
Using Criminal Background Checks to Inform Licensure Decision Making

Introduction

The vast majority of encounters between nurses and their patients are positive interactions that allow nurses to meet the health care needs of patients. While the chances are small that a nurse is someone whose behavior may put the patient at risk of harm, incidents of serious incompetence, neglect or abuse traumatizes the victims and shakes public trust in care providers and organizations serving vulnerable populations (Cooper & Sheets, 1998). Health care consumers are dependent upon professional licensing boards to conduct appropriate screening of applicants. This Paper provides guidelines for conducting criminal background checks, from the authority required to mandate criminal background checks to a practical “how-to” section for boards moving toward this requirement, and information to support the use of the data obtained through criminal background checks in nursing licensure decision making.

Nurses work with patients, residents and clients throughout the whole spectrum of health care settings. Nursing care is often of an intimate physical nature and involves therapeutic contact with patients while providing health care services. Nurses are afforded access to the facility rooms and homes of people who are sick, disabled, dependent or infirm. Nurses are in a position to have access to information about a patient as well as to the patient’s personal property and loved ones in a way not generally available in a business or social relationship or to the public. Often, vulnerable individuals are unable to protect themselves, voice objections to actions or provide accurate accounts at a future time (RI, 2001). Advocacy for these patients, residents and clients is an important aspect of nursing and is in the finest tradition of nursing practice. Nurses are placed in a position of public trust.

In light of this extraordinary trust, nurses are held to a high standard. Boards of nursing have the responsibility of regulating nursing and a duty to exclude individuals who pose a risk to the public health and safety. One means of predicting future behavior is to look at past behavior. Checking whether applicants for the privilege of nursing licensure have a criminal history and examining the nature of that history can provide significant information for boards to use in making decisions about who should be granted the privilege to practice nursing.

Background

Historically, boards of nursing have obtained information about prior criminal convictions from applicants for nursing licensure by asking questions on licensure applications. Decisions about whether or not to license an individual with a criminal history were determined on a case-by-case basis. In 1990, the California Board of Nursing began to conduct criminal background checks on applicants for nursing licensure. In the mid-1990s, concerns regarding the screening of applicants led other boards to explore the use of criminal background checks to validate the background of applicants for licensure. The 1996 NCSBN Delegate Assembly adopted a resolution directing NCSBN to develop resources to support board of nursing decision-making regarding criminal convictions. In response to that resolution, policy recommendations and a supporting Paper, *Criminal Convictions and Nursing Regulation*, were brought to the 1998 Delegate Assembly. That body adopted a policy recommendation to boards of nursing that criminal background checks be conducted on applicants for nursing licensure. This policy recommendation made a strong statement about the behavioral expectations for nurses.

In 1998, the Nursing Practice & Education Committee developed the *Uniform Core Licensure Requirements* using a competence framework¹ (NCSBN, 1996). The uniform requirements included

¹The NP&E Framework consisted of *Competence Development* (education); *Competence Assessment* (licensing examination); and *Competence Conduct* (e.g., criminal background checks, questions about functional abilities, and good morale character requirements).

competence conduct expectations for self-reports regarding all felony convictions, all plea agreements and misdemeanor convictions of lesser-included offenses arising from felony arrest. State and federal background checks using current technology (i.e., fingerprinting) were included to validate self-reports. This requirement was noted to be consistent with the 1998 NCSBN policy recommendation to conduct criminal background checks on candidates for nursing licensure. The supporting Paper stated:

Crimes that have a potential impact on the ability to practice a profession safely or predict how the nurse might treat vulnerable clients in his or her care should be considered as part of a licensing decision. [Crimes] are indicative ... of competence conduct [which is] composed of affective or behavioral elements...[and] may also reflect inadequate critical thinking skills and poor judgment. A felony conviction is a significant event. With the common use of plea bargains, the behavior underlying a misdemeanor should also be scrutinized on behalf of the vulnerable persons who are recipients of nursing care. It is the responsibility of the board of nursing to use the conviction history (including plea agreements) in decision making regarding competence conduct and licensure (NCSBN, 1998, 13).

When the Disciplinary Resources Advisory Panel was charged to develop a model process for conducting criminal background checks in the fall of 2004, it was clear that for many boards of nursing the question had changed from “whether to conduct criminal background checks” to “how to conduct criminal background checks.”

Data Collection

The Panel members began this endeavor by collecting information related to the topic and using this information as the basis for model development. The data sources included current state statutes and rules, information from other professions and a literature review.

REVIEW OF NURSING STATUTES AND RULES

In 1998, five boards of nursing were authorized to conduct fingerprint checks. Only three reported using them to validate background for licensure applicants. In *Profiles of Member Boards 2002*, 13 boards reported conducting both Federal Bureau of Investigation (FBI) National Clearinghouse of Information on Crime (NCIC) checks and state criminal agency checks. An additional 11 boards reported conducting on state checks.

In a 2005 NCSBN survey, 18 boards reported the use of criminal background checks. A review of state statutes and rules identified 25 boards of nursing that reported doing criminal background checks (most were as a routine step in the licensure process; a few boards had authority but limited use for discipline investigations (See Attachment A for a summary of survey findings).

REVIEW OF OTHER PROFESSIONS AND OCCUPATIONS

After a number of high profile cases in the late 1980s alleging misconduct, childcare workers became among the first employees to be required by federal law to have criminal background checks. The National Child Protection Act of 1993 defined child abuse crimes reporting requirements by criminal justice agencies (CJIS, 1995). Other federal mandates for criminal background checks included nursing facilities and home health agencies. There are approximately 15 federal laws that permit criminal background checks for employment and licensure purposes when individuals provide services to children, the elderly or other vulnerable adults.

Teachers and student teachers were also required by states to have criminal background checks, again because their work involves contact with children. School volunteers are included in the screening because they may have unsupervised contact with children. Other services where there is frequent and unsupervised contact with children may be required to have criminal background checks. Examples include park service and recreation department employees.

Many banking and financial service positions are required to have criminal background checks and individuals may be barred from becoming employed, certified or licensed if the individuals have had disqualifying convictions. Criminal background checks are also frequently required in those occupations working with security or investigations, e.g., burglar alarm companies, private security or private investigators. There are requirements for weapons dealers to be checked as well as purchasers of guns in some states.

