



Council on Licensure,
Enforcement and Regulation




2010 Annual Educational Conference • September 23-25

Expungement of Disciplinary Orders


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Promoting Regulatory Excellence

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Thoughts on Expungement

- Be assured that if you knew all, you would pardon all. Thomas Kempis
- If there is something to pardon in everything, there is also something to condemn. Friedrich Nietzsche
- Where there is injury let me sow pardon. Francis of Assisi

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Thoughts on Expungement

- We pardon to the extent that we love. Francois de La Rochefoucauld
- What is tolerance? It is the consequence of humanity. We are all formed of frailty and error; let us pardon reciprocally each other's folly - that is the first law of nature. Voltaire

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Overview

- Traditional Canadian approach
- Recent developments / trends
- Rationale and policy arguments
- Tough issues

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Traditional Canadian Approach


- Nothing is universal, but...
 1. Should there be publication / record?
 2. Initial active publication
 3. Passive access stays on forever
 - Rare "pardon" options

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Traditional Canadian Approach

Access options:


- Publication to profession / stakeholders
 - Archive at office (more recently online)
- Public register
- On request (often hurdles)
- Website version of the above

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Recent Trends

Limitations on ability to remove info


- E.g., periods of time
- E.g., nature of finding (sexual abuse)
- E.g., nature of sanction (reprimand only)
- E.g., process requirements (hearing)
- E.g., test for removal (public interest)

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Recent Trends

Specified content of register


- E.g., referrals, including allegations
- E.g., synopsis of findings
- E.g., varies with types of orders
 - Even for closed hearings (e.g., incapacity)
- E.g., pending appeal
- With name of the member

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Recent Trends

Website access requirements


- Up to entire register on website
- Typically newsletters are posted
- Typically website is searchable
- Some process descriptions

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Recent Trends

Responding to requests


- Must actively explain what information is available
- Format of response is generally flexible
 - Including verbal
- French language access

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Rationale

Transparency of process


- Secrecy leads to abuse
- A form of accountability
- Removing hurdles for those who cannot attend in person
- Constitutional right of public access to discipline hearings


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Rationale


Informed choice of practitioner


- Especially with reduction in exclusive scopes of practice
- If asked, public wants info
- Public wants to assess relevance on own


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<h3>Rationale</h3>		
Public's right to know		
<ul style="list-style-type: none"> • Freedom of information principles • Regulation in the public interest • Self-regulation is a delegation from the government • Constitutional issues 		


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<h3>Rationale</h3>		
Other rationales		
<ul style="list-style-type: none"> • Info is in the public domain already • Internet has changed the world forever • Part of sanction, deterrence (both kinds) • Facilitates enforcement • Only a few access info; what is the harm? • Simplifies things (e.g., what is minor?) 		

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<h3>Tough Issues</h3>		
<ul style="list-style-type: none"> • Personal safety / suicidal members • Innocent people: witnesses, clients, family • Personal health information • Confusion (e.g., terms no longer in place) • Changing values (e.g., conduct now OK) • Former / dead members 		


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<p>Tough Issues</p> <ul style="list-style-type: none"> • Confusion with similar named members • Members changing their names • Inconsistency in rules (retrospectivity, different professions) • Mobility of members • Members giving up 		


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<p>Tough Issues</p> <ul style="list-style-type: none"> • Scenario: Jim, an optician, has been disciplined for conduct unbecoming (sexual harassment of an employee) and suspended for two weeks. The register on the website has to include a synopsis of the finding. As a result, Jim has been unable to find work for five years other than low paying part-time work in a laboratory. Is this fair? 		

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<p>Tough Issues</p> <ul style="list-style-type: none"> • Scenario: Stephen, a physiotherapist, has been disciplined for sexually groping a patient. He was suspended for three months and underwent boundaries training. He now works in solo practice. There have been three subsequent similar complaints but only one went to discipline and the allegations were not proved. Can he use Jim's precedent? 		

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<h3>Conclusion</h3>		
<ul style="list-style-type: none"> • Strong arguments against expungement • Flexibility of discretion vs. certainty and consistency of clear rules • In Canada trend has been towards greater ongoing public access to the information 		


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<h3>Speaker Contact Information</h3>		
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<h3>History</h3>		
<ul style="list-style-type: none"> • The Kentucky Board of Nursing was established in 1914 • Autonomous Board, reporting directly to the Governor • 16 Board Members appointed by Governor for 4 year terms • 47 Staff Members 		

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Consumer Protection Branch

- Branch Manager
- Section Supervisors
- Nurse Investigators
- Case Managers
- Prosecuting Attorney
- Paralegal
- Program Coordinators

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Consumer Protection Branch
(cont'd)

- Investigation and Discipline Section
- Compliance Section
 - Kentucky Alternative Recovery Effort for Nurses Program (KARE)
 - Nurses monitored on probation

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Purpose of Discipline

- Protect and safeguard the health and safety of the public
- Maintain the integrity of the nursing profession
- KBN Philosophy of Discipline
- Just Culture

