

## CHAPTER 14

### DOH INVESTIGATIONS AND THE 27 BIGGEST MISTAKES NURSES MAKE IN DOH INVESTIGATIONS

#### I. INTRODUCTION

If you receive a letter, a telephone call or a visit from an investigator from the Department of Health (DOH) investigating you, your facility, or the care of one of your patients or former patients, you should treat this as an extremely serious matter.

A nursing license is a valuable asset which merits protection. Courts have repeatedly held that a professional license confers upon the licensee a property right which cannot be removed without due process of law. At the same time, consumers have the right to be protected from incompetent or dangerous health care practitioners.

The Florida Legislature has delegated to the Department of Health ("DOH") the duty to protect the public from nurses who present a danger to the public. One method by which DOH performs this duty is the investigation and prosecution of complaints against nurses. This chapter outlines the investigative process preceding a formal disciplinary action against a nurse's license and discuss protective measures the nurse should take to protect the license upon notice of an administrative investigation.

#### II. INITIATION OF AN INVESTIGATION

The most common way in which a nurse will be advised of the initiation of a DOH investigation is through a letter on DOH letterhead, signed by a DOH investigator (sometimes called a "malpractice investigator") by regular U.S. mail. This will have a "Uniform Complaint" attached to it and it should also have a letter or other written document from the patient or complainant giving greater details about the complaint. This will be sent to the address you have on file with the DOH; therefore, it is extremely important to keep your address correct and up to date at all times. (Remember, failing to update your address within the time period set by the DOH is separate grounds for disciplinary action.) In some cases this correspondence will be sent to you via certified mail, return receipt requested.

The investigations for any professional board of licensed health care providers (Board of Nursing, Board of Medicine, Board of Dentistry, Board of Pharmacy, etc.) are investigated by the Department of Health. The investigators who investigate such matters are all attached to the Medical Quality Assurance (MQA) Division of the DOH. Do not be misled into thinking the investigation is not disciplinary or penal in nature just because the investigator may be called a "quality assurance investigator" or a "malpractice investigator." These investigations may lead to discipline which includes revocation of your licenses and tens of thousands of dollars in fines.

The Uniform Complaint form itself contains a great deal of information about your investigation, including codes that tell how seriously DOH is treating the matter. In the most serious cases, the DOH investigator may just show up in person at your office or your home and notify and attempt to interview

you in person. **We recommend that you advise the investigator that you cannot speak to him or her or provide any information at all until you have spoken with an attorney.** You cannot be required to speak to the investigator or to make any statement to the investigator. The contact by the DOH investigator (usually in writing, but sometimes by telephone or in person) is the way in which an investigation against your nursing license begins. It is best to think of the DOH investigator as a police officer and to treat him or her as such.

Complaints or reports leading to an administrative investigation may originate from a variety of sources. Disgruntled patients or family members may write to the DOH, the Agency for Health Care Administration (AHCA), the Department of Children and Families (DCF), the Department of Business and Professional Regulation (DBPR), or the Board of Nursing (the Board). The DOH is required to investigate any filed complaint so long as it is in writing and contains facts that show a violation of the laws governing licensed nurses and CNAs. Moreover, anonymous complaints or complaints filed by a confidential informant may be investigated if the alleged violation is substantial and the DOH, after preliminary inquiry, has reason to believe the complaint is true. Furthermore, DOH may initiate investigations, even without a complaint, if the agency has reasonable cause to believe that a nurse has violated applicable statutes or rules.

Additional sources of complaints include hospitals and ambulatory surgery centers. These licensed facilities are mandated by law to report certain internal risk management findings to DOH which then refers the information for disciplinary action. For instance, licensed facilities must report any adverse or untoward incident which occurred in the facility or prior to admission if the incident resulted in the following:

1. The death of the patient;
2. Brain or spinal cord damage to the patient;
3. Performance of surgery on the wrong patient; and
4. Surgical errors including wrong site, wrong procedure, removal of foreign objects remaining from surgery or repair of inadvertent surgical injuries.

