

California Campaign to Revoke Licenses of Nurses with Prior Out-of-State Disciplinary Records

A recent Los Angeles Times “exposé” of California-licensed nurses who have been disciplined for professional misconduct in other states has resulted in a California-wide effort to revoke all of those nurses’ California licenses. So committed is California’s Governor to this agenda, that he recently fired the head administrator and replaced all but one of the members of the Board of Registered Nursing. The new appointees have been given their marching orders, and more than 2,000 Registered Nurses are slated for license discipline against their California R.N. licenses on the basis of prior conduct in other states. It seems likely that Licensed Vocational Nurses will face similar issues soon.

Obviously, some nurses should not be practicing anywhere, but California apparently assumes that all nurses with license issues in other states should also be barred here. And nurses who are now on California’s hit-list, and their counsel, might assume that loss of their California licenses is inevitable. Neither of these assumptions is supported by logic or law.

License Discipline and Revocation in California

Like all professional and occupational licenses issued by the state, a nursing license—RN or LVN—once earned, becomes the property of the nurse. And, like any other property, such as real estate or money, the nursing license cannot be taken away (revoked), even for a short time (suspension), and cannot be diminished or restricted in any way (probationary conditions) without two things: good cause and due process.

There is a vast body of law as to what constitutes good cause. But here’s the take-away you need to remember: *the mere fact that some other state revoked or disciplined a nursing license issued by that state does not, by itself, constitute good cause for California to discipline a California nursing license.* This may seem a self-evident point, particularly to experienced counsel. But my experience as a former California Administrative Law Judge, presiding at administrative law hearings pertaining to a wide variety issues of professional and occupational licensure, causes me to predict that the Deputy Attorneys General who are assigned to process these “special” cases will initially rely on the introduction of certified records of past out-of-state discipline to establish sufficient basis for revocation of the California license. The records of the prior license discipline will first be offered as “official records,” for hearsay exception purposes, if that exception fails, as it should, the records will be offered as “business records.” It will be up to the licensee and licensee’s counsel to drive the inquiry deeper, based on the allocation of the burden of proof to the State. Although it is untenable for the State

to produce admissible testimony from live witnesses as to acts of misconduct which, if they occurred, occurred long ago and far away, there are provisions in administrative law for telephone testimony and testimony by declaration or affidavit.

As for due process, as in all other contexts, that constraint simply means that California cannot unilaterally revoke or discipline the license based on what State officials believe to be good cause or established fact (via the records of past discipline). Instead, the Board of Registered Nursing must notify the nurse of the State's intention to revoke, suspend, or impose conditions on the license, and provide specific allegations of fact on which the intention is based. The State must offer the nurse an opportunity to deny that the license should be disciplined, and an opportunity to demonstrate why by competent evidence.

The demonstration of why the license should not be disciplined takes place at an administrative hearing where the nurse's advocate can challenge all or any of the State's reasons and evidence before an impartial Administrative Law Judge. Also at the administrative hearing, the nurse's advocate may introduce evidence that the nurse is competent and that there presently exists no reason to deny the licensee the right to practice nursing in California. The judge will give due consideration to the evidence put before him or her and issue (1) findings of fact that explain what evidence the judge finds credible, (2) conclusions of law that explain what laws the judge thinks apply to the case, and (3) a proposed decision. The proposed decision is then forwarded to the Board for action, and the nurse and the nurse's advocate can appear before the Board to argue in favor of or in opposition to the ALJ's proposed decision.

Opportunities at the Disciplinary Hearing

Anyone – licensee or lawyer -- who is not familiar with the hearing process might not realize that the administrative hearing offers many opportunities to the nurse to avoid or reduce the discipline against the license proposed by the State. For example, the records of prior discipline imposed by another state may not be available. Or the out-of-state records may not meet the standards of admissible evidence set forth in the California Evidence Code (California law will apply at the hearing.) The discipline imposed by the prior state may have been based on conduct that is lawful in California. There may have occurred procedural defects in the out-of-state disciplinary process.

Many more possible grounds for invalidating or reducing the State's claims. may lurk in the history and facts of any individual case. The out-of-state discipline may have occurred a number of years ago, and the nurse may have current relevant work experience that may show any previous

performance problems have been addressed and resolved. The nurse may have evidence of further professional training since the time of the out-of-state discipline, or the nurse may have completed rehabilitation or received counseling. The nurse may be able to demonstrate a new maturity, significant changes based on life experiences (parenthood, military service, successful employment, religious enlightenment), and improvements in professional competence and personal accountability. Any similar facts would be compelling evidence where the State's only basis to discipline the nursing license is the mere fact of out-of-state prior misconduct.

These are only a few of the more obvious kinds of evidence that may be utilized to defend a nursing license in an administrative hearing. Countless others exist.

The Economics of Defending Against Discipline of the Nursing License

Some nurses (and other professional and occupational licensees) believe that they cannot "afford" to defend their license against the State's current campaign. But consider: what income can be earned in a year from nursing? In two years? In three? A license revocation may prohibit re-application for a new nursing license for at least three years and probably longer. Can the licensee afford not to defend the right to earn a living? And looking backward, the comparison of costs of defending the license against what has been invested is compelling. What were the costs in earning a 4-year R.N. degree?

How to Begin to Defend Against Discipline of a California Nursing License

The one certain way to lose a California nursing license on the basis of prior out-of-state professional discipline is to do nothing upon receipt of the notice of proposed action ("Accusation") from the Board. Do not let this happen! Once lost on this ground, the right to challenge the proposed discipline is irretrievable.

Read the Notice carefully. It provides a relatively short window of time for the nursing licensee to provide written notice of denial of the charges and demand for hearing ("Notice of Defense.") Do not let this deadline pass! It is critical to get the denial/demand Notice to the licensing agency before the time expires.

Upon committing to challenge the proposed revocation, the licensee should move quickly to find counsel skilled and experienced in licensing law. It is common for a representative of the licensing agency to attempt an interview of the licensee during the time that the hearing is pending (no 5th Amendment rights in this process) and, if successful in that effort, the licensee's statements in the

interview – or an approximation of varying quality – will be introduced in the State's case in chief. Discovery demands should be made on behalf of the licensee before the hearing date is near. And negotiations of outcome and even hearing and evidence stipulations may be productive in the time between Notice of Defense and hearing.

The licensing agency will tell the licensee that in it is not required to have an attorney to defend against license discipline. True enough. But the licensee should have counsel, specialized and experienced counsel. These cases will feature out-of-state records and turn on fine points of multiple-level hearsay, burden of proof, the corpus rule, nexus and statutory standards for rehabilitation. The case will be presented by an attorney; it will be judged by an attorney. It will not be fine if the party without an attorney is the nurse with everything to lose.

A nursing license is an asset. It has value: real, quantifiable, actual value. It can be effectively preserved and protected by skilled and knowing exercising of all of the legal rights it confers.

California is at war with 2000 of its nurses, but individual nursing licensees should take care that they are not among the casualties.