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Statistics

- 71,596 Nurses licensed in Kentucky
 - RNs - 56,662
 - LPNs - 14,934
 - ARNPs - 3,997
 - Sexual Assault Nurse Examiners - 234
 - Dialysis Technicians Credentialed - 1093
 - RNs Retired - 1416
 - LPNs Retired - 699

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Statistics (Complaints Entered)

- Complaints Entered FY 2007 - 2008 = 1376
- Complaints Entered FY 2008 - 2009 = 1563
- Complaints Entered FY 2009 - 2010 = 1619

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Statistics

Fiscal Year	Complaints Entered
FY 2007 - 2008	1376
FY 2008 - 2009	1563
FY 2009 - 2010	1619

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Statistics

- 247 Nurses being monitored on limitation/probation
- 91 Nurses being monitored in KARE

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Disciplinary Violations

- Kentucky is a Mandatory Reporting Jurisdiction - KRS 314.031(4)
- Types of Violations:
 - Fraud or deceit in attempting to procure a license
 - Felony or misdemeanor convictions
 - Negligently or willfully acting in a manner inconsistent with the practice of nursing

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Disciplinary Violations (cont'd)

- Unfit or incompetent to practice safely
- Abusing controlled substances or alcohol
- Misusing or misappropriating drugs placed in the custody of the nurse for administration
- Falsifying or in negligent manner making incorrect entries, or failing to make essential entries

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Confidentiality of Investigative Materials		
<ul style="list-style-type: none"> • 201 KAR 20:161 Section 1 (6)(a) <p>“All preliminary information shall be treated as confidential during the investigation and shall not be disclosed to board members or to the public The board shall make available to the public the fact that an investigation is pending.”</p>		


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Complaint Disposition		
<ul style="list-style-type: none"> • Staff File Away • Credentials Review Panel • Board Member Review • Letter of Concern 		

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Complaint Disposition (cont'd)		
<ul style="list-style-type: none"> • Consent Decree • Agreed Order • Formal Administrative Hearing • Proposed Decision • Final Order 		

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Reporting Obligation

- NURSIS - National Council State Boards of Nursing
- Healthcare Integrity and Protection Data Bank
- National Practitioner Data Bank
- Office of Inspector General
- Board Newsletter

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Open Records Act


- KRS 61.870 - 61.884
 - Establishes right of access to public records unless specifically exempt
 - "Public Records" vs. "Open Records"
 - Fourteen (14) specified exemptions, including:
 - Records of a personal nature


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Open Records Act (cont'd)


- Public records that are prohibited from disclosure by state or federal law.
- Records of agencies involved in law enforcement or administrative adjudication if disclosure of the records would harm the agency by premature release. Generally, such records may be inspected after enforcement action is completed or a decision is made to take no action.

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History of Kentucky Expungement Procedure		
<ul style="list-style-type: none">• 1994 - Legislation Enacted - KRS 314.131(9) • 1995 - Administration Regulation - 201 KAR 20:410 Section 3<ul style="list-style-type: none">- Consent Decrees at least seven (7) years old - Agreed Orders and Decisions at least ten (10) years old AND which concern:		


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History of Kentucky Expungement Procedure (cont'd)		
<ul style="list-style-type: none">• Failure to obtain continuing education; • Paid fees by a check that was returned unpaid by the bank; OR • Practiced without current active license, registration or temporary work permit.		

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History of Kentucky Expungement Procedure (cont'd)		
<ul style="list-style-type: none">• 2003 - Amendment to Regulation<ul style="list-style-type: none">- Agreed Orders and Decisions at least 10 years old resulting in a Reprimand • 2008 - Amendment to Regulation<ul style="list-style-type: none">- Includes all Agreed Orders and Decisions at least 20 years old		

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<p>History of Kentucky Expungement Procedure (cont'd)</p> <ul style="list-style-type: none"> • Scope <ul style="list-style-type: none"> - All affected records shall be sealed - Proceeding to which they refer shall be deemed never to have occurred - Upon request, nurse may properly reply that disciplinary records do not exist - KBN shall not report expunged cases to another state agency, board of nursing or other organization 		


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<p>Kentucky Expungement of Criminal Records</p> <ul style="list-style-type: none"> • What? • Who? • Which records are eligible? <ul style="list-style-type: none"> - Convictions; Misdemeanors and Violations - KRS 431.078 - Non Convictions - KRS 431.076; KRS 510.300 		

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<p>Kentucky Expungement of Criminal Records (cont'd)</p> <ul style="list-style-type: none"> - Juvenile Court Records - Judicial and Executive Records - <i>U.S. v. Doe</i>, 556 F.2d 381 (6th Circuit, 1977) • Compare: Segregation - KRS 17.142 		

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Kentucky
Expungement of Criminal Records
(cont'd)

- How?
 - Petition/Motion for Expungement
 - Form AOC - 496.2
 - Form AOC - 497.2
- Effect?

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Number of Expungement Requests

- 1995 - 2003 = 3
- 2003 - 2008 = 15
- 2008 - current = 12

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**CASE
EXAMPLES**

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