

COMMENTARY

Bill of Rights for Nurses in Licensure Matters

LaTonia Denise Wright, RN, JD

Nurses are not receiving the education and training needed for practical application of nursing law, regulations, and standards to current dilemmas and issues routinely encountered in clinical nursing practice. Nurse attorneys advising nurses in licensure and workplace matters are in a unique position to educate nurses on the law, legalities, and legal process through seminars, conventions, poster presentations, and publications and provide prospective, potential, and actual nurse-clients with a *Bill of Rights* for the disciplinary process and procedure. This article was drafted for educational and information purposes for the individual nurse.

Keywords: board of nursing; licensure; misconduct; attorney representation

You, like all Americans, have heard this repeated on a television show or on a radio talk show: "You have the right to remain silent. Anything you can and will say will be used against you in a court of law. You have the right to have an attorney present now and during any future questioning." These are the Miranda Rights read to accused individuals prior to questioning (*Miranda v. Arizona*, 1966).

What do Miranda Rights have to do with the practice of nursing? Everything for nurses involved in board of nursing disciplinary investigations and adjudications.

DIFFERENCE BETWEEN THE STATE BOARD OF NURSING AND PROFESSIONAL NURSING ASSOCIATIONS

Unfortunately, confusion still exists between the role of a board of nursing and a nursing association. A board of nursing is a *governmental agency* established by law. The board of nursing has authority over its licensees, which may include registered nurses, licensed practical nurses, and dialysis technicians. A board of nursing carries out its role by establishing requirements for nursing educational programs, establishing requirements for applicants seeking licensure, issuance of licenses, certificates of authority, and certificates to prescribe drugs, renewing licenses, certificates of authority, and certificates to prescribe drugs, investigating alleged violations of nursing law, and disciplining licensees who violate the Nurse

Practice Act (nursing law) and Board of Nursing regulations (nursing rules).

The role of a board of nursing as a regulatory agency is to protect the public from unsafe nursing care. One manner in which the board fulfills its role is through the issuance and renewal of licenses to nurses who meet the conditions and prerequisites delineated in the nursing practice act, rules and regulations. For example, depending on state nursing practice act, rules and regulations, the board of nursing may investigate nurses convicted of certain crimes, felonies or misdemeanors, even if the crimes are unrelated to nursing practice.

Why, you might ask, would the board of nursing be concerned if a nurse is convicted of crime unrelated to nursing practice? Laws and regulations prohibiting criminal conduct are written to protect the public from harm and the role of a board of nursing is to protect the public from unsafe nursing care, therefore, a board of nursing depending on the nursing law and rules in a specific state may inquire about the criminal convictions of licensees even if unrelated to practice.

Compare and contrast the role of a board of nursing with that of professional nursing associations. The board of nursing protects the public and does not advocate for the best interest of its licensees, which includes nurses. Professional nursing associations advocate for nurses through the development of professional standards and practices, codes of ethics, and health policy initiatives. There are many professional nursing associations in

the United States that may tailor membership around a specialty, workplace, geography, gender, heritage, ethnicity, or other shared similar interest (McPeck, 2001).

Specialty nursing associations include but are not limited to the American Association of Critical Care Nurses (AACCN), Oncology Nurses Society (ONS), Infusion Nurses Society (INS), and the Wound Ostomy Continence Nurses Society (WOCNS). Workplace-based professional associations include but are not limited to the American Associations of Office Nurses (AAON), American Assisted Living Nurses Association (AALNA), and the National Association of School Nurses (NASN). Heritage- and ethnicity-based professional associations include but are not limited to the National Black Nurses Association (NBNA), National Association of Hispanic Nurses (NAHN), and National Alaskan Native American Indian Nurses Association (NANAINA).

The American Nurses Association (ANA) differs from the specialty-, workplace-, heritage-, or ethnicity-focused professional associations in that it is a broad-based and multipurpose nursing association as ANA has members from all nursing specialties, practice areas, and educational levels. It is generally recognized as the only full-service professional association representing the nation's 2.7 million registered nurses through its 54 constituent member associations (CMAs).