Other mandatory reporting laws, such as those governing child and elder abuse and neglect, may also lead to an investigation.

### **III. IMPORTANT TIPS TO REMEMBER INITIALLY**

It is extremely important that you remember the following tips so that you are not intimidated into making any remark or statement that may later be used against you:

1. DOH licensure investigations are considered to be penal (criminal) in nature. Therefore, you have all of the same constitutional rights you do in criminal cases.
2. You cannot be required by anyone to make any statement to the DOH Investigator or to your supervisor relating the investigation. No action of

any type can be taken against you for refusal to speak with or make a statement to the investigator.

3. Any statement, no matter how insignificant it seems, can and will be used against you by the DOH. For example, just agreeing or stating that you were working in a certain place on a certain day can be used to prove this fact in a later hearing. The state may not be able to produce witnesses or evidence to prove this against you, if you do not admit it. If you do admit it or state it, orally or in writing, then this is all the proof that is required in any hearing.
4. Do not mail the investigator a copy of your resume or any statement or documents of any kind. This can be used against you. (See #3 immediately above.)
5. If approached in person by an investigator tell the investigator you cannot speak with him or her as you must consult with your attorney first. Do not be intimidated or persuaded to make any statement or speak to the investigator any further.
6. It does not matter against whom the investigation was initiated. You may be added to the investigation or have a separate investigation begun against you based on this investigation.
7. If you have nursing malpractice insurance, immediately notify your insurance company and request assignment of an attorney to your case. Most nursing malpractice insurance also pays for DOH investigation defense.
8. If you do not have insurance, immediately attempt to locate and retain the services of a qualified, experienced health law attorney who has experience in handling Board of Nursing and Department of Healthy cases. Ask the attorney how many time she or she has appeared before the Board of Nursing in such cases. Contact The Health Law Firm, the American Association of Nurse Attorneys (TAANA), the Florida Nurses Association (FNA), the American Health Lawyers Association (AHLA) or other similar professional organization if you are unable to locate one on the Internet.

#### **IV. THE INVESTIGATION PROCESS**

In most instances, the nurse will be notified of the initiation of an investigation by a letter from DOH that includes a copy of the complaint which caused the investigation. The letter is generally sent certified mail, return receipt requested and delivered to the nurse's address as listed on file with the Board. Nurses have a duty to notify the Board of new addresses within sixty (60) days of address changes. Failure

to receive the notice of investigation may not be a defense to the action if the failure is attributable to the nurse's oversight.

The notification letter generally introduces the DOH investigator, invites the nurse to submit a written response in response to the complaint and states that the investigator may wish to schedule an appointment with the nurse to obtain a verbal statement regarding the incident. The letter may or may not inform the nurse that he/she has the right to be represented by counsel.

Most likely, the letter will not include important information the nurse should consider prior to responding. For example, the letter will not clearly state that this investigation may result in disciplinary action against the nurse's license. Similarly, DOH may not inform the nurse that statements made or documents provided at this stage of the investigation may be used against the nurse if disciplinary action ensues, nor enumerate the nurse's right not to respond or talk with the investigator. The nurse's decisions of whether to respond to the letter and if so, how to respond are important ones and should be undertaken in consultation with an attorney familiar with licensure issues.

In addition to information received from the licensee, the DOH investigator has subpoena authority and may obtain information which might otherwise be confidential. For example, the investigator may subpoena patient records or personnel files. Furthermore, the investigator may interview others involved in the care at issue. The investigation may last for many months especially in complex cases. Once the investigation is complete, the investigator will prepare a detailed report.

The initial DOH letter may or may not advise the nurse that he has a right to obtain a complete copy of the finished DOH investigation. It also may or may not tell the nurse he has the right to submit a rebuttal to the DOH investigation report. Such a rebuttal may include statements, documents, journal articles, expert reviews of your own, additional protocols and procedures, character reference letters, continuing education certificates, or anything else you consider may be relevant to the matter. It is our standard policy to always request a copy of the investigation report, in writing, at the beginning of an investigation and a number of times throughout the investigation. This letter also states that we wish to submit additional documents and information after reviewing the investigation, but before the case is submitted to the Probable Cause Panel for consideration.

