



NCSBN

*National Council of State Boards of Nursing*

***2016 NCSBN Discipline Case Management Conference - Guidance for Staff in Discipline and Eligibility Cases: Texas Disciplinary Guidelines for Criminal Conduct and Texas Policy on Minor Criminal History***

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**Event**

2016 NCSBN Discipline Case Management Conference

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**Presenter**

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- [Dusty] I was happy that National Council asked me to be part of this seminar and give a presentation, but I realize now that I am the last one, no break in the afternoon, and I have to follow the very exciting Boundary Violation presentation, which is...had me fascinated. I want to give you a caveat that I'm from Texas. Everything I'm about to tell you is built on all our statutory framework that's there. And I'm going to go through that and...it's related to how we attempted to address criminal history. That we began...and I'll go through that history a little bit...about 10 years ago. Who does criminal background checks in their state now? Is it nearly everybody? And who does FBI criminal background checks? So, some of what I'm going to say is pretty apparent to many of you all, and these problems that we've experienced, and what we do about them I'm sure a lot of you all have seen and addressed, but we have spent a lot of time through the years sort of evaluating this unbelievable amount of information that comes from FBI fingerprint checks and what do we do about them. But let me begin with the overview of what we've tried to do. And we've tried to develop an objective guideline related to criminal conduct. And The Board of Nursing attempts to ensure consistency, and fairness in evaluating all these, basically thousands of, reports that we have on applicants for nurse licensure and licensees who had to submit to fingerprint checks when our law changed. Is it important? Is the character of a nurse even relevant? I like these slides. I've used them a lot through the years. I'm sure it's alluded to repeatedly. According...annual Gallup Poll, Americans trust nurses more than any other profession. And they have very high or high ethical standards. 85% of the public believe that and it's a full 17 points higher than the next profession. Let's take a look at that. Here's the top six. Nurses are at 85. And you can see the next profession is Pharmacists, 68. That's 17 points below. Fourteen years in a row. And the only time it's not...since the Gallup Poll has been in place is after 9/11, and the Firefighters achieved a higher poll. Okay. I want to contrast that with Lawyers. Lucky for us, we're not in the bottom six. But we are only 14 points higher than the lowest. Okay. And 64 points below Nurses. I know. Can you believe it? Now is this perception about nursing a reality? Is it a misconception? Well, in our state professional character is a statutory requirement. Let me get to that provision. Our Nurse Practice Act says that, "An applicant for licensure must have good

