

WHAT EVERY NURSE REALLY NEEDS TO KNOW ABOUT LEGAL ADVICE FROM THE BOARD OF NURSING

Recently a number of nurses have received in the mail a brochure called "What Every Nurse Needs to Know" published by the National Council of State Boards of Nursing. It gives advice in response to the question: "What should you do if you are the subject of a complaint?" It advises the nurse to contact the Board of Nursing (BON) immediately in such an event and states that the complaint will be handled in a "fair and appropriate matter." It advises that a BON representative will describe the investigation process and answer any questions that you may have about an investigation if a complaint is filed against you.

This does not appear to be sound advice and we would warn nurses against following it. Such advice may cause great damage to any defenses you may have, even if you are totally innocent.

Most states, Florida included, do not require you to make any statement to an investigator (or attorney) working on a Board of Nursing complaint, and we recommend that you not do so. In fact, under Florida law, your constitutional right to not make any statement that might help to incriminate you applies to such proceedings. Nurses are often falsely accused of misconduct or wrongdoing by patients, families of patients, employers and rivals. Most states do have adequate procedural safeguards in place that, if used by the nurse, will help to ensure the correct outcome of the matter. However, you must first know what these rights and safeguards are, and then know how to use them to your advantage in such proceedings. Very few attorneys are experienced in such matters and even fewer nurses are.

You should think of the investigation in the same light as a criminal investigation against you if you were wrongfully accused of a crime. In the case of a BON complaint, you can lose your license, lose your career, and be assessed monetary fines in the thousands of dollars. Why would you want to contact the investigator in such a matter and make statements that can later be used against you, if you don't have to? In most states, Florida included, the burden of proof is on the state to prove every element of the case against you. However, if you make any statements to the investigator (or the attorney for the Board), oral or written, this can be used against you. Even the simplest, most innocuous statements can cause you tremendous difficulty, because anything you say is something the state is no longer required to prove in an investigation or a hearing.

For example, the state may not have an admissible document or a witness who is available at the time who can state that you actually saw or treated the patient. Without being able to prove this, the state may not be able to prove any charge against you. Yet if you make a simple statement that you did treat the patient, the state no longer has to introduce any other proof of this. You have helped the state to prove its case against you without even meaning to do so. You have now made the case against you quicker, easier and less expensive for the state to prove; you may have made the case against you possible to prove when otherwise the state would not have been able to prove it at all.

It has also been our experience that BON representatives do not have the time or resources to answer every question you may have. Furthermore, BON representatives are not able to give you

legal advice on what to do. Even if you do speak with an attorney representing the BON, that attorney is not allowed by law to give you legal advice. Remember, the attorney representing the BON works for the state and is similar to a prosecutor. If you were charged with a criminal offense, would you call up the attorney prosecuting you and ask for her or his legal advice on what to do?

If you have nursing malpractice insurance, your professional liability insurance will most probably pay for your legal defense of a complaint filed against you, for a subpoena sent to you or for any deposition you must give. The need for defense of a complaint filed against you with the state licensing agency occurs many times more frequently than the need to defend a nursing malpractice claim or suit. This is the main reason we recommend that every nurse purchase nursing malpractice insurance. It is very inexpensive and usually provides excellent coverage. However, always check to make sure that it will cover your legal expenses in a nursing complaint whether or not it results in a potential malpractice claim. If possible, purchase a rider to raise the limits of such legal defense payments for licensure defense to at least \$50,000. If this is not available from this insurer, purchase a second policy.

Most nursing professional liability insurance allows the nurse to select the attorney of his or her choice to defend her or him. This is a very desirable feature to have in a professional liability insurance policy. Otherwise, the insurance company will reserve the right to pick your attorney, whether or not you agree with the choice.

Many nurses make a terrible mistake thinking "I work for a hospital; the hospital insures me." Or "I work for a nursing home, the nursing home insures me." This is not correct when it comes to complaints filed with the Board of Nursing. A hospital will have insurance (or will self-insure) to cover itself, not you. A nursing home may have insurance to cover itself, not you. If you have a complaint filed against you with the Board of Nursing, it is very rare that your employer will pay for your legal defense; additionally this will almost never occur if you no longer work for that employer. In many cases, and in most cases we have seen in the past year, it has been the employer hospital or the employer nursing home that has filed the complaint with the Board of Nursing against the nurse. You don't think the employer is going to pay for your legal defense if it has filed the complaint, do you? In addition, the employer who has filed the complaint, in the vast majority of cases, also fires the nurse. So you may be out of a job as well as no be able to pay for a legal defense of your license.

If your employer obtains an attorney to represent you in a matter, ask the attorney: "Do you work for me or the employer?" Also ask: "If there is a conflict between my defense and the employer's defense, will you continue to represent me or will you represent the employer?" Ask these questions in writing and get the answer in writing.

Failing to purchase professional liability insurance to protect your license is not very smart given how inexpensive it is. You have worked many years to obtain your professional license. You and your family have spent a great deal of money for your education to achieve it. If you can't afford a legal defense, you may be forced into accepting a settlement agreement (also referred to sometimes as a "stipulation" or a "plea bargain") for some type of disciplinary action. Even if you

only receive some small disciplinary action, this will be shown on your license forever. It will be reported to national reporting agencies and will prevent many employers, especially the good employers from hiring you. It may even bar you from working in some circumstances. If you have a professional license in another state, it will be reported to the other states and similar disciplinary investigations will be started against you in these other states.

Even if you don't have insurance that covers your legal defense in an investigation that has been opened against you, please locate and consult with an experienced health lawyer who routinely defends nurses in nursing board cases. Additionally, don't believe or rely on all of the rumors, gossip and "legal advice" that your colleagues who are not lawyers (or even your lawyers friends who are not experienced health lawyers) will give you. The fee for the legal consultation is worth the price. Make your decisions from a position of experienced knowledge, not one of ignorance or false assumption.

We recommend that if you receive any notice or indication that anyone has filed a complaint against you with the BON or any other licensing agency that you do not contact the BON, its investigators, or any of its representatives. We recommend that you immediately contact an attorney who specializes in defending nurses before the BON. If you are unable to locate one, contact The American Association of Nurse Attorneys (TAANA), the American Health Lawyers Association (AHLA) or your state bar association, by telephone or by visiting their website, and ask for a referral to such an attorney. Be sure to ask the attorney how many similar cases has she or he actually handled before the Board of Nursing.

The foregoing information applies to doctors, dentists, pharmacists, advanced registered nurse practitioners (ARNPs), certified registered nurse practitioners (CRNAs), midwives, physician assistants, massage therapists, psychologists, mental health counselors, social workers, and all other licensed health professionals; not just to nurses.

The attorneys of The Health Law Firm represent nurses, doctors, dentists, pharmacists, advanced registered nurse practitioners (ARNPs), certified registered nurse practitioners (CRNAs), midwives, physician assistants, massage therapists, psychologists, mental health counselors, social workers, physical therapists, respiratory therapists, medical students, residents, interns and all other licensed health professionals, in Florida and also in states other than Florida. In many states we are permitted to represent the health professional in investigations and administrative proceedings.

Please note that this article represents our opinions based on our many years of practice and experience in this area of health law. You may have a different opinion; you are welcome to it. This one is ours.

(Revised April 12, 2011)

(Note: This article is for informational purposes only; it is not legal advice.)

© Copyright George F. Indest III (Board Certified by The Florida Bar in the specialty of

Health Law), The Health Law Firm, Altamonte Springs, Florida, 2011. All rights reserved.

F:\Nursing Council Article.wpd