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Professional Licensure: Investigation and Disciplinary Action

Comprehensive information on protecting one's nursing license.

This is the second 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 common reasons boards of nursing conduct investigations and take disciplinary action. The third and final article will discuss strategies for protecting your license.

Complaints to nursing boards can come from a number of sources. Patients, coworkers, members of the public, or employers can call the board of nursing, put complaints in writing, or complete a board of nursing Web site complaint form. Licensees may also self-report when required by law to do so. Additionally, a board may be notified by other nursing boards, other agencies, or law enforcement of action taken against a nurse. Generally, the complaint is kept confidential, as is the identity of the complainant. The information obtained in the investigation may also be kept confidential, even from the subject of the investigation.

Upon receipt of a complaint, the nursing board will confirm that the nurse is licensed in that state or jurisdiction and that the complaint is governed by the laws and regulations of that state. If the complaint lies outside the parameters of the nursing board's purview, the complainant will be notified that the matter won't be addressed by the board. The complaint may be forwarded to other agencies under whose jurisdiction the matter does fall, or the case may be closed. If the matter is found to be within the board's jurisdiction, and the complaint is such that, were the allegations true, they would constitute a violation of nursing rules and regulations, a formal investigation will ensue. The nurse is notified that an investigation is being undertaken; at that time, she or he should immediately seek the advice of counsel. Failure to respond to a nursing board inquiry can result in a default judgment of disciplinary action, including permanent revocation of one's license.

Illustration by Janet Hamlin.

INVESTIGATION

Nursing boards take complaints very seriously and may be required by law to investigate each complaint received. Because the mission of the licensing board is to protect the public, an investigation may be required to ensure that the licensee is competent and ethical and provides safe care. Investigations are conducted in a number of manners. Some nursing boards use board-appointed investigators to conduct interviews of the licensee who is the subject of the complaint. Some boards require nurses to complete questionnaires, called *interrogatories*, to provide the

necessary information. Nursing boards may also conduct informal settlement conferences or formal hearings to determine whether the nurse has violated laws and regulations that govern nursing practice in the state. Still other states issue an *order to show cause*, which is a court order requiring nurses to appear at a certain time and date and prove why the board shouldn't take disciplinary action. This is an adversarial process, and nurses shouldn't answer questions, make statements, or appear at proceedings without counsel present.

The purpose of the investigation is fact-finding. The investigator collects data, interviews parties, reviews records, and assembles evidence related to the events and circumstances surrounding the complaint. The investigator then compiles a report that details the elements of the allegations against the nurse and the facts as determined by the investigation. Relevant evidence and documents are then forwarded to the prosecutor or nursing board–designated personnel. Expert consultants may review the materials and may be used as testifying witnesses by the prosecutor. Investigations will include a review of adverse employment actions, other administrative agency determinations, criminal proceedings, and out-of-state disciplinary actions.

The licensee will be notified either that the investigation didn't result in information suggesting that violations occurred or that charges are warranted. If the nursing board finds that there isn't sufficient evidence to support adverse actions, the matter will be closed. How long nursing boards keep the investigative materials and whether or not they expunge the complaint from the nurse's record varies. (State-specific information can be found on the National Council of State Boards of Nursing [NCSBN] Web site: www.ncsbn.org/boards.htm.) If the board thinks disciplinary action is indicated, the nurse may have one of several options: a consent agreement, settlement, or stipulation; attendance at an informal settlement conference; or a formal hearing. Regardless of whether they result from a consent agreement, informal settlement conference, or formal hearing, disciplinary actions may then be published on the Internet, posted on the nursing board's Web site, printed in the board's next newsletter, or reported to other agencies, including data banks and the NCSBN. Most disciplinary actions become a permanent part of the nurse's record and are considered public information.

Consent agreement. A consent agreement or stipulation is a negotiated settlement in which the board of nursing and the nurse agree to a penalty. The nurse may or may not be required to admit wrongdoing to enter into the agreement. In states in which the licensee does have to admit wrongdoing, it will be impossible to later deny the allegations or appeal the facts of the charges once the agreement has been signed. Signing a consent agreement may also waive one's right to a later hearing or appeal.

