

Forensic Fitness for Duty and Regulating Unprofessional Conduct:

The relationship between investigation, prosecution, evaluation, and rehabilitation of safety-sensitive professionals

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Social Contract

Licensure

- A restricted practice or a restriction on the use of an occupational title
- Occupation created under a "practice act" requires a license
- Justified to regulate an activity whose incompetent execution would be a threat to the public
- Governed by Rules, Regulations, Statutes, Legal Codes, and Codes of Ethics

Objectives

- Provide a conceptual and practical framework for the evaluation, rehabilitation, and monitoring of licensees who have engaged in problematic behavior and/or unprofessional conduct
- Review the process and focus of forensic fitness for duty evaluations in safety-sensitive healthcare professionals
- Examine how Board investigations and settlement agreements/consent orders can be integrated with expert opinion evaluations
- Review how rehabilitative treatment and monitoring processes can cultivate accountability and compliance in licensees

Agency

Agent: an individual engaging with the social structure (from unconscious/involuntary to intentional)

Licensees are under a duty to apply value judgments to the potential consequences of their **technical and behavioral** decisions and are held to be responsible by their Boards

→ Licensure commits us to Moral Agency and taking full responsibility for compliance with what is considered 'right' (consequences of our actions for others)

(Robinson, Edward Heath. In the International Journal on Semantic Web and Information Systems 2011 7(4): pp. 62-84)

Why Fitness for Duty

Formal Relationships Required in Professional Functioning

- State Statutes, Codes, and Regulations
- The Board
- Professional Health/Monitoring Program
- Professional Societies
- Science and the field of medicine/nursing
- Nursing School and CME
- The Health System
- Coworkers and competitors
- Patients, friends and family
- Being a citizen in civil society with privilege

Evaluation of the Capacity for Perspective on Licensure and Regulation

- 'Fitness' and 'regulatory accountability' considerations generally are not overtly trained
- Licensure links nurses to an administrative law context and set of requirements for self-monitoring
- 'Fitness' concept places evaluations in a specific context distinct from a regular clinical evaluation
- Administrative law = boundaries, expectations, and responsibilities (duty supersedes rights and privileges)
- Licensure means scrutiny even when there are no "problems" vis-à-vis subjective distress in the licensee's experience
- Character and the need to avoid the 'semblance of impropriety': Private conduct bears directly on fitness

AACN Core Competencies, Character Fitness, and Role Definition

- Person-centered care: patient is priority
- Interprofessional Partnerships
 - altruism, excellence, caring, ethics, respect, communication, shared accountability, collaboration, **understanding team dynamics**
- Professionalism
 - **formation and cultivation of a sustainable professional identity**, including accountability, perspective, collaborative disposition, and comportment, that reflects nursing's characteristics and values
- Personal, Professional, and Leadership Development
 - participation in activities and self-reflection that foster **personal health, resilience, and well-being**; contribute to lifelong learning; and support the acquisition of nursing expertise and the assertion of **leadership**.

Familiar Nursing Fitness Concerns

- Substance Use Disorder and Diversion
- Psychiatric and Medical Instability
- Disruptive/Unprofessional Conduct
- Sexual Harassment and Misconduct
- Teamwork disruption dynamics
- Dishonesty/Untrustworthiness

The 'Nursing Act'

'Diagnosis and Treatment' as Technical Expertise and 'Mental Activity' requiring education and a license

'Care' as a Moral Navigation of Interpersonal Encounters requiring Psychological and Ethical Awareness

Fitness Considerations for Investigation

- '**Duty**' and '**Responsibility**' require competency and personal ethical intention and integrity
- Licensure and NLC eligibility therefore require '**Character Fitness**' in addition to knowledge
- Fitness requires an Intentional Professional Mental Function – **Role Definition** – in the Ethical-Relational Sphere that is as important as **Differential Diagnosis and Provision of Care** is in the Technical Sphere
 - Healthcare is a moral act requiring intention/duty/obligation constraints and management of relationship motivation while staying in one's role

Frames of Orientation for Professional Duty in the evaluation and NLC contexts

- Administrative Law-Forensic (fitness/risk)
- Civil Law (workplace laws)
- Clinical (stability/resilience/impairment)
- Economic/Political (Stakeholders)
- Organizational Management and Human Resources – team and organization view
- Leadership with mutual accountability
- Educational – knowledge/skill/expertise

Capacity for Ethical and Moral Judgement in Nursing

- Does the Licensee think about Good and Bad and Duty and Obligation?
- Do they have awareness of principles of conduct governing their decisions and actions?
- Do they consider the potential outcomes flowing from their acts of agency for others, as well as themselves?
- Does the licensee consider the impact of their behavioral decisions on patient clinical risk **and** their own reputational risk?