The Probable Cause Panel (PCP) is a subcommittee of the Board of Nursing. It consists of two or three members of the Board of Nursing. However, be warned that one of these members may be a lay person. One of these members may be a Licensed Practical Nurse (LPN).

Not every case will require submission of materials to the Probable Cause Panel after the investigation is received and reviewed. There will be a few where the allegations made are not "legally sufficient" and do not constitute an offense for which the physicians may be disciplined. In other cases, an experienced health care attorney may be successful in obtaining a commitment from the DOH attorney to recommend a dismissal to the Probable Cause Panel. In still other cases (usually the most serious ones), for tactical reasons, the experienced health care attorney may recommend that you waive your right to have the case submitted to the Probable Cause Panel and that you proceed directly to an administrative hearing. The key to a successful outcome in all of these cases is to obtain the assistance of a health care lawyer who is experienced in appearing before the Board of Nursing in such cases and does so on a regular basis.

The Probable Cause Panel will review the investigation and any additional material that you have submitted. It will determine whether there is probable cause to believe that the nurse has committed any violation of the Nurse Practice Act and whether or not disciplinary action against the nurse is warranted. It will take a majority vote of the PCP (at least two (2) members) to vote that there is probable cause.

If there is a finding that there is no probable cause, the case will be dismissed and the file is sealed. The contents of the file cannot be revealed or disclosed and it is exempt from the Florida Public Records Act. The matter remains confidential.

However, if the PCP finds there is probable cause, the case is then sent to the DOH Legal Department and formal charges against the nurse are prepared. The formal charge sheet or "Administrative Complaint" resembles a law suit in a civil case. The Administrative Complaint outlining the separate counts or charges upon which the DOH will proceed in prosecuting the nurse is filed and served upon the nurse. The matter becomes a public record ten (10) days after the PCP's decision that there is probable cause

If the case is very serious, or if it involves allegations of drug abuse, alcohol abuse, mental impairment or defaulted student loans, the case is initially placed on a "fast track" and the entire investigation must be completed within 45 days. The investigation is then submitted to the Surgeon General (formerly known as the Secretary of the Department of Health) to determine if an Emergency Suspension Order (ESO) should issue. If an ESO is issued, the nurse's license to practice is immediately suspended until all proceedings are over with and the matter has been finalized. This will mean the nurse is unable to work as a nurse anywhere in Florida for months, years or, perhaps, forever. This is another reason to treat these matters seriously and to immediately retain the services of an experienced health law attorney.

It is in the nurse's best financial and professional interest to resolve issues raised by an administrative investigation prior to a finding of probable cause by the Panel. Therefore, one of the nurse's best strategies is to treat the investigation seriously from its initiation and to allocate resources to dismissing the case prior to a probable cause finding.

After the investigation, if there is a formal Administrative Complaint prepared, the nurse will be given a number of options. These are usually in the form of an "Election of Rights" statement included when the nurse is served with the Administrative Complaint. Administrative hearings are covered in another chapter of this manual. However, the following warnings should be heeded:

1. It is best not to complete the Election of Rights form, except with an appropriately experienced health attorney familiar with board of nursing cases. Many mistakes are made in completing this form and you may be giving up extremely valuable procedural rights.
2. When in doubt, always dispute every allegation in the Administrative Complaint and request a formal hearing. You can always decide later to convert this to an informal hearing, if your attorney advises you this is in your best interest.

