Agenda Item: 6.8
Prepared by: C. Marshall & J. Sparks
January 2008

REPLACEMENT REPORT
Proposed Revisions to Peer Review Rules 217.19 & 217.20

Summary of Request:

In response to SB 993 and HB 2426 passed during the 80th Legislative Session, the Board charged the Nursing Practice Advisory Committee(NPAC) with the task of revising the nursing peer review rules at the July 2007 board meeting. The proposed new rules along with repeal of the current Rules 217.19 and 217.20 were published in the November 2, 2007 issue (Vol. 32, #44) of the *Texas Register* for a 30-day comment period. No comments were received regarding the repeal of current peer review rules 217.19 and 217.20.

The comments received on the initially proposed new peer review rules were extensive. Staff have adopted many of the these changes and made additional adjustments based on feedback such that staff propose to withdraw the initially proposed rules, and re-propose the new rules attached to this report. The repeal of the current rules 217.19 and 217.20 remains in effect in conjunction with this request. The new proposed rule language is reflected in Attachment A {rule 217.19} and Attachment B {rule 217.20}.

This report contains the comments received (Attachments C-1 and C-2), board staff responses to comments, and proposed new rule language for §217.19 and 217.20. Responses to comments on the initially proposed new rules (Tex. Reg. 11/2/07) are broken down by comments/responses not impacting rule language (Attachment D) and comparison tables (Attachments E and F) that do reflect rule language changes.

This agenda item is for review, discussion, and action by the board.

Historical Perspective:

Though most of this information was included in the previous board report in October 2007, it is repeated here for the benefit of anyone seeing this as the first report on the subject of the re-proposed peer review rules. Some additional clarifying information has been added based on questions received.

The basic rules and concepts of nursing peer review have been in existence since 1987, with “parity of counsel” added in 1995, and safe harbor peer review in 1997. It was not until the Board of Nursing and the Board of Vocational Nurse Examiners combined in February 2004 that safe harbor peer review became applicable and accessible to LVNs. The peer review process is outlined in Texas Occupations Code, chapter 303, *Nursing Peer Review.* Reporting requirements are found in Tex. Occ. Code, chapter 301.

In 2001, after a year of deliberations on revisions by NPAC, as well as response to public comments, the board repealed rule 217.17 *Minimal Procedural Standards During Peer Review*, and adopted two new rules that separated incident-based peer review [rule 217.19] and safe harbor peer review [217.20].

In response to the first Institute of Medicine (IOM) report "To Err is Human," the concept of having a peer review committee examine external factors contributing to a nursing error was incorporated into rule 217.19(a)(7) in 2001. As national patient safety efforts continue to focus on external system factors, SB 993 amended §301.305(c) to require that a peer review committee examine any required report of a nurse to the board by a nurse's employer or practice setting when a nurse is terminated, suspended for 7 or more days, or other substantive disciplinary action ensues related to one or more practice errors committed by the nurse.

The intent is to prevent external factors that negatively impact patient safety from going unchecked and unchanged —the issues and surrounding circumstances do not go away because the nurse was terminated, suspended, made a "do not return", etc. New language in §301.305(c) further mandates that the peer review committee report to a facility's patient safety committee if it is determined that external factors did impact or contribute to the nurse's error.

Revisions to rule 217.16 *Minor Incidents* went into effect 5/17/06. This rule is should be utilized by both nursing managers and incident-based peer review committees in determining whether or not a nurse's behavior is board reportable. The Minor Incident rule defines exclusions (acts that cannot be considered minor under any circumstances) and establishes criteria for determining if one or more minor incidents should be reported to the board.

This newest §217.16 incorporated a new concept of permitting a peer review committee to utilize a smaller workgroup of the committee to engage in fact-finding, analysis, and dialogue with the nurse [217.16(g)(2)]. The workgroup is permitted to use informal processes, and the nurse's rights are protected through review by the full committee prior to any report to the board. This concept, along with more detailed guidance, has been added to the proposed new §§217.19 and 217.20, with the nurse involved having the right to accept or reject the use of a smaller workgroup.

The reasons for adding the ability to utilize a smaller work group of the peer review committee primarily related to incident-based peer review, however the process can be used in safe harbor as well. Incident-based peer review is often seen as an intimidating process where the nurse is being questioned and judged by a panel, instead of the original intent of peer review–to be a collegial review of a nurse's practice, looking at both individual and system-related factors that contributed to nursing error. With Safe Harbor, contributing factors may involve multiple departments within a practice setting. Exploration into these systems factors may be just as effectively accomplished by having fewer nurses (the smaller work group) from the peer review committee gathering the background information and discussing the specific issues with the nurse; however, the nurse retains the right to have the entire peer review committee convene and make a determination.

The Board is also aware that holding a peer review is a time-consuming process and may be a hardship on a facility or agency trying to staff direct patient care needs at the same time pulling nurses off to participate in peer review. It is hoped that by permitting the use of a smaller workgroup of the peer review committee, the peer review process can be effective, easier than in the past, less intimidating, less time-consuming, and can promote safer patient care.`

SB993 added protections for a nurse who reports a nurse, refuses to engage in conduct, or assists a nurse with filing safe harbor because of unsafe conditions for patients. This includes not only protections for the nurse claiming safe harbor or reporting another nurse, but also for the nurse reporting a facility or non-nurse health care provider who the nurse believes in good faith is endangering patient safety. These "whistle blower" protections have been added at the end of each rule, as well as included in the titles for each rule, to assure that nurses are able to easily find and be aware that they do have these protections when upholding their duty to always advocate for patient safety [rule 217.11(1)(B)].

With regard to Safe Harbor Peer Review (rule 217.20), besides arranging the rule for better flow and understanding, additions include addressing the nurse's due process rights, and providing for a nurse to do a "quick" request for safe harbor at the time asked to engage in the conduct, with provision to complete the "comprehensive" request later in the same work period but prior to leaving the work area.

NPAC members also decided to be redundant on the most important step with safe harbor: invoking it at the time the nurse is asked to engage in the conduct or accept the assignment. The committee agreed that a nurse may be handicapped by the stress of the situation that is creating the danger to patients, while at the same time trying to recall what steps to take to invoke safe harbor. Repeating this vital step in more than one place in the rule is intended to help the nurse find and carry out this step that protects the nurse's license while enabling the nurse to protect and care for patients.

Repetition and redundancy in certain other elements of both rules was intentional on the part of NPAC to emphasize and assure nurses and those who utilize nursing services are aware of key provisions of each rule.

A brief summary of the key changes brought about by SB 993, and now incorporated into the proposed and re-proposed new peer review rules, is accessible at the following link (page 14, October 2007 BON Bulletin) ftp://www.bon.state.tx.us/oct07.pdf.

Pros & Cons:

Pros: The peer review process has always been one of the more complex sections of nursing law. The proposed rule revisions to peer review rules 217.19 and 217.20 are congruent with the newest changes in NPA Ch. 301 and Peer Review Ch. 303. The proposed rules have also been re-ordered by the committee to be more readable and understandable for nurses and anyone trying to implement peer review in the spirit that was legislatively intended. Further clarity has been achieved following additional language changes implemented after responding to comments received from the first proposed rules published 11/02/07, as well as additional comments from TNA to the re-drafted language for rule 217.20 (see replacement agenda item for Attachment B and additional TNA comments in supplement to Attachment C-2).

Cons: Since provisions of SB993 became effective 9/1/07, failure to publish and adopt new peer review rules may result in confusion, and possible lack of compliance with the new statutes due to a disconnect between the current peer review rules and the new statutes.

Staff Recommendations:

Move to withdraw proposed peer review rules 217.19 and 217.20, and to re-propose adoption of new rules by the same titles:

217.19 Incident-Based Nursing Peer Review and Whistleblower Protections; and
217.20 Safe Harbor Peer Review for Nurses and Whistleblower Protections.

in the Texas Register for a 30-day comment period.

The board authorizes staff legal counsel to make non-substantive language changes in the proposed new rules for clarification purposes. Such non-substantive editorial changes may occur prior to publication in the Texas Register. If negative comments are not received, move to adopt new rules 217.19 and 217.20 as re-proposed.

Agenda Item 6.8 Attachments

A: Re-Proposed Rule 217.19 Incident-Based Nursing Peer Review and Whistleblower Protections

B: Re-Proposed Rule 217.20 Safe Harbor Peer Review for Nurses and Whistleblower Protections (Please Reference Replacement Attachment B)

C-1: Comments Received on Proposed Peer Review Rules Published in *Texas Register* November 2, 2007 [except TNA Comments]

C-2: Comments Received from Texas Nurses Association (TNA) on Proposed Peer Review Rules Published in *Texas Register* November 2, 2007

D: BON Responses to Comments Not Involving Language Changes to Rules

E: Table: BON Responses to Comments on Rule 217.19 Incident-Based Peer Review and Whistleblower Protections [language changes]

F: Table: BON Responses to Comments on Rule 217.20 Safe Harbor Peer Review and Whistleblower Protections [language changes]

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ATTACHMENT A
Re-Proposed Rule 217.19
Incident-Based Peer Review

Legend
Suggested Language from Comments: Blue
BON Recommended Language: Green
Language Changes Underlined (strike-outs deleted)
See Attachment E (table) for details
Section Headings in bold for ease in navigating rule

217.19. Incident-Based Nursing Peer Review and Whistleblower Protections.

(a) Definitions

(1) Assignment: Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. **This includes but is not limited to** the specified functions, duties, **practitioner orders, supervisory directives, and** amount of work designated as the individual nurse's responsibility. Changes in the **nurse's licensure responsibilities** may occur **at any time during the work period .**

(2) Bad Faith: Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(3) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses.

(4) Conduct Subject to Reporting defined by §301.401 of the Nursing Practice Act as conduct by a nurse that:

(A) violates the Nursing Practice Act (NPA) or a board rule and contributed to the death or serious injury of a patient;

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or

another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

(5) Duty to a patient: A nurse's duty **is to always advocate for patient safety, including any nursing action necessary** to comply with the standards of nursing practice (§ 217.11) and to **avoid** engag**ing** in unprofessional conduct (§ 217.12). **This includes** administrative decisions directly affecting a nurse's ability to comply with that duty.

(6) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(7) Incident-Based Peer Review: Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to 5 minor incidents by the same nurse within a year's period of time) should be reported to the board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.

(8) Malice: Acting with a specific intent to do substantial injury or harm to another.

(9) Minor incident: Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in rule 217.16.

(10) Nurse Administrator: Chief Nursing Officer (CNO) or the CNO's designee.

(11) Nursing Peer Review Law (NPR law): Chapter 303 of the Texas Occupations Code (TOC). Nurses involved in nursing peer review must comply with the NPR Law.

(12) Nursing Practice Act (NPA): Chapter 301 of the Texas Occupations Code (TOC). Nurses must comply with the NPA.

(13) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, Occupations Code §151.001 et seq.) ;

(B) a medical committee under Subchapter D, Chapter 161 **of the** Health and Safety Code (§§161.031-.033); or

(C) a multi-disciplinary committee, including nursing representation, or any committee established by the same entity to promote best practices and patient safety.

(14) Peer Review: Defined by §303.001(5) of NPR Law (TOC ch. 303) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation

regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. **Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.**

(15) Safe Harbor: A process **that protects a nurse from employer retaliation and licensure sanction when a nurse makes a** good faith **request for peer** review of **an** assignment or conduct the nurse is requested to perform and **that the** nurse **believes could result in a violation of the NPA (TOC) or board rules.** Safe Harbor must be invoked prior to engaging in the conduct or assignment for which **peer review** is requested, **and may be invoked at anytime during the work period when the initial assignment changes.**

(16) Texas Occupations Code (TOC): One of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The Occupation Code contains the statutes governing occupations and professions including the health professions. Both the NPA and NPR Law are located within these statutes. The Occupations Code can be changed only by the Texas Legislature.

(17) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse:

(A) made a good faith request for Safe Harbor Nursing Peer Review under §303.005(c) of NPR Law (TOC ch. 303) **and rule 217.20**, or

(B) refused to engage in an act or omission relating to patient care that would constitute **a violation of** the NPA or board rules **as permitted by** §301.352 of the NPA (TOC ch. 301) **(Protection for Refusal to Engage in Certain Conduct)**; **A nurse invoking Safe Harbor under 217.20 must comply with 217.20(g) if the nurse refuses to engage in the conduct or assignment**; or

(C) made a **lawful** report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance with NPA (TOC) §301.4025 (report of unsafe practices of non-nurse entities) and **(j)(2)** of this section.

(b) Purpose

The purpose of this rule is to:

(1) define minimum due process to which a nurse is entitled under incident-based peer review,

(2) provide guidance to facilities, agencies, schools, or anyone who utilizes the services of nurses in the development and application of incident-based peer review plans,

(3) assure that nurses have knowledge of the plan, and

(4) provide guidance to the incident-based peer review committee in its fact finding process.

(c) Applicability of Incident-Based Peer Review

Section 303.0015 of the NPR Law (TOC ch. 303) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of a RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of NPA §§301.402(e) (relating to alternate reporting by nurses to peer review), 301.403 (relating to peer review committee reporting), 301.405(c) (relating to peer review of external factors as part of employer reporting), and 301.407(b) (relating to alternate reporting by state agencies to peer review).

(d) Minimum Due Process

(1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under Nursing Peer Review (TOC) §303.002(e). Any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if the person or entity **does** not utilize the number of nurses described by Subsection (c).