At least 10 states already require physician applicants for licensure to have criminal background checks: North Carolina, California, Florida, Idaho, Illinois, Kentucky, Louisiana, New Mexico and North Dakota. Nevada requires osteopaths and doctors who embrace holistic medicine to be screened. Florida requires checks of allopathic physicians, chiropractic, osteopathic and podiatric doctors. Four other states require in-state, but not federal, checks for physicians: Maine, New Jersey, Texas and Washington. The South Carolina and Delaware Boards of Medicine are considering criminal checks for physicians (Sun, Sept. 26, 2004).

Massachusetts, Missouri and Oregon require criminal background checks for most, if not all, professional licensure applicants (CLEAR, 2005).

LITERATURE REVIEW

Criminal background checks are an example of a legislative trend that put obligations on licensing agencies and employers with the intent of protecting children and vulnerable adults. The Committee reviewed various resources, articles and Web sites addressing the use of criminal background checks. Criminal background checks were seen to be a reasonable measure to protect service recipients from harm, by review of the backgrounds of individuals seeking positions requiring direct contact with vulnerable service recipients. According to the Department of Justice, statutes governing state social welfare and licensing agencies have increasingly required that certain screening practices be used for those workers and volunteers working in settings in which individuals come into contact with children, the elderly and individuals with disabilities (DOJ, 1998, p. 1).

Where professional licensure is involved (e.g., attorneys, physicians, nurses, brokers, etc.) the statute will generally provide that the required criminal history information is a prerequisite to the issuance of a license. The more specific a criterion for licensure screening, the better — e.g., “drug arrest” may be too broad. Defining a time frame, like a recent history of drug conviction, is a better criterion. Other factors to consider are the recency and circumstances of conduct, the age of the person at the time of the offense and societal conditions that may have contributed to the nature of the conduct — e.g., neighborhood pressure to join a gang or a perceived threat of retribution for not joining a gang. A person’s commitment to change and efforts to rehabilitate, not just remorse but tangible evidence of a desire to become a law-abiding citizen, is an important factor. An example would be making restitution to victims of crime or progress in rehabilitation programs (Patterson, 1998).

Examples of crimes bearing on the fitness of an individual to have contact with, and responsibility for, children or vulnerable adults include any conviction for a sex crime, an offense involving a child victim, a drug felony or other convictions such as crimes involving violence or theft that would pose a concern regarding children or vulnerable adults (Coates, 2000). Another reason for doing criminal background checks is for the protection of personal property, very much a concern when services are provided within the home or to vulnerable individuals who are not attentive to their surroundings.

Criminal law is for the purpose of preventing harm to society, declaring what conduct is criminal and prescribing the punishment to be imposed for such conduct. Substantive criminal laws are commonly codified into criminal or penal codes (Black, 1979). The broad aim of criminal law is to prevent harm to society, with some of the primary societal interests being protection of people from physical harm and of property from loss, destruction, or damage. Other interests include protection of: the public health, the public peace and order, the government (from injury

or destruction), the administration of justice (from interference), safeguards against sexual immorality and other continually evolving interests (Northrop, 1987).

Criminal procedure is concerned with the procedural steps through which a criminal case passes. Limitations are placed on the government so that an individual's liberty and exercise of constitutional rights are not unduly impeded. The definition of a crime cannot be so vague as to fail to provide adequate notice of what conduct is prohibited. Generally, the law requires two elements for a crime, an act (*actus reus*) and a criminal intent or guilty mind (*mens rea*), to be present for the conviction of a crime. The specific elements of crimes vary, but typically involve the defendant's mental state, causation (i.e., certain conduct that produces a certain result) and prohibited conduct (Northrop, 1987).

"The necessity of greater procedural protections in the criminal and quasi-criminal setting than those available in the civil context is due to the nature of what is at stake in each of these. In criminal proceedings, life and liberty are usually at stake. In civil proceedings, generally money is the issue. The criminal trial provides the accused with a process that includes full notice of the charges, the right to compel witnesses on the accused's behalf at the trial and the right to confront the witnesses against him or her" (Northrop, 1987, p. 395).

Patterson says use of arrest data in screening processes for paid positions has been adjudicated as a discriminatory practice and is therefore barred under Title VII of the U.S. Civil Rights Act of 1964 (this is in reference to employment). Decisions should be based on convictions. However, employers can consider an arrest for which a disposition is pending to disqualify an applicant until a decision is rendered. Similarly, licensing boards can postpone licensure decision-making when disposition of a criminal matter is pending. Some boards have used arrest records to trigger inquiry into the underlying conduct.

Passed by Congress in 1972, Public Law 92-544 is an appropriations statute (set out as a note under § 534 of Title 28, Judiciary and Judicial Procedure) that provides funding to the FBI for acquiring, collecting, classifying, preserving and exchanging identification records with duly authorized officials of the federal government, the states, cities and other institutions. For a national records criminal background check, the FBI requires that:

1. The applicant provide a complete set of readable fingerprints.
2. The organization inform the applicant it may request a records check for the position sought.
3. The organization inform applicants of their rights to obtain a copy of any background report and to challenge the accuracy and completeness of the information before a final determination of eligibility is made (Patterson, 1998).

An important tool to support accessing criminal background information is the National Crime Prevention and Privacy Compact, which organizes an electronic information sharing system among the federal government and the states to exchange criminal history records for purposes authorized by federal or state law, such as background checks for governmental licensing and employment (Title 42, chapter 140, subchapter II § 14616). Under this compact, the FBI and the Party States agree to maintain detailed databases of their respective criminal history records and to make them available to the federal government and to party states for authorized purposes. The FBI continues to manage the federal data facilities that provide a significant part of the infrastructure for this system. As of June 2, 2005, 24 states had adopted this compact². States that have adopted the compact provide federal data as well as state information from the states that participate in the compact (CSG, 2005).

Another source of information for boards are the sex offender registries. With Megan's Law (RCNL), N.J.S.A. 2c: 7-1 et seq., the New Jersey legislature mandated a list of individuals who have been

²States that have passed the compact as of June 2, 2005: Alaska, Arkansas, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, and Wyoming. Six other states have legislation pending. (Commodore, 2005)

convicted of criminal sexual misconduct, ranging from child molestation to rape/sexual assault, be accessible to the public. The state registries list offenders by state of residency regardless of where the conviction occurred. Internet access to sex offender regulation and community notification registries is available at www.klaaskids.org/pg-legmeg2.htm. Information on Megan's Law and related topics is available at a variety of other Web sites accessible via internet search engines. According to the Bureau of Justice Statistics, as of September 2004, all 50 states and the District of Columbia have centralized sex offender registries. All 50 states, the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands submit records on sexual offenders to the National Sex Offender Registry (BJS, 2005).

