



Professional Licensure Protection Strategies

How to keep oneself from being investigated and protect oneself if an investigation is under way.

This is the third and final article in a three-part series on nursing boards' disciplinary actions and what nurses need to know to maintain their license in good standing. This article discusses strategies for protecting your license.

A nursing board investigation can be a uniquely stressful experience, even if disciplinary action is ultimately not taken. A nursing license may be the only means by which a person can generate income and maintain meaningful employment. One's identity as a nurse may also be threatened when she or he is under investigation. There are steps nurses can take, however, to reduce their chances of being investigated by their licensing boards and to improve the odds of achieving a good outcome when they're under investigation.

PROTECTING ONE'S LICENSE

Develop and maintain interpersonal communication skills. Patients and families are less likely to file a complaint against a nurse with whom they have a personal connection. Establishing rapport and maintaining an alliance with patients creates good will. Nurses who are perceived as abrasive, insensitive, or unkind are more likely to be complained about and named in lawsuits than nurses who create bonds with their patients and are perceived as caring. Patients will forgive mistakes more than they will forgive indifference. The single most protective action nurses can take to reduce liability exposure is to develop good interpersonal communication skills.^{1,2}

As Irwin Press noted, "Patients who are more satisfied are less likely to sue. Period. All studies of malpractice claims show the same result. Communication is the key to the vast majority of suits. Anger, not injury, is the trigger for most claims. . . . Empathy and good interpersonal skills prevent malpractice claims."³

Stay informed. Visiting the nursing board's Web site periodically will flag practice alerts, frequently

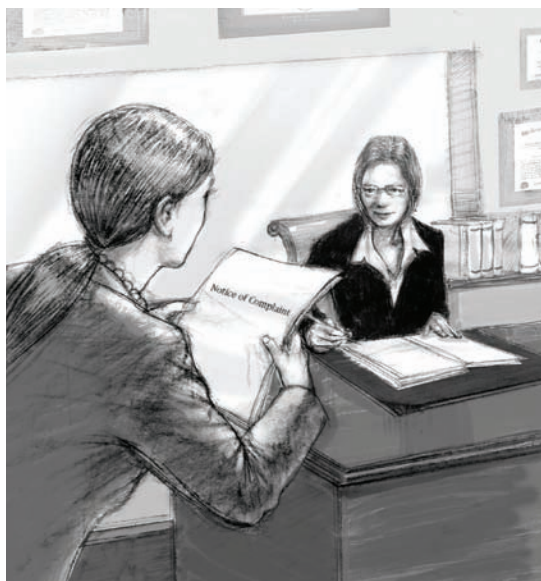


Illustration by Janet Hamlin.

asked questions, regulatory changes, or advisory opinions for the nurse. Nurse practice acts or nursing regulations vary in their style. Some are written in plain English and easy to understand, whereas others are difficult to find or confusing. They may be generic and broad based or quite specific, but reading the actual statutes can inform nurses as to what's legally expected of them as licensed professionals. The state's definition of professional misconduct or unprofessional conduct, as well as posted disciplinary actions, will alert nurses to behaviors that can trigger an investigation and charges. The definition of nursing practice and scope-of-practice demarcations can



provide guidance regarding what one may and may not do. Some states offer jurisprudence self-tests or quizzes to test one's knowledge of the state's nursing statutes. Taking the quiz periodically can further one's understanding of the state's nursing laws and regulations.

Many nursing boards have open meetings and publish the dates of those meetings so that the public knows when and where they will take place. Nurses should attend an open meeting of their licensing board to develop a better sense of who the board members are and what their board discusses. When in doubt about how a board would interpret activities or functions, nurses should request advisory opinions from the board and maintain a copy of the request and of the response.

Stay educated. Nurses need to demonstrate that they take patient safety seriously and are self-directed in meeting their continuing education and competency needs. Attendance at continuing education conferences or seminars, membership in professional organizations, and subscriptions to nursing journals can demonstrate this to the board. Advanced degrees and specialty certifications can also demonstrate a commitment to continuing competency. It's important to maintain certificates of completion for continuing education courses so they can be produced as evidence of compliance with contact-hour requirements.

Nurses who communicate with management have fewer claims against them than nurses who do not.

Nurses should belong to at least two professional organizations. One membership can be in an organization that addresses generic practice issues, policy, politics, health care economics, or other professional issues. The other membership should be specific to the nurse's clinical area of practice. Nurses should also subscribe to at least two professional journals. Like professional organizations, one should be generic, to address policy and practice issues, and one should be clinical and specialty specific. Many professional associations provide a subscription to the organization's journal as a member benefit.

Resolve conflicts between job descriptions and legal scope of practice. Nurses are required to confine their practice to the scope authorized by law. If a job description or common practice in the workplace exceeds what the board permits nurses to do, nurses

can be compromised. "Because that's what we do here," "because that's what the physician told me to do," or "because my supervisor said it was okay" isn't an effective defense if nurses are charged with exceeding their legal scope of practice or with practicing advanced practice roles or medicine without a license. Similarly, nurses shouldn't delegate tasks to those who aren't authorized to perform them.