Once the agreement is signed, it's submitted to the board for approval, along with all investigative materials. The licensee may or may not be present when the agreement is presented. If the nurse is present when the agreement is submitted to the board, she or he may be required to take an oath and answer questions board members pose. If the nurse isn't required to be present, notification will be sent as to whether or not the agreement was accepted. If the agreement is accepted, it will be followed by a formal *final order* accepting the terms. (A final order is a written order issued by the board that contains the findings of fact and conclusions of law in the case.) If the agreement isn't accepted, the prosecutor and the nurse will be notified and the matter may proceed to an informal settlement conference or a formal hearing.

Informal settlement conference. Although less formal than an actual hearing, informal settlement conferences are still official proceedings. Because statements made at an informal settlement conference can be harmful to the nurse in a subsequent formal hearing, nurses shouldn't attend informal settlement conferences without an attorney.

Generally, the prosecutor will begin by offering an agreement that contains the findings from the investigation and the prosecutor's recommendations regarding the discipline for the infraction. If the nurse agrees to the proposed order, the agreement is signed by both parties and sent to the board for approval. The board may approve the proposed order as is, suggest modifications, or reject it entirely. If the board approves the proposed order without changes, it becomes a final order. If the board rejects the proposed order or suggests modifications, the nurse may still be able to proceed to a formal hearing.

If the nurse doesn't agree with the proposed order, the conference provides the nurse with an opportunity to respond to the allegations and dispute the evidence or proposed disciplinary action and to provide additional information for the board's consideration. The committee or hearing officer will generally make a determination at the end of the conference. If the nurse disagrees with the recommendations, the board may require the nurse to submit proposed revisions for consideration or permit the nurse to proceed directly to a formal hearing. There may be time limits for requesting the hearing, and the right to do so may be waived if the deadline is missed.

Formal hearing. Formal hearings are similar to civil trials. The board of nursing must prove the allegations in the complaint, but the standard of proof

required to do so will differ by state. Even though the standard isn't as rigorous as in a criminal prosecution (*beyond a reasonable doubt*), the board may need to show by *a preponderance of the evidence* (more likely than not) or by *clear and convincing evidence* that the assertions are true. The hearing takes place in a courtroom-like setting in front of an administrative law judge (ALJ), hearing officer, a board of nursing member, a hearing panel consisting of several nursing board members, or the entire board of nursing, depending on the state.

A court reporter records the entire proceeding and a transcript is made. The prosecutor makes statements; examines witnesses, including experts; and presents evidence. The defense may cross-examine the prosecution's witnesses. After resting her or his case, the defense may also present evidence and the defense witnesses may be cross-examined by the prosecutor. When both sides have rested their cases, the hearing will be concluded.

Decisions are generally not handed down at the conclusion of the hearing. The transcript of the proceedings is made available to both sides, along with the opportunity to correct any errors. In some states the parties have a certain period of time to propose an order. In other states the ALJ or hearing panel will render a decision and make a recommendation to the nursing board. Attorneys for both sides may be permitted to file *exceptions* (statements of disagreement) regarding the findings, which the board may take into consideration. The board considers the ALJ or hearing panel recommendation and issues a final order. The process can be a lengthy one and take months or even years to fully resolve.

CAUSES OF DISCIPLINARY ACTION

The board of nursing may take disciplinary action against any nurse who's thought to be in violation of nursing laws or who's thought to pose a danger to the public. Many complaints can fall into a category of "professional misconduct" or "unprofessional conduct" as well as unsafe practice or illegal or unethical behavior. These terms are defined by the individual states, and nurses are advised to know the definitions in each state in which they're licensed or in which they practice.

Professional misconduct or unprofessional conduct. Professional misconduct is a broad term that encompasses many areas in both clinical and nonclinical arenas. Anything that falls outside the bounds of what the board of nursing considers acceptable may be deemed professional misconduct or unprofessional conduct. Charges of professional misconduct can be brought against a nurse for such things as

- dishonesty or fraud in obtaining or renewing a license.
- practicing outside one's authorized scope or delegating to an unlicensed person activities that may only be performed by licensed professionals.
- failure to adequately monitor and supervise those to whom care has been delegated.
- practicing negligently, incompetently, or while impaired.
- failure to practice within minimally acceptable standards of safe practice.
- habitual drug or alcohol use or chemical dependency.
- criminal convictions or failure to notify the board of nursing of the same.
- disciplinary action imposed by another licensing board.
- violations of public health law.
- failure to abide by a state's mandatory reporting obligations.