professional character, must complete an accredited program. And pass a licensure exam." But I beg to differ. I don't think nurses in our state have to have good professional character. And I don't think they have to have it in yours. I think they have to have superlative character, right? So how are we going to judge that? Well, we do so by sometimes looking at criminal history, right? Criminal history could be relevant to professional character. We have a statute in our state that covers all occupations. It's called Chapter 53 of the Occupations Code. And it deals with, what are the consequences of reviewing someone's criminal history whenever they seek licensure for an occupation. And in our Nurse Practice Act: "it is grounds for disciplinary action...whether it be a conviction, or placement on deferred adjudication for a felony or a misdemeanor involving moral turpitude." And of course, pursuant to that, sort of authority to deny licensure or to take disciplinary action based on criminal behavior, we have of course adopted a rule, and our rule is 213.28 in our Texas Admin Code. Let's look at...again this is our enabling legislation. This gives us the authority to review criminal history, to take action on it if we see it. I want to add a little note here...maybe some of your states have a similar evaluation. In 2009, we were...before then we were taking a lot of disciplinary action on people, like, murdered, and raped and...and because there was no sort of...we're very litigious in Texas, and there's a big defense bar regarding nurses. We had to fight a lot of disciplinary hearings for revocation...someone who had murdered someone, or someone who had raped someone...we had the authority to take action on these felonies. We had the authority to revoke them if we felt that...but because we had a history of sort of self-disclosure...some of this information.... Do you understand what I mean by self-disclosure? On the applications and on the renewal they just would tell us if they had been convicted of a crime, or not. We had a long...we didn't require FBI checks...we had a long history of people who maybe had murdered, or raped, or done heinous things...had not disclosed those, and we had no way of actually knowing about it. And then when it would come up we would then seek a disciplinary action against them for their murder, or their rape. And we would have these long hearings because when it comes to revoking someone that's a high stakes issue for their license, and they will fight you on that, and we'll have a hearing. And that became tedious. We were inundated with one particular law firm who was repeatedly sort of saying, "Well, you know, it's not...we get a right to due process. We're going to show their character at the hearing. All you have is conviction. We have a long history of them working as a nurse without incident, etc." In the end, the legislature provided...we showed some of the...a lot of people got deferreds for, like, indecencies with children, and things like that because these are crimes that are hard to prove, and there's a lot of plea bargains that exist, and yet we were having to pursue those also with trying to show the underlying conduct. We didn't...our statute used to say conviction, now it says, or deferred order. And we would have to prove the underlying conduct that was associated with their plea bargain. Anyway, with all the public policy associated with you shouldn't be a nurse if you've committed, or plead guilty to a heinous crime, the legislature gave us...they're called...we call them the heinous crimes. They're felony crimes. There are about 13 of them. The law was passed that if you had been convicted of any of these, or if you'd ever plead the third to any of these, you shall be revoked, and you would not be subject to licensure until five years after you had completed the last day of your probation. It's not a complete bar, but it is what we negotiated with the Nurses Association at that time to be sort of a bar and one that would be unlikely to license people with these heinous crimes is what we called them. Now, going back to sort of the statute that covers all of our licensing agencies, Chapter 53 exists, and it makes criminal history relevant to all occupational licensing. This

statute is sort of one of those like the APA, it covers all licensing agencies, and you have the right to suspend, revoke, or discipline, or disqualify someone from a licensure, but you have to show that the crime directly relates to the duties and responsibilities of the licensed occupation. And that applies to us. And we also have an automatic revocation if you are on probation for a felony, and it's revoked, and you go to jail. And we have a lot of those cases that sort of transcend any evaluation. If you are on felony probation and you happen to be licensed, and you go to jail, then it's an automatic revocation. There's a lot of talk about what does "directly relate" mean? And the statute sort of goes through it: "You're supposed to consider the seriousness of the crime, the relationship of the crime for the purpose for requiring a license to engage in the occupation, the extent to which a license might offer an opportunity to engage in similar conduct, and then the relationship of the crime to the ability, capacity, or fitness required to perform the duties." I know this is kind of a little boring to you, but it's kind of what leads to the development of our guidelines I'm going to get to in a minute. Chapter 53 also wants you to look at the nature and extent of the person's past activity, the age when they committed the crime, the amount of time that might have elapsed since the last criminal activity, the work activity that the person has showed. You can see that these are sort of ways of evaluating...well, a person may have committed a crime, but given where they are now, and how long it's been, and how old they were at the time, maybe it's not that big a deal. It shouldn't impact our state's authority to license them. And it requires in that statute that an agency shall develop guidelines relating to the practice the licensing authority has under the chapter. And they must state the reasons a particular crime is considered to relate to a particular license, and any other criteria that effects the decision of the licensing agency. Now based on this legislative instruction, and what the board...and nursing, and the superlative character required of nurses, the board has thought a lot about these and these guidelines. In our 213.28 we wanted to talk about the types of crimes that might impact nursing, that directly relate. Offenses against a person, offenses against property, offenses involving fraud and deception, offenses involving lying and falsification, and offenses involving the delivery, manufacture, or use, or dispensing/prescribing controlled substances, and dangerous drugs, etc. Now, that's all crimes. So, why are all crimes related to the practice of nursing? Well, nurses have access to persons who are vulnerable. Nurses have access to persons who are especially vulnerable, if they're elderly, children, mentally ill, sedated. They provide care to these populations. They provide care in people's homes. Nurses who are chemically dependent may hurt people. That's why all these crimes, arguably, relate to the practice. Now, as I said before, the board had had a long history of self-disclosure. Well, in 2003, we got legislative approval to do the fingerprint checks. And in February 2004, we were the board of Nurse Examiners, and there was a board of Vocational Nurse Examiners, or Licensed Practical Nurses for some of you all who don't use our Vocational Nurse designation. They combined the boards, and so we got authority to do criminal background checks, FBI checks on all licensees. And we were going to get criminal backgrounds on all licensees. The problem with that is, is that we had over 270,000 licensees at the time who had never been through a fingerprint check. And we were going to be, then, fingerprint checking all applicants and applications for licensure by endorsement, and by exam. So we developed a plan that we were going to attempt to hit 10% of the population every year, through the renewal process. So that in 10 years we would complete over 350,000 of these background checks. Pursuant to those legislative instructions I talked to you about, we...and in order to sort of address this mammoth task fairly and consistently, we developed the guidelines, and they were written into our rule

