extent of discipline that can be handled through a decree order. We have two attorneys, a general counselor (who also is a hearing officer) and a prosecuting attorney. They form the administrative hearing process. When formal charges are filed, nurses are given all due process rights. We follow Kentucky civil rules and also rules of the evidence except in one major way. We can listen to hearsay evidence, but the caveat is that there cannot be a decision based solely on that evidence. You have to have substantive non-hearsay evidence to make a decision. The hearing officer has 60 days in which to render proposed findings of facts. The prosecutor submits his own findings. You have 15 days from that date for each side to file exceptions to the proposed decisions, and then it goes to the board for the final word. So all of this is reviewed

on a peer review process.

Most boards members are nurses. They report to the national practitioner data bank and to jurisdictions throughout the country. It is very critical to note that we do not report the letter of concern and the secondary consent decrees. They don't appear on newsletters or anywhere else. But if you get to the decree order stage or you go to the hearing, you get full disclosure. The meat of this is public records vs. open records. We disclose that there is an investigation, but we don't disclose the pleadings because under our law, it is not a final decision. So we have to wait until we get a final decision and then it becomes an open record. The process in civil and criminal proceedings is public. Administrative law is not civil and it is not criminal. There are some similarities, but there are 14 specified exemptions from the open records act. But as a rule, we try to avoid closed or executive sessions, because they can be very sticky.

I wish I could say that there were some scientific methods of doing an expungement, but the truth is that at a branch meeting in 1993, we just decided to talk about it. We were driven by two reasons. One reason was that many years ago, we hired a new nurse investigator who had previous disciplinary actions on her license. In fact, her license had been suspended for several years for work and abuse. Her license was reinstated, she worked and had no subsequent problem, and then I interviewed her. My concern was that she would be too easy on people and it turned out to be the exact opposite. She is pretty harsh because she has been there. You couldn't pull anything over her eyes because she had done it already. The other thing that drove us to discuss expungement was the incredible number of criminal expungements that we were seeing from the civil system. We decided to call the National Council of State Board authority which is comparable to your federation, and we found that there was no other board of nursing in the United States or jurisdiction that has expungements. We decided to go for it anyway, and went to the consumer protection committee of our board. We presented our idea to our state General Assembly in 1994 and we got absolutely no opposition, even though I am still not sure if there is any other board in Kentucky that is doing an expungement.

We began very slowly and would only expunge consent decrees for individuals who failed to obtain their continuing education. We really began expungement in September of 1995 and came back several years later to amend the regulation to include all decree orders and decisions that were at least 10 years old and had a reprimand on the license. So again we took another baby step. Then we decided to include any decree order decision that was at least 20 years old and had no subsequent disciplinary action.

We have a very detailed procedure. For instance, if an individual wishes to have his record expunged, he has to write a letter to our general counsel, who ensures that he has met the qualifications. If that is the case, he will pull the card from the archive, and tell us that the person has met the criteria. Our executive director requests that the order be deleted from the National Council for State Board of Nursing data bank and if that is approved, that order is deleted. The nurse is notified of the expungement with a letter from our executive director. The file is placed in a locked cabinet in our law library and the number and type of orders that are expunged are reported to our board statistically. We don't give names.

HIPDB, the Healthcare Integrity and Protection Data Bank, does not expunge it, but that is out of our control. It is in our statute, however, that the licensee doesn't have to report it to any other board of nursing. I will tell you that courts are getting fed up with the damage that the National Practitioner Data Bank (NPDB) can cause.

When I first started this job I didn't think anybody should have disciplinary action taken off his record. But I now know that there are people who change their behavior.

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