Self-Care Problems

- Knowledge Deficits, Lack of Superordinate life and career management, and 'Trouble'
- Imbalance – Depth, Breadth, and Scope
- Strain build-up and life crises
- Isolation and lack of relationship variety
- Role Impropriety and Boundary Problems
- Disruptiveness, harassment, and threat
- Ethical lapses and misconduct
- Burnout and Illness

What is Fitness for Duty

Types of Assessments

- All are 'Coerced and Reluctant'
- Substance use disorder and Diversion
- Disruptive conduct
- Sexual harassment, misconduct, and violence
- Unprofessional behavior
- Ethical violations/Lack of integrity
- Psychiatric Disturbance
- Leadership and teamwork deficits
- Adjustment Disorder/Change/Transition

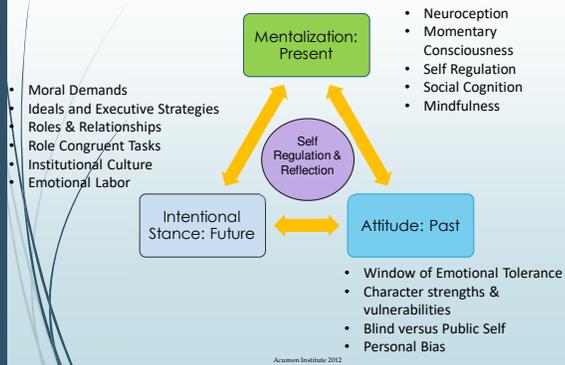
What are the Indications?

- Problems/impairments that impact on capacity to practice
- Problems that impact others' perception of character and safety
- Problems that disrupt the delivery of care
- Character flaws and ethical violations
- Perception of impropriety with regard to integrity and trustworthiness, including in private life
- Other forms of frank misconduct

Areas of Concern in Each Case Type

- Public safety
- Problems with professionalism, professional identity, and using ethical organizing principles in practice
- Cognitive problems
- Distortions and transference problems that derail relationships (monitoring, patients, and colleagues)
- Self-regulation and self-esteem deficits
- Competency/fitness distinctions
- Clinical vs. forensic functions of assessment

The Professional Executive Mindset



The Assessment Process: Clinical vs. Forensic Roles

- Clinical: diagnosis, treatment, helping, advocacy
- Forensic: assisting the 'finder of fact' (Board) while focusing on a neutral determination regarding the ultimate administrative-legal question of 'fitness'
- The evaluatee often does not know what they are being assessed for – **the evaluator must**
- Identify the ethical professional dilemma and design its solution, if that is possible/feasible/acceptable

How to Evaluate Fitness

- Importance of Orientation of the Evaluator

The Assessment Process: Clinical vs. Forensic Roles

- Gauge practitioner's ability to form a working alliance with the scrutiny of the evaluation as this helps to determine rehabilitation potential
 - respect, attitude adjustment, and the ability to develop insight and lessen resistance to critical self-examination
- Does not include a confidential therapeutic alliance
- Clinical role precludes a forensic role
- Conflict of interest: Evaluation and the referral to/involvement in treatment must be separated

The Role of Fitness Evaluator

- Importance of initial orientation and regular recalibration of the evaluator's perspective
 - Continuing education and contact with others
 - Team setting and process
 - Examination of countertransference
- Evaluator must be knowledgeable about the Administrative Forensic context (the average 'clinician' is not)
- Forensic role is neither advocate, nor therapist, nor 'finder of fact,' but rather that of the provider of 'expert opinion' in relation to matters of psychological and psychiatric 'fitness to practice'

Why We Need Fitness Evaluations

- To protect the public, first and foremost
- To provide a neutral opinion equidistant from all stakeholders bearing on psychological (mental status) and moral (character) 'fitness'
- To provide an objective assessment of: risk; function; pathology; insight; capacity for learning and changing attitude; appreciation of professional duty, traits, and the necessity of accountability
- Goes beyond individual 'subjective distress' to objective status and moral-ethical capacity

Multiple Stakeholders: Can Licensee Conceive of Each One's Perspective

- The Public
- The Nursing Board
- The Professional Health/Monitoring Program
- Academic/training institutions
- Other disciplines/professions
- The community
- The licensee being evaluated and her/his needs
- Again, this work goes far beyond private subjective experience and preferences of the evaluatee

Evaluation – Moral Character

- Moral Outlook on Regulations
- Intentional Approach to Role Definition
- Capacity to Empathize with Patients
- Defenses: Rationalization, Normalization, and Externalization
- Capacity for Guilt, Shame, and Remorse
- Ability to Internalize Responsibility
- Excuses

Fitness for Duty Considerations

- Mental Status/Neurocognitive function
- Personality and Moral character
- Mental attitude toward 'critical self-reflection,' observation and 'self-assessment'
- Decision making and moral judgment
- Appreciation of duty, traits, and understanding of the necessity of professional accountability and self-regulation
- 'Risk' is always considered, in myriad forms: clinical, interpersonal, and ethical/reputational

Elements of Assessment

- Identifying information, reason for evaluation, and incident event-relevant history
- → Frame the professional problem
- Procedures and Informed consent
- Collateral sources of information
- Psychiatric, Substance Use, Sexual, Developmental, Medical, Legal/Behavioral/ Conduct, Educational, Work/Professional, and Supervisory History, as relevant

What are the Indications of Unfitness?