213.28, and eventually they were developed in a format that should be part of...or part of it is part of you all's materials. Some of our disciplinary guidelines for criminal conduct, a few pages are in there. If you go to our website, and you go to Discipline and Complaints drop down menu, Board Policies, and Guidelines, it can take you to our full 45, or 50 page guidelines which list every crime that we believe relates to the practice of nursing. And I'll get to some examples of that right now. You all probably can't see that. I know I was sitting in the back earlier. It's kind of blurry, but this is what our guidelines look like, and this is sort of an example regarding murder. On the left you have murder. It has some asterisks there it leads you to a footnote or an asterisk note. It says murder is one of those, what we call 4535 crimes. That's a crime that you are sort of automatically revoked on, and are barred from licensure. And so it sort of goes through, and there's a section on what penalty are we talking about. Are we talking about a felony, or misdemeanor? We have a jump page there so that you can hit felony, or misdemeanor, and it will go to our criminal code that talks about well, a felony is one that can be... I think it's at least a year in prison. Misdemeanors are broken down into how...it's based on the amount of punishment you can get. Felony or misdemeanor obviously relates to how serious the crime is, the more serious, the higher the felony grade. We have a site to our penal code to where murder is defined. And then we have these three sections: if judicial order occurred five years or fewer, then obviously you're going to have a discussion in that particular box about what would be the result. And with murder, it's revocation or denial of licensure, and we site our code 301.4535. If the judicial order occurred more than five years ago, and five years' anniversary has elapsed since their finishing of the probation, it's possible that they might be licensed...we have a lot of words here because in 2009, when that particular law passed we had to apply the law that existed before that. We had to apply that law prospectively so that before that if you were convicted of murder and five years had not elapsed since you terminated your probation or parole, you could get a hearing on that, and try to demonstrate your eligibility for licensure. Now after that date, that five year anniversary is firm, and we don't have to have a hearing if you're within that time frame. I'm sure that's just fascinating to you all, isn't it? Okay. For drug crimes, this has been a real...obviously this is kind of a problem for all of us, right, because a lot of...we talked earlier in this seminar about the disease process. Nursing is often a profession of second chances, and recovery, and unfortunately many of our recovering nurses sometimes have a felony in their history. A felony associated with they're trying to pass forged prescriptions, and that type of deal. And many felonies are viewed in our state, and if you look in our guidelines, if it's less than five years since the felony, the instructions in our guidelines are to revoke you, or to deny you licensure. With drug crimes we felt like all the litigation that was involved, all the mitigation, and aggravation that occurs in this area that if you look at the judicial...you can't read that, but it says: if the judicial order occurred five years, or less ago, if you're a felony, you're going to be denied, or revoked, or suspended. We included that as one of the options. And a suspension may be enforced or probated. In order to be eligible for a probated suspension, the individual must provide verifiable evidence of successful completion of treatment, 12 consecutive months of sobriety, a suspension will be enforced at a minimum until the individual can provide such evidence, and any probation period should be a minimum of two years, etc. If it's a misdemeanor, you can have... I know it says example felony crime, but you can see sometimes those drug crimes are misdemeanors, and so we have another section on that for misdemeanor. If you can provide verifiable successful completion of treatment, and sobriety for 12 months, then, you know, we can put you under a probated order. And then we have kind of

