Off duty, under scrutiny: How much off-the-clock behavior can the state regulate?

By Eric Dexheimer
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Three years ago, while on his computer at home one evening, professor Rodney Hicks clicked the wrong button.

After digitally recording a lesson for his graduate nursing students at Texas Tech University, he accidentally reduced the screen instead of completely exiting out of it. Then he logged onto a private chat room. Because he hadn't closed the window, the program continued to capture screen shots of his sexually explicit session.

Hicks, who holds a doctorate in his field and taught under an endowed professorship, had earned high reviews as both a nurse and an academic. Months earlier, the Texas Tech University Health Science Center's School of Nursing had named him "Outstanding Teacher of the Year." In more than 30 years of nursing practice he'd never had a patient complaint filed against him, court records say. Colleagues praised his high ethical standards.

But when the single college student who saw the mistakenly posted graphic discussion reported it, none of that mattered. Hicks said he left his university job under pressure in 2011.

The Austin-based state Board of Nursing also moved to suspend or revoke the professional license essential to his livelihood. Even though he was never charged with any crime, the board asserted Hicks had nevertheless engaged in "unprofessional or dishonorable conduct" that threatened patient and public safety.

It's not an isolated case. In recent years, Texas boards that oversee the growing number of state-regulated occupations have punished licensed professionals not for on-the-job missteps that imperil the public, but for legal behavior that occurs outside of work hours -- often saying the incidents dishonor the profession or indicate character failings that might seep into their work.

Legal critics say the cases are based on an unproven connection between off-duty behavior and acceptable work performance, and that they distract licensing boards from attending to genuine public threats. Once regulators begin linking professional licenses to personal behavior that, while perhaps objectionable is not against the law, they say it's hard to know where to stop.

"Should we take away the license of a cardiologist who smokes cigarettes?" asked Adam Slote, a San Francisco lawyer considered an expert in the field through his representation of nurses in several high-profile California cases. "Or the nurse who doesn't vaccinate her children, or the Realtor who goes into foreclosure because he paid too much for his own home?"
Civil libertarians fear such broad reach can overstep the government's authority. "I don't think that when people get an occupational license they should be giving up their privacy," said Marc Levin, an analyst with the conservative Texas Public Policy Foundation.

Board of Nursing Executive Director Katherine Thomas stressed that regulators must act aggressively on behalf of patients who in many instances can't look out for themselves. "If you are a nurse, you are caring for the most vulnerable people -- unconscious, elderly, children -- who are putting their entire trust in you," she said. "You need to uphold standards to where that trust is deserved." She added that it is uncommon for nurses to be sanctioned for their legal off-duty actions.

Yet the board also has taken the official position that a licensed nurse may be judged on his or her behavior 24 hours a day, regardless of whether he or she is on the clock.

In 2009, after nurse Terri Dye reached into her car and drew a handgun on an unfamiliar man advancing aggressively on her in a Lubbock hospital parking lot, a jury may or may not have concluded she acted in self-defense; the man, a process server in her divorce, never filed a complaint. But that didn't stop the nursing board from moving in 2011 to suspend her license.

Never mind that Dye hadn't yet checked in at work, where her nursing skills were not in question: In legal filings, regulators contended the parking lot incident had grave -- if theoretical -- implications for patients. While none had actually witnessed the incident, a board expert testified that if they had, they might have been frightened by the gun.

Dye's behavior "did not conform to the minimum standards of nursing practice [because] Dye did not appropriately assess the situation," the board's legal filings explained. "If a nurse reacts without appropriately assessing a situation, it could cause an unsafe environment."

"It was 'could've, could've, could've','' recalled Dye, who now lives in Amarillo.

At the judge's recommendation, the board eventually decided not to punish Dye for the incident. But its final order in the matter stressed its authority: "The Board reiterates that a nurse may be subject to disciplinary action for unprofessional or dishonorable conduct whether such conduct occurs while the nurse is 'on duty or on call' or not."

Casting wide net

Other state-regulated professions have seen similar cases. In July 2011, the Texas Education Agency revoked the license of a teacher who'd had a sexual relationship with a high school student. Yet Plano teacher Robert Lange didn't know the 18-year-old from his classes; she was enrolled in a different school district in a different county.