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- failure to abide by consent agreement provisions or conditions of probation or practicing while one's license is suspended or expired.
- failure to notify the board of nursing of address or name changes within the required time frame.
- moral character lapses.
- falsifying medical or business records.
- inadequate or improper documentation.
- failure to cooperate in a board of nursing investigation.
- privacy violations.
- advertising or soliciting business in violation of state rules.
- refusing to care for patients on the basis of race, religion, or other nonclinical reasons.
- patient abandonment, neglect, or abuse.
- sexual misconduct or boundary violations with patients or inappropriate involvement with patients or their finances.
- failure to wear an identification badge with one's name and status prominently displayed.
- failure to abide by infection control practices.
- failure to protect clients from unsafe practices or conditions, abusive acts, or neglect.

- appropriating for personal use medication, supplies, equipment, or personal items of the patient or employer, or borrowing money, materials, or property from patients.
- financial improprieties or failure to file accurate and timely tax returns.
- failure to pay spousal or child support or student loans.
- driving under the influence.

Many professional misconduct allegations aren't directly related to the nurse's clinical practice but may still result in an investigation and disciplinary action on one's license. In *Weber v. State Board of Nursing* (1992),[1] the Colorado Board of Nursing charged nurse Sherry Weber with failing to furnish medical records in a timely fashion to four of her patients, guilty pleas in two felony check charges, and *procuring her nursing license by fraud, deceit, misrepresentation, misleading omission, or material misstatements of fact*, in that she had denied that she'd pled guilty to the felonies when renewing her RN license. The board imposed a one-year suspension of her license, to be followed by two years of probation.

Weber unsuccessfully appealed the nursing board decision by arguing that she was disciplined for conduct that didn't involve the practice of nursing. Specifically, she argued that the state's definition of nursing didn't include the handling of medical records. She argued that, therefore, even if she had failed to handle her patients' medical records properly, that failure didn't violate generally accepted standards of nursing practice.

The court noted that an expert had testified at the hearing that the failure to properly maintain patient medical records fell below generally accepted standards of nursing practice. The ALJ had concluded from this testimony that the handling of records constituted "an integral part of the profession of nursing" and "an essential element of appropriate patient care." This part of the ALJ's decision was upheld.[1]

Weber also argued that the guilty pleas were deferred judgments that never resulted in convictions. Once she had completed the deferred judgment period, her guilty pleas were withdrawn. The pleas, therefore, didn't legally exist at the time the board brought charges against her. The court agreed with her that the board had been wrong on the law for this portion of the ALJ's decision. Nevertheless, the court also held that, "[i]n professional disciplinary proceedings, a licensing board is allowed to consider the underlying conduct giving rise to the criminal charges in the context of other disciplinary rules." The case was then sent back to the board of nursing for a new hearing on the penalty.[1]

Substance abuse or impairment. Between 8% and 12% of nurses have substance abuse disorders, and such disorders may impair their practice.[2] This proportion is comparable to that in the general population; government statistics put the percentage of the population ages 12 or older with substance dependence or abuse at 8.7%.[3] Compared with that in the general population, prescription medication use is higher among nurses, but marijuana and cocaine use is lower.[2] Because vulnerable patients may be harmed by impaired providers, nursing boards will respond to complaints regarding substance use, even if such substances are legal.

Many states offer an alternative-to-discipline program for nurses if patients haven't been harmed. Such programs may be referred to as peer assistance, professional assistance, diversion, or intervention projects. Although the exact manner in which they operate is specific to the state and the program, they typically operate with a mission to protect the public and rehabilitate the nurse. Although participation in the program is voluntary, the alternative may be actual disciplinary action on one's license or reporting to a data bank. A growing number of boards of nursing are adopting alternative-to-discipline programs because they protect the public while providing for early intervention and monitoring.[4]

Nurses in these programs may be required to sign written agreements and temporarily surrender any or all of their licenses to the nursing board. They will be evaluated by an addiction center approved by the board, then participate in treatment and ongoing monitoring. This may be at the nurse's expense. Once the board-approved monitor deems the nurse ready to return to practice, the board may return the nurse's license while imposing practice restrictions, probationary terms, random drug testing, individual and group counseling, and continuing monitoring and treatment. Deviations from the prescribed treatment plan, violations of probationary terms, or a return to substance use may disqualify the nurse from the program and result in disciplinary action. The programs may be lengthy, requiring monitoring for months or even years. Chemical dependency or mental illness programs are generally confidential, but nurses may be required to advise their employers and any prescribing providers of their participation in these programs.