another little section of guidance. This continues this big long...that's why those guidelines are 45 pages. We have to cover every contingency because whenever we fight these litigation battles, everyone's looking for a rule and everybody's looking for a policy, and everybody's looking for... And of course, our staff, sort of the whole point of this, our staff needs these to help evaluate these thousands of cases which I'll get to in a minute. And so we have the ability to force someone to get an evaluation. One of the last sort of considerations is if you're on for either a felony or misdemeanor, a chemical dependency evaluation may be required in order to help guide staff in the determination of what's the right remedy. I kind of threw in a...oh, I didn't go over this last column. But the last column is our, the board's adopted rationale for why the crime relates to the practice. And here is sort of a misdemeanor one I threw in there for you all to review. It's called "Deadly Conduct." It's a misdemeanor. It's an offense against a person that involves causing bodily injury to another person. How many think that relates to the practice of nursing? Maybe, maybe not. If it's a misdemeanor, it's a misdemeanor, and even though if the order is less than five years old, it says: "Impose discipline. License with stipulations." In other words, we can't, under our guidelines, look at deadly conduct, and say you're disqualified, all right, the way this reads. And the rationale we have in this particular crime is the stress inherent in the practice of nursing, and the possible combativeness of patients in vulnerable states requires control of impulses that lead to an assaultive offense. A person who has committed assaultive offenses raises serious questions regarding the ability to provide safe patient care. So you see our guidelines are designed to talk about the crime, talk about some evaluation of the time associated for when that crime was committed, mainly because we have had such a long history of non-disclosure that when they come up, and when they used to come up, these time periods were relevant to our evaluation of all these cases. And that's less so now. Anyone who applies for a licensure in Texas now has to submit to a background check. Obviously these time frames might be relevant to history of that person, and they're used in evaluating what to do with that application. Now the guidelines provide a recommended sanction, or range of sanctions, in order to determine the appropriate sanction. Each case has to be considered on the merits. It's not clear from your materials, but we have a long laundry list, similar to the slides I showed earlier about, you know, the age of the person when they committed the crime. Have they been employed since then? Is it one time deal? That type of deal. So we have to look at aggravating, and mitigating circumstances for each offense because everything has to be fair. One size doesn't always fit every similar crime. And for those of you all who have been doing this a long time, in Texas particularly, considering the vastness of our state, not all crimes are prosecuted equally, and not all evaluation of what they plead to is exactly a demonstration of the character of that person. If multiple offenses are present in a single case, the most severe sanction recommended should be imposed. That's written into our guideline. And of course, if chemical... I mean if criminal activity is due to substance abuse, or chemical dependency, including alcohol, evidence of evaluation by a board approved evaluator may be required. Because we have that authority to have a person evaluated it's...and generally they want...generally they will go get an evaluation, right? Because our guidelines are fairly conservative in their construct, and in their application. And if an applicant wants something different, or wants to demonstrate mitigation, obviously a chemical dependency evaluation that they get from under our criteria, and from our board approved evaluators may, in fact, give them a boost towards a less onerous sanction, and/or probationary period. All right. I don't know if you all can...oh yeah you all can see that. What happened to us whenever we started doing all of these criminal background checks?