While not a panacea, careful screening is an important patient safety activity. A criminal history record describes any arrests and subsequent dispositions attributable to an individual (BJS, 2005). The probability of continuation of the behavior is at issue — a continuing pattern of criminal offenses justifies concerns about future conduct. Certain crimes such as sexual molestation have a high probability of repetition (Patterson, 1998).

Recidivism is measured by criminal acts that resulted in the rearrest, reconviction or return to prison with or without new sentence during a three-year period following the prisoner's release. The Bureau of Justice Statistics stated the following regarding recidivism:

- *Of the 272,111 persons released from prisons in 15 States in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within three years, 46.9% were reconvicted and 25.4% resentedenced to prison for a new crime.*
- *The 272,111 offenders discharged in 1994 accounted for nearly 4,877,000 arrest charges over their recorded careers.*
- *Within three years of release, 2.5% of released rapists were rearrested for another rape and 1.2% of those who had served time for homicide were arrested for a new homicide.*
- *Sex offenders were less likely than non-sex offenders to be rearrested for any offense — 43% of sex offenders versus 68% of non-sex offenders.*
- *Sex offenders were about four times more likely than non-sex offenders to be arrested for another sex crime after their discharge from prison — 5.3% of sex offenders versus 1.3% of non-sex offenders.*

(BCJ, 2005)

In the current criminal justice system, a felony conviction is a highly significant event (Cooper & Sheets, 1998). The regulatory agency reviewing an individual with a criminal history must be aware that the individual has interfaced with the police, prosecutors, defense attorneys, judges, correctional officials and parole and/or probation authorities in the investigation, prosecution and sentencing aspects of the conviction (Northrop, 1987). It is not the role of the licensing board to retry, or second-guess these authorities. It is the role of the licensing board to use the conviction history in decision-making regarding competence conduct and licensure.

PREMISES

1. It is critical to focus on what the public needs rather than what states are currently doing.
2. Licensing boards must maintain a balance between the board's responsibility to protect the public health, safety and welfare and the individual's right to practice a chosen profession.
3. Criminal law is for the purpose of preventing harm to society, declaring what conduct is criminal and prescribing the punishment to be imposed for such conduct.
4. Past criminal behavior raises concerns regarding the behavioral competence of the individual.
5. It is not the role of the licensing board to retry or second-guess decisions made by the justice system. It is the role of the board to use conviction history in decision-making

regarding competence conduct and licensure.

6. Boards are more aware that persons with histories of criminal convictions are applying for licensure.
7. Choices made at an earlier time in an individual's life have significant impact and consequences in later life activities. Getting involved in criminal activities represent a choice that affects the person's subsequent ability to exercise selected privileges in our society.
8. The burden is upon the individual applicant to provide evidence that he/she has met all requirements for education, examination and behavior, in addition to other requirements for nursing licensure. This means the burden is on the individual applicant to provide any documentation that would prove or disprove a criminal conviction, or if appropriate, provide any aggravating or mitigating evidence regarding criminal conviction.
9. The model developed should provide the most rational approach for assuring public safety. Public safety includes access to safe and competent nurses.
10. Appropriate licensing and/or disciplinary actions based on criminal convictions should reflect any aggravating or mitigating circumstances.

OBTAINING AUTHORITY FOR CRIMINAL BACKGROUND CHECKS

Statutory authorization is needed to access the FBI database when the data is used for matters that do not involve police or courts (FBI, 2005). Public law (PL) 92-544 authorizes the Federal Bureau of Investigation (FBI) to conduct a criminal background check for boards empowered by a state statute approved by the United States Attorney General. Boards must comply with jurisdictional requirements to obtain access to state criminal records. Required safeguards to assure the security of criminal history record information reflect the concern for the proper use, security and confidentiality of such information (FBI, 2005).

The FBI has established the following mandatory elements of a state statute enacted under the auspices of PL 92-544. The state statute must:

1. Exist as a result of a legislative enactment;
2. Require that the criminal background check be fingerprint-based;
3. Authorize the submission of fingerprints to the State Identification Bureau for forwarding to the FBI for a national criminal history check;
4. Identify the categories of licensees subject to criminal backgrounds; and
5. Provide that an authorized government agency be the recipient of the results of the record check (DOJ, 2005).

PL 92-544 does not allow federal criminal records to be directly shared with health care employers or others (DOJ, 2005).

EXAMPLES OF THE GRANTING OF AUTHORITY

Many of the states that are conducting criminal background checks have been granted legislative authority through language in the Nurse Practice Act. This is the approach used in the *NCSBN Model Nursing Practice Act* and *Model Nursing Administrative Rules*, where the authority first appears in an article granting powers to the board, and is also addressed in the articles describing the licensure process.³

³An example of statutory language granting the board authority to conduct criminal background checks, from the Arizona Nurse Practice Act: "Require each applicant for initial licensure to submit a full set of fingerprints to the board for the purpose of obtaining a state and federal criminal records check pursuant to section 41-1750 and Public Law 92-544. The department of public safety may exchange this fingerprint data with the federal bureau of investigation" (Arizona Statutes 32-1606, 15. revised 2002).

The states that have broad requirements for criminal background checks as a requirement for most professional licenses in that state often have the authorization to do criminal background checks in an article or chapter pertaining to all health professional boards. Additional language pertaining to the implementation of criminal background checks may also be in the general chapter or may be included in each profession's practice act and/or rules.⁴

Another approach that has been used when agencies do not have a state legislative mandate to conduct criminal background checks is to use federal law to obtain the necessary authority. The National Child Protection Act of 1993 encouraged states to adopt legislation meeting the criteria of PL 92-544, to authorize national criminal history background checks to determine employee and volunteer fitness to care for the well being of children and also, as added by PL 103-322⁵, the elderly or individuals with disabilities. However, numerous jurisdictions did not enact the necessary legislation granting authority to conduct criminal background checks. As a result, Congress enacted the Crime Identification Technology Act of 1998 (PL 105-251). A part of this law is the Volunteers for Children Act (VCA) (42 USC § 14601)⁶, which relieves the states of the necessity to enact language consistent with 92-544 by authorizing national fingerprint checks in the absence of existing state procedures (CJIS, 1995). The Iowa Board of Medical Examiners used authority obtained through the VCA to conduct criminal background checks on prospective licensees. This was based on a determination by the Access Integrity Unit (AIU) of the FBI that the board was a "qualified entity." (Inman, 2004)

Model Process for the Use of Criminal Background Checks

WHY USE CRIMINAL BACKGROUND CHECKS?

