Void for Vagueness Ruling: A Case for Rewriting Regulatory Rules

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Three days after an outpatient procedure, a nurse-anesthetist began a sexual relationship with the patient who had undergone the procedure. Subsequently, the hospital terminated the nurse's privileges to practice as a nurse-anesthetist and filed a complaint with the board of nursing (BON), who found that he violated its rule on professionalism, which requires maintaining "appropriate professional boundaries." On appeal, the district court overturned the BON's decision, finding that regulatory rules did not address when a patient stops being a patient and did not address consensual sex between a nurse and a patient or former patient. Therefore, the court ruled, the BON's decision was unreasonable. Rather than appeal the case, the BON focused on writing new rules to protect the public.

On May 13, 2011, during an outpatient surgical procedure, a female patient who was conscious but under the influence of propofol and midazolam spoke in some detail about her personal marital and sexual history to her nurse-anesthetist, describing problems in her marriage and her dissatisfaction with that aspect of her life. The two had never met prior to the surgery. She also told the nurse-anesthetist, who was bald, that she was attracted to bald men and asked if he would check on her after the procedure. Later that day, the patient was discharged. The next day, which was Saturday, the nurse called the facility and requested the telephone numbers for the female patient and another patient, stating that he wished to check in with them to make sure they were not experiencing any adverse reactions to the anesthesia.

After the nurse left a voice mail message for the woman, she texted him, thanking him for checking on her. What followed, according to the nurse, was 3 minutes of texting about the woman's physical condition. The conversation changed when the patient expressed concern about what she had shared during Friday's procedure, as she had no memory of the conversation, merely an impression that she had done a lot of talking. She asked what she had said. The nurse repeated the substance of her disclosures about her personal life. In his testimony, the nurse admitted that at this point the conversation became personal rather than professional. For the rest of the day and throughout the next day, they exchanged text messages of a personal nature. Then, on Monday, 3 days after the surgical procedure, they met in a parking lot, where they engaged in oral sex. The nurse advised the woman not to divulge the relationship to the surgeon who performed her procedure. He also told her that he was separated from his wife, which was not true. For the next 6 weeks, they maintained a sexual relationship until the patient's husband discovered it and reported it to the hospital.

After an investigation, the hospital terminated the nurse's privileges to practice as a nurse-anesthetist and filed a formal complaint with the Idaho Board of Nursing (BON), alleging that he violated the nurse practice act (NPA). After its own investigation, the BON filed an administrative complaint that alleged several violations of the NPA:

- Engaging in conduct of a character likely to deceive, defraud, or endanger a patient or the public (Idaho Code § 54-1413 (1)(h) and Board Rule 100.09)
- Failing to safeguard the patient from the incompetent, abusive, or illegal practice of any person (Board Rule 101.04.d)
- Violating the professionalism rule by failing to maintain appropriate professional boundaries with respect to a patient (Board Rule 101.05.h)
- Failing to be responsible and accountable for nursing judgments, actions, and competence (Board Rule 101.05.c).

Administrative Hearing

During the administrative hearing before the BON, the nurse admitted to all of the facts alleged above. There was thus no controversy over the fact that the patient had been his patient, that he had met her through his practice as a nurse, and that he had entered into a sexual relationship with her within 3 days of acting as her nurse. Nor was there any dispute that the professional communication initiated by the nurse the day after the patient's surgery turned personal after the first 3 minutes. The nurse admitted to deceiving the patient with regard to his marital status, and to asking her to keep their affair secret from her surgeon. The question before the BON was thus whether the nurse's conduct violated the laws and rules governing nursing conduct in Idaho.

The nurse, who was represented by counsel, asserted that his activity with the woman had nothing to do with his status as her nurse and that it occurred outside of his professional duties and responsibilities. He maintained that she had ceased to be a patient when she

was discharged from the hospital the day of her surgery. Thus, his conduct could not constitute a violation of the NPA.