(2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address:

(A) the level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by Subsection (d)(3)(F) of this rule;

(B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by Nursing Peer Review Law (TOC) §§303.006 and 303.007, 303.0075 and Subsection (h);

(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the NPA (TOC) §301.410, and Subsection (g);

(D) reporting of nurses to the board by incident-based peer review committee in accordance with the NPA (TOC) §301.403, and subsection (i); and

(E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed to in writing by the nurse being reviewed.

(3) In order to meet the minimum due process required by Nursing Peer Review Law (TOC) chapter 303, the nursing peer review committee must:

(A) comply with the membership and voting requirements as set forth in Nursing Peer Review (TOC) §303.003;

(B) exclude from the committee, including attendance at the peer review hearing, any person or persons with administrative authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person who is administratively responsible over the nurse being reviewed from appearing before the committee to speak as a fact witness;

(C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that:

(i) the nurse's practice is being evaluated;

(ii) the incident-based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless:

(I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee, or is

(II) otherwise agreed upon by the nurse and incident-based peer review committee.

(iii) includes the information required by Paragraph (D).

(D) Include in the notice required by Paragraph (C):

(i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality but the nurse shall be provided the name of the patient/client;

(ii) the name, address, telephone number of contact person to receive the nurse's response; and

(iii) a copy of this rule (§217.19 of this title) and a copy of the facility's incident-based peer review plan, policies and procedures.

(E) provide the nurse the opportunity to review, in person or by attorney, the documents concerning the event under review, at least 15 calendar days prior to appearing before the committee;

(F) provide the nurse the opportunity to:

(i) submit a written statement regarding the event under review;

(ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented;

(iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding;

(iv) make an opening statement to the committee;

(v) ask questions of the committee and respond to questions of the committee; and

(vi) make a closing statement to the committee after all evidence is presented;

(G) complete its review no more than fourteen (14) calendar days after the incident-based peer review hearing, or in compliance with subsection (d)(3)(C)(ii) of this rule relating to consultation with a patient safety committee;

(H) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility of the findings of the committee within ten (10) calendar days of when the committee's review has been completed; and

(I) permit the nurse to file a written rebuttal statement within ten (10) calendar days of the notice of the committee's findings and make the statement a permanent part of the incident-based peer review record to be included whenever the committee's findings are disclosed;

(4) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.

(5) Nurse's Right To Representation

(A) A nurse shall have a right of representation as set out in this Subdivision (**5**). These rights are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required.

(B) The nurse has the right to be accompanied to the hearing by a nurse peer or an attorney. Representatives attending the incident-based peer review hearing must comply with the facility's incident-based peer review policies and procedures regarding participation beyond conferring with the nurse.

(C) If either the facility or nurse will have an attorney or representative present at the incident-based peer review hearing in any capacity, the facility or nurse must notify the other at least seven (7) calendar days before the hearing that they will have an attorney or representative attending the hearing and in what capacity.

(D) Notwithstanding any other provisions of these rules, if an attorney representing the facility or incident-based peer review committee is present at the incident-based peer review hearing in any capacity, including serving as a member of the incident-based peer review committee, the nurse is entitled to "parity of participation of counsel." "Parity of participation of counsel" means that the nurse's attorney is able to participate to the same extent and level as the facility's attorney; e.g., if the facility's attorney can question witnesses, the nurse's attorney must have the same right.

(6) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under subsection (d)(3)(C) of this section. If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 and Subsection (d).

(e) Use of Informal Work Group In Incident Based Peer Review

A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the

informal workgroup that require:

(A) the nurse to be informed of how the informal work group will function, and to consent, in writing, to the use of an informal work group. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal work group;

(B) if the informal work group suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity, the chair **person** must be notified to determine if peer review should be terminated and the nurse reported to the board or to a board-approved peer assistance program as required by Subsection (g);

(C) the informal work group to comply with the membership and voting requirements of Subsection (d)(3)(A) and (B);

(D) the nurse be provided the opportunity to meet with the informal work group;

(E) the nurse to have the right to reject any decision of the informal work group and to then have his/her conduct reviewed by the peer review committee, in which event members of the informal work group shall not participate in that determination; and

(F) ratification by the committee chair person of any decision made by the informal work group. If the chair person disagrees with a determination of the informal work group to remediate a nurse for one or more minor incidents, the chair person shall convene the full peer review committee to **make a determination regarding** the conduct in question.

(G) the chair person must communicate any decision of the informal work group to the CNO.

(f) Exclusions to Minimum Due Process Requirements

The minimum due process requirements set out in Subsection (d) do not apply to:

(1) peer review conducted solely in compliance with NPA (TOC) §301.405(c) relating to review of external factors, after a report of a nurse to the board has already occurred under NPA (TOC) §301.405(b) (relating to mandatory report by employer, facility or agency); or

(2) reviews governed by Subsection (g) involving nurses whose practice is suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity;

(3) when a person required to report a nurse believes that a nurse's practice is impaired or suspected of being impaired and has also resulted in a violation under NPA (TOC) §301.410(b), that requires a direct report to the board.

(g) Incident-Based Peer Review of a Nurse's Impaired Practice/Lack of Fitness

(1) When a nurse's practice is impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, peer review **of the nurse** shall be suspended. **T**he nurse shall be reported to the board or to a board-

approved peer assistance program in accordance with NPA (TOC) §301.410 (related to reporting of impairment):

(A) if there is no reasonable factual basis for determining that a practice violation is involved, the nurse shall be reported to:

(i) the board; or
(ii) a board-approved peer assistance program, **that** shall handle report**ing the nurse** in accordance with Rule 217.13, or

(B) if there is a reasonable factual basis for a determination that a practice violation is involved, the nurse shall be reported to the board.

(2) Following suspension of peer review of the nurse, the committee shall proceed to evaluate external factors to determine if:

(i) any factors beyond the nurse's control contributed to a practice violation, and

(ii) any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct.

(3) If the committee determines under Subdivision (2) that external factors do exist for either (i) or (ii) of this Subparagraph, the committee shall report its findings to a patient safety committee or to the CNO if there is no patient safety committee.

(4) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under Subsection (d) by suspending the committee's review **of the nurse** and reporting the nurse to the Board in accordance with this Subdivision (2).

(5) Subdivision (1) does not preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.

(h) Confidentiality of Proceedings

(1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and the information not disclosed except as provided by Nursing Peer Review Law (TOC) §§303.006, 303.007, and 303.0075. Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse.

(2) In accordance with Nursing Peer Review Law (TOC) §303.0075, a nursing incident-based peer review committee, **including an entity contracted to conduct peer review under §303.0015(b)**, and any patient safety committee established by the same entity, may share information.

(A) A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee.

(B) The privileges under this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee.

(C) This section does not affect the application of Nursing Peer Review Law (TOC) §303.007 (relating to disclosures by peer review committee) to a nursing peer review committee.

(D) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.

(3) A CNO shall assure that policies are in place relating to sharing of information and documents between an Incident-Based Nursing Peer Review committee and a patient safety committee(s) that at a minimum, address:

(A) separation of confidential Incident-Based Nursing Peer Review information from the nurse's human resource file;

(B) methods in which shared communications and documents are labeled and maintained as to which committee originated the documents or communications;

(C) the confidential and separate nature of incident-based peer review and patient safety committee proceedings including shared information and documents; and

(D) the treatment of nurses who violate the policies including when a violation may result in a nurse being reported to the board or a nursing peer review **committee.**

(i) Committee Responsibility to Evaluate and Report

(1) In evaluating a nurse's conduct, the incident-based peer review committee shall review the evidence to determine the extent to which any deficiency in care by the nurse was the result of deficiencies in the nurse's judgment, knowledge, training, or skill rather than other factors beyond the nurse's control. A determination that a deficiency in care is attributable to a nurse must be based on the extent to which the nurse's conduct was the result of a deficiency in the nurse's judgment, knowledge, training, or skill.

(2) An incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under rule 217.16, Minor Incidents. In accordance with that rule, the committee may determine that the nurse:

(A) can be remediated to correct the deficiencies identified in the nurse's judgment, knowledge, training, or skill, or

(B) should be reported to the board for either a pattern of practice that fails to meet minimum standards, or for one or more events that the incident-based peer review committee determines cannot be categorized as a minor incident(s).

(3) An incident-based nursing peer review committee is not required to submit a report to the board if:

(A) the committee determines that the reported conduct was a minor incident that is not required to be reported in accordance with provisions of rule §217.16 Minor Incidents; or

(B) the nurse has already been reported to the board under NPA (TOC) §301.405(b) (employer reporting requirements).

(4) If the committee determines it is required to report a nurse to the board, the committee shall submit to the board a written, signed report that includes:

(A) the identity of the nurse;

(B) a description of the conduct subject to reporting;

(C) a description of any corrective action taken against the nurse;

(D) a recommendation as to whether the board should take formal disciplinary action against the nurse, and the basis for the recommendation;

(E) the extent to which any deficiency in care provided by the reported nurse was the result of a factor beyond the nurse's control and

(F) any additional information the board requires.

(5) If an incident-based peer review committee determines that a deficiency in care by the nurse was the result of a factor(s) beyond the nurse's control, in compliance with TOC §303.011(b) (related to required peer review committee report when external factors contributed to a nurse's deficiency in care), the committee must submit a report to the applicable patient safety committee, or to the CNO if there is no patient safety committee. A patient safety committee must report its findings back to the incident-based peer review committee.

(6) An incident-based peer review committee is not required to withhold its determination of the nurse being incident-based peer reviewed, pending feedback from a patient safety committee, unless the committee believes that a determination from a patient safety committee is necessary in order for the incident-based peer review committee to determine if the nurse's conduct is reportable.

(A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a deficiency in care, in addition to reporting to a patient safety committee, the incident-based peer review committee may also make recommendations for the nurse, up to and including reporting to the board.

(B) An incident-based peer review committee may extend the time line for completing the incident-based peer review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete its review of the nurse within this 90-day time frame.

(7) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.

(j) Nurse's Duty to Report

(1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the board under NPA (TOC) §301.402 (mandatory report by a nurse) provided that the following conditions are met:

(A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings and shall be subject to Nursing Peer Review (TOC) §303.006 (confidentiality of peer review proceedings); and

(B) The nurse has no reason to believe the incident-based peer review committee made its determination in bad faith.

(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made without malice under this rule and NPA (TOC) §301.402(f) (retaliation for a report made without malice prohibited). A violation of this subsection or NPA (TOC) §301.402(f) is subject to NPA (TOC) §301.413 that provides a nurse **the** right to file **civil** suit to recover damages. The nurse may **also** file a complaint with **the regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability**.

(k) State Agency Duty to Report

A state agency that has reason to believe that a nurse has engaged in conduct subject to reporting shall report the nurse in writing to:

(A) the board or

(B) the applicable nursing peer review committee in lieu of reporting to board.

(l) Integrity of Incident-Based Peer Review Process

(1) Incident-Based Peer Review must be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the board.

(2) The CNO of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this rule and for taking reasonable steps to assure that incident-based peer review is implemented and conducted in compliance with the NPA, Nursing Peer Review, and this rule.

(3) A determination by an incident-based peer review committee, a CNO, or an individual nurse to report a nurse to the board cannot be overruled, dismissed changed, or reversed. An incident-based peer review committee, CNO, and individual nurse each have a separate responsibility to protect the public by reporting a nurse to the board as set forth in NPA (TOC) §301.402, §301.405, rule 217.11(1)(K), and this rule.

(m) Reporting Conduct of other Practitioners or Entities: Whistleblower Protections

(1)This section does not expand the authority of any incident-based peer review committee or the board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025 (report of unsafe practices of non-nurse entities), a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(i) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to §301.413 that provides a nurse **the** right to file **civil** suit to recover damages. The nurse may **also** file a complaint with **the regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability**.

The provisions of this §217.19 adopted to be effective May 12, 2002, 27 TexReg 4019; amended to be effective July 5, 2004, 29 TexReg 6296.; **amended____2008,____Tex Reg____**

Agenda Idem 6.8
January 2008
Prepared by C. Marshall and J. Sparks

ATTACHMENT B REPLACEMENT
Re-Proposed Rule 217.20
Safe Harbor Peer Review

Legend

Suggested Language from Comments: Blue
BON Recommended Language: Green
Language Changes Underlined (strike-outs deleted)
See Attachment F (table) for details
Section Headings in bold for ease in navigating rule
Highlight = Changes & Rationale in Replacement Doc. for Jan 08 Brd Mtg

(a) Definitions

(1) Assignment: Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. **This includes but is not limited to** the specified functions, duties, **practitioner orders, supervisory directives, and** amount of work designated as the individual nurse's responsibility. Changes in the **nurse's ~~licensure responsibilities~~** assignment may occur **at any time during the work period .**

(2) Bad Faith: Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(3) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses.

(4) Conduct Subject to Reporting defined by §301.401 of the Nursing Practice Act as conduct by a nurse that:

(A) violates the Nursing Practice Act (NPA) or a board rule and contributed to the death or serious injury of a patient;

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

(5) Duty to a patient: A nurse's duty **is to always advocate for patient safety, including any nursing action necessary** to comply with the standards of nursing practice (§ 217.11) and to **avoid** engag**ing** in unprofessional conduct (§ 217.12). **This includes** administrative decisions directly affecting a nurse's ability to comply with that duty.

(6) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(7) Incident-Based Peer Review: Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to 5 minor incidents by the same nurse within a year's period of time) should be reported to the board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.

(8) Malice: Acting with a specific intent to do substantial injury or harm to another.