The use of criminal background checks in the licensing of occupations and professions began with the childcare industry as a response to numerous allegations of misconduct and identification of providers with questionable backgrounds. While a lack of criminal history is no guarantee against future criminal acts, it is an indicator that the person is less likely to commit crimes in the future.

Nurses provide services for vulnerable people, often of a personal and intimate nature, so it is in the public interest to determine that those seeking the authority to practice nursing are qualified to do so, including in the areas of behavior, attitude and conduct. In the past, many boards included a "good moral character" requirement, an approach intended to seek information about this aspect of qualification; some jurisdictions continue to use this as a requirement for licensure. The trend in recent years has been for boards to move away from "good moral character," the term being vague, subjective and difficult to define. Criminal background checks were seen as a more objective and reliable source of information regarding an applicant's behavior and conduct.

Although most states ask questions about criminal convictions on licensure applications, applicants may not be motivated to be truthful. Criminal background checks provide validation of the information reported on applications.

WHO SHOULD BE CHECKED?

Applicants for licensure as registered nurses and licensed practical/vocational nurses by either examination or endorsement should be screened. Similarly, applicants for licensure/authority to practice as advanced practice registered nurses should be screened for both initial licensure

⁴N.J. SA 45:1-28, et.seq.

⁵Codified at (42 U.S.C. §5119a(a)(3)

⁶The VCA amended the National Child Protection Act to authorize national criminal fingerprint background checks of volunteers, job applicants and employees of qualified entities who provide care for children, the elderly or individuals with disabilities as well as those who have unsupervised access to such populations (regardless of employment or volunteer status) to determine if the individual has been convicted of crimes that bear upon their fitness to have such responsibility, see 42 U.S.C. §5119a(a)(1).

and licensure by endorsement.⁷ Boards that regulate nursing assistive personnel should screen these individuals as part of requirements for being on the Nurse Aide Registry and/or as part of a certification process for nursing assistants.

WHAT KIND OF CRIMINAL BACKGROUND CHECKS SHOULD BE CONDUCTED?

Some states do only state-wide (or sometimes regional) criminal background checks. But as we live in a mobile society, there are significant limitations to only state or regional checks. Boards are advised to check both state and federal criminal records. Fingerprint identification is a method of identification using the impressions made by the minute ridge formations or patterns found on the fingertips. No persons have exactly the same arrangement of ridge patterns and the patterns of one individual remain unchanged throughout life. Other personal characteristics may change, but fingerprints do not. FBI fingerprint searches are highly preferable to name checks for screening (FBI, 2005). Fingerprint comparison is the accepted standard for establishing positive identification of criminal history record subjects in the United States.

WHEN SHOULD CRIMINAL BACKGROUND CHECKS BE CONDUCTED?

Obviously, applicants for licensure should be screened at the point of application. Since a criminal background check is in essence a snapshot at a point in time, a few states are beginning to consider approaches for conducting checks of licensees, as well. When a board first undertakes criminal background checks, retroactive testing — a process for screening licensees previously licensed without criminal background checks — may be considered, e.g., screening a portion of the licensees annually until all have been checked. Other states may choose not to take on this approach and simply grandfather previously licensed individuals. The point of regular contact with licensees is when the license is renewed; this may be a logical opportunity to implement this requirement. Given the number of nurses, it may be resource-prohibitive to do a check with each renewal (particularly for states that have moved to annual renewal).

The Committee has identified two possible approaches for ongoing screening. If the board were to enforce such a requirement, a check conducted every five years could be staggered, so that 20% of licensees are screened each year. The other approach that the Committee discussed was having the board do initial and subsequent licensures by endorsement and employers would do periodic screens for nurses. Employer criminal background checks are becoming more common at the point of hire and could be done periodically while a nurse is in the facility/agency employ. Like boards, employers cannot share specific criminal background check information, but employers should be expected and encouraged to report to the boards of nursing a denial of employment or a release from employment for a criminal conviction (however, they cannot report the nature of the crime or the particulars if obtained via the FBI criminal background check).

The other time for the board to conduct a criminal background check would be during an investigation. Criteria for screening as part of an investigation include whether the subject nurse has previously been screened, the nature of the allegations and whether there are multiple boards involved in the case. Some boards may choose to screen all nurses under investigation but if the screening involves fingerprinting, they would need statutory authority.

HOW — SUGGESTED PROCESSES FOR CONDUCTING CRIMINAL BACKGROUND CHECKS

The state agency obtains state (and possibly regional) records and transmits the fingerprints to the FBI. Fingerprinting, either through electronic “live scans” or paper and ink “hard cards,” is required for all federal criminal background checks conducted for employment and licensing purposes. New technology is being developed in many areas all the time, so states are advised to use terminology in statutes and rules that is broad enough to accommodate new developments,

⁷There may be situations when an individual who holds two types of nursing license chooses to apply for both at the same time, e.g., someone who is both an LPN/VN and an RN, who wants to keep both licenses current; or when RN licensure is required for APRN licenses/authority to practice. In these situations, one criminal background check should be used for both applications.

but specific enough to articulate what is intended and required by the statute.

Once a board is authorized to conduct criminal background checks a process is needed for implementation. The Committee identified these key steps in the process, based on review of the processes used by nursing boards already conducting criminal background checks.