Even in the absence of impaired practice, exposure to illegal substances can result in disciplinary action. In *Ferguson v. Delaware Bd. of Nursing* (2009),[5] nurse Marilyn Ferguson was issued a letter of reprimand by the board after she tested positive for marijuana. Although she presented expert testimony that the test had been unreliable and that

passive inhalation could produce a positive result, the board still held that she had violated professional conduct rules. On appeal, the court held that the board had ignored expert testimony and that its decision wasn't supported by substantial evidence. It reversed the board's decision and sent the case back for reconsideration.

Criminal convictions. Nursing boards may take disciplinary action against a licensee on the basis of criminal convictions. "Conviction," as defined by the board, may include plea arrangements or deferred adjudication, and the board may decline to issue a license to an applicant with any criminal history, including such arrangements. In *Bethea-Tumani v. Bureau of Professional and Occupational Affairs* (2010),[6] Pennsylvania's board of nursing had denied Glecina Bethea-Tumani's application for licensure as an RN based upon misdemeanor convictions for insurance fraud and conspiracy. Bethea-Tumani was granted a hearing, and the board found that she had failed to produce "satisfactory evidence that she is of good moral character, can practice nursing with reasonable skill, honesty, and safety to patients, and is able to meet the requirements of the profession." When a license was still refused, Bethea-Tumani filed an appeal. On appeal, the board contended that the convictions demonstrated a pattern of bad judgment and called into question her moral character and ability to practice nursing. Because the convictions directly related to honesty, and because they had occurred within a year of the application for licensure, the board had substantial evidence to support the decision to refuse a license. Additionally, the law specifically authorized the board to refuse to issue a license to an applicant when the applicant has pled guilty to a felony or crime of moral turpitude. The court agreed and upheld the board's decision.

Reciprocal discipline. Disciplinary action in one state creates grounds for other states to take action against a licensee, regardless of whether that license is active or lapsed. Nurses may need to defend themselves in every state in which they've ever been licensed if they're charged with misconduct in any one of them. In *Lankheim v. Bd. of Registration* (2011),[7] nurse Penelope Lankheim was dismissed from a Florida graduate nursing program after failing a course. In 2003, she was subsequently charged by the Florida Department of Health with falsely representing to a physician that she was still enrolled in the program so he would act as her preceptor. While seeing patients under his supervision, she prescribed treatment plans and medications and disclosed confidential information on some of the patients.

An ALJ determined that Lankheim had violated the rules of professional conduct by "making fraudulent representations relating to the practice of nursing ([as evidenced by] misrepresenting herself as a current nursing graduate student); by practicing as an unlicensed advanced registered nurse practitioner; and by violating rules governing patient confidentiality."[7] The Florida Board of Nursing agreed to impose the ALJ's recommended penalties, which included a reprimand, probation, and a fine. Nurse Lankheim, however, offered to voluntarily relinquish her license. As Florida law specifically states in the *Board of Medicine Voluntary Relinquishment form*, which contains clarifying language (http://bit.ly/RTWoYP),

> If a licensee wishes to voluntarily relinquish a license, but the licensee or the license is currently under . . . [investigation with pending disciplinary action] . . . then the licensee may relinquish the license only with the approval of the Board. If the voluntary relinquishment is accepted by the Board at the time an investigation is underway, or is anticipated, or when a disciplinary action is in progress, then the acceptance of the voluntary relinquishment of the license shall be considered disciplinary action against the license . . . and shall be reported as such by the Board. In addition, the licensee will be required to cease practice immediately upon signing the voluntary relinquishment and agrees to never reapply for licensure in Florida again.