(9) Minor incident: Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in rule 217.16.

(10) Nurse Administrator: Chief Nursing Officer (CNO) or the CNO's designee.

(11) Nursing Peer Review Law (NPR law): Chapter 303 of the Texas Occupations Code (TOC). Nurses involved in nursing peer review must comply with the NPR Law.

(12) Nursing Practice Act (NPA): Chapter 301 of the Texas Occupations Code (TOC). Nurses must comply with the NPA.

(13) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, Occupations Code §151.001 et seq.) ;

(B) a medical committee under Subchapter D, Chapter 161 **of the** Health and Safety Code (§§161.031-.033); or

(C) a multi-disciplinary committee, including nursing representation, or any committee established by the same entity to promote best practices and patient safety.

(14) Peer Review: Defined by §303.001(5) of NPR Law (TOC ch. 303) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on

obtaining all relevant information about an event. **Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review**.

(15) Safe Harbor: A process **that protects a nurse from employer retaliation and licensure sanction when a nurse makes a** good faith **request for peer** review of **an** assignment or conduct the nurse is requested to perform and **that the** nurse **believes could result in a violation of the NPA (TOC) or board rules.** Safe Harbor must be invoked prior to engaging in the conduct or assignment for which **peer review** is requested, **and may be invoked at anytime during the work period when the initial assignment changes.**

(16) Texas Occupations Code (TOC): One of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The Occupation Code contains the statutes governing occupations and professions including the health professions. Both the NPA and NPR Law are located within these statutes. The Occupations Code can be changed only by the Texas Legislature.

(17) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse:

(A) made a good faith request for Safe Harbor Nursing Peer Review under §303.005(c) of NPR Law (TOC ch. 303) **and rule 217.20**, or

(B) refused to engage in an act or omission relating to patient care that would constitute **a violation of** the NPA or board rules **as permitted by** §301.352 of the NPA (TOC ch. 301) **(Protection for Refusal to Engage in Certain Conduct)**; **A nurse invoking Safe Harbor under 217.20 must comply with 217.20(g) if the nurse refuses to engage in the conduct or assignment**; or

(C) made a **lawful** report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance with NPA (TOC) §301.4025 (report of unsafe practices of non-nurse entities) and **(j)(2)** of this section.

(b) Purpose

The purpose of this rule is to:

(1) define the process for invoking Safe Harbor;

(2) define minimum due process to which a nurse is entitled under safe harbor peer review,

(3) to provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans;

(4) ~~to~~ assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor;

(5) provide guidance to the peer review committee in making its determination of the nurse's duty to the patient.

(c) Applicability of Safe Harbor Nursing Peer Review:

(1) Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient.

(2) Any person or entity that conducts Safe Harbor Nursing Peer Review is required to comply with the requirements of this rule.

(d) Invoking Safe Harbor

(1) Safe Harbor must be invoked prior to engaging in the conduct or assignment and at ~~one~~ any of the following times: *{To make same as (e)(1)(B)}*

(A) when the conduct is requested or assignment made;

(B) when changes occur **in the request or** assignment **that** so modify the level of nursing care **or supervision** required **compared to what was originally requested or assigned** that **a nurse believes in good faith that patient harm may result.**

C) when the nurse refuses to engage in the requested conduct or assignment. *{Add to make same as section (e)(1)(B)(iii) r/t Safe Harbor protections}*

(2) The nurse must notify the supervisor requesting the conduct or assignment in writing that the nurse is invoking Safe Harbor. The content of this notification must meet the requirements for a Quick Request Form described in paragraph (3). A detailed written account of the Safe Harbor request that meets the minimum requirements for the **Comprehensive** Written **Request** described in paragraph (4) below must be completed before leaving the work setting at the end of the work period.

(3) Quick Request Form

(A) A nurse wishing to invoke Safe Harbor must make an initial request in writing that at a minimum includes the following.

(i) the nurse(s) name making the safe harbor request and his/her signature(s);

(ii) the date and time of the request;

(iii) the location of where the conduct or assignment is to be completed;

(iv) the name of the person requesting the conduct or making the assignment;

(v) a brief explanation of why safe harbor is being requested.

(B) **The *BON Safe Harbor Quick Request Form* may be used to invoke the initial request for Safe Harbor, but use of the form is not required. The initial written request may be in any written format provided the above minimum information is provided.**

(4) **Comprehensive** Written **Request for Safe Harbor Peer Review**

(A) **A nurse who invokes Safe Harbor must supplement the initial written request under section (3)(A) by submitting a comprehensive request in writing before leaving the work setting at the end of the work period. This comprehensive written request must include a minimum of the following information:**

(i) the conduct assigned or requested, including the name and title of the person making the assignment or request;

(ii) a description of the practice setting (e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation);

(iii) a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (Rule 217.11) or other section of the NPA and/or Board rules the nurse believes would have been violated. If a nurse refuses to engage in the requested conduct or assignment, the nurse must document the existence of a rationale listed under subsection (g) of this rule.

(iv) If applicable, the rationale for the nurse's not engaging in the requested conduct or assignment awaiting the nursing peer review committee's determination as to the nurse's duty. The rationale should refer to one of the justifications described in Subsection (g)(2) for not engaging in the conduct or assignment awaiting a peer review determination.

(v) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and

(vi) the nurse's name, title, and relationship to the supervisor making the assignment or request.

(B) **The *BON Comprehensive Request for Safe Harbor Form* may be used when submitting the detailed request for Safe Harbor, but use of the form is not required. The comprehensive written request may be in any written format provided the above minimum information is included.**

~~(5) If the nurse does not use the BON **Quick Request and Comprehensive** Request Forms to invoke Safe Harbor, the facility and nurse must follow the Safe Harbor process as outlined in this **rule**.~~ *{TNA recommended deletion/no longer needed since process spelled out in rule and nurses are supposed to comply with rules.}*

(6) The nurse invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor.

(7) A nurse may invoke Safe Harbor to question the medical reasonableness of a physician's order in accordance with Nursing Peer Review Law (TOC) §303.005(e). In this situation, the medical staff or medical director shall determine whether the order was reasonable.

(e) Safe Harbor Protections

(1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c) as set out in Subsection (2), the nurse shall:

(A) invoke Safe Harbor in good faith.

(B) notify the supervisor in writing that he/she intends to invoke Safe Harbor in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at **any** of the following times:

(i) when the conduct is requested or assignment made;

(ii) when changes occur **in the request or** assignment **that** so modify the level of nursing care **or supervision** required **compared to what was originally requested or assigned** that **a nurse believes in good faith that patient harm may result.**

(iii) when the nurse refuses to engage in the requested conduct or assignment.

(2) Subsections 303.005(c) and (h) of the Nursing Peer Review Law (TOC Ch. 303), provide the following protections:

(A) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for requesting Safe Harbor in good faith;

(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination.

(C) A nurse is not subject to being reported to the board and may not be disciplined by the board for engaging in the conduct awaiting the determination of the peer review committee as permitted by Subsection (g). A nurse's protections from disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination remain in place for 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not affect to the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor.

(3) If retaliation occurs, Section 301.413 of the NPA provides a nurse **the** right to file **civil** suit to recover damages. The nurse may **also** file a complaint with **the** appropriate **regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or**

civil liability. *{TNA recommended addition for sentence sense.}*

(4) Safe Harbor protections do not apply to any civil action for patient injury that may result from the nurse's practice. *{TNA suggested edit to clarify}*

(f) Exclusions to Safe Harbor Protections

(1) **A nurse's protections** from disciplinary action by the board under subsection (e)**(2)** do not apply to:

(A) the nurse who invokes Safe Harbor in bad faith;
(B) conduct **the nurse** engages in prior to the request for Safe Harbor; or
(C) conduct unrelated to the reason for **which** the **nurse** requested Safe Harbor.

(2) **If the peer review committee determines that** a nurse has engaged in conduct **subject to reporting that is** not related to the request for Safe Harbor **the committee must comply with the requirements of § 217.19 Incident-Base Peer Review** of this title.

(g) Nurse's Right To Refuse To Engage In Certain Conduct Pending Nursing Safe Harbor Peer Review Determination

(1) A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which:

(A) the nurse lacks the basic knowledge, skills, and abilities that would be necessary to render the care or engage in the conduct requested or assigned at a minimally competent level **such that engaging in the requested conduct or assignment** would expose **one or more patients** to an unjustifiable risk of harm; or

(B) the requested conduct or assignment would constitute unprofessional conduct and/or criminal conduct such as fraud, theft, patient abuse, or exploitation **.falsification,**

(2) **if a nurse refuses to engage in the conduct or assignment because it is beyond the nurse's scope as described under (1)(A) of this paragraph:**

(A) **the nurse and supervisor must collaborate in an attempt to identify an acceptable assignment that is within the nurse's scope and enhances the delivery of safe patient care; and**

(B) **The results of this collaborative effort must be documented in writing and maintained in peer review records by the chair of the peer review committee.**

(h) Minimum Due Process

(1) A person or entity required by §303.005(i) of NPR Law (TOC ch. 303) to provide nursing peer review shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Nursing Peer

Review) and the procedure for making a request.

(2) In order to meet the minimum due process required by NPR Law (TOC) chapter 303, the nursing peer review committee shall

(A) comply with the membership and voting requirements as set forth in TOC §303.003;

(B) exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse;

(C) Limit attendance at the **S**afe **H**arbor **Nursing P**eer **R**eview hearing by a CNO, nurse administrator, or other individual with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, to appearing before the safe harbor peer review committee to speak as a fact witness, and

(D) Permit the nurse requesting safe harbor to:

(i) appear before the committee;

(ii) ask questions and respond to questions of the committee; and

(iii) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.

(i) Safe Harbor Timelines

(1) The Safe Harbor Nursing Peer Review committee shall complete its review and notify the CNO or nurse administrator within 14 calendar days of when the nurse requested Safe Harbor.

(2) Within 48 hours of receiving the committee's determination, the CNO or nurse administrator shall review these findings and notify the nurse requesting safe harbor of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect.

(3) The nurse's protection from disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination expires 48 hours after the nurse is advised of the peer review committee's determination. The expiration of this protection does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor.

(j) General Provisions

(1) The Chief Nursing Officer (CNO) of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the Nursing Practice Act (TOC ch. 301) and Nursing Peer Review Law (TOC ch. 303).

(2) Safe Harbor Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in nursing peer review in bad faith is subject to disciplinary action by the Board.

(3) The peer review committee and participants shall comply with the confidentiality requirement of Nursing Peer Review Law(TOC) §§303.006 and 303.007 relating to confidentiality and limited disclosure of peer review information.

(4) If a nurse requests a Safe Harbor Peer Review determination under Nursing Peer Review Law (TOC) §303.005(b) and refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determinations of the committee are not binding if the CNO or nurse administrator believes in good faith that the ~~safe harbor peer review~~ committee **has** incorrectly determined a nurse's duty.

(A) **In accordance with §303.005(d)**, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct;

(B) If the CNO or nurse administrator in good faith disagrees with the ~~decision of the peer review~~ committee's determination, the rationale for disagreeing ~~with a peer review committee's determination~~ must be recorded and retained with the peer review records;

~~(A)~~**(C)** If the CNO or nurse administrator believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and rule 217.11(1)(K);

(D) **This section does not affect the protections under §303.005(c)(1) and §301.352 relating to a nurse's protection from disciplinary action or discrimination for making a request for Safe Harbor Peer Review.**

{Sub-section (4) language not changed from originally proposed language until this latest draft. It still tracks statute language but has been re-ordered and broken up for ease in understanding and clarity.}

(k) Use of Informal Work Group In Safe Harbor Nursing Peer Review

A facility may choose to initiate an informal review process utilizing a workgroup of the nursing peer review committee provided that the final determination of the nurse's duty complies with the time lines set out in this rule and there are written policies for the informal workgroup that require:

(A) the nurse:

(i) be informed how the informal workgroup will function and that the nurse does not waive any right to peer review by accepting or rejecting the use of an informal workgroup; and

(ii) consent, in writing, to the use of an informal workgroup;

(B) the informal workgroup **to** comply with the membership and voting requirements of Subsection (h) of this rule;

(C) the nurse **to** be provided the opportunity to meet with the informal workgroup;

(D) the nurse **to have** the right to reject any decision of the informal workgroup and have the entire committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the informal workgroup shall not participate in that determination;

(E) ratification by the safe harbor peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full peer review committee to review the conduct in question; and

(F) the peer review chair person communicate any decision of the informal work group to the CNO or nurse administrator.

(I) Reporting Conduct of other Practitioners or Entities; Whistleblower Protections

(1) This subsection does not expand the authority of any safe harbor peer review committee or the board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(3) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to NPA (TOC) §301.413 that provides a nurse **the** right to file **civil** suit to recover damages. The nurse may **also** file a complaint with **the regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability**.

Attachment C-1

Comments Received on Proposed Peer Review Rules
217.19 Incident-Based Peer Review and 217.20 Safe Harbor Peer Review
Published in Texas Register Vo. 32, #44
November 2, 2007

[See attachment C-2 for TNA Comments]

From: Hagan, Paula [mailto:PaulaHagan@texashealth.org]
Sent: Monday, December 03, 2007 8:19 PM
To: Joy Sparks
Subject: Comments to the proposed Texas Board of Nursing rules

Ms. Joy Sparks, Assistant General Counsel Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, Texas 78701

Re: Proposed Board of Nursing Rules

Dear Ms. Sparks,

The Texas Health Resources (THR) Legal Department offers the following comments to the proposed Texas Board of Nursing Rules regarding §217.19 (Incident-Based Nursing Peer Review and Whistleblower Protections) and §217.20 (Safe Harbor Peer Review for Nurses and Whistleblower Protections). For your information, THR is a non-profit health care system which owns and operates thirteen hospitals in north Texas.