These CMAs include the 50 states, the District of Columbia, Guam, the Virgin Islands, and the Federal Nurses Association. The CMAs, which were in the past referred to as state nurses associations, determine much of the direction of the ANA through the ANA House of Delegates, which is composed of delegates sent from each CMA and apportioned according to each CMA membership count. CMAs support for region- and state-level activities, special interest forums, committees, group programs, educational conferences, meetings, and lobbying and monitoring of state legislation and regulations. ANA has 150,000 individual registered nurse members through its CMAs.¹

The Board of Nursing Is a Governmental Agency

The 14th Amendment in the United States Constitution prohibits states from depriving any person of life, liberty, or property, without due process of law. Your state board of nursing is a governmental agency and as a governmental agency must provide licensees with due process in disciplinary investigations and licensure matters.

Due process is a "... legal concept that ensures the government will respect all of a person's legal rights instead of just some or most of those legal rights, when

the government deprives a person of life, liberty, or property. Due process has also been interpreted as placing limitations on laws and legal proceedings in order to guarantee fundamental fairness, justice, and liberty."²

A nursing license represents a property interest protected by the United States Constitution and states laws and regulations.³ The potential for deprivation, that is, action being taken against the property interest in the license triggers due process in board of nursing disciplinary investigations. However, a nurse's property interest in a nursing license is limited by the board's role as a state agency to protect the public from unsafe practitioners (Manns & Simpkins, 2003).

Nurses don't have an unequivocal right to practice nursing. A right is something to which one is entitled. Rights in general tend to be unalienable, unbridgeable, and uncontestable while privileges are enjoyed pending compliance with conditions prescribed by law. A nursing license is more appropriately viewed a privilege granted by the board of nursing based upon a nurse meeting the prerequisites for licensure or renewal. A nursing license is a privilege and as a privilege the board of nursing can place restrictions on the ability of nurses to practice in a particular state. For example, the board can reprimand, suspend, probate, or revoke the license of a nurse based on the evidence obtained in the investigation of a complaint.

Board of Nursing Disciplinary Investigations

The board of nursing, as a state agency must comport to state laws and regulations in its operation, communication, and conduct with licensees. In each state there is a process for the filing, investigation, and resolution of complaints filed against nurses with the board of nursing. While the manner of disciplinary investigations and the adjudication procedure vary from state to state when a complaint is filed against a nurse for allegedly illegal, unethical, unprofessional, or unacceptable conduct, the *guarantees* of due process remain constant and therefore can be construed as a Bill of Rights for nurses in licensure matters:

1. Right to Due Process. You have a right to due process in board of nursing disciplinary investigations and adjudications, which is guaranteed by the 14th Amendment in the United States Constitution and state laws and regulations. Due process means you are entitled:

1. to *Be Informed of the Allegations* made against you;

2. to *An Opportunity to Be Heard*, which means having the chance to present your account of the reported incident; and
3. to *Fundamental Fairness* in the resolution of the Complaint pending against your license, meaning sufficiently fair and just legal procedures must be utilized whenever action is taken against your license (Sheets, 2005).

2. You Have a Right to Remain Silent. Let's say you are returning home from an exhausting 12-hour shift and you answer the phone and it's a board of nursing investigator who wants to speak with you about a complaint filed against your license. The investigator wants to know what happened. You can invoke your right to remain silent and inform the investigator of such. You are not required to speak with the investigator at that particular time. You may wish to consult with an attorney or speak with the investigator at a later date and time to compose yourself and gather your thoughts. You definitely want to provide an account of the incident, but considering exercising your right to remain silent to consult with legal counsel first before providing information to board of nursing staff about a complaint pending against you.

3. Anything You Say Can and Will Be Used Against You in the Course of the Investigation. When a board of nursing investigator contacts you regarding a complaint filed against you, it isn't a social call. This individual is paid to engage in fact-finding and investigate complaints, compile evidence, and submit the findings of the investigation to the board depending on the process and procedure of the board of nursing for complaint investigations.