The board made it clear to Lankheim that relinquishment would be considered discipline and issued a final order indicating that this had been explained to her. Lankheim had held a Massachusetts nursing license since 1987. Massachusetts concluded that the facts underlying her relinquishment in Florida (the unauthorized practice of nursing, deceiving a physician, and violating patient confidentiality) constituted violations of Massachusetts nursing law and moral character requirements, therefore warranting sanctions in Massachusetts. In 2005, the Massachusetts Board of Nursing issued an *order to show cause* addressing why, in light of her discipline in Florida, her Massachusetts license should not be disciplined. The Massachusetts board then issued a decision suspending her Massachusetts license for five years.

Lankheim appealed the Massachusetts board's decision, arguing that for a number of reasons, the final order of the Florida Board of Nursing didn't constitute discipline that could serve as the basis of reciprocal discipline in Massachusetts[7]:

- The Florida board's decision included no findings of fact.

- Lankheim hadn't understood that the voluntary relinquishment of her license in Florida would constitute discipline.
- She hadn't admitted any wrongdoing.
- She hadn't agreed not to contest the allegations against her.

The court held that the first three arguments were not supported by the evidence. As for the fourth argument, the court held that when she had agreed to relinquish her license voluntarily and permanently in lieu of other sanctions, she effectively agreed not to contest the allegations against her. Because she had been free to challenge the evidence before the Florida board and chose not to do so, she could not now do so in Massachusetts. The Massachusetts board's decision to suspend her license for five years was upheld.

POTENTIAL DISCIPLINARY OUTCOMES

Nursing board decisions to take disciplinary action determine one's ability to practice or hold oneself out as a nurse. Specific actions that a board of nursing can take vary by state. The matter may be closed without sanction, or disciplinary action can be taken. If the matter is not closed without sanctions, punishments can take a number of forms and may be imposed in combination. Examples include

- *reprimand or censure*—reprimand and censure are similar in that they're official records indicating that a licensee has been disciplined. They may, in themselves, not compromise one's ability to practice but may be imposed along with other penalties.
- *citation*—the board of nursing imposes a fine or order of abatement in lieu of making a formal accusation.
- *cease and desist order*—an order to stop a particular activity or else face further penalty.
- *warning*—this can be accompanied by stipulations or specific requirements.
- *mandated continuing education.*
- *fine or civil penalty.*
- *remediation*—an attempt to correct practice and promote safety; it may define terms for the license to be reinstated in good standing.
- *referral to an alternative-to-discipline program.*
- *community service.*
- *probation*—during probation, the nurse may or may not be permitted to practice. If the nurse is permitted to remain in practice during the period of probation, it is with terms and conditions or restrictions.
- *practice restrictions, monitoring, or supervision.*
- *suspension*—a period of time in which a nurse may not practice or hold herself or himself out as a nurse. The suspension may be *actual* or *stayed*. During *actual* suspension, the license is surrendered to the board and the licensee may not practice or hold herself or himself out as a nurse during that time. During a *stayed* suspension, the nurse may be permitted to work with probationary terms. Suspensions may be partially actual and partially stayed, and may be for a definite or indefinite period of time.
- *emergency or summary suspension*—an emergency suspension occurs when the nursing board determines that there is an imminent threat to public safety in allowing the nurse to continue in practice.
- *surrender or relinquishment*—a voluntary returning of one's license to the board of nursing after which the nurse may no longer practice or hold herself or himself out as a nurse. Surrender and relinquishment are viewed as the equivalent of revocation. There may or may not be the opportunity to petition for reinstatement at a later date.
- *revocation*—an indefinite or permanent separation from practice in which the nurse may no longer practice or hold herself or himself out as a nurse. States differ, but there may be a waiting period during which the nurse may not petition for reconsideration or restoration. The mandatory waiting period may be as long as seven years from the date of revocation.

COLLATERAL IMPLICATIONS

Even if one's license has been restored to good status, the fact that there was disciplinary action can create other barriers to practice. When a nurse has been disciplined, the board of nursing may report that discipline to other agencies or authorities. The board may consider disciplinary action to be public information and post the infraction and penalty on the Internet. Other regulatory agencies may follow those postings and take action.