Section 217.19. Incident-Based Nursing Peer Review and Whistleblower Protections

1. Definitions.

a. We are concerned that the definition of “bad faith” and the exclusions in the definition of “good faith” are overly broad, will be subject to a lot of interpretation and argument, and could result in loss of immunity from civil liability for persons participating in nursing peer review. Our primary concerns with the definitions are that “bad faith” includes acting out of personal animosity or denying a nurse due process and that the same are excluded from the definition of “good faith”.

The nursing peer review laws contain a lot of detail on what constitutes minimum due process. Since under the proposed rules, the definition of bad faith includes “denying a nurse due process”, an inadvertent error made in providing a nurse with notice of a hearing or conducting a hearing could result in a finding of bad faith. For example, if a chair of an incident-based peer review committee miscounted and scheduled a hearing 20 days after notice was sent to the nurse instead of the required minimum of 21 days, the nurse who was reviewed would have an argument that she was not afforded due process. In addition, “personal animosity towards the nurse” is quite subjective.

In addition, we have a concern that because of the two definitions of good faith and bad faith in the proposed rules (because of how broad the definitions are, good faith and bad faith have to be defined differently in §217.19 and in §217.20), and having two different in the rules for two different purposes will cause confusion in their application.

As a result, we propose that "bad faith" be defined as "acting with malice" and good faith be defined as "acting without malice". This would simplify the definitions, be consistent with the statutes (see Item 7 below), and avoid the need for having two sets of definitions of good faith and bad faith in the rules.

b. We have two very minor comments to the defined term "Nursing Peer Review". We suggest calling it Nursing Peer Review Laws" or "Nursing Peer Review Statutes" rather than just "Nursing Peer Review" to avoid people confusing it with the new defined term under §217.19(d)(11) for "Peer Review". In addition, in the second sentence, we suggest adding the word "in" after "involved".

c. We have a very minor comment to the definition of "Nursing Practice Act" under §217.19(d)(9). We suggest changing the word "includes" to "means" since the Nursing Practice Act does not include any other statutes.

e. We have a very minor comment to the definition of "Peer Review". We suggest revising the beginning of the first sentence to read as follows: "Defined in the Texas Occupations Code (TOC) §303.001(5), a section of the Nursing Peer Review Laws, …".

2. We have a very minor comment to §217.19(c), "Applicability of Incident-Based Peer Review". We suggest revising the beginning of the first sentence to read as follows: "Texas Occupations Code (TOC) (a section in the Nursing Peer Review Laws) requires a person…".

3. Regarding §217.19(d)(2)(C), we are unclear what is meant by "intemperate use" and "diminished mental capacity" since these are new terms not referred to in the statutes and are not defined.

4. Regarding §217.19(e) regarding "Use of Informal Work Group In Incident Based Peer Review", we are not sure if the proposed rules are entirely clear regarding when an informal work group may or may not be used. For example, is it permissible to use an informal work group to conduct an initial review of any report to an incident-based peer review committee or only conduct that appears to be a minor incident? Is it permissible for an informal work group to conduct an initial review of incident-based peer review of external factors after a report of a nurse to the board has already occurred or when a nurse is or is suspected of being impaired?

5. Regarding §217.19(e)(B), we believe this subsection is not entirely clear. We ask the Nursing Practice Advisory Committee to consider whether a definition of "practice violation" should be added to the proposed rules.

6. Section 217.19(j) requires that two conditions be met before a report made to an incident-based peer review committee satisfies the nurse's duty to report to the BON; however, both of these conditions are outside of the reporting nurse's control. Section §217.19(j)(B) [the second of the two conditions] provides that the nurse has no reason to believe the peer review committee's determination was in bad faith. We are not certain that the practical application of this condition will always be logical. For example, if an incident-based peer review committee could be found to have acted in bad faith in reporting a nurse to the BON (e.g. because of the broad definition of bad faith such as if the nurse were found to have been denied minimum due process because the nurse was inadvertently given 20 days notice of a hearing instead of 21 days). In such case, the nurse who reported the conduct would not have discharged her duty to report to the BON.

7. Regarding §217.19(l), “Integrity of Incident-Based Peer Review Process”, a nurse is subject to disciplinary action by the Board of Nursing for knowingly participating in incident-based peer review in bad faith. With such a broad definition of bad faith, a nurse reporting another nurse could be subjected to disciplinary action if a reported nurse alleged that the committee acted with personal animosity. We believe such a broad definition will have a chilling effect on nurses coming forward to report a matter of concern about another nurse and/or on nurses’ willingness to serve on incident based peer review committees because of the concern of being subject to disciplinary action by the BON or potential loss of immunity from civil liability.

In addition, we noticed an inconsistency in the terminology used in §217.19(l) and that of §301.402(f) of the Nursing Practice Act (which only provides for the term “without malice” rather than in good faith or bad faith and §303.101 of the nursing peer review laws (which also only provides for the term “without malice”). For example, §303.101 of the nursing peer review laws affords nursing peer review committee members, nursing schools, hospitals, and others immunity from civil liability for participating in peer review if the person acted “without malice”. We believe it is extremely important for the BON rules to be consistent with the statutes especially with respect to affording persons taking part in peer review with immunity from civil liability. We respectfully request the BON and Nursing Practice Advisory Committee consider simplifying the definitions as described above and consider the practical application of the definitions of good faith and bad faith in a number of scenarios before finalizing the rules.

Section 217.20. Safe Harbor Peer Review for Nurses and Whistleblower Protections

1. We are not sure whether the proposed rules are entirely clear on when a nurse may or may not refuse to engage in an activity that he/she believes violates her duty to a patient.

2. We have the same comments and concerns about the definitions of “bad faith” and “good faith” under §217.20 for the reasons stated above.

Thank you for the opportunity to submit our comments to the proposed rules. The THR hospitals are in the process of updating their nursing peer review policies to comply with SB 993 and HB 2426, and we look forward to publication of the final rules. If you have any questions, feel free to call me at (817) 462-7147 or e-mail me.

Sincerely,

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Board Certified Health Law
Texas Board of Legal Specialization

November 29, 2007

By Email
Joy Sparks, Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, Texas 78701

Re: Proposed Rules, 32 Tex. Reg. 7845 (Nov. 2, 2007)

Dear Ms. Sparks:

I would like to offer the following comments on the proposed rules regarding Chapter 217, Sections 217.19 and 217.20. Just for perspective, I am involved in advising hospitals and other entities in developing and implementing policies on nursing peer review as well as occasionally representing nurses before the Texas Board of Nursing (TBON).

Section 217.19 Incident-Based Peer Review

(a) Definitions

(1) Bad Faith: I am concerned with the term "bad faith" and its substitution for the term "malice". I understand that the term "bad faith" originates from the use of the term "good faith" in Section 303.005(a-1) dealing with the safe harbor. The immunities afforded by the Nursing Practice Act (Act) for participants in nursing peer review and reporting do not use the terms "good faith" or "bad faith," but are available unless a nurse acts with "malice." §303.010. Malice, a term which is not defined in the Act or the proposed rules, is encompassed in the proposed definition of bad faith, meaning that what constitutes bad faith is broader than malice.

Is there a statutory basis for a broader definition of bad faith as compared to malice? Is it in the best interests of the public to deny nurses certain protections for inadvertent actions? For example, the proposed definition of "bad faith" includes a denial of due process and would result in an inadvertent failure to allow a nurse 10 days to file a rebuttal statement, but only nine days, qualifying as "bad faith." (*But see*, proposed regulation §217.19(l)(1) which allows disciplinary action by the TBON for participation in bad faith incident-based peer review only if done so "knowingly.") In the medical peer review arena, the legislature has carefully balanced the need to protect the public with the need to secure sufficient numbers of physicians who are willing to participate in the

necessary function of medical peer review. "Malice" in the context of medical peer review has been defined by the courts as "a specific intent by the defendant to cause substantial injury or harm to the claimant." *Romero v. Columbia Kingwood Medical Center*, 166 S.W. 3d 212, 225 (Tex. 2005). In the federal Health Care Quality Improvement Act, there are four standards to be met for immunity to be afforded for medical peer review committees and participants. The third standard, which requires that "adequate notice and hearing procedures" be afforded to the physician also allows "or such other procedures as are fair to the physician under the circumstances." 42 U.S.C. §11112(a)(3). Further, immunity is available to a person who provides information to a professional review body "unless such information is false and the person providing it knew that such information was false." Id. at §11111(a)(2). "Bad faith" should require some element of knowledge or intent on the part of the actor.

If there is a statutory basis for the broader definition, has the use of the term "bad faith" been strictly limited to where appropriate? In at least one place, I found that the term "good faith" has been substituted for the term "without malice." In proposed rule §217.19(j)(2), the term "good faith" is used when referencing the prohibition on retaliation against a nurse for filing a report with the TBON or a nursing peer review committee. In Senate Bill 993, however, Section 301.402(f) does not use the term "good faith" but "without malice." If these terms are going to have different definitions, they need to be carefully used and used consistent with the statutory authority.

(10) Patient Safety Committee: Most patient safety committees, at least in the hospital setting, also will be established as "medical peer review committees," as defined in Section 151.002(8). Therefore, I ask that the term "medical peer review committee" be added to the listing. A medical peer review committee may be a committee of a health care entity's medical staff, a committee of the health care entity, a committee of the governing board, or the governing board itself.

(11) Peer Review: For clarification purposes, please consider adding to this definition "the performance of incident-based peer review, safe harbor peer review, or any other review required by the Nursing Practice Act or the TBON rules."

(d) Nurse's Right to Representation

(5) The reference here to having notified the nurse under "subsection (d)(3)(H)" deals with notice of the nursing peer review committee's findings after the proceeding has been completed. I wonder if the reference should be to "subsection (d)(3)(C)," which is the original notice that the nurse's conduct will be reviewed and notice of the nurse's rights in the proceedings, etc.

(f) Exclusions to Minimum Due Process Requirements

(3) This proposed regulation provides that when a direct report to the TBON is mandated due to impairment which has also resulted in a practice violation, a second report to TPAPN is "prohibited." As this is not provided for in Section 301.410(b) of the Act, I just wanted to ensure that this is the intent since it will need to be reflected in nursing peer review policies and procedures.

(g) Incident-Based Peer Review of Impaired Nursing Practice/Lack of Fitness

(1) When a nurse is reported by an employer to the TBON due to an impairment resulting in a practice violation, is the nursing peer review committee to evaluate the external factors to determine if any factors beyond the nurse's control contributed to the practice violation? Subsection (2) makes clear that, if the committee is already reviewing the nurse's conduct and then discovers impairment plus a practice violation, the evaluation of external factors is to be conducted, but the review is not addressed in subsection (1).

On another issue, it would be very helpful if the TBON would clarify what is a "practice violation" and how it relates to the terms "Conduct Subject to Reporting" and "Minor Incident."

(j) Nurse's Duty to Report: For purposes of clarity, please consider some reference in this subsection to the different reporting requirements in the case of impairment without a practice violation and impairment with a practice violation, and also the obligations of the nursing peer review committee if any.

(l) Integrity of Incident-Based Peer Review Process

(1) See comment above under (a)(1) bad faith definition when compared to this section which only allows disciplinary action by the TBON if a nurse "knowingly" participates in bad faith peer review.

Section 217.20 Safe Harbor Peer Review

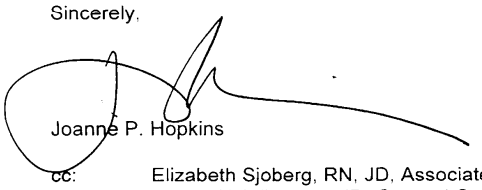
(a) Definitions Same comments as above for the following definitions:

(1) Bad Faith
(10) Patient Safety Committee
(11) Peer Review

(h) Minimum Due Process: Please consider clarifying that these procedures are the only requirements to comply with the "minimum due process" requirements for safe harbor (i.e., that the procedures in Section 217.19 do not apply to the safe harbor process).

I appreciate the opportunity to submit these comments to the proposed rules and am available to answer any questions you may have. Thank you.

Sincerely,



Joanne P. Hopkins

cc: Elizabeth Sjoberg, RN, JD, Associate General Counsel, Texas Hospital Association
James H. Willmann, JD, General Counsel, Texas Nurses Association

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ELIZABETH L. HIGGINBOTHAM, RN, JD
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and Electronic Mail

Ms. Joy Sparks, Attorney
Board of Nursing
333 Guadalupe Street, Suite 3-460
Austin, Texas 78701

Dear Joy,

As you know, I had the pleasure of presenting testimony before the public health committee on May 2, 2007 related to Whistleblower protection. My opposition to this legislation was grounded in the fact that there are no "teeth" in the law to punish hospitals for not abiding by nurses' rights. Yes, there is a "civil penalty", but it requires the nurse to file a lawsuit. I have now filed three cases and as you know, just filing a lawsuit does not mean that the nurse will win. It is an expensive proposition with regard to time and not many attorneys are willing to even look at these cases. I am concerned that some of the language in the Proposed Rules may detract from rights that nurses currently have.