1. Consider the impact and resources that will be required by this activity. Identify a lead staff person for process development and provide adequate staff support. Other areas of board operations that will be affected by new information should be involved in the planning and implementation. Planning should include consideration of security issues, as the information obtained through checks is confidential and should be managed as such.
2. Identify the state agency or bureau responsible for conducting state results and transmitting fingerprints to the FBI. It is helpful to develop contacts and a working relationship with these individuals. Obtain fingerprint cards or identify locations and agencies that perform fingerprinting or obtain instructions for conducting electronic screening.
3. Develop policies and procedures to guide staff in the implementation of screening and triage. Prepare educational materials for applicants that describe the purpose of fingerprinting, the procedures for screening, places to get fingerprinted and information noting that the applicant is responsible for any costs from local law enforcement, the state agency and the FBI.
4. Prepare staff for the phone calls that will come in from the applicants. Questions often arise related to clarifying disqualifying arrests or convictions. Having some standard scripts prepared in advance can be of assistance. Plan for those situations when staff need to refer calls to supervisors.
5. Try to anticipate the unexpected. Plan for those individuals whose fingerprints cannot be read by having a back-up procedure for background checking by name and other identifiers. Some states have included a provision in the law to address situations when an individual cannot be fingerprinted. This typically involves doing a records check on the person's name, social security number and other vital statistics.
6. The FBI will report the results of the search to the requesting agency, which will forward both the state and the FBI results to the board. The state requesting agency is the conduit for submitting criminal background checks and returning results.
7. Train staff for receiving and reviewing the criminal background reports. Prepare staff to read the reports that will include arrests as well as convictions.
8. Develop criteria to establish those arrests or convictions that will require further review and those that do not. It is effective for the board to establish criteria for decision-making and delegate to staff the initial review of positive findings. Procedures should be established for staff review and recommendations using the board criteria.
9. The applications of those with criminal records should be reviewed for how questions about criminal convictions were answered.
10. Develop and establish policies for the ability of applicants to sit for the licensure exam prior to receipt of the criminal background records and/or to receive a temporary permit pending the receipt.
11. Develop a policy to guide staff in those situations involving very old convictions where court records are unavailable.⁸
12. Criminal background checks provide a valuable tool for boards, but boards should be cognizant that not all arrests/convictions are recorded and there are, at times, errors made in the reporting. It is important to confirm and validate findings. The burden, however, is

⁸For example, a criminal background check identifies a conviction that occurred twenty years earlier but the applicant claims it was never a conviction, or that it was expunged, or it was her sister who actually sustained the conviction. The court reports that there are no records remaining to substantiate or refute the applicant's story.

ultimately upon the individual applicant to provide any documentation that would prove or disprove a criminal conviction, or if appropriate, to provide any aggravating or mitigating evidence regarding criminal conviction.

CRITICAL POLICY CONSIDERATIONS AND DECISIONS

Whether exploring or already implementing criminal background checks, boards of nursing should address the following policy considerations and make decisions regarding how the process is to be conducted:

- Whether to conduct criminal background checks from a point forward, with grandfathering of individuals already licensed or to look retroactively at previously licensed individuals.
- What questions should be on application regarding criminal background.
- Management of the length of time required to complete the criminal background checks leads to these considerations regarding the application process:
 - Whether to allow an individual to sit for the licensing examination prior to the receipt of the criminal background checks (See Table 1).
 - Whether to grant a temporary permit to a nurse applying for licensure via endorsement pending the receipt of the criminal background checks (See Table 1).
- Security provisions to keep criminal background checks results confidential.
- Exception and waiver processes for individuals whose fingerprints are not readable (as discussed in the suggested process above).
- Appeal procedures if an applicant for licensure or a licensee requests a reconsideration of a board’s decision based on a criminal conviction.

Table 1 – CBCs and Exams/Permits: Timing Considerations	
Sits for exam while criminal background checks processed	Sits for exam after criminal background checks results received
PRO: ■ Allows new graduates to test more quickly after graduation (applicants do better on the exam if not delayed in taking). CON: ■ May be more efficient for boards to deal with positive criminal background checks before individuals be allowed to sit for the examination.	PRO: ■ Individuals disqualified for licensure do not go through time and expense of exam. CON: ■ New graduates prevented from sitting for the exam closer to graduation.
Issue a temporary permit to endorsement applicant	No temporary permits
PRO: ■ Allows experienced nurses who have met all other qualifications to work sooner, allows public access to nursing care. ■ Many more endorsement applicants have no criminal history than those who do. CON: ■ Potential for nurses with criminal backgrounds to have access to vulnerable individuals before the board knows about conviction.	PRO: ■ Strictest standard, prevents individuals with criminal histories from practicing before board has review opportunity. ■ Does not rely on the expectation of low numbers to protect the public. CON: ■ Majority of endorsing nurses do not have conviction history yet are prevented from practicing until criminal background checks process is complete.

DISCUSSION

The determination to do criminal background checks from a point forward or to conduct criminal background checks on previously licensed nurses as well as new applicants involves financial and resources issues as well as policy consideration. The advantage of doing criminal background checks for all is that the public can be assured that the board has considered the criminal backgrounds of every licensed nurse at some point in time. The chief disadvantage is related to the sheer volume of nurses and the resources required to process all these individuals. Applicants are required to pay for the criminal background checks screening and boards would likely require licensed nurses to pay as well. Boards may expect some challenge from already licensed nurses. Another issue that would need to be addressed with the state law enforcement agencies and FBI is the impact on the workload of those organizations. Advance notice of the numbers of screenings that would be required to check all licensed nurses should be given to the agencies involved in doing the screening. An evaluation of the percentage of positive checks in states currently doing criminal background checks on applicants would provide an estimate of the numbers of positive checks that might result from all licensed nurses.

Another policy issue for consideration regards questions about criminal convictions on licensure applications. Most boards, if not all, have some questions about criminal background. For example, the NCSBN *Model Nursing Practice Act* and *Model Nursing Administrative Rules* include reporting of criminal conviction, *nolo contendere* pleas, Alfred pleas, or other plea arrangement in lieu of conviction. This language allows the board to consider both felony and misdemeanor convictions. The concern with criminal convictions is with the underlying behavior rather than the label attached to the crime. Some serious behavior can be pled down to a lesser plea. Some boards may choose to consider arrests (reported on the FBI records) as well as convictions. If a board does this, it is important to use the arrest as a flag to check other sources regarding the underlying behavior.

Some boards doing criminal background checks have moved toward asking only about felony convictions or convictions which disqualify an applicant for licensure. These boards rely on the information in the criminal background checks to inform licensure decisions as they relate to criminal convictions that are not a bar from licensure. Other boards ask questions related to prior arrests and convictions and track the differences between the application response and the criminal background checks and pursue actions related to fraud and deceit in procuring a license when an applicant is not truthful on the application.