What we got was a lot of rap sheets. And this is sort of a four-year snapshot of what we call...we call them positive hits. And in 2011, we had 5,300 positive hits. In 2012, 4,400. In 2015 45... I just sort of added those things up. And these are all the top number is how many people submitted to the fingerprint cards, and then it shows the positive...it shows the percentage of those in that category that had a positive hit. So in that period we had almost 20,000 positive hits. That's a lot of files to look at. That's a lot of paperwork. And of course, not all rap sheets are created equally, right? Some are...and I'm going to get to why we have our minor criminal history policy. And you know, I probably don't have to go over this. You all know this, right? Generally, the LPN, or the LVN applicants have a tendency to have a much higher positive hit rate than RNs. If you all didn't know that already, that's very common, very common. When we first started out... I know you all want to get out of here, but California was doing criminal background checks, and so was Arizona whenever we started in 2004. And we got numbers like oh, you're probably going to get, for RNs, positive hit rates are probably in the 4-6% range, and the LPN, or LVN hit rates are probably going to be maybe sometimes 8-10%. And we are like 8-10% wow, that's dramatic. I don't know what they were looking at. So, we developed a minor criminal history policy because staff was reviewing a lot of...are we even going to be concerned about this? A single minor incident. What is a minor criminal history example? We don't even ask for...of course, none of that fingerprint stuff covers, you know, sort of these chronic speeders, right? I mean they're in trouble with the law all the time, license suspended, or whatever. That's not even covered by this, and so we don't even...traffic violations we don't even worry about. And we're never required to be self-disclosed. So we allow some of the staff review of this to sort of, like, pass these people on, and really not result in any kind of disciplinary action, with a caveat, which I will get to in a minute. But here's some examples: one time DUI, possession of marijuana, two theft by checks. Does that bother anybody? Okay. We have a lot of that, so we can't have thousands more disciplinary actions based on theft by checks, but it is a problem. I agree. Domestic violence. Our board had a lot of heartburn over this, but there was a large number of singular, single domestic violence offenses that appear in rap sheets. Misdemeanor graffiti. Anybody have a problem with that? Disorderly conduct. Who knows what that is, right? These are all sort of... Texas crimes though, but we have a little provision there, or some out of state equivalent that we can compare. We allow for two public intoxication. And two misdemeanor panhandling. We don't...apparently we don't care much about loud noise violations. Minor in possession of tobacco, or selling to a minor. And remember these are sort of singular events in someone's criminal history. Vehicular molestation, yes, yes, yes. I think I might have been subject to a vehicular molestation charge in my life. I'm not sure. Here's the caveat, right. Before a matter can be closed without further investigation, we have to review the documents. Generally when someone says yes, they have to provide us with the information. Generally, they provide us that one time whatever happened explanation, and we look at that along with that event. And if there doesn't appear to be any material omissions, if the incident seems to be isolated, or minor...which may sort relegate against dismissing a family violence type charge, or something like that. There's no recency of conduct, and there is no reasonable basis to conclude the behavior might affect the person's ability to practice nursing safely. This has helped our enforcement, and investigations, this minor criminal history policy because you saw that every crime relates to the practice of nursing. Theft, you know, assaults, all these things that we have to develop guidelines. We did. We submit... I mean we implement a FBI fingerprint background check, and we just had a deluge of rap sheets. And they just can't...we have to triage these