Before I address the concerns with proposed language, I laud the committee for putting the nurses' RIGHT to refuse in plain English. We know that ***Lunsford*** delineates a nurse's duty to his/her patient and T.O.C. 301.352 (a) speaks to refusal. Thank you for eliminating any doubt about the nurse's ability to advocate for a patient by refusing unsafe assignments. In addition, I believe that the ability to refuse is enhanced by the "user friendly" amendments to the Safe Harbor rules, allowing a brief initial request for Safe Harbor. Finally, I appreciate the NPAC's well considered recognition that the right to refuse may come at any time during a shift or tour of duty (217.20 (a) (15) (b) and (d).

217.19 (a); 217.20 (a)

(10) *Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety that includes:*

(A) the entity's medical staff…

(B) a medical committee…or

(C) A multi-disciplinary committee, including nursing representation, or any committee established or contracted within the same entity to promote best practices and patient safety, may apply as appropriate."

Is the list intended to be **exclusive with regard to the specified entities, or do you mean "including but not limited to"** ? The old adage about the "fox guarding the henhouse" is applicable here. Allowing a hospital to completely control a patient safety committee is tantamount to a self evaluation which is completely subjective; the likelihood of a self report to a licensing or accrediting body is unlikely. Rules such as HIPAA and the Texas Health & Safety Code provisions protect the health information of any consumer whose health information would be considered negates any challenge that a hospital would make about breach of confidentiality.

Whistleblower protections need to be strengthened; penalties for a hospital's refusal to give a nurse safe harbor peer review (beyond reporting the DON or CNE to the Board of Nursing) should be considered. Otherwise, the Board will be inundated with complaints that an already overburdened staff would have to deal with.

217.13 Peer Assistance Rules

My concerns here relate to the forced disclosure of personal health information with regard to mental health diagnosis and addiction to employers (the employment contract, required waivers) and/or the public in cases where there are no practice violations. See proposed rule at 217.13 (e) (F) (G) (H). In addition, the proposed rule does not speak to mental health conditions. I believe that the lack of confidentiality is violative of Title II of the Americans with Disabilities Act.

Bipolar and other mental health disorders required to be disclosed

The issue here pertains to the handling of mental health and chemical dependency diagnoses and information by the Board and its sanctioned Peer Assistance Program. Nurses are required to disclose a diagnosis of Bipolar at initial licensure or renewal; this is not an issue and has been settled recognizing that the State has a right to the information because of public safety concerns. If there are no practice related allegations that accompany the disclosure of the diagnosis, the nurse is allowed to enter the Texas Peer Assistance Program (TPAPN) which is non-disciplinary and allegedly "confidential". The confidentiality only extends to the Board not publishing the fact of the Order in their quarterly publication. To participate in TPAPN, the nurse is required to inform his or her employer of participation in the program and sign a contract with the employer (217.13 (e) (F). Hence, the employer who would otherwise not be entitled to that health information (unless the nurse requested accommodation) obtains it. If the nurse refuses to enter into TPAPN, the alternative is for the nurse to fight the case whereby the diagnosis becomes the subject of Public Formal Charges (217.13(3)). Settlement of the matter with the Board results in issuance of a public Order which

likewise requires employer notification and also contains personal health information in the Findings of Fact. The nurse's right to privacy should not be compromised because of a mental health diagnosis or the disease of addiction; moreover, these persons are in a protected class and should not be discriminated against as a result of their disease processes.

There are less restrictive means available to the Board with regard to monitoring persons who are diagnosed with mental health disease or chemical dependency that is required to be disclosed that does not require unnecessary disclosure of personal mental health information. For example, the Board could (but refuses to) enter into a confidential Order with the nurse and cause a drug screening company or the nurse's mental health provider to regularly inform the Board of treatment, compliance with recommended treatment and fitness to practice.

The Board of Nursing has adopted less restrictive means to monitor persons who are suspected of having a substance abuse issue, whereby employers are not involved in the process and do not have to be notified (EEP program through TPAPN). The persons with chemical dependency and mental health issues are being treated differently, and are actually singled out simply because of their diagnoses. Other agencies have confidential orders for persons who have no allegations of practice deficiencies. This Board can and should adopt similar procedures.

Respectfully submitted,

Elizabeth L. Higginbotham, RN, J.D.

ELH/lkm

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Board Certified Health Law
Texas Board of Legal Specialization

November 29, 2007

By Email
Joy Sparks, Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, Texas 78701

Re: Proposed Rules, 32 Tex. Reg. 7845 (Nov. 2, 2007)

Dear Ms. Sparks:

I would like to offer the following comments on the proposed rules regarding Chapter 217, Sections 217.19 and 217.20. Just for perspective, I am involved in advising hospitals and other entities in developing and implementing policies on nursing peer review as well as occasionally representing nurses before the Texas Board of Nursing (TBON).

Section 217.19 Incident-Based Peer Review

(a) Definitions

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Is there a statutory basis for a broader definition of bad faith as compared to malice? Is it in the best interests of the public to deny nurses certain protections for inadvertent actions? For example, the proposed definition of "bad faith" includes a denial of due process and would result in an inadvertent failure to allow a nurse 10 days to file a rebuttal statement, but only nine days, qualifying as "bad faith." (*But see*, proposed regulation §217.19(l)(1) which allows disciplinary action by the TBON for participation in bad faith incident-based peer review only if done so "knowingly.") In the medical peer review arena, the legislature has carefully balanced the need to protect the public with the need to secure sufficient numbers of physicians who are willing to participate in the

necessary function of medical peer review. "Malice" in the context of medical peer review has been defined by the courts as "a specific intent by the defendant to cause substantial injury or harm to the claimant." *Romero v. Columbia Kingwood Medical Center*, 166 S.W. 3d 212, 225 (Tex. 2005). In the federal Health Care Quality Improvement Act, there are four standards to be met for immunity to be afforded for medical peer review committees and participants. The third standard, which requires that "adequate notice and hearing procedures" be afforded to the physician also allows "or such other procedures as are fair to the physician under the circumstances." 42 U.S.C. §11112(a)(3). Further, immunity is available to a person who provides information to a professional review body "unless such information is false and the person providing it knew that such information was false." Id. at §11111(a)(2). "Bad faith" should require some element of knowledge or intent on the part of the actor.

If there is a statutory basis for the broader definition, has the use of the term "bad faith" been strictly limited to where appropriate? In at least one place, I found that the term "good faith" has been substituted for the term "without malice." In proposed rule §217.19(j)(2), the term "good faith" is used when referencing the prohibition on retaliation against a nurse for filing a report with the TBON or a nursing peer review committee. In Senate Bill 993, however, Section 301.402(f) does <u>not</u> use the term "good faith" but "without malice." If these terms are going to have different definitions, they need to be carefully used and used consistent with the statutory authority.

(10) Patient Safety Committee: Most patient safety committees, at least in the hospital setting, also will be established as "medical peer review committees," as defined in Section 151.002(8). Therefore, I ask that the term "medical peer review committee" be added to the listing. A medical peer review committee may be a committee of a health care entity's medical staff, a committee of the health care entity, a committee of the governing board, or the governing board itself.

(11) Peer Review: For clarification purposes, please consider adding to this definition "the performance of incident-based peer review, safe harbor peer review, or any other review required by the Nursing Practice Act or the TBON rules."

(d) Nurse's Right to Representation

(5) The reference here to having notified the nurse under "subsection (d)(3)(H)" deals with notice of the nursing peer review committee's findings after the proceeding has been completed. I wonder if the reference should be to "subsection (d)(3)(C)," which is the original notice that the nurse's conduct will be reviewed and notice of the nurse's rights in the proceedings, etc.

(f) Exclusions to Minimum Due Process Requirements

(3) This proposed regulation provides that when a direct report to the TBON is mandated due to impairment which has also resulted in a practice violation, a second report to TPAPN is "prohibited." As this is not provided for in Section 301.410(b) of the Act, I just wanted to ensure that this is the intent since it will need to be reflected in nursing peer review policies and procedures.

(g) Incident-Based Peer Review of Impaired Nursing Practice/Lack of Fitness

(1) When a nurse is reported by an employer to the TBON due to an impairment resulting in a practice violation, is the nursing peer review committee to evaluate the external factors to determine if any factors beyond the nurse's control contributed to the practice violation? Subsection (2) makes clear that, if the committee is already reviewing the nurse's conduct and then discovers impairment plus a practice violation, the evaluation of external factors is to be conducted, but the review is not addressed in subsection (1).

On another issue, it would be very helpful if the TBON would clarify what is a "practice violation" and how it relates to the terms "Conduct Subject to Reporting" and "Minor Incident."

(j) Nurse's Duty to Report: For purposes of clarity, please consider some reference in this subsection to the different reporting requirements in the case of impairment without a practice violation and impairment with a practice violation, and also the obligations of the nursing peer review committee if any.

(l) Integrity of Incident-Based Peer Review Process

(1) See comment above under (a)(1) bad faith definition when compared to this section which only allows disciplinary action by the TBON if a nurse "knowingly" participates in bad faith peer review.

Section 217.20 Safe Harbor Peer Review

(a) Definitions Same comments as above for the following definitions:

(1) Bad Faith
(10) Patient Safety Committee
(11) Peer Review

(h) Minimum Due Process: Please consider clarifying that these procedures are the only requirements to comply with the "minimum due process" requirements for safe harbor (i.e., that the procedures in Section 217.19 do not apply to the safe harbor process).

I appreciate the opportunity to submit these comments to the proposed rules and am available to answer any questions you may have. Thank you.

Sincerely,

Joanne P. Hopkins

cc: Elizabeth Sjoberg, RN, JD, Associate General Counsel, Texas Hospital Association
James H. Willmann, JD, General Counsel, Texas Nurses Association

From: Julia Soper [mailto:jasoper@psja.k12.tx.us]
Sent: Tuesday, November 20, 2007 11:51 AM
To: Joy Sparks
Subject: comments related to proposed rules Title 22 from Texas Register 11/2/07

Ms. Sparks, I hope I am not too late to submit comments related to the proposed rules 217.19 and 217.20 related to nursing peer review.

I found the re-wording of the Peer Review rules very helpful. Having worked with these guidelines in their previous format, I appreciate the changes that have been made that help the document to flow more logically and understandably, and recognize the daunting amount of work involved to put them in their present format. My comments in the attached document are primarily editorial in nature with the aim of improving the clarity of a document that already promises to be a more "user-friendly" guide to nurses.

In general, my comments focus on improving language consistency and eliminating redundant terminology. There are several sections (Definitions, Use of Informal Work Group, Reporting Conduct of Other Practitioners) that, with minor changes, appear in both rules, yet they are formatted and worded somewhat differently. As much as possible for the reader's sake, these sections should be identical. There is also an over-abundance of various wordings of "incident-based nursing peer review" and "safe harbor nursing peer review" in the rules. I realize the need for accurate legal terminology, but once a particular type of committee or process has been referenced in a sentence or section, it is generally understandable and desirable to use a shortened term when the committee or process is mentioned again. A final area that was confusing were the legal references throughout the document. As an example, chapter 303 of the Texas Occupations Code is variously referred to as §303, Nursing Peer Review (TOC) §303, TOC §303, Texas Occupations Code (TOC) §303, Nursing Peer Review (TOC) chapter 303, Nursing Peer Review (TOC ch 303), and Texas Occupations Code chapter 303 (Nursing Peer Review). In addition, some of the references are followed by a short parenthetical phrase describing the referenced law, which I find helpful, myself, while other references do not.

If it is appropriate and if the Board of Nursing agrees that these comments have merit, I would be willing to review the document an additional time to incorporate these suggestions. In the meantime, I appreciate the opportunity to offer comments related to nursing practice and your time involved in reviewing my suggestions.

Sincerely,

Julia Soper, RN
Director of Health Services
Pharr-San Juan-Alamo ISD
601 E. Kelly, Pharr, TX 78577
Phone: 956-702-6003
Fax: 956-783-2256

§217.19.Incident-Based Nursing Peer Review and Whistleblower Protections.

(a) Definitions.

Comment [JAS1]: This section should have identical wording of the definitions that are the same in §217.20 (a).

(1) Bad Faith: Taking action not supported by a reasonable factual or legal basis. The term includes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process.

(2) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses.

(3) Conduct Subject to Reporting is conduct by a nurse that:

(A) violates chapter 301 of the Nursing Practice Act (NPA) or a board rule and contributed to the death or serious injury of a patient;

Deleted: ,

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. (§301.401(1))

Deleted: ;

(4) Duty to a Patient: Conduct required by standards of nursing practice (§217.11) or prohibited by unprofessional conduct (§217.12), including administrative decisions directly affecting a nurse's ability to comply with that duty, as adopted by the board.

(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process.

(6) Incident-Based Peer Review: Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to 5 minor incidents by the same nurse within a year's period of time) should be reported to the board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable. (§303.001(5))

(7) Minor incident: Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16.

Deleted: c

(8) Nursing Peer Review (NPR): Consists of chapter 303 of the Texas Occupations Code (TOC) and can only be changed by the Texas Legislature. Nurses involved in nursing peer review must comply with the NPR statutes.

(9) Nursing Practice Act (NPA): Includes chapters 301, 304, and 305 of the Texas Occupations Code (TOC) and can only be changed by the Texas Legislature. Nurses must comply with the NPA.

(10) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety that includes:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, Occupations Code §151.001 et seq.);

(B) a medical committee under Subchapter D, Chapter 161, Health & Safety Code (§§161.031 - 161.033); or

(C) a multi-disciplinary committee, including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety, as appropriate.