The state health department, the Office of the Medicaid Inspector General, or the attorney general's office may be advised that disciplinary action was taken against a nurse by the board, or discover the action through interagency communications. Such bodies may then take action as well. The Office of the Medicaid Inspector General, for example, may place the nurse on its disqualified- or excluded-provider list. Once on the list, the nurse may not work for any employer in that state that receives Medicaid reimbursement for nursing services. Similarly, the federal government may exclude the nurse from participation in the Medicare program. Although most nurses aren't direct billers to these programs, they may still be disqualified from working

for employers who do receive Medicaid or Medicare reimbursement. Consequently, the nurse may be unable to secure employment, even if the license has been restored to good standing with the nursing board. Placement on a disqualified-provider list may also make it difficult to obtain licensure and employment in another state.

Action taken against a health care professional's license is reported to federal data banks, the National Practitioner Data Bank (NPDB) and the Healthcare Integrity and Protection Data Bank (HIPDB). According to the U.S. Department of Health and Human Services (DHHS),[8] the NPDB

> is intended to improve the quality of health care by encouraging State licensing boards, hospitals, professional societies, and other health care organizations to identify and discipline those who engage in unprofessional behavior; to report medical malpractice payments; and to restrict the ability of incompetent physicians, dentists, and other health care practitioners to move from State to State without disclosure or discovery of previous medical malpractice payment and adverse action history.

The DHHS describes the purpose of the HIPDB this way: "to combat fraud and abuse in health insurance and health care delivery."[8]

Data bank listings can compromise clinical privileges, professional society membership, participation in Medicare and Medicaid, collaborative practice agreements, and employability.

Obtaining licensure in another field may also be difficult if a nursing license has been disciplined. Cosmetologists, barbers, architects, real estate agents, and workers in many other non–health care fields require licenses to practice, and such licenses may not be issued if a nursing license was revoked, surrendered, or suspended.

CHALLENGING NURSING BOARD DECISIONS

Nurses have property interests in their professional licenses because it's the license that permits them to earn a living. The Constitution prohibits states from depriving citizens of their property rights without due process. For nurses accused of professional misconduct, this means that they have the right to notice of the charges and the opportunity to be heard in their own defense. Nurses who have had adverse license determinations, therefore, may appeal those decisions. This may be done internally—by petitioning for a rehearing or review of the matter by the board—or it may entail requesting judicial review—going to court. Both actions may be restricted by a time limitation, after which an appeal may not be possible. Similarly, an appeal may not be possible if the nurse has signed a consent agreement that waives appeal rights.

The state's administrative procedure act will outline the specific requirements, time frames, and process for appealing nursing board decisions. The process can be lengthy, but it may be possible to obtain a temporary injunction against the board while the matter is pending. In such cases, the discipline is stayed, allowing the nurse to continue practicing until a court renders a decision. Successful appeals require an understanding of what is required to perfect the appeal, as well as knowledge of administrative and procedural requirements in the state.

Although the explicit standards for appealing a licensing board decision are state specific, the courts are usually reluctant to overturn a board of nursing determination. There may be narrow grounds upon which they will do so. The deference granted to nursing board decisions is based upon a legislative intent and assumption that professional regulation is performed by those agencies with expertise in the profession being regulated. Courts, therefore, are hesitant to substitute their judgment for that of the board. The court considers the evidence and all reasonable inferences from the evidence in the light most favorable to the nursing board's findings. If the court thinks that the board could have reasonably made its findings and reached its result, the court will affirm its decision.

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The reasons a court will hear an appeal of a nursing board's decision are outlined by individual state statutes (referred to as a *standard of review*), but there are several common reasons a court will reverse a nursing board or send the matter back to the board (remand) for a new proceeding:

- The board's decision was in violation of the state's constitution.
- The board exceeded its authority.
- The board made an error of law.
- The board's decision was not supported by substantial evidence.
- The board's decision was arbitrary and capricious.
- The board's decision was an abuse of discretion.

In all steps, from the filing of a complaint through final resolution and appeal, nurses obtain more favorable outcomes when represented by attorneys with specific expertise in administrative law and nursing-licensure defense.

It's important to note that the emotional and psychological effects of being investigated by the nursing board are considerable. For most nurses, their license and identity as nurses are at the core of their self-image, and when the latter is threatened it can be very destabilizing. Nursing is not merely *what we do*; for many of us it is *who we are*. Part 3 will discuss licensure-protection strategies and suggest actions nurses can take to maintain their licenses in good standing. ▼

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