things, and this is a tool in which, you know, we just bypass what we consider minor criminal history. That really wasn't enough as time progressed and not everything's is a minor, not everything fits into that list of very minor incidents, right? So we had to expand our minor criminal history policy and start considering sort of age based...how old was that? Do we even care about it if that Class A misdemeanor that doesn't fit within the...or Class B or C misdemeanor that doesn't fit within that list. Is it more than 10 years old? Is it more than five years old? And so, we had to sort of...and this is because this was relevant to the nursing community, to nursing schools who are trying to get their students, you know, into clinical practices that have a history. These are people who may have had a history of crime, but have rehabilitated, and are now, you know, kind of seeking to better themselves. So we kind of added what is known as our age-based criminal history review. And we're not going to take disciplinary action against an applicant, or petitioner with a judicial order conviction for a Class B, or Class C misdemeanor that is more than five years old. And we are not going to take disciplinary action against a licensee for a Class B or C misdemeanor when the judicial order of conviction, or deferred adjudication was entered more than five years before the board learns of the conviction, or deferred. Class A misdemeanors, we're going to give them more than 10 years. If it's more than 10 years old, then they're going to get a pass on that. Of course, we're not going to give them a pass on everything if it's just not the right thing to do, right? So we have another little caveat. You can take disciplinary action against a petitioner if it's an A, B, or C if it's part of a pattern of conduct. If they've got more than one, if it's occurring a lot, I don't care how old it is, something's not quite right about that person's history, and they're subject to review. And we're always going to reserve our right to take action against non-disclosure of that criminal history. I'm glad I got through this quicker than I thought. I'm sure you all are happy about that, too. I hope you get all of your CNEs. So the conclusion here is that criminal history is important to licensure decisions because it often speaks to a nurse's professional character, and generally that's a requirement for licensure. Past criminal behaviors may compromise patient safety if they're repeated. Successful regulatory approach includes anticipating the volume of that criminal history, that results from those criminal background checks, and developing the guidelines for recommending disciplinary action ensures that your decision making is consistent, transparent, focused on the board's mission to protect and promote public welfare, and safety. Okay, so in your materials. I believe is some examples of our guidelines for criminal conduct, and it should include our entire criminal history policy, minor criminal history policy. And so you can see what Texas does. And this doesn't address all those nuances like two DWIs, which...that's in our guidelines for criminal conduct. You got two DWIs you're subject to being disciplined if one of those occurred in 1980, and the other one occurred in 2015. These are the kind of bazaar examples that pop up that we have...anyone, and all of you will have difficulty in evaluating. Are there any questions? I'd be surprised. Andrew? Thank you. - [Andrew] This will be real quick. In New Mexico we had a licensee apply for licensure, obviously, but he committed a homicide when he was a minor. Juvenile. How would Texas approach that? - Good question. I think that we are subject to statutory restrictions, all of us, in these regulatory areas. Our criminal history policy doesn't really incorporate... I think we speak to our criminal history policy on some juvenile matters that are made public by law because of the violent nature of what the juvenile did, they become part of the public record. I think that they are relevant. Whenever the law provides that those are public. Most juvenile offenses are...in Texas, are prosecuted under civil provisions of the family code and are sealed, and are not subject to disclosure. And so you can have someone

who committed a series of drug, and theft type offenses at 17, and then whenever they turn 18 they go to college. You get fingerprint checks, and you're not going to get that information, necessarily. Sometimes the FBI includes some juvenile...and I'm not sure what the cutoff is, but if we see it in the record we're going to ask about it. And we're going to investigate violent and serious crimes that the juvenile system has made public under the law. And that may be relevant. Yes. - [Man] Just wondering, does Texas require if you are charged, but are awaiting trial to have those disclosed, and how you handle that? - We require self-disclosure of pending charges, and an explanation about that. As you can see from our enabling legislation, we can take action on a conviction, or order of deferred, or a pretrial order, judicial order regarding a crime. An arrest only we cannot take action on. That is restricted in our law. But it also goes on to say that we can look at the underlying conduct. And I think what many of us have done historically. Many of our boards is if the criminal justice system decided that there was something other than a conviction that was going to be associated with somebody's behavior, that you could show otherwise than a conviction, and it speaks to professional character, then they would take action under a professional character violation. And so we will take action on an arrest only if we can prove the underlying conduct, and that underlying conduct speaks to a violation of the professional character requirements of our law. And we have in Texas, and I think the federal government will eventually...the federal government has it too, and it's going to be sort of a... I'm sure you all have seen some seminars on it too...they're going to roll out the rap back or once you are an entity that is authorized to receive criminal history information from the FBI, and those depositories, if there is another recorded event that takes place, that will be automatically sent to those people who subscribe to that service. And so the beauty about having everybody fingerprint checked, and having these rap back situations are, you can learn about things without self-disclosure anymore. All right. No more questions? Thank you very much. I appreciate being here.