- Incompetence/Negligence
- Cognitive/Functional Incapacity and Impairment
- Problems that impact others' perception of fitness and safety, including ethical concerns
- Behavioral disruption of the delivery of care
- Character flaws and ethical violations leading to perception of impropriety (integrity, trustworthiness, and moral judgment)
- Frank misconduct (practice act violations)
- **Questions about the Intentional Stance of the Licensee arise in others' minds**

Elements of Assessment

- Fluid/hair/blood drug screening and other labs
- Organizational, team, and life stage factors
- Polygraph: 3 concrete behavioral questions
- Formal Forensic Actuarial assessment of risk
- Mental status and psychological test findings
- Summary with explanatory hypothesis
- Diagnoses
- Conclusions and recommendations

Evaluation: Position and Perspective

- ▶ Maintain a neutral position/alignment
- ▶ Use multiple collateral sources
- ▶ All collateral information is biased and requires interpretation, even Board investigations that have already 'found fact'
- ▶ Evaluating fitness is not 'finding fact,' it is formulating expert opinion
- ▶ Evaluating vs. finding clients for treatment: conflict of interest/dual relationship

General Goals of Fitness Evaluation

- ▶ Identify the **nature and severity** of any psychiatric, psychological, medical, cognitive, or character impairment or disorder
- ▶ Identify any **aggravating or mitigating circumstances** that may have predisposed the licensee to impairment/behavioral problems
- ▶ Establish an **'Explanatory Hypothesis'**
- ▶ Estimate **risk of recidivism**, including recommendations for treatment, monitoring, and supervision methods to lower risk of recurrence

Aim of Fitness to Practice Evaluations

- ▶ Integration, rationality, and coordination in the report; i.e. written in a single voice
- ▶ Flow to the process and the final report that:
 - ▶ Pulls all of the elements together in a case formulation/explanatory (not excusatory) hypothesis of the problem
 - ▶ Leads to rational functional recommendations for rehabilitative treatment, education, coaching, structure, restriction, feedback, monitoring elements, and accountability framework
 - ▶ Defines and solves the 'problem' from the perspective of the Stakeholders ('make sense')

What Does the Board Get Out of Fitness Evaluations

- ▶ An 'explanation' but not an 'excuse'
- ▶ An understanding of the person-problem-organization interface
- ▶ Gauge of rehabilitative potential and risk of future problems
- ▶ Sense of what needs to be done
 - ▶ Education
 - ▶ Treatment vis-à-vis therapeutics and character/skills development
 - ▶ Accountability monitoring
 - ▶ Restrictions, or Revocation

Aim of Fitness to Practice Evaluations

- ▶ Provides an administrative-forensic determination in terms of the interface between an individual's mental status, personality, character, mental attitude, decision making, and judgment as these pertain to 'fitness' in the sphere of licensed professional medical work involving a fiduciary duty to patients and other stakeholders
- ▶ 'Risk' is always identified: clinical, interpersonal, and reputational

The Report

- ▶ Ultimately, the report must:
 - ▶ Formulate and explain the 'professional' problem
 - ▶ Provide direction for remediation
 - ▶ Address 'accountability' going forward
 - ▶ Define the 'professional' development that the evaluatee must address in order to retain and secure licensure and practice and be usable in cultivating the nurse's **'Executive Professional Mindset'**

Recommendations

- 'Functional Equivalents'
 - Interventions should be 'operationally' defined, not linked to specific programs
- Importance of referral neutrality and objectivity
 - Assessment/Feedback and Referral/Treatment should not overlap
- Board/Monitoring Program facilitates referral to specific 'approved' providers
 - This protects against conflict of interest

Evaluation and Investigation

- Evaluator should be apprised beforehand of the Board's operative questions so that the evaluation addresses them systematically
 - Boards can and should consult with evaluator to define the relevant questions
- Evaluator really should be a neutral expert: neither defense nor prosecution
- Competent evaluation includes 'Risk Assessment'

Coordination with Investigation

Evaluation and Investigation

- Releases are preferable to subpoenas especially across State lines
- Evaluation should remain incomplete until all investigation data considered relevant by the Board is gathered and reviewed
- Boards should remain clear about their role as 'finders of fact,' not evaluators
- Questions remaining after the evaluation should be reviewed via addenda rather than simply dismissing the evaluation report