Among the boards of nursing currently conducting criminal background checks, the more common practice is a simultaneous process, where an applicant by examination is allowed to sit for the exam while the criminal background check is being processed, and the applicant by endorsement, who has met all other requirements, is granted a time-limited temporary permit while the criminal background check is being processed, if they have not otherwise disclosed a disqualifying conviction. Providing access to nurses is another element of public protection. However, some states require the completion of the criminal background checks prior to sitting for the examination or being allowed to practice in the jurisdiction. This is the stricter standard and arguably a safer approach.

Planning for the security of the information received is an important step in the criminal background check implementation process. In the past year, the FBI audited two boards regarding the management of criminal background check information. Regarding FBI data, the law requires that the information is kept confidential and not shared except with the subject of the criminal background report. The confidentiality requirements also mean that in order to take action on the basis of a criminal conviction, the respondent must admit to the conviction; the board must obtain court documents or otherwise independently verify the information to identify the conviction in any public documents.

The board needs to plan for those individuals who do not have readable fingerprints by determining how many attempts should be made before concluding an individual has unreadable prints. The

board needs to consider what other types of background checks could be used — e.g., electronic scanning, review of records or full investigation. As with other aspects of administrative law and practice, individuals who have been denied licensure on the basis of information first identified in criminal background checks have due process rights and must have the opportunity to appeal board decisions.

USING CRIMINAL BACKGROUND CHECKS TO INFORM LICENSURE DECISION-MAKING

Criminal convictions are grounds for discipline or denial of licensure for all boards of nursing. Courts have historically deferred to the expertise of administrative agencies regarding rules and decisions if there is a rational basis for their enactment (Tribe, 2000). Applicants have the burden of proving that all requirements for licensure are met. In most jurisdictions, once a license is issued, an individual is seen to have a property right in a professional license that cannot be revoked to otherwise disciplined without affording the individual due process. The burden of proof to demonstrate that a nurse does not meet ongoing requirements or violates grounds for discipline shifts to the board once an individual is licensed. The right to a professional license is not typically deemed a fundamental right, thus the standard for review is the rational basis test. The courts have upheld statutes requiring automatic suspension or revocation of a license based on criminal conviction. To date, courts have declined to question the state's authorization of sanctions for a broad class of convictions and the courts have uniformly held that the action of a state regulatory body in suspending or revoking an individual's license on the basis of a criminal conviction does not constitute double jeopardy (*State of Oklahoma v. Giger*). The legal basis for using criminal history to inform licensure decision-making is firm. The question for boards of nursing becomes how to use the information.

To Bar or Not to Bar

Currently, there are a number of approaches for how to use the information among the boards already conducting criminal background checks. There are several possible approaches:

- A case-by-case review of applicants and nurses with criminal convictions;
- A time limited bar to felony convictions;
- A permanent bar to certain categories of felonies;
- An absolute bar to felony convictions.

Case-by-case review. The case-by-case review has been the historical approach for boards of nursing making licensure decision involving applicants with criminal convictions. Boards have traditionally asked for self-disclosure; in recent years there is trend for boards to validate self-disclosure by criminal background checks. This approach allows for boards to evaluate the nature and context of the crime, rehabilitative efforts, the time elapsed and other factors. Using case-by-case review, boards have the discretion to deny or grant licensure. At its best, this approach gives individuals a chance. At its worst, boards may be manipulated into an unsound decision. There may be inconsistency of decisions due to changing board composition over time or inconsistency between jurisdictional policies and/or approaches that may have implications for individuals moving between states. The majority of boards of nursing currently decide cases in this manner.

Criteria for Consideration in Case-by-Case Decisions

While some boards have identified bars to licensure, the majority of boards continue to review cases on a case-by-case basis. This allows the board the discretion to consider the context of the conviction as well as aspects of the applicant's life since conviction. Some of the aggravating circumstances that the board may consider as exacerbating the situation are that the case involves:

- Multiple or repeat criminal violations;
- Prior disciplinary action;
- Conviction for a crime against a child or vulnerable adult;

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- Conviction determined to be related to professional practice;
 - Abuse of trust in order to commit the violations;
 - Exploitation of unique position or knowledge;
 - Financial benefit accrued by respondent;
 - Knowing, willful or reckless conduct;
 - Lack of rehabilitation potential;
 - Lying under oath and/or on an application for a credential;
 - Currently subject to court oversight (e.g., under probation for previous criminal convictions).

There are also circumstances that may mitigate the context of convictions. Mitigating circumstances in a case include:

- Lack of previous convictions, in this or any other jurisdiction;
- The respondent acted under strong and immediate provocation;
- At a time prior to detection, the respondent compensated or made a good faith attempt to compensate the victim for the injury or loss sustained;
- The respondent was suffering from a mental or physical condition that significantly diminished his or her capacity for understanding the ramifications of or ability to control his or her conduct. This can only be applied if such condition is not an element of the violation (e.g., charges under impaired practitioner);
- Identified potential for rehabilitation;
- The respondent sought and/or completed appropriate remedial measures prior to institution of disciplinary actions, i.e., responsible and accountable for the respondent's own actions;
- Isolated incident;
- Minimal risk of harm to patients or clients.

Time limited bar to felony convictions. Another approach is a time-limited bar to felony convictions. This option looks at the time elapsed since the felony conviction. Since most recidivism occurs in the first three years, this approach provides a safety cushion and time for the individual to get his/her life back together following the felony conviction. This approach is currently used in Arizona, Kentucky and Oklahoma. The time limit reflects a minimum period of time that the applicant with a prior felony would be required to have completed all court requirements (absolute discharge) before being eligible to apply for licensure.