It may be necessary to seek clarification in writing from one's employer or to obtain an advisory opinion from the nursing board regarding specific activities. If the conflict between what the employer expects and what the nursing board allows cannot be resolved, nurses should abide by nursing board restrictions. Disagreements with employers are unpleasant but preferable to licensure discipline.

Maintain professional liability insurance. Many nurses rely on their employers to cover them for malpractice insurance rather than maintaining individual policies. Employer policies, however, don't cover licensure defense. Typically, employer insurance policies are limited to covering malpractice charges that arise within the course of employment. Nurses who need to defend themselves against allegations that arise outside of the workplace or against professional licensure charges aren't covered by employer policies. An individual professional liability policy is inexpensive and can provide coverage for the legal expenses associated with defending one's license.

Keep a file. Letters of recommendation can demonstrate the confidence others have placed in a nurse. Because it can be useful to provide copies of these letters to the board, nurses should maintain a file of any references they've obtained. Copies of performance appraisals or evaluations, thank-you letters from patients, awards, and certificates of accomplishment should be saved as well. Documentation of public interest activities (such as participation in local health fairs, disaster drills, or blood pressure or cancer screening clinics; teaching classes to the community on cardiopulmonary resuscitation or diabetes management; or offering flu shots at schools or churches) or volunteer work can be helpful in speaking to a nurse's character. Nurses who maintain files with these materials are better prepared should such documents be needed for disciplinary defense.

Maintain healthy relationships with managers. Nurses who adhere to employer policies and communicate with management have fewer claims against them than nurses who do not.⁴ Letters of reference or recommendation and copies of performance appraisals are easier to obtain when nurses have healthy and respectful working relationships with their employers. Additionally, employers with whom nurses have good working relationships are more willing to work

with nurses who have temporary practice restrictions or who are on board probation. Poor evaluations shouldn't remain unchallenged if they don't fairly represent a nurse's performance. Similarly, nurses shouldn't sign corrective action memos or disciplinary action by employers if they don't accurately represent the facts. If nurses must sign them to obtain copies of them, the signature should be prefaced by "under protest" or "disagree with above." In facilities where nurses are represented by collective bargaining agreements, nurses should have a representative with them during all stages of adverse employer actions.

Maintain professional boundaries. Personal relationships with patients may be restricted or strictly prohibited by a state's nursing law. Nursing boards may believe that patients are vulnerable to exploitation in such cases. Nurses don't want to suggest to regulators that they're taking advantage of the nurse-patient relationship for personal gain. Personal relationships with patients do not have to be of a sexual nature to trigger a nursing board investigation. Business or social relationships with patients or former patients can also be considered inappropriate. Such relationships can suggest unethical conduct, even if they take place after the patient has been discharged from the nurse's care. Sexual relationships can lead to charges of sexual misconduct, even if the patient has consented to such a relationship.⁵

Respect physical limitations. Sleep deprivation is a serious form of impairment that can endanger patients.⁶ Nurses who moonlight in second or third jobs, who agree to work too much overtime, or who treat 12-hour shifts as part-time work can find themselves making clinical mistakes that come to the attention of the nursing board. Shift work disrupts the normal sleep cycle and can create dangerous levels of fatigue. Nurses must respect their need for adequate sleep because they will be held accountable for endangering patients if they fail to do so. As the American College of Occupational and Environmental Medicine's Presidential Task Force on Fatigue Risk Management notes, "The only remedy for sleep deprivation is sleep, and it is the employee's responsibility to use sleep opportunities to obtain rest, sleep, and meals."⁷

Understand the connection between private conduct and licensure discipline. Illegal or unethical behavior can result in a licensing board investigation, even when not related to nursing practice. Nurses can be disciplined or separated from practice for engaging in untoward conduct in their personal lives. Consider the case of Glecina Bethea-Tumani that I discussed in Part 2 of this series (November).⁸ Previous criminal charges from her personal life led to the nursing board's subsequent refusal to grant her a nursing license.

Taxes must be filed, spousal and child support payments must be paid on time, and nurses must not drive when impaired or intoxicated. Social media must be used responsibly. Remember from Part 1 (October) that nursing boards take the misuse of social media very seriously. Discussing patients, complaining about employers, bullying coworkers, or posting sexual content can lead to disciplinary action.⁹

Nurses can be disciplined for engaging in untoward conduct in their personal lives.

If arrested or charged with a crime, nurses should seek the counsel of a licensure defense attorney, as well as a criminal attorney. Attorneys are specialized in practice and don't have competence or expertise in all arenas. Criminal attorneys might not understand the potential legal or career implications when negotiating plea arrangements for licensed professionals. A conference with both the criminal and licensure attorney or a criminal attorney's "curbside consult" with a licensure attorney can better position the nurse in the event of future investigation by the nursing board.