(11) Peer Review: Defined in Nursing Peer Review Law (NPR law), contained within the Texas Occupations Code (TOC) §303.001(5), is the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event.

(12) Texas Occupations Code (TOC): One part of the Texas Statutes, or laws. The Nursing Practice Act (NPA) and Nursing Peer Review (NPR) statutes are but a few of the chapters of Texas laws contained within the TOC.

(13) Whistleblower Protections: Protections available to a nurse that prohibit retaliatory action by an employer or other entity for:

(A) a request made by a nurse under TOC §303.005(c) related to invoking safe harbor protections, or

(B) a nurse's refusal under TOC §301.352 to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the Nursing Practice Act or board rules; or

(C) a report made by a nurse under TOC §301.4025 (report of unsafe practices of non-nurse entities) and subsection (i)(2) of this section, that may also be protected under other laws or regulations, concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.

(b) Purpose. The purpose of this rule is to define minimum due process to which a nurse is entitled under incident-based peer review, to provide guidance to facilities, agencies, schools, or anyone who utilizes the services of nurses in the development and application of incident-based peer review plans, to assure that nurses have knowledge of the plan, and to provide guidance to the incident-based peer review committee in its fact finding process.

(c) Applicability of Incident-Based Peer Review. Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of a RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of NPA §§301.402(e) (relating to alternate reporting by nurses to peer review), 301.405(c) (relating to peer review of external factors as part of employer reporting), and 301.407(b) (relating to alternate reporting by state agencies to peer review).

(d) Minimum Due Process.

(1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under Nursing Peer Review (TOC) §303.002(e). Any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if they do not utilize the number of nurses described by subsection (c) of this section.

(2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address:

(A) level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by subsection (d)(3)(F) of this section;

(B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by Nursing Peer Review (TOC) §303.006 and §303.007;

(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the NPA (TOC) §301.410, and subsection (g) of this section;

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(D) reporting of nurses to the board by incident-based peer review committee in accordance with the NPA (TOC) §301.403, and subsection (i) of this section; and

(E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed in writing by the nurse being reviewed.

(3) In order to meet the minimum due process required by Nursing Peer Review (TOC) chapter 303, the nursing peer review committee must:

(A) comply with the membership and voting requirements as set forth in Nursing Peer Review (TOC) §303.003(a) - (d);

(B) exclude from the committee, including attendance at the incident-based peer review hearing, any person or persons with administrative authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person who is administratively responsible over the nurse being incident-based peer reviewed from appearing before the incident-based peer review committee to speak as a fact witness;

(C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that:

(i) the nurse's practice is being evaluated;

(ii) that the incident-based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless:

(I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee, or is

(II) otherwise agreed upon by the nurse and incident-based peer review committee.

(iii) Said notice must include a written copy of the incident-based peer review plan, policies and procedures.

(D) Include in the written notice:

(i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality but the nurse shall be provided the name of the patient/client;

(ii) name, address, telephone number of contact person to receive the nurse's response; and

(iii) a copy of this rule (§217.19 of this title) and a copy of the facility's incident-based peer review plan, policies and procedures.

(E) provide the nurse the opportunity to review, in person or by attorney, the documents concerning the event under review, at least 15 calendar days prior to appearing before the committee;

(F) provide the nurse the opportunity to:

(i) submit a written statement regarding the event under review;

(ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented;

(iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding;

(iv) make an opening statement to the committee;

(v) ask questions of the committee and respond to questions of the committee; and

(vi) make a closing statement to the committee after all evidence is presented;

(G) conclude its review no more than fourteen (14) calendar days from the incident-based peer review hearing, or in compliance with subsection (d)(3)(C)(ii) of this section relating to consultation with a patient safety committee;

(H) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility of the findings of the committee within ten (10) calendar days of when the committee's review has been completed; and

(I) permit the nurse to file a written rebuttal statement within ten (10) calendar days of the notice of the committee's findings and make the statement a permanent part of the incident-based peer review record to be included whenever the committee's findings are disclosed;

(J) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.

Comment [JAS2]: This statement does not appear to be part of minimum due process. It is also mentioned in 2 additional places where it seems to fit more appropriately: (i)(7) and (l)(3)

(4) Nurse's Right To Representation

(A) A nurse shall have a right of representation as set out in this section. The rights set out in this section are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required.

(B) The nurse has the right to be accompanied to the hearing by a nurse peer or an attorney. Representatives attending the incident-based peer review hearing must comply with the facility's incident-based peer review policies and procedures regarding participation beyond conferring with the nurse.

(C) If either the facility or nurse will have an attorney or representative present at the incident-based peer review hearing in any capacity, the facility or nurse must notify the other at least seven (7) calendar days before the hearing that they will have an attorney or representative attending the hearing and in what capacity.

(D) Notwithstanding any other provisions of these rules, if an attorney representing the facility or incident-based peer review committee is present at the incident-based peer review hearing in any capacity, including serving as a member of the incident-based peer review committee, the nurse is entitled to "parity of participation of counsel." "Parity of participation of counsel" means that the nurse's attorney is able to participate to the same extent and level as the facility's attorney; e.g., if the facility's attorney can question witnesses, the nurse's attorney must have the same right.

Comment [JAS3]: This section should be identical, in wording and format, to the similar section in §217.20 (j), as much as possible. It is confusing to the reader to have two sections that are so close but with minor differences.

(5) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under subsection (d)(3)(H) of this section. Nursing Peer Review (TOC) §303.002(d) prohibits nullifying by contract any right a nurse has under the incident-based peer review process. If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 and subsection (d) of this section.

(e) Use of Informal Work Group In Incident-Based Peer Review.

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Comment [JAS4]: Since there is only a (1) in this section and no (2), the info contained in (1) should be moved to follow directly after the section title, as was done in §217.20 (j)

(1) A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the informal workgroup that require:

Deleted: if the informal workgroup believes that a practice violation has occurred and suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity,

(A) the nurse to be informed of how the informal workgroup will function, and to consent, in writing, to the use of an informal workgroup. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal workgroup;

(B) the committee chair to be notified to determine if peer review should be terminated and the nurse reported to the board if the informal workgroup believes that a practice violation has occurred and suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity;

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Comment [JAS5]: This section needs to be revised as indicated to maintain consistency in wording throughout the section.

(C) the informal workgroup to comply with the membership and voting requirements of subsection (d)(3)(A) and (B) of this section;

(D) the nurse be provided the opportunity to meet with the informal workgroup;

(E) the nurse to have the right to reject any decision of the informal workgroup and to then have his/her conduct reviewed by the incident-based peer review committee, in which event members of the informal workgroup shall not participate in that determination; and

(F) ratification by the incident-based peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup to remediate a nurse for one or more minor incidents, the chair person shall convene the full peer review committee to review the conduct in question.

(G) the peer review chair person must communicate any decision of the informal work group to the CNO.

Comment [JAS6]: Need consistency in terminology—in this section alone, the person in charge of the committee is referred to using 4 different phrases: committee chair, incident-based peer review committee chair person, chair person, and peer review chair person .

(f) Exclusions to Minimum Due Process Requirements. The minimum due process requirements set out in subsection (d) of this section do not apply to:

(1) Peer review conducted solely in compliance with NPA (TOC) §301.405(c) relating to incident-based peer review of external factors, after a report of a nurse to the board has already occurred under NPA (TOC) §301.405(b); or

(2) when during the course of the incident-based peer review process, a practice violation is identified as a possible consequence of the nurse's practice being impaired as described under subsection (g) of this section; or

(3) when a person required to report a nurse believes that a nurse's practice is impaired or suspected of being impaired has also resulted in a violation under NPA (TOC) §301.410(b), that requires a direct report to the board.

(g) Incident-Based Peer Review of a Nurse's Impaired Practice/Lack of Fitness.

Comment [JAS7]: Since this section discusses both review based on an incident (section 2), as well as review of a nurse when no incident is involved (section 1), perhaps the section would be better re-named by removing the words “Incident-Based” from the title.

(1) Instead of requesting review by a peer review committee, a nurse whose practice is impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, with no evidence of nursing practice violations, shall be reported, in accordance with NPA (TOC) §301.410(a) (related to reporting of impairment), to either:

Comment [JAS8]: Who is requesting: the nurse? Another nurse? The sentence still maintains its meaning by leaving this word out.

(A) the board; or

(B) a board-approved peer assistance program.

(2) If during the course of an incident-based peer review process, there is a reasonable factual basis for a determination that a practice violation occurred due to a nurse's practice impairment or suspected practice impairment or lack of fitness due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity of a reported nurse, the process shall be suspended, and the nurse reported to the board in accordance with NPA (TOC) §301.410(b) (related to required report to board when practice violations exist with suspected practice impairment/lack of fitness).

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(A) Following suspension of peer review of the nurse, the incident-based peer review committee shall proceed to evaluate external factors to determine if:

(i) any factors beyond the nurse's control contributed to a practice violation,

(ii) if any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct, and

(iii) if the committee determines external factors do exist for either clause (i) or (ii) of this subparagraph, the committee shall report its findings to a patient safety committee or to the CNO if there is no patient safety committee.

Comment [JAS9]: “it’s” = “it is”; Microsoft’s grammar program does not pick this up.

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(B) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under TOC §303.002(e) relating to peer review by suspending the committee's review and reporting the nurse to the Board in accordance with paragraph (2) of this subsection.

(3) Neither paragraph (1) or (2) of this subsection above preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.

(h) Confidentiality of Proceedings.

(1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and not disclosed except as provided by Nursing Peer Review (TOC) §§303.006, 303.007, and §303.0075. Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse.

(2) Sharing of Information: In accordance with Nursing Peer Review (TOC) §303.0075, a nursing incident-based peer review committee and any patient safety committee established by or contracted with the same entity, may share information. A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee.

(A) The privileges under this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee.

(B) This section does not affect the application of Nursing Peer Review (TOC) §303.007 (relating to disclosures by peer review committee) to a nursing peer review committee.

(C) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.

(3) A CNO shall assure that policies relating to sharing of documents with the incident-based peer review committee address, at a minimum:

(A) methods in which shared committee communications and documents are labeled and maintained as to which committee originated the documents or communications;

(B) separation of confidential information under incident-based peer review from the nurse's human resource file;

(C) the confidential and separate nature of incident-based peer review as well as documents that are shared with incident-based peer review, and that violations of said policies are subject to being reported to the board.

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(i) Committee Responsibility to Evaluate and Report.

(1) In evaluating a nurse's conduct, the incident-based peer review committee shall review the evidence to determine the extent to which any deficiency in care by the nurse was the result of deficiencies in the nurse's judgment, knowledge, training, or skill rather than other factors beyond the nurse's control. A determination that a deficiency in care is attributable to a nurse must be based on the extent to which the nurse's conduct was the result of a deficiency in the nurse's judgment, knowledge, training, or skill.

(2) A incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under §217.16, Minor Incidents, of this title. In accordance with this rule, the committee may determine that the nurse:

(A) can be remediated to correct the deficiencies identified in the nurse's judgment, knowledge, training, or skill, or

(B) should be reported to the board for either a pattern of practice that fails to meet minimum standards, or for one or more events that the committee determines cannot be categorized as a minor incident(s).

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(3) Report Not Required: A nursing incident-based peer review committee is not required to submit a report to the board if:

(A) the committee determines that the reported conduct was a minor incident that is not required to be reported in accordance with provisions of §217.16, Minor Incidents, of this title; or

(B) the nurse has already been reported to the board under NPA (TOC) §301.405(b) (employer reporting requirements).

(4) If an incident-based peer review committee finds that a nurse has engaged in conduct subject to reporting to the board, the committee shall submit to the board a written, signed report that includes:

(A) the identity of the nurse;

(B) a description of the conduct subject to reporting;

(C) a description of any corrective action taken against the nurse;

(D) a recommendation as to whether the board should take formal disciplinary action against the nurse, and the basis for the recommendation;

(E) the extent to which any deficiency in care provided by the reported nurse was the result of a factor beyond the nurse's control, and

(F) any additional information the board requires.

(5) If an incident-based peer review committee determines that a deficiency in care by the nurse was the result of a factor(s) beyond the nurse's control, in compliance with TOC §303.011(b) (related to required peer review committee report when external factors contributed to a nurse's deficiency in care), the committee must submit a report to the applicable patient safety committee, or to the CNO if there is no patient safety committee. A patient safety committee must report its findings back to the incident-based peer review committee.

(6) An incident-based peer review committee is not required to withhold its determination of the nurse being reviewed pending feedback from a patient safety committee, unless the committee believes that its determination is necessary for the incident-based peer review committee to determine if the nurse's conduct is reportable.

(A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a nurse's error, in addition to reporting to a patient safety committee, the incident-based peer review committee may also make recommendations for the nurse, up to and including reporting to the board.

(B) An incident-based peer review committee may extend the time line for completing the review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete the review of the nurse within this 90-day time frame.

(7) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.

(j) Nurse's Duty to Report.

(1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the board under NPA (TOC) §301.402 (mandatory report by a nurse) provided that the following conditions are met:

(A) the reporting nurse shall be notified of the committee's actions or findings and shall be subject to Nursing Peer Review (TOC) §303.006 (confidentiality of peer review proceedings); and

(B) the nurse has no reason to believe the committee made its determination in bad faith.

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(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made in good faith under this rule and NPA §301.402(f) (retaliation for a good faith report prohibited). A violation of this subsection or NPA §301.402(f) is subject to NPA §301.413 (retaliatory action prohibited).