4. You Have a Right to Retain an Attorney. Unlike certain criminal proceedings, where defendants are provided with a court-appointed attorney or public defender at no cost, nurses involved in disciplinary investigations must retain their own personal legal counsel (LaDuke, 2005). Hence this is one benefit of purchasing your own professional liability insurance policy with a licensure defense protection benefit. Your insurer may cover the legal and expert witness fees and costs associated with defending your license before the board of nursing.

5. You Have the Right to Have Attorney Representation Now and During Any Future Questioning. Unfortunately, some nurses don't know until several months or even years later a complaint has been filed with the board of nursing. You may retain an attorney during the fact-finding and investigative phase, settlement phase, or hearing or posthearing phases. You have

a right to have your attorney present at all phases of the disciplinary investigation and adjudication process, including meetings with the board of nursing, board of pharmacy, and state attorney general's office investigators, and hearings before the board of nursing, administrative law judge, or hearing officer.

Nurses often ask if it will anger the board if attorney representation is sought in board investigations and adjudications. Nurses, as educated and licensed professionals, must keep in mind that disciplinary investigations and adjudications before the board are adversarial in nature because of the role of the board and its authority to take action against a nursing license if warranted by the evidence. Therefore retaining attorney representation should not be viewed as an indication of guilt or wrongdoing on the part of the nurse.

Self-representation is a right in any civil, criminal, or administrative case in which you are a party. The question is not can you represent yourself because of course you can; the question is really is it in your best interest to represent yourself?

As a nurse, if you were named as a defendant in a civil suit for nursing negligence, would you represent yourself? As a nurse, if you were indicted by a grand jury and a defendant in a criminal case alleging you practiced medicine without a license, i.e., you practiced outside the nursing scope of practice, would you represent yourself? As a nurse, if you are involved in a disciplinary investigation and adjudication before the board for an alleged violation of the Nurse Practice Act or board of nursing regulations, would you represent yourself?

YOUR NURSING LICENSE IS YOUR LIVELIHOOD, RIGHT? SO PROTECT IT!

You are a licensed nurse who is accountable for your own nursing practice. Nursing associations advocate for nurses, but you must also advocate for yourself. One way to do this is to think of yourself as a risk manager mitigating the inherent risks and potential liabilities associated with your own individual nursing practice. Who knows your nursing practice better than you do anyway, right? Consider:

1. Reviewing your state nursing practice act, rules and regulations;
2. Obtaining your own individual professional liability insurance policy with a licensure defense protection benefit. This will cover the legal and expert witness fees and investigation costs associated with defending your license before the

board of nursing and in litigation stemming from errors, omission, or acts arising out of your nursing practice;

3. Purchasing the American Nurses Association Foundation of Nursing Package that includes: *Code of Ethics for Nurses with Interpretive Statements, Nursing Scope and Standards of Practice, and Nursing's Social Policy Statement*, 2nd Edition. These are available online for purchase at www.nursingworld.org;
4. Joining a national, state, or specialty nursing association because nursing associations advocate for nurses and need the monetary and non-monetary support of individual nurses to do the collective work of the profession that benefits individual nurses; and
5. Reading journals, standards, literature, and practice statements applicable to your nursing practice and specialty area and staying abreast of your nursing employer's policies and procedures.

NOTES

1. See the American Nurses Association website at www.nursingworld.org
2. See the definition of due process at www.wikipedia.com
3. See Massachusetts Board of Nursing Registration, "Facts about the Board of Nursing Complaint Process," at www.mass.gov/dpl/boards/rn/misc/ncpfacts.htm

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Biographical Data. LaTonia Denise Wright, RN, JD, is an attorney, clinical consultant, and practicing home health RN (per diem) in Cincinnati, Ohio. Her law practice is limited to health law and representing, counseling, and advising nurses in licensure and workplace matters in Ohio, Kentucky, and Indiana. She is on the Board of Directors of the Center for American Nurses (Center), which as a professional association focuses on the workplace needs of individual non-union registered nurses. She serves as the Center's liaison to the American Nurses Association Congress on Nursing Practice & Economics.

Offprints. Requests for offprints should be directed to LaTonia Denise Wright, RN, JD, Attorney at Law, 10045 Springfield Pike, Suite 5, Cincinnati, OH 45215-1461. E-mail: ldw@nursing-jurisprudence.com