The two had met in a non-school activity and the legally adult woman "fully consented" to the relationship, court documents show. No charges were filed because no laws were broken. The agency nevertheless found Lange "unworthy to instruct" and permanently revoked his license.
Lange, 56, who taught for 30 years, is appealing the decision. "When all you have in play is lawful personal behavior -- not relevant to the license in any way -- how do you get to 'unworthy to instruct?''' asked his Austin attorney, Kevin Lungwitz.

The answer is that some regulators have adopted rules that allow for broad interpretation. Texas's description of "unworthy to teach," for example, has been defined in a key court case as essentially undefinable: "What qualities or lack of qualities should render one unworthy would be difficult for legislative enumeration."

That allows licensers to cast a wide net. In 2006, Houston school teacher Carmelita Anderson decided she wanted to teach her then-10-year-old foster son a vivid lesson. The boy had been in trouble -- stealing, lying and smoking -- so Anderson, who had also worked with prisoners and emotionally disturbed youth, decided to offer a quick "homeless" lesson that they'd discussed in the past, court records show.

She let the boy off on a street a few minutes from their home and drove off, keeping an eye on him in the mirror. She said she drove 500 feet, performed two u-turns, and picked him up. "You were out here less than a minute," she said as they debriefed in the car. "Imagine your life like this forever."

Two Houston police officers had observed the incident, however, and Anderson was charged with child endangerment for leaving the boy alone on the side of a busy road at dusk. Prosecutors declined to pursue the charges. Child Protective Services and the school district both investigated and dropped the matter.

But the state moved to suspend Anderson's teaching certificate anyway. While she had earned glowing job evaluations working as a teacher, the out-of-school incident proved she "lacks fitness" to instruct children, the regulatory board said. It eventually voted to reprimand Anderson.

Similarly, the nursing board can discipline licensees for any conduct that might hurt not just patients, but also "the public." It doesn't have to prove actual harm to pursue disciplinary proceedings.

In 2010, when Ollie Traylor was found asleep on the couch at the house of her Houston home health patient, the state nursing board moved to revoke her license. The judge concluded her conduct wasn't serious; there was no evidence it had happened repeatedly, for example, or that Traylor's nap harmed, or was likely to harm, the patient. He recommended dropping the case.

The board disagreed, contending it only had to show there was potential for patient harm. Last July, it overrode the judge's recommendation and revoked Traylor's license.

The nursing board's definition of "patient," too, has been expansive. Hospice nurse Lori Jan Vazquez cared for a man dying of cardiac disease in Austin for two months in late 2007. The two stayed in touch afterwards, and he gave Vazquez and her children several gifts before he died.
In 2010, when regulators sought to reprimand Vazquez for violating "the professional boundaries of the nurse/patient relationship" for accepting the gifts, she noted their professional relationship had ended. Before he'd died, the patient testified he gave her the gifts as a friend.

But an expert for the board recommended a penalty because a nurse's duties "don't just end when the nurse stops caring for a patient." The expert testified there were no definitive rules when the relationship ended, so "the nurse/patient relationship may extend ad infinitum."

Such interpretations suggest "the nursing board is taking an extraordinarily broad interpretation of the law," said Baylor University law professor Ron Beal, who teaches and practices administrative law. Other attorneys agreed the nursing board had an aggressive approach to off-duty behavior, though it wasn't unique.

"The dirty little secret is when you become a health care professional you can't make the mistakes Joe Blow down the street does," said Austin's Jon Porter, who worked as an investigator for the Texas Medical Board before entering practice defending licensees. "And when you make that mistake, it puts your license at risk."

Legislating morality?

State-issued licenses -- Texas currently has more than 500 occupations overseen by state regulators, representing about a third of its total workforce -- are considered a government privilege that can be removed or restricted for reasons including "moral turpitude." Often these are cases in which a licensee has been convicted of a crime relevant to his or her profession.

Few would argue that a teacher who has sexually assaulted a child or a stockbroker convicted of swindling investors should be allowed to continue in those professions. But other crimes are more of a stretch.

Following a rough patch, San Antonio licensed vocational nurse Tammy Spence qualified for food stamps and Medicaid assistance for her son for an 18-month period in 2007 and 2008. Picking up some extra shifts later put her over the income limit, which she didn't report.

In 2009 she was charged with welfare fraud. After she explained what happened, prosecutors agreed to a deferred prosecution; the charge would eventually be dropped after she paid back the more than $12,000 in total benefits she'd received.