(k) State Agency Duty to Report. A state agency that has reason to believe that a nurse has engaged in conduct subject to reporting shall report the nurse in writing to:

(1) the board or

(2) the applicable nursing peer review committee in lieu of reporting to board.

(l) Integrity of Incident-Based Peer Review Process.

(1) NPA chapter 303, requires that incident-based peer review be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the board under the NPA §301.452(b).

(2) The CNO of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this rule and for taking reasonable steps to assure that incident-based peer review is implemented and conducted in compliance with the NPA, Nursing Peer Review, and this rule.

(3) A determination by an incident-based peer review committee, a CNO, or an individual nurse to report a nurse to the board cannot be overruled, dismissed, changed, or reversed. An incident-based peer review committee, CNO, and individual nurse each have a separate responsibility to protect the public by reporting a nurse to the board as set forth in NPA §301.402, §301.405, §217.11(1)(K), and this rule.

(m) Reporting Conduct of other Practitioners or Entities/Whistleblower Protections.

Comment [JAS10]: This section should be identical, in wording and format, as much as possible, to the similar section in §217.20 (k).

(1) This section does not expand the authority of any incident-based peer review committee or the board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025 (report of unsafe practices of non-nurse entities), a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(i) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to §301.413 (retaliatory action prohibited).

Comment [JAS11]: These 2 sections should be re-labeled as sections (3) and (4), as the information does not appear to be pertinent to section (2)(B).

§217.20.Safe Harbor Peer Review for Nurses and Whistleblower Protections.

(a) Definitions.

Comment [JAS12]: This section should have identical wording of the definitions that are the same in §217.19 (a).

(1) Bad Faith: Taking action not supported by a reasonable factual or legal basis. The term includes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process.

(2) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses or that person's designee. Also known as the Nurse Administrator.

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(3) Conduct Subject to Reporting means conduct by a nurse that:

(A) violates the Nursing Practice Act (NPA) chapter 301 or a board rule and contributed to the death or serious injury of a patient;

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. (NPA §301.401(1))

(4) Duty to a patient: Conduct required by standards of nursing practice (§217.11) or prohibited under unprofessional conduct (§217.12) including administrative decisions directly affecting a nurse's ability to comply with that duty.

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(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process.

(6) Minor incident: Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16.

(7) Nursing Peer Review (NPR law): Consists of chapter 303 of the Texas Occupations Code (TOC) and can only be changed by the Texas Legislature. Nurses involved nursing peer review must comply with the NPR statutes.

Deleted: <#>Nurse Administrator: Chief Nursing Officer (CNO) or the CNO's designee. ¶

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(8) Nursing Practice Act (NPA): Includes chapter 301 of the Texas Occupations Code (TOC) and can only be changed by the Texas Legislature. Nurses must comply with the NPA.

(9) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety that includes:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, TOC §151.001 *et seq.*);

(B) a medical committee under subchapter D, chapter 161, Health & Safety Code (§§161.031 - 161.033); or

(C) a multi-disciplinary committee including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety, as appropriate.

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(10) Peer Review: Defined in the NPR law, contained within Texas Occupations Code (TOC) §303.001(5), is the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event.

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(11) Safe Harbor: A process allowing an individual to request in good faith a review of a situation, action, conduct, or assignment while being protected from retaliation and licensure liability.

Deleted: Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.

(12) Safe Harbor Peer Review: The determination if the requested conduct or assignment could have potentially endangered a patient, resulting in the nurse violating his/her duty to the patient. A safe harbor peer review committee reviewing a nurse's request for safe harbor must also ascertain if external factors in the systematic approach and/or nursing policies related to the conduct under review could prevent the recurrence of the same or similar unsafe situation. In accordance with Nursing Peer Review (TOC)

Comment [JAS13]: Different wording? Not clear what this means.

§303.011(b), if the committee determines that external factors contributed to a nurse's request for safe harbor, the committee is to report to a patient safety committee.

(13) Texas Occupations Code (TOC): One part of the Texas Statutes, or laws. The Nursing Practice Act (NPA) and Nursing Peer Review (NPR law) statutes are but a few of the chapters of Texas laws contained within the TOC.

(14) Whistleblower Protections: Protections available to a nurse that prohibit retaliatory action by an employer or other entity for:

(A) a request made by a nurse under Nursing Peer Review (TOC) §303.005(c) regarding invoking safe harbor protections, or

(B) under the NPA (TOC) §301.352 regarding a nurse's refusal to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the NPA or board rules; or

(C) a report made by a nurse under NPA (TOC) §301.4025 (related to patient safety concerns) and subsection (k) of this section, that may also be protected under other laws or regulations, concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.

(b) Purpose. The purpose of this rule is to define minimum due process to which a nurse is entitled under safe harbor peer review, to provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans; to assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor, and to provide guidance to the peer review committee in its fact finding process.

(c) Applicability of Safe Harbor Peer Review:

(1) Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient.

(2) Any person or entity that conducts Safe Harbor peer review is required to comply with the requirements of this rule.

(d) Invoking Safe Harbor.

(1) Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.

(2) At the time the nurse is requested to engage in the conduct or assignment, or refuses to engage in the requested conduct or assignment, he/she must notify in writing the supervisor requesting the conduct or assignment that the nurse is invoking Safe Harbor. The content of this notification must at least meet the requirements for an initial written request set out in paragraph (3) of this subsection. Full detailed documentation of the Safe Harbor request that complies with paragraph (4) of this subsection must be completed before the end of the work period.

(3) An initial written notification or request for Safe Harbor must include:

(A) the nurse's name making the safe harbor request and his/her signature(s);

(B) the date and time of the request;

(C) location of where the conduct or assignment is to be completed;

(D) name of the person requesting the conduct or making the assignment;

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Deleted: Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.

Comment [JAS14]: This information was repeated 4 times in §217.20. Seemed like the information is appropriately placed here and in section (e)(1)(B), and should be deleted from sections (a)(12) (now re-labeled as a11) and (b).

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(E) a brief explanation of why safe harbor is being requested.

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(4) The detailed written account must include at a minimum:

(A) the conduct assigned or requested, including the name and title of the person making the assignment or request;

(B) a description of the practice setting (e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation);

(C) a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (§217.11 of this title) or other section of the NPA and/or Board rules the nurse believes would have been violated. If a nurse refuses to engage in the requested conduct or assignment, the nurse must document the existence of a rationale listed under subsection (g) of this section.

(D) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and

(E) the nurse's name, title, and relationship to the supervisor making the assignment or request.

(5) If the nurse does not submit the initial request for Safe Harbor using the form on the board web site, the facility and nurse shall adhere to the Safe Harbor process as outlined on the board's form.

(6) The nurse invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor.

(7) A nurse may invoke Safe Harbor to question the medical reasonableness of a physician's order in accordance with Nursing Peer Review (TOC) §303.005(e). In this situation, the medical staff or medical director shall determine whether the order was reasonable.

(e) Safe Harbor Protections.

(1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c), the nurse shall:

(A) invoke Safe Harbor in good faith.

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(B) notify the supervisor that the nurse intends to invoke Safe Harbor in accordance with subsection (d) of this section. This must be done before accepting or refusing the assignment At the time the nurse is requested to engage in the conduct or assignment. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.

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(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination. A violation of this subsection or Nursing Peer Review (TOC) §303.005(h) is subject to NPA (TOC) §301.413.

(3) A nurse's protections from licensure action by the board for a good faith safe harbor request remain in place until 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not apply to the nurse's protections from retaliation under TOC §303.005(h). Safe Harbor protections also do not apply to any civil action that may result from the nurse's practice.

(f) Exclusions to Safe Harbor Protections.

(1) The protections provided under subsection (e) of this section do not apply to the nurse who invokes Safe Harbor in bad faith, or engages in activity unrelated to the reason for the request for Safe Harbor or that constitutes reportable conduct of a nurse.

(2) In addition to consideration of the nurse's request for Safe Harbor, the safe harbor peer review committee may consider whether an exclusion to Safe Harbor peer review applies, and evaluate whether a nurse has

engaged in reportable conduct provided such review is conducted in accordance with the requirements of §217.19 (incident-based peer review) of this title.

(3) If the safe harbor peer review committee determines that a nurse's conduct was not related to the nurse's request for Safe Harbor and would otherwise be reportable to the Board, the committee shall report the nurse to the Board as required in NPA (TOC) §301.403.

(g) Nurse's Decision to Accept or Refuse Assignment When Invoking Safe Harbor and While Awaiting Determination of Safe Harbor Peer Review Committee. A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which:

(1) the nurse lacks the basic knowledge, skills, and abilities that would be necessary to render the care or engage in the conduct requested or assigned at a minimally competent level; or

(2) the requested conduct or assignment would constitute unprofessional conduct and/or criminal conduct.

(h) Minimum Due Process.

(1) A person or entity required to comply with Nursing Peer Review (TOC) §303.005(i) shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Peer Review) and the procedure for making a request.

(2) In order to meet the minimum due process required by Nursing Peer Review (TOC) chapter 303, the nursing peer review committee shall comply with the membership and voting requirements as set forth in TOC §303.003(a) - (d);

(3) The peer review committee shall exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse.

(4) Attendance at the safe harbor peer review hearing by a CNO or other persons with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, is limited to appearing before the safe harbor peer review committee to speak as a fact witness.

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(5) The nurse requesting safe harbor shall be permitted to:

(A) appear before the committee;

(B) ask questions and respond to questions of the committee; and

(C) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.

(i) Safe Harbor Processes.

(1) The following timelines shall be followed:

(A) the safe harbor peer review committee shall complete its review and notify the CNO within 14 calendar days of when the nurse requested Safe Harbor;

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(B) within 48 hours of receiving the committee's determination, the CNO shall review these findings and notify the nurse requesting Safe Harbor of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect.

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(2) The CNO of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the Nursing Practice Act (TOC ch. 301) and Nursing Peer Review (TOC ch 303).

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(3) Texas Occupations Code chapter 303 (Nursing Peer Review) requires that peer review be conducted in good faith. A nurse who knowingly participates in peer review in bad faith is subject to disciplinary action by the Board under the Texas Occupations Code §301.452(b).

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(4) The peer review committee and participants shall comply with the confidentiality requirement of Nursing Peer Review (TOC) §303.006 and §303.007 relating to confidentiality and limited disclosure of peer review information.

(5) If the CNO in good faith disagrees with the decision of the peer review committee, the rationale for disagreeing must be recorded and retained with the peer review records.

(A) If the CNO believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and §217.11(1)(K) of this title.

(B) If a nurse requests a safe harbor peer review determination under Nursing Peer Review (TOC) §303.005(b), and refuses to engage in the requested conduct or assignment pending the review, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct. The determinations of the committee are not binding if the CNO believes in good faith that the committee incorrectly determined a nurse's duty; however, this does not affect protections provided for the nurse under Nursing Peer Review (TOC) §303.005(c) or NPA (TOC) §301.352.

(j) Use of Informal Work Group In Safe Harbor Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing peer review committee provided that the final determination of the nurse's duty complies with the time lines set out in this rule and there are written policies for the informal workgroup that require:

(1) the nurse:

(A) be informed how the workgroup will function and that the nurse does not waive any right to peer review by accepting or rejecting the use of an workgroup, and

(B) consent, in writing, to the use of an workgroup.

(2) the workgroup to comply with the membership and voting requirements of subsection (h) of this section;

(3) the nurse be provided the opportunity to meet with the workgroup;

(4) the right of the nurse to reject any decision of the workgroup and have the safe harbor peer review committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the workgroup shall not participate in that determination;

(5) ratification by the peer review chair person of any decision made by the workgroup. If the chair person disagrees with a determination of the workgroup, the chair person shall convene the full peer review committee to review the conduct in question; and

(6) the peer review chair person must communicate any decision of the work group to the CNO.

(k) Reporting Conduct of other Practitioners or Entities/Whistleblower Protections.

(1) This section does not expand the authority of any safe harbor peer review committee or the board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(3) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing

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Comment [JAS15]: This section should be identical, in wording and format, to the similar section in §217.19 (e), as much as possible.
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Comment [JAS16]: This section should be identical, in wording and format, as much as possible, to the similar section in §217.19 (m).

professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to NPA (TOC) §301.413.

TEXAS HOSPITAL ASSOCIATION

November 30, 2007

peer review

Joy Sparks, Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, Texas 78701

Re: Incident-based Nursing Peer Review and Whistleblower Protection Rules and Safe Harbor Peer Review for Nurses and Whistleblower Protection Rules, 32 Tex. Reg. 7848-7855 (2007) (prop. to be codified at 22 TEX. ADMIN. CODE (§217.19 and §217.20) (Bd. of Nursing)

Dear Ms. Sparks:

On behalf of the more than 510 hospital and health system members of the Texas Hospital Association, I appreciate the opportunity to provide the following comments relating to the proposed Incident-based Nursing Peer Review and Whistleblower Protection Rules and the proposed Safe Harbor Peer Review for Nurses and Whistleblower Protection Rules. During the 80th Texas Legislature, THA actively supported the legislation that amended the Nursing Practice Act and Nursing Peer Review Law, including Senate Bill 993 by Sen. Jane Nelson and House Bill 2426 by Rep. Vicki Truitt. With its provisions relating to employer reporting requirements, employment policies, and protections available to nurses reporting patient concerns or advocating for their patients, Senate Bill 993 serves as the major statutory authority for the proposed nursing peer review rules. House Bill 2426 provides the statutory authority for peer review provisions related to impaired nurses.