At the time, the BON's rules defined a *patient* as "[a] n individual or group of individuals who are the beneficiaries of nursing services in any setting and may include client, resident, family, community" (Board Rule 010.24). There was no express guidance regarding when a patient stops being a patient for the purposes of the NPA, so the BON looked to national guidelines governing the practice of nursing. After considering these guidelines and the facts of the case, the BON found that on the day after surgery, the nurse considered the woman to be a patient because of the initial purpose of the phone call. Further, the BON found that the nurse used his position of trust as a nurse to engage in a conversation about personal matters that he would not have been privy to but for his nursing activities during the patient's surgery. Despite who broached the subject, the nurse failed to establish appropriate professional boundaries with the patient. Instead of politely ending the conversations when they turned personal, he permitted, and admitted to encouraging, the private conversations that culminated in sexual activity.

Ultimately, the BON found that the nurse violated the BON's rule on professionalism by failing to maintain appropriate professional boundaries and the BON's rule on accountability.

Finding that the nurse violated the Idaho NPA, the BON ordered that his licenses be placed on probation for 2 years with conditions, including that he participate in 16 weeks of moral recognition or cognitive behavioral therapy, that he write a 25-page paper on professional boundaries and sexual misconduct, that he complete three National Council of State Boards of Nursing courses ("Idaho Nurse Practice Act," "Ethics of Nursing Practice," and "Professional Boundaries"), and that his practice be supervised by an on-duty supervisor at all times during his probation (Board Order at 15-16). He was also ordered to pay the BON's attorney's fees and investigative costs.

Appeal to the District Court

Following the entry of the BON's order, the nurse filed a petition for judicial review with the district court, contending that the BON's findings were unsupported by substantial evidence, and were arbitrary and capricious. Specifically, he pointed to the absence of any definitions in the NPA of *former patient* or *sexual misconduct* as those terms apply to the professionalism rule. The nurse pointed to a previous Idaho supreme court case in which the court found an agency's rule to be "void for vagueness" and thus unenforceable (*Tuma v. Board of Nursing*, 100 Idaho 74, 593 P.2d 711 [1979]). "A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law" (*Id*. at 79, 593 P.2d at 716).

The district court found that because the BON's rules did not expressly address when a patient ceases to be a patient or specifically address consensual sex between a nurse and a patient or former patient, the BON's finding that the nurse violated its professionalism rule was unreasonable. The court further found that the BON's professionalism rule was void for vagueness because it contained terms such as "maintain professional boundaries" and "imbalance of power" that did not plainly and unmistakably warn the nurse that he would be subject to professional discipline if he engaged in consensual sexual activity with an individual under the circumstances (Memorandum Decision and Order at 14). (See Table 1.)

The court also found that the BON violated the nurse's due process rights by subjecting him to disciplinary actions because "he lacked sufficient notice that his conduct would violate the vague and unclear provisions of this rule" (Memorandum Decision at 15). The district court found the BON's accountability rule ("the nurse shall be responsible and accountable for his nursing judgments, actions, and competence") to be even more vaguely worded (Memorandum Decision at 16).

Based on these findings, the court vacated the BON's findings and disciplinary sanctions in their entirety (Memorandum Decision at 17).

New Sexual Misconduct Rules

After deliberating, the BON narrowly voted not to appeal the district court's decision but instead to move forward with drafting new, explicit, and comprehensive rules governing sexual misconduct.

Over 6 months, a committee of three BON members, the BON investigator, and the BON prosecutor researched sexual misconduct rules of BONs in other states as well as sexual misconduct rules promulgated by other professional regulatory boards. The committee gave a great deal of thought to the district court's order and its emphasis on whether the rules "plainly and unmistakably" inform a nurse regarding conduct that constitutes a violation of the NPA. The new rules had to be clear to both nurses and the judges who might preside over appeals of the BON's actions.

Throughout the process, the committee considered the level of detail in the rules, balancing the need for clarity and specificity with the need for the BON to apply the rules broadly if necessary. For example, some states provide a long list of prohibited acts; the potential downside of this is that acts not explicitly included on the list cannot be considered violations. Nor is it likely that such a list could capture every act or scenario that could be sexually gratifying to any or every nurse. On the other hand, the rules must adequately describe