Permanent bar to certain categories of felonies. Another policy option is the identification and bar of felonies involving serious or violent offenses. Violent crimes represent the highest risk of dangerousness. The high recidivism rate for property crimes (e.g., theft, check forgery, credit card theft, auto theft, receiving stolen property and property damage) raises concerns regarding the vulnerability of patients to property crimes, especially in autonomous settings. This approach does not bar other felonies that continue to be reviewed case-by-case. The Panel identified the following crimes as those crimes that should be considered for a permanent bar to licensure:

1. Murder
2. Felonious assault
3. Kidnapping
4. Rape/sexual assault
5. Aggravated robbery

-
6. Sexual crimes involving children
 7. Criminal mistreatment of children or vulnerable adults
 8. Exploitation of vulnerable individuals (e.g., financial exploitation in an entrusted role)

Absolute bar for felony convictions. The broadest consideration for possible screening mechanisms for individuals caring for vulnerable populations is the elimination of applicants who have been convicted of a felony. This approach recognizes that a felony conviction is a significant event. Samenow wrote about the criminal mind, stating that criminals need to be seen as responsible for their behavior, held accountable and be assisted in altering their thinking patterns (Samenow, 213). To determine if cognitive change has truly occurred requires extensive assessment, with review of court records, clinical and forensic interviews as well as evaluation of the situational context (Cohen, 1996). With increasing numbers of applications with felony convictions and with limited resources of boards of nursing, the comprehensive assessment necessary to screen effectively for those few (by recidivism standards) felons who might be rehabilitated from those individuals who continue to pose a danger to vulnerable consumers may be beyond the resources available to boards of nursing. This option allows boards to focus their administrative processes on other applicants and licensed individuals needing special scrutiny. Some think this approach is harsh and cite examples of former criminals who have rehabilitated and gone on to model lives. However, given the serious concerns regarding recidivism, this is arguably the safest approach; however, no states currently enforce a felony bar.

Conclusions

Increasingly, health care is provided away from traditional institutional settings. More care settings are in the home or community, away from the scrutiny of supervisors or close association with colleagues. Patients have short hospital stays and are sent home with significant care needs and increased vulnerability because of those needs. Everyday, the media brings home reports of shootings, murders, terror and war. We live in a complicated, dangerous world.

Responding to the problems of life with anger, violence and exploitation is not limited by geography, culture or age group. Society reflects its environment, and the pool of licensure candidates and nurses reflect society. The nursing board's role in screening and identifying those individuals who may pose a threat to consumers has never been more important.

Life is all about choices: the choices made have impact and may have significant consequences on later life activities. If a person chooses not to pursue post-secondary education, many professional opportunities, including nursing, are not available. If a person makes poor judgments and gets involved in criminal activities, this affects the person's subsequent ability to exercise selected privileges in our society.

The truth is that regulation does pose barriers — necessary barriers that provide assurance that complex professional activities are reserved for those individuals who have demonstrated competence to practice a profession. Whenever mandatory requirements for entering a profession are implemented, some people are denied the privilege to practice the profession. The fact that there needs to be a disciplinary process indicates that entry requirements alone cannot screen every unsafe applicant or licensee.

Criminal background screening is a tool to support boards in licensure decision-making. The requirement for criminal background checks may discourage individuals who have disqualifying convictions from even applying for licensure. Nurses who commit crimes tarnish the reputation of the profession as well as diminish the confidence of the public. An applicant with a history of felony conviction presents a confirmed history of serious deviance from societal standards. Consumers needing health care are vulnerable. Nursing is a stressful profession. Stress tends to cause bad habits to reappear. It is appropriate to establish high behavior standards for applicants for nursing licensure and for licensed nurses.

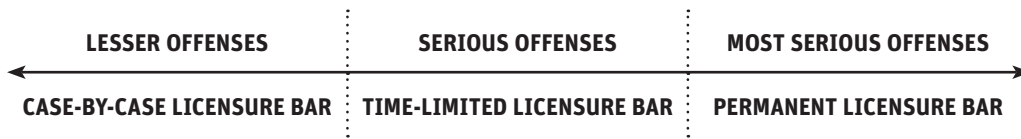
Based upon the recidivism rates, the changing society, the increasing autonomy of nursing practice and prior court decisions in this area, as well as limited state resources for licensing agencies, there is a rational basis for a policy approach limiting access to nursing licensure for convicted felons.

II. Recommendations

The recommendations of the Discipline Resources Advisory Panel regarding criminal background checks include that:

- A. State and federal criminal background checks be conducted on applicants for nursing licensure.
- B. Applicants for licensure not receive a permanent license prior to receipt of criminal background check results and the meeting of all licensure requirements.
- C. It is not the role of the board of nursing to retry a case or second-guess the criminal justice system. It is the role of the board to use conviction histories in decision-making regarding competence conduct and licensure.
- D. There is a continuum of criminal behavior, with lesser offenses on one end and dangerous violent crimes on the other. Policy decisions regarding how boards of nursing use criminal histories are also illustrated on the continuum (See Table 2).

Table 2 – Offense and Board Action Continuum



- E. There be an permanent bar to the most serious felonies as listed below:
 - 1. Murder
 - 2. Felonious assault
 - 3. Kidnapping
 - 4. Rape/sexual assault
 - 5. Aggravated robbery
 - 6. Sexual crimes involving children
 - 7. Criminal mistreatment of children or vulnerable adults
 - 8. Exploitation of vulnerable individual (e.g., financial exploitation in an entrusted role)
- F. There be a time-limited bar for other serious crimes, including:
 - 1. Drug trafficking
 - 2. Embezzlement
 - 3. Theft
 - 4. Arson
- G. That the behavior, underlying plea bargains and lesser offenses be evaluated using the criteria for mitigating and aggravating circumstances (see Table 3).

Table – Mitigating and Aggravating Circumstances

Mitigating Circumstances	Aggravating Circumstances
<ul style="list-style-type: none"> ■ No previous convictions ■ Strong and immediate provocation ■ Compensation (or attempt to compensate) to the victim for the injury or loss sustained ■ Mental or physical condition that significantly diminished individual’s capacity for understanding the ramifications of or ability to control his or her conduct (such condition is not element of offense) ■ Rehabilitation potential 	<ul style="list-style-type: none"> ■ Multiple or repeat criminal violations ■ Prior disciplinary action ■ Crime against a child or vulnerable adult ■ Conviction related to professional practice ■ Abuse of trust ■ Exploitation of unique position or knowledge ■ Financial benefit ■ Knowing, willful or reckless conduct ■ Lack of rehabilitation potential ■ Lying ■ Currently subject to court oversight (LA)

H. That boards retain the discretion, under defined circumstances and following a strict and predetermined process, to determine that extraordinary circumstances warrant a waiver of either the time-limited or permanent bar.