She did. Meanwhile, in 2010 the Board of Nursing moved to revoke her license -- even though Spence had practiced without incident for more than a decade. "They said it was a crime of moral turpitude," Spence said. "That if I deliberately got welfare benefits I wasn't entitled to, it would hurt patient safety."

Spence settled, agreeing to be supervised by another nurse for a year. Thomas, of the nursing board, said the crime could hint at professional problems: "If they have engaged in behavior that violated the public trust outside of work, it could speak to their behavior at work."
Yet Elizabeth Higginbotham of San Antonio, a registered nurse and lawyer who represents nurses in licensing disputes, said that approach means "anything you could do at any point could be considered unprofessional. They really do believe they have the ability to legislate morality."

Slote, the San Francisco lawyer, said occupational boards increasingly are feeling pressure to take aggressive action as a legal shield. "It's really the fear that if they don't act, and then something happens, they'll be blamed," he said. "There's this concept of, 'We're trying to prevent future conduct.'"

One of the few researchers to study the issue in detail, Loyola University Chicago School of Law professor Nadia Sawicki, concluded in a 2010 law review article that state medical boards "often focus on character-related misconduct, including criminal misconduct, that bears only a tangential relation to clinical quality and patient care."

Even among doctors who have encountered personal or certain legal tangles, Sawicki added, there is slim evidence it predicts trouble in their clinical work. Very little research shows what personal behavior reveals future professional problems.

And the connection isn't always obvious. In 2008, a nurse from Magnolia attempted suicide after a series of personal setbacks. Following a four-day hospital stay, psychiatric treatment and on-going counseling, the woman, who'd been a nurse for 16 years, returned to work, according to court documents.

Since then she'd been a stellar worker, testimony showed, earning the highest evaluation from her employer in 2010 and 2011. At a recent hearing, a quadriplegic patient she cared for in his home four days a week said she often stayed late to help him, and he rated her care 9.99 out of 10. She'd also been a foster mother to medically fragile children.

But the nursing board contended the woman's suicide attempt had demonstrated poor judgment that placed patients at risk, so she should practice only under the supervision of another nurse. "An attempted suicide speaks to a person's competency to act rationally," Dusty Johnston, the nursing board's general counsel, said in an interview.

Last September, an administrative judge recommended only a warning. "There was no evidence (the nurse) has ever placed a patient at risk of harm," the judge wrote. "Indeed, the record demonstrates that she is an extraordinary person who ably cares for her patients." The case is pending.

'Reckless behavior'

The computer error by Hicks, the nursing professor, wasn't discovered for a month. The single graduate nursing student who saw the explicit screen-grabs immediately reported it to the university. She later described her reaction as "shock and disgust," though conceded she continued reading even after realizing the chat was private and had been posted mistakenly.

The only other person to view the graphic content was Chandice Covington, the dean of Texas Tech University Health Sciences Center, who immediately initiated a review of all of Hicks's patient
contacts. It found no evidence of misbehavior or complaints.

The dean also lodged a complaint with the Board of Nursing, and in early 2011, the board formally charged Hicks with engaging in unprofessional or dishonorable conduct. It also asserted the "obscene" content of the chat demonstrated he was mentally unfit to practice.

A battery of psychological tests given or interpreted by five experts was inconclusive. Although the chat had veered from adults to underaged subjects, several experts testified there was nothing to indicate that he was any more likely to engage in -- versus fantasize or talk about online -- deviant sexual behavior than anyone else.

Last March, Judge Penny Wilkov agreed Hicks had no mental disabilities. "Dr. Hicks had a pattern of accolades, success, and promotions that would not be expected of a person with a personality disorder," she wrote in her opinion. "By all accounts, his record as a nurse is exemplary."

But the judge did find Hicks's at-home behavior had harmed the nursing student. "To conduct private graphic chats just minutes (after preparing a lesson) was reckless behavior," she wrote. "Had he kept his work life and private life completely separate, he would have ensured a safe environment for his students to learn without the possibility of viewing explicit material."

Wilkov recommended Hicks work only under the supervision of another nurse for a year. Hicks has appealed to district court, arguing that he has never acted unprofessionally while working.

"The nursing board regulates nursing practice; they don't regulate nurses," he said from California, where he now teaches nursing. "Where are my privacy rights? The board can't regulate what goes on in your own home."