3. Never elect an "informal hearing." This is the same as a guilty plea. You must admit that every allegation made against you in the Administrative Complaint is true. The only thing you will be arguing over at the informal hearing is the amount and type of punishment you will receive.
4. Do not voluntarily relinquish (give up) your nursing license. This will be treated the same as a revocation of your nursing license. You will be reported to the National Practitioner Data Bank (NPDB) and the Healthcare Procurement Integrity Data Bank (HIPDB) which will result in your future exclusion from the Medicare and Medicaid Programs and you will also be permanently debarred from federal government contracting. You will also be reported to the national association of state boards of nursing and if you have a nursing license in another state, disciplinary proceedings will be commenced against that license, as well. See separate chapters in this Manual on these issues.

A chart published by the Department of Health (current as of July 2008) showing the investigation and disciplinary process is contained in Appendix 14-1 to this chapter.

**V. LITTLE KNOWN FACTS ABOUT DOH INVESTIGATIONS THAT COULD SAVE YOUR LICENSE**

We have compiled a list of several important facts regarding DOH investigations that you should know. If you are aware of these facts, it could prevent you from making a number of mistakes that might result in disciplinary action being taken against you. These are contained in Appendix 14-2 to this chapter.

**VI. THE 27 BIGGEST MISTAKES NURSES MAKE IN DOH INVESTIGATIONS**

We have identified 27 major mistakes which nurses make during the DOH investigation process. Avoiding these mistakes will greatly improve your chances of having the case against you dismissed with no formal administrative complaint's being filed. Even if a formal administrative complaint is filed, at least you will have made it much easier to defend yourself and to ultimately obtain a dismissal.

The 27 biggest mistakes nurses make in DOH investigations is attached as Appendix 14-3 to this chapter.

**VII. IMPORTANT FACTORS TO CONSIDER IN MAKING DECISIONS REGARDING DOH COMPLAINTS AND INVESTIGATIONS**

When you are aware that the Department of Health has an investigation pending against you, it is important for you to also begin considering the potential impact that it might have on your professional license and on your future ability to practice in your chosen profession.

The investigation and all information and documents received by the Department of Health are confidential by Florida law until ten (10) days after probable cause is determined to exist or the subject of the investigation (you) waives confidentiality, whichever occurs first. After probable cause has been determined the case becomes a public record and your file, except for patient identifying information and other limited information, will be made available to the public for review and copying. Once an Administrative Complaint is filed, the case becomes public record and anyone making a request of the Department of Health will be informed of the charges.

The Department of Health currently publishes information about all regulated professionals who have been disciplined. Primarily, this effort is directed toward inclusion of information about disciplinary actions in the newsletter of the Board of Nursing and on its website on the Internet. This means that once disciplinary or summary action is taken, the information is widely disseminated by the Department of Health.

With the exception of certain investigative state and federal agencies and other state licensing boards, the Department of Health cannot disclose the existence of its investigation or a matter closed without a finding of probable cause to anyone. Consequently, you may find yourself in situations where you will be forced to disclose a confidential Department of Health investigation or face exclusion from participation with insurance provider organizations, hospital staff, professional associations and other entities including other state licensing boards. Care should be given to providing information to the requesting entity while remaining truthful in the response.

### **A. THE NATIONAL PRACTITIONER DATA BANK (NPDB) AND THE HEALTHCARE INTEGRITY PROTECTION DATA BANK (HIPDB)**

License discipline is reported to the National Practitioner Data Bank (NPDB) and the Healthcare Integrity Protection Data Bank (HIPDB). Malpractice suits and other actions taken against your staff privileges (if you have any), provider status with insurance carriers, DEA registration, or summary final action are reported as well. This information is then used by a variety of organizations, including hospitals and other state licensing boards in evaluating your credentials. Because all action taken by your licensing board is public, all discipline, no matter how minor, is now required to be reported to the Healthcare Integrity Protection Data Bank, which in turn determines whether the report should also be included in the National Practitioner Data Bank.

Take a close look at Appendix 14-4, to this chapter, regarding action taken against a licensed practical nurse (LPN). She was reported to the NPDB after she voluntarily relinquished her LPN license during a pending DOH investigation.