Evaluation and Investigation

- Requires collateral information from all available sources other than the licensee
- Clear, documented communication between Board attorneys/investigators/compliance managers and the evaluators
- If usefulness of evaluation will be judged on data held by the Board, the Evaluator should have access in order to provide truly neutral and informed 'Expert' opinion
- Board investigative evidence provides leverage saves time in evaluation, facilitates disclosure and polygraph interview

Punishment and Rehabilitation

- Boards need to be cognizant of base rates in low frequency misconduct when judging risk
- Using rehabilitation as an option for Boards requires evidence, accountability, and willingness to tolerate political heat, along with a non-resistant, and genuinely repentant licensee
- Thus, the evaluation must address character, attitude, perspective, and rehabilitation compliance potential, and define an accountability structure

Treatment and Monitoring

- Importance of Orientation of the Treatment Provider

Interventions

- Education – Workshops, Targeted CME
- Coaching – Leadership perspective
- Psychotherapeutic and behavioral treatment
- Intensive treatment with psycho-educational and therapeutic groups of peers is key (withdrawn from work)
- Primary Addiction treatment: residential/inpatient containment with 24-hour observation if addiction is diagnosed
- All should be integrated through Authorizations for Release of information

Accountability

- Urine/blood/fluid/hair drug screening
- Maintenance polygraphs
- Psychotherapy with reporting
- Mentor/Site Monitor
- Feedback from identified coworkers
- 360 degree surveys if problems persist
- Improvement plan with defined behavioral expectations

Teach Role Definition and Differentiation

- An intentional professional mental function involving:
 - Classification of relationship type
 - Management of emotions and motives that arise in medical interactions
 - Thinking about motive in self and patient/others
 - Identifying role requirements, duties, and obligations
 - Attention, at all times, even when others are oblivious

Treatment

- "Don't Ask Questions/Don't Ask Why"
 - Client's ability to know why is an outcome of treatment, not a preexisting ability
- Therapeutic Frames of Reference
 - Objective Self-Awareness
 - Clients' Personal Constructs and Repertoire
 - Directly Addressing 'Attitude' including Hostility/Scorn and Avoidance
 - Behavioral Rehearsal
 - Unconditional 'Neutral' Regard and Therapist as 'Ordeal'
 - Spontaneity, Humor, and Being Real
 - Ethical and Regulatory Orientation

Brodsky 2011

Approach to Treatment and Orientation for NLC

- Directive accountability
- Professionalism, professional identity definition, and using ethical organizing principles in practice
- Managing distortions and transference problems that derail professional relationships
- Motivation, self-regulation and self-esteem
- Intentional Ethical Orientation
- Role-Relationship Modeling

Approach to Treatment and Orientation for NLC

- Emotional self-regulation skills
- Boundary Theory
- Ethics, Morals, and Regulatory orientation
 - Intentional Agency orientation
- Training in Interpersonal Psychology Basics:
 - Mentalization and Intentional Stance
 - Teamwork
 - Social Psychology of small and large group dynamics

Suggestions

- Initial orientation to students and residents
- Required regular continuing education on key topics
 - Role Definition and Differentiation
 - Managing Drugs/Medications and Standard of Practice
 - Professional Boundaries and Dual Relationships
 - Sexual Harassment and Misconduct
 - Disruptive Behavior
 - Accountabilities of Licensure
 - The Relevance of 'Private' Conduct to Regulatory Fitness Considerations

Resources

- ASAM:
 - Principles of Addiction Medicine, Chapter: Addiction Among Physicians and Physician Health Programs, by Paul H. Earley and Chris Bundy
 - ASAM placement criteria chapter on safety-sensitive occupations



Forensic Fitness for Duty:
*Evaluation and
Rehabilitative Treatment of
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Forensic Fitness for Duty Services

- Aligned with Regulatory Function
- Forensic Evaluation
 - Provides a neutral opinion to the Board regarding 'fitness'
 - Follows a standard forensic protocol specific to 'safety-sensitive professionals'
- Treatment
 - Psychiatric/Behavioral/Personality
 - Addiction



Forensic Fitness for Duty Services

- ▶ Licensing Boards, Professional Health Programs and Healthcare Organizations are the referral source to ensure accountability
- ▶ Evaluation and Treatment are separate
- ▶ Evaluation always oriented to fitness, rehabilitative potential, and monitoring needs
- ▶ Treatment is aimed at relief from symptoms/distress, professionalism, and reorientation of conduct to regulatory requirements of licensure



Forensic Fitness for Duty Services

- Evaluations vary from focal to comprehensive and multidisciplinary
- Health Insurance generally does not reimburse for forensic fitness evaluations
- Cost can be contained through focalizing of the referral question
- Outcomes and accountability are tracked through compliance with monitoring
- Evaluation, Treatment, and Follow Up/Accountability Monitoring are seamless



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