IF ONE IS UNDER INVESTIGATION

Retain counsel. A nursing board can inform a nurse that she or he is under investigation by sending a letter or by calling the nurse. It's important to respond to board inquiries in a timely fashion, but it's also critical to understand the adversarial nature of an investigation, even when characterized as "informal." Making statements or answering questions without counsel can create problems because nurses can unknowingly make statements against their own interest. Although nurses have the right to represent themselves, they're unlikely to understand their rights and know what to expect or how to frame defenses without legal advice. Nurses may not be told, but should know, that they have the right to be represented by an attorney at all stages of the investigation. Having an attorney to counsel the nurse through the entire process can also reduce some of the anxiety associated with the experience.

It's not advisable to be represented by a lawyer who practices an area of law unrelated to nursing licensure. Using one's uncle, the real-estate lawyer, may be less expensive and more convenient, but this doesn't provide the skill or expertise necessary



to protect a license. Nurses should obtain representation by an administrative attorney experienced in licensure defense as early in the process as possible. Nurses receiving a telephone call from the board regarding an investigation should state that they're willing to cooperate but are unable to answer questions or make statements until they retain counsel. If they receive a letter from the board, they should immediately send the letter to their attorney, so a *notice of appearance* can be sent on their behalf. Attorneys skilled in licensure defense can be found through The American Association of Nurse Attorneys, local bar associations, or referral from one's professional liability carrier.

Do not apply for licensure in another state. Some nurses with a licensure investigation pending in one state think they'll be protected from employability problems by obtaining a license in an adjacent state. However, as a result of the reciprocal jurisdiction issues previously discussed, this will compound the problem. Applying for licensure in a second state while under investigation in one's home state can lead to an investigation in the second state as well. Similarly, complaints that arise within the context of a multistate license can lead to investigation in compact states as well as one's home state.

A licensure defense lawyer can counsel a nurse regarding the advisability of seeking another license given the particular circumstances of the case.

Once represented by counsel, nurses shouldn't have any conversations or written correspondence with the nursing board.

Confirm that the board has your current contact information. Nursing boards require licensees to inform them of name or address changes. If the nurse hasn't filed an address change with the board, she or he may not receive communications from the investigator or prosecutor. Failure to respond to board correspondence or to do so in a timely manner can compromise the defense and lead to other charges.

Do not have direct communications with the board. Once represented by counsel, nurses shouldn't have any conversations or written correspondence with the nursing board. All inquiries, responses, comments, conversations, and so forth should be

conducted through the nurse's attorney. If contacted by the board, the nurse should advise the board that she or he is represented by counsel and provide the attorney's contact information.

Minimize conversations and maintain a low profile until the matter is resolved. Conversations with anyone other than one's attorney can be discoverable and damaging. Posting on social media platforms and participating in blogs, chat rooms, or e-mail discussions can also create problems in defending against licensure charges. With high-profile cases, nurses should not speak with the media but direct all inquiries to counsel. Until the case with the nursing board is fully resolved, nurses should minimize visibility and stop discussing the matter.

Obtain legal advice when applying for initial licensure or renewal. Initial licensure and renewal applications require complete honesty in completion. Many applications ask questions about adverse employment actions or criminal charges. Nurses with such issues should have a licensure defense attorney review the application before submitting it. The attorney can assist the nurse in explaining the circumstances and providing supporting documents. Similarly, while under investigation or while disciplinary action is pending, nurses should review their applications with an attorney before submitting them.

Do not surrender or relinquish your license without legal advice. Because surrender and relinquishment are considered revocations, such actions may not be reversible. They may also lead to equal disciplinary action in other states and to exclusions and data bank listings. The voluntary nature of such actions doesn't make them less permanent than board-induced revocations. It may be preferable to attend a hearing and put defenses on the record so they're preserved for later restoration attempts, even without the likelihood of success at the hearing. Nurses should discuss the consequences, risks, and benefits of and alternatives to voluntary surrender or relinquishment with an attorney before making the decision to forfeit their licenses in this manner.

Understand collateral implications. When making decisions regarding accepting consent agreements, negotiating disciplinary action, attending hearings, or appealing board decisions, nurses should consider the other legal issues that can arise from board actions. As discussed in Part 2 of the series, these can include exclusions from participation in Medicare or Medicaid, data bank listings, employability problems, and reputation damage. Good decisions about defense positions and strategy can only be made when the nurse is fully informed of all the potential collateral implications.

Stress management. The experience of being investigated or disciplined by the nursing board is extremely stressful and can even be traumatic. For nurses who remain employed during the process, it's easy to be preoccupied with or distracted by the stress. Nurses may also be impaired from the resultant sleep deprivation. Under these conditions, clinical issues can arise. A nurse can commit medication errors, forget to put side rails back up, or miss patient status changes as a consequence of anxiety or fatigue. This can make defense of the underlying charges more difficult and create the appearance of a pattern of performance or practice issues.

Nurses undergoing investigation should adopt whatever sleep hygiene practices are necessary to help them obtain adequate rest. It may also be helpful to obtain stress counseling or professional help during the experience so current clinical performance can be maintained.

A nursing license represents one's livelihood and one's identity. The possibility of losing it or of being unemployable as a result of disciplinary action against it can be very frightening. It's possible to survive the experience and continue having a meaningful career, but it's necessary to have the right support system in place in order to do so. ▼

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