### **B. FEDERATION OF STATE NURSING BOARDS**

All action taken by the licensing board against your license is reported to a national federation of state licensing boards for your particular profession. Should you have a license in another state, the other state will become aware, through this reporting mechanism, of the actions taken in this state. We often see discipline arising in another state resulting from an initial investigation and discipline by the Florida Department of Health.

Many states require that their licensed professionals separately report action taken in any other state against them. If your state is one of those requiring a report, the failure to timely inform that state of action taken here in Florida could result in penalties in that other state in addition to any they might want to impose as a direct result of the events here in Florida. Importantly, once another state has taken action against you, regardless of whether the original event arose in Florida, it must be immediately reported back to Florida no later than fifteen (15) days after the date of the action or you could face further or other disciplinary action in Florida as a result.

**C. HEALTH MAINTENANCE ORGANIZATIONS/MANAGED CARE ORGANIZATIONS/PREFERRED PROVIDER ORGANIZATIONS OR OTHER PREPAID HEALTH PLANS**

HMOs, PPOs and other managed care organizations will often request information from you even during the early confidential stage of a Department of Health investigation. Discipline can result in exclusion from managed care organizations or at least, their desire to evaluate the circumstances of the Department of Health's case. The organization, through your contract, may require that you promptly report any discipline to their credentialing coordinator or some other responsible person within the organization. A failure to report the investigation and/or any discipline taken against you could be the basis for an action to terminate your provider status with that organization. The same might be true for your failure to reveal pending investigations. You will want to check your contract/bylaws with any provider organization or insurance plan in which you participate for any specific requirements concerning reporting/disclosure of investigations and license discipline.

Check with a qualified health care attorney to whom you have disclosed all of the facts, before you decide on whether or not to make such a report.

**D. MALPRACTICE INSURANCE**

Discipline can have an effect on your ability to carry malpractice insurance and the premiums which you pay. Certain disciplinary complaints can result in exclusion from or termination from certain insurance carriers and most feel that you have a duty of disclosure. You will want to review your malpractice policy for any required reporting under the terms of the policy.

### **E. HOSPITAL STAFF PRIVILEGES AND MEMBERSHIP**

A Department of Health investigation or a resulting disciplinary action can have an effect on your ability to maintain or obtain staff privileges and staff membership in hospitals, preferred provider organizations, managed care organizations, and health maintenance organizations. Usually, unless you are an ARNP, this will not make any difference to you. To most nurses, it will not have an impact.

However, if you do have medical staff privileges, there may also be a reporting requirement under the medical staff bylaws and with the loss of certain rights, mandatory suspension of clinical staff privileges. Again, we recommend that you check your organization's bylaws, rules & regulations, and requirements for membership including any contractual arrangements you have with the organization or entity for their reporting requirements and possible adverse action.

Should an entity take action against you, please note that you may have the obligation to immediately report that action to the Department of Health under their practitioner profile or other reporting requirements. A failure to timely report adverse action can cause the Department of Health to take other or further action against you.

### **F. MEDICARE AND MEDICAID PROGRAM PARTICIPATION**

Pursuant to the federal statutes and Federal Regulations governing the Medicare Program, disciplinary action by a state agency, including summary action can be a possible basis for suspension or exclusion from participation in Medicare and other federally funded programs including health benefits programs for federal employees and the state Medicaid Program.

Take a close look at Appendix 14-4, to this chapter, regarding action taken against a licensed practical nurse (LPN). She was reported to the NPDB after she voluntarily relinquished her LPN license during a pending DOH investigation.

If your license has been summarily suspended or restricted, Medicare and Medicaid can take immediate action to suspend or terminate your provider number. This action can come on two fronts. The Office of the Inspector General for the Department of Health and Human Services may take administrative action to exclude you from federally funded programs and at the same time, Florida Medicaid may take independent action against your provider numbers.

Additionally, the Office of Personnel Management may also seek to exclude you from providing services to individuals enrolled in the Federal Employees Health Benefits Program. Medicare and Medicaid have available to them civil, administrative, and criminal sanctions for certain types of violations.