Appendices

B-1. Member Board Survey Results Summary – Criminal Background Checks

B-2. States That Do Not Require Criminal Background Checks (CBC)

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Attachment A

Member Board Survey Results Summary – Criminal Background Checks (Fall 2004)

Board	Source of Authority	When Required							What Required			Comments
		Examination	Endorsement	Renewal	Reinstatement	Investigation	Student	Other	State Fingerprint	Fed Fingerprint	Other	
AK		✓	✓		✓				✓	✓		
AZ	Nurse Practice Act	✓	✓		✓				✓	✓		
AR	Nurse Practice Act	✓	✓			✓				✓	✓	State check on driver's license and social security #.
CA-RN	Business/prof. Code Section 480 (a)(1)	✓	✓		✓				✓	✓		
CA-VN	Statutes	✓							✓	✓		Will require for anyone if not previously printed in state.
FL		✓	✓		✓				✓	✓		
HI	Nurse Practice Act/Uniform code	✓	✓	✓	✓	✓					✓	State/federal: all documents relating to criminal conviction.
ID	Nurse Practice Act	✓	✓		✓					✓		
IL	Nurse Practice Act	✓	✓						✓	✓		
KY		✓									✓	State criminal check.
LA-PN	Revised Statutes	✓	✓						✓	✓		
LA-RN	Nurse Practice Act	✓	✓		✓	✓	✓	✓	✓	✓		
MO		✓	✓						✓	✓		
NV	State Law – revised statute	✓	✓			✓				✓		
NH				✓	✓			✓				
NJ		✓	✓					✓	✓	✓		
NM	Nurse Practice Act	✓	✓						✓	✓		
NC	Nurse Practice Act	✓	✓						✓	✓		
OH	Nurse Practice Act	✓	✓						✓	✓		
OK	Nurse Practice Act	✓	✓								✓	State criminal records search requested.
OR	Oregon Revised Statutes § 181.710	✓	✓	✓	✓	✓	✓		✓			Law Enforcement Data Systems (LEDS); moving toward federal Criminal Background Check (CBC).
RI	Department of health policy	✓		✓	✓	✓					✓	State name search.
TX	Texas Occupations Code § 301.2511 Texas Government Code § 411.125	✓	✓	✓	✓	Have authority	Have authority					Doing RN CBC for 18 months; will begin LVN in near future. Plan to check all previously licensed nurses (10% a renewal cycle) for the next 10 years; researching doing checks on students.
UT	Nurse Practice Act	✓	✓		✓				✓	✓	✓	State/federal Name ID check.
WA		✓	✓						✓			
WI	Nurse Practice Act and State Law S. 440.03 (13)	✓	✓			✓					✓	State name search: Department of Justice.
WY	Nurse Practice Act and State Law	✓	✓		✓				✓	✓		

Attachment B**States That Do Not Require Criminal Background Checks (Winter 2004 – Spring 2005)**

STATE	WHAT THEY DO
Alabama	Limited CBC phasing in now, board initiative and specific case/reason; Authority: Nurse Practice Act, only for licensees under investigation or others who give reason to believe they may have criminal histories, no fingerprints, just state databases.
Colorado	Only on nurse aides, questionnaire filled out, based on honor system; if applicant says yes, he or she must provide more information, such as letter of explanation, court documents, charges/convictions. A misdemeanor that is more than three years old can be on registry; if felony conviction is more than five years old, then board decides on case-by-case basis; if on current probation, typically not listed on registry.
Connecticut	No pending legislation.
Delaware	Ask applicants if they have been convicted of crimes and to submit the related court documents. It is an honor system.
District of Columbia	Facilities are required to do CBCs before hiring – so board feels it would be redundant.
Georgia	Waiting for change in statute.
Guam	Currently revising Practice Act and Rules and Regulations and will include CBCs as a requirement.
Indiana	Honor system.
Iowa	Committee beginning to working on it; currently asks two questions; honor system.
Kansas	Forms ask questions and applicant is required to self-report. If there are questions, may run a KBI check. Looking into CBCs and how to do it.
Maine	Endorsement and Examination, then check Nursys®.
Maryland	Legislation pending.
Massachusetts	Require “satisfactory evidence of good moral character,” five yes/no questions with penalty of perjury; if found to be lying, automatic removal of license.
Michigan	Only if indicated on application, answers determine if investigation; penalty of perjury and discipline if found to be lying.
Minnesota	Initial intake form asks specifically, if found to be falsifying, nurse practice section – up for review.
Mississippi	Have specific questions on the application and there is a law requiring anyone employed/volunteering, etc., in licensed health care facilities.
Montana	MUST document in questionnaire; lying results in license removal (www.discoveringmontana.com/dli/nur).
Nebraska	Self report – one question, honor system. Grounds for discipline if found to be lying, not necessarily revocation of license, determination made on case-by-case basis.
New York	Only used in certain situations, legislative mandate, NYS Education Department Law, only required on applicants who answer yes to moral character questions, if answer is yes then they must submit documentation.
North Dakota	Check each applicant on Nursys®. Also have a list of regulatory questions that need to be completed on a notarized document.
Northern Mariana Islands	Since response was not received, assumption is that CBCs are not required.
Pennsylvania	Only required when person reports, one question on application, case-by-case basis for those that report.
Puerto Rico	Since response was not received, assumption is that CBCs are not required.
South Carolina	Questions: if answer yes, do CBC; if no, honor system.
South Dakota	Indicated by questionnaire – do CBCs on those who admit to convictions. If lying, under investigation before board of nursing results in revocation or suspension. Convicted felons voluntarily refrain from practice or face emergency suspension.

STATE	WHAT THEY DO
Tennessee	Ask this question: "Have you ever been convicted of a crime other than a minor traffic violation?" If the response is yes: put a "hold" on the application and follow up with a request for additional information.
Vermont	Rely on disclosure on applications.
Virginia	On all applications individuals are asked to declare any and all misdemeanor and felony convictions with the exception of driving convictions. They then have to provide a certified copy of the court documents. All Nursing homes run criminal background checks on individuals and most hospitals do also. When Nursing students go to a hospital for their clinical experience the hospital will do a background on them.
Virgin Islands	Attorney Generals office pending.
West Virginia RN	Based on questions, case-by-case, if found to be lying goes to discipline.