Many times they will implement one or more proceedings against a provider of Medicare and Medicaid services. Once action has been taken by either or all of the entities, there can be a significant delay in obtaining reinstatement of the provider numbers and termination of any period of debarment from providing services to federal employees. Additionally, you may have the obligation to immediately report any adverse action against your provider status to the Department of Health. Failure to timely report

required information to the Department can be an independent basis for other or further discipline against you.

#### **G. MEDICAID PROVIDER STATUS**

As with Medicare, disciplinary action including summary action can be a basis for exclusion from provider status. The action taken by Medicaid may be in addition to that taken by Medicare and the Office of the Inspector General. Additionally, although no action is taken initially by the Medicaid Program Office, they may take action at the time of your re-enrollment as a Medicaid Provider or upon notification that you have been debarred from providing services to federal employees or that you have been excluded from participation in federally funded programs under Medicare's notice or at such other times as the contract manager re-evaluates the provision of Medicaid services in the State of Florida.

#### **H. OTHER STATE LICENSING BOARDS**

If you are seeking or renewing licensure in another state, the Department of Health's investigation and discipline can have a possible affect on your ability to become licensed or have a license renewed. At a minimum, you can expect a delay in the processing of your application until resolution of the investigation.

If you have a license in another state, you may be subject to disciplinary action for the acts complained of by Florida and if Florida takes action against you, it may serve as a basis for discipline by the other state. Additionally, you may have an independent requirement to report action taken in Florida or any other state and a failure to report could serve as an independent basis for further action against you.

Also, many states, as a condition of license renewal, will inquire into pending matters in other states even if those matters are confidential. Florida law provides that the Department of Health may furnish confidential information to law enforcement agencies and any other regulatory agency and thus, you can expect that for confidential investigations, Florida may disclose the investigation to your other state of licensure upon inquiry.

#### **I. PROFESSIONAL ORGANIZATIONAL MEMBERSHIP**

Many professional organizations make similar inquiries into your license status and whether a licensing board has disciplined you. Many also require you to self-report any problems or discipline to the organization. You could see discipline, exclusion from the organization or other sanctions as a result of the Florida action. If you are a member of a professional nursing association, if you are certified or registered, or if you have an advanced specialty, the organization(s) responsible for these may commence action against you.

**J. SUPERVISION OF ASSISTANTS**

Under some situations, being placed on probation, suspension, or having restrictions or conditions placed on your license may affect your ability to supervise other nurses or CNAs.

**K. SERVICE AS EXPERT, MONITOR, OR REVIEWER FOR THE STATE OR OTHER ENTITY**

Having had discipline imposed against the license may exclude an individual from serving as an expert for a state licensing board, it might affect your service as an expert for other state entities, and it could also result in exclusion from service as a monitor, a consultant, or reviewer for a private entity or insurance carrier either during the period disciplinary conditions were imposed or subsequently.

**L. DISQUALIFICATION OF EMPLOYMENT OR PARTICIPATION**

Some violations are of such a nature that even without discipline imposed by the board, the event itself will disqualify the professional from employment in certain settings or by certain entities or cause you to be dropped from participation by certain plans. This is true for certain criminal offenses as well as certain disciplinary penalties.

Many entities and organizations are required to do background screening as a condition of employment or participation. The result of this case or the underlying event, which caused the investigation to be initiated, may result in disqualification. You will want to carefully evaluate the requirements of employment or participation for any particular setting and assure that the underlying event or the disciplinary action taken does not disqualify you from further employment or participation with the entity.

**VIII. CONCLUSION**

An administrative DOH investigation is the first step in the disciplinary process which could ultimately lead to the loss or restriction of the nurse's right to practice. Investigations should not be treated lightly because early in the proceedings the nurse may inadvertently waive procedural protections normally available to the holder of a professional license. Consultation with an attorney familiar with nurse licensure issues and the administrative process is mandatory.