As a member of the Board's Nursing Practice Advisory Committee representing THA, I had the honor of participating in the drafting of these proposed rules. Overall, the proposed rules are quite good. However, as with any significant revision to rules, issues usually arise following a more thorough review. Other stakeholders will be providing clarifying language. Based on my review of their draft proposed changes, I anticipate that THA will concur with their specific suggestions.

With regard to substantive changes, THA members have expressed concern, confusion and some negativity relating to the use and definition of the terms "bad faith," "good faith" and "malice." THA respectfully requests that the Board reconvene its Nursing

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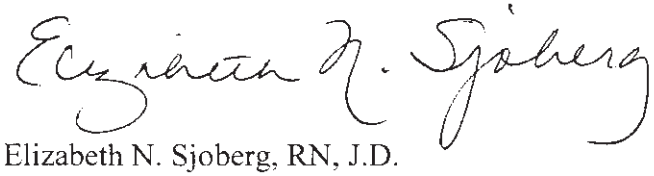
Practice Advisory Committee to address these terms and their use. Clarity in definition and application of terms must be achieved to ensure that nurses employed by Texas hospitals may comply easily with these proposed rules.

I appreciate the opportunity to provide these comments and am ready to meet again with my fellow members of the Nursing Practice Advisory Committee to clarify language in the proposed rules.

Sincerely,



Elizabeth N. Sjoberg, RN, J.D.
Associate General Counsel

TEXAS NURSES ASSOCIATION

DELIVERED VIA EMAIL TO:
joy.sparks@bon.state.tx.us

December 3, 2007

Joy Sparks
Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Ste 3-460
Austin, Texas 78701

Re: Proposed Rules 217.19 (Incident-Based Nursing Peer Review) and 217.20 (Safe Harbor Nursing Peer Review); 32 Tex Reg 7845 (11/2/2007)

Dear Ms. Sparks:

The Texas Nurses Association (TNA) submits the following comments on the board's proposed Rules 217.19 (Incident-Based Nursing Peer Review) and 217.20 (Safe Harbor Nursing Peer Review) as published in the Texas Register at 32 Tex Reg 7845. Before setting out its comments, TNA would like to acknowledge the work done by BON staff and the NPAC. Because of the extensive effort done by the committee and staff in preparing the proposed rules, TNA has had the luxury of being able to focus its attention on fine tuning of the proposed wording.

TNA's comments are divided between Rule 217.19 (Part I) and Rule 217.20 (Part II) and under each rule into three categories:

1. Comments recommending substantive changes.
2. Comments recommending changes that while editorial are significant enough to have substantive implications.
3. Comments suggesting changes that are purely editorial. These editorial only comments are offered simply for the BON staff to consider as it drafts the final rules. They are not intended as substantive comments on the rule.

Because TNA is recommending more changes of a substantive nature to Rule 217.20 (Safe Harbor Nursing Peer Review), the comments on that rule will be addressed first.

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THE PROFESSIONAL ASSOCIATION OF REGISTERED NURSES
Texas Affiliate of the American Nurses Association

I. Rule 217.20 (SAFE HARBOR NURSING PEER REVIEW)

A. Comments Recommending Substantive Changes

1. Nurse's Engaging in Conduct Awaiting Nursing Peer Review

Safe Harbor Nursing Peer Review was designed to address situations in which a nurse and nurse supervisor have a good faith disagreement about what is a nurse's duty to a patient in a specific situation. Safe Harbor provides a mechanism to resolve such disagreements without putting the nurse at risk of adverse consequences from either the facility or the BON and also for minimizing the risk to patients pending resolution of the disagreement. TNA believes that normally it is in the best interest of the patient and also the nurse for the nurse to engage in the conduct or assignment awaiting nursing peer review. In fact, the nurse's not engaging in the conduct or assignment implies that either the nurse or the supervisor is not acting in good faith. The nurse also loses some of her/his Safe Harbor protections if she/he refuses to engage in the conduct or assignment. While patient safety is more likely to be better promoted by the nurse's engaging in the conduct or assignment, there are exceptional situations in which this is not the case. For example, the request involves the nurse falsifying a patient record or the nurse is requested to accept an assignment for which the nurse is so lacking in the needed skills and knowledge that patients would be put at risk of harm.

TNA believes it is very important that Rule 217.20 be carefully worded so that it conveys the message to the nurse that normally it is in the patient's and the nurse's best interests to engage in the requested conduct or assignment awaiting the nursing peer review committee's determination of the nurse's duty to the patient. This issue is addressed in Subsection (g) of proposed Rule 217.20, and TNA is concerned the proposed wording of Subsection (g) may not adequately convey this message.

TNA recommended wording for Subsection (g) is set out in Exhibit 1A. TNA is recommending that the subsection be expanded 1) to describe the effect on the nurse's safe harbor protections when a nurse does not engage in the requested conduct or assignment and 2) to repeat language currently found in proposed Subsection (d)(4)(C) relating to the nurse's documenting her/his rationale for not engaging in the conduct or assignment.

2. Process for Invoking Safe Harbor Nursing Peer Review

A nurse's Safe Harbor protections do not apply until the nurse timely and appropriately invokes Safe Harbor. TNA believes it important that Rule 217.20 makes the process for invoking Safe Harbor as explicit as possible. Subsection (d) of proposed Rule 217.20 addresses the process to be used by a nurse to invoke Safe Harbor. While TNA is recommending a fairly extensive rewording of this subsection, the changes are intended to clarify the steps in the process rather than change the process itself. TNA's recommended changes to Subsection (d) and related provisions are set out in Exhibit 1B. These changes include:

1. Making more explicit that Safe Harbor must be invoked prior to engaging in the requested conduct or assignment and that the Safe Harbor protections apply only to conduct subsequent to the request.
2. Adding a definition of the term “assignment” that makes clear that a new assignment occurs when there are changes in the clinical situation in which an assignment is made and making more explicit that Safe Harbor can be requested whenever such a new assignment occurs.
3. Identifying more clearly that the nurse always has the option of using the BON-developed Safe Harbor Request Form to make either the initial request for Safe Harbor or to make the end of work period report when the short initial request form is used.
4. Identifying more clearly that the Detailed Account Form to be used to make the end of the work period report when short initial request form is used can also be used to make the initial request for Safe Harbor
5. Identifying more explicitly that BON-developed form includes a process for nurse and facility to follow once Safe Harbor has been invoked.

3. Application of Good Faith, Bad Faith and Malice Standards

Proposed Rule 217.20 defines “good faith” based on the definition of “good faith” in §303.005(A-1) of the Nursing Peer Review Law. It then defines “bad faith” as the converse or opposite of “good faith.” Malice is included in the definitions of “good” and “bad faith” but is not defined.

“Good” and “bad faith” and “malice” are terms for setting the standard to be used for determining if someone is to be held liable for certain activities. The issue of whether good faith, bad faith or malice should be standard with respect to questions of liability is addressed in the following places in NPA and NPR Law.

1. What should standard be for determining if individuals or entities should be afforded immunity from civil liability for making reports to the BON or other entities (e.g., reporting a nurse to the BON)
2. What should standard be for determining if Nursing Peer Review Committee and committee members should be afforded immunity from civil liability (e.g., protected from being sued for slander by the nurse being reviewed)
3. What should standard be for determining if NPR committee and committee members should be afforded immunity from licensure liability (e.g., disciplinary action by the BON for inappropriately conducting of NPR)
4. What should standard be for nurses to get protections from retaliation under Safe Harbor NPR.
5. What should standard be for nurse administrator CNO to be able not to accept NPR determination when Safe Harbor NPR has been requested

By way of background for issue, I did a word find of the NPA and NPR Law for occurrences of “good faith,” bad faith” and “malice” with following results:

NPA:

"good faith" - §301.413(a), (b), and (g)(B) – all are references to making a "good faith request" for safe harbor under NPR Law. Section 301.413 is the NPA section addressing a nurse's remedies if retaliated against for making a report, raising a patient care concern or for requesting safe harbor.

"bad faith" - §301.413(a) refers to nurse right to file a counterclaim if someone files a frivolous lawsuit in bad faith against the nurse making a report.

"malice" - §301.402(f), 301.4025(c), 301.412 and 301.413(b), (g)(A) – all refer to a nurse's protections from civil liability or retaliation for making a report as long as makes report without malice.

NPR Law:

"good faith" – §303.005(a-1), (c), (d), (h) – (a-1) defines "good faith for purposes of nurse requesting safe harbor or CNO not accepting NPR determination; all the other sections relate to the nurse making the safe harbor request or the CNO not accepting NPR determination in good faith.

"bad faith" - §303.006(f)(2) – authorizes committee member to report to BON independently of NPR committee if believes committee acted in bad faith.

§303.009(a) - refers to NPR committee and committee members right to file a counterclaim if someone files a frivolous lawsuit in bad faith against the nurse because served on NPR.

"malice" - §303.010(a), (b) – refers to civil liability protections for NPR committee and members as long as act without malice.

In summary, "acting in good faith" is the primary standard used in the NPR Law in relationship to Safe Harbor protections. "Acting without malice" is the standard used in the NPA and NPR Law in relationship to persons having immunity from liability for making mandatory reports to the BON or for participating in nursing peer review. "Acting in bad faith" is not used as a primary standard.

Proposed Rule 217.20 sometimes uses "bad faith" as a standard where the NPA or NPR Law uses malice. Since "bad faith" is defined in the proposed rule without specifying any mental element, using it as a substitute for malice may be inconsistent with the NPA and NPR Law. TNA also believes that even when used appropriately as a standard of civil or licensure liability that it should include some mental element. This is consistent with language in proposed Subsection (i)(3) that bases licensure liability on a nurse's "knowingly participating in peer review in bad faith."

TNA recommends that 1) the definition of "bad faith" be redefined in Proposed Rule 217.20 to require "knowing or reckless" conduct, 2) a definition of "bad faith" be added and 3) the "acting without malice" standard be used whenever referring to someone incurring civil liability for making a required or permitted report or for participating in Nursing Peer Review. TNA's proposed rewording to reflect these recommendations is set out in Exhibit 1C.

4. Safe Harbor Protections and Exclusions from Protections

Subsections (e) and (f) of proposed Rule 217.20 address Safe Harbor protections afforded the nurse and exclusions to those protections. While referencing the protections afforded the nurse under §303.005 of the Nursing Peer Review Law, Subsection (e) does not explicitly set out all of those protections. TNA recommends that the protections be specifically set out. Subsection (f) addresses exclusions to the protections and includes as an exception that the nurse engages in reportable conduct while awaiting the determination of the nurse's Safe Harbor request by the Nursing Peer Review Committee. TNA believes that use of "reportable conduct" without any qualification is too broad, because the purpose of Safe Harbor is to determine if the requested conduct or assignment violates the nurse's duty to the patient. If the peer review committee determines it does, the nurse technically will have engaged in reportable conduct if engaged in the requested conduct or assignment awaiting the committee's determination. TNA believes this is inconsistent with the intent of Safe Harbor Nursing Peer Review and renders its protection against licensure liability practically meaningless. TNA recommends that "reportable conduct" be qualified to be "reportable conduct unrelated to the reason for the Safe Harbor request." TNA's recommended rewording of Subsections (e) and (f) are set out in Exhibit 1D.

B. Comments Recommending Changes That While Editorial Are Significant Enough To Have Substantive Implications

TNA's recommended wording to reflect the three recommendations discussed below is set out in Exhibit 2.

1. Definition of Safe Harbor NPR

Subsection (a)(13) defines "Safe Harbor Nursing Peer Review" in terms of requested conduct or assignment "endangering a patient." TNA believes this is too restrictive since some requests for Safe Harbor do not involve endangering a patient, e.g., request to falsify a record. TNA recommends deleting the "endangering patient" qualifier.

2. Applicability of SHNPR

Subsection (c) relating to applicability of Safe Harbor Nursing Peer Review does not include qualifier in §303.0015 that a facility, agency or entity with ten are more nurses is required to have nursing peer review for RNs only if five of the of ten nurses are RNs.

3. Safe Harbor Processes

TNA recommends that Subsection (i)(5)(B) [relating to Safe Harbor Processes] more explicitly state that a CNO's or nurse administrator's decision not to abide by a Safe Harbor Nursing Peer Review Committee's determination as to a nurse's duty does not invalidate that determination. The committee's determination of the nurse's duty has significant implications for the nurse. For example, the nurse definitely should not continue to engage in the conduct (beyond the 48 hours) because now a nursing peer review committee has agreed with the nurse that the conduct violates the nurse's duty to patient. TNA recommends that Subsection (i)(5)(B) specifically state that the CNO's or nurse administrator's decision "does not invalidate the committee's determination as to the nurse's duty to a patient."

C. Comments Suggesting Changes That Are Only Editorial

TNA is suggesting a significant number of editorial changes. While TNA believes these changes will improve the readability and understandability of proposed Rule 217.20, these comments are offered simply for the BON to consider as it drafts the final rules. They are not intended as substantive comments on the rule. The suggested editorial changes to Rule 217.20 are set out in Exhibit 3. To avoid repeating changes to subsections of Rule 217.20 to which TNA is recommending substantive changes, any editorial changes to those sections are included in Exhibits 1 and 2 addressing substantive changes to those subsections.

TNA has identified the following areas in which it believes proposed Rule 217.20 would benefit from greater consistency in formatting.

1. Capitalization of “Safe Harbor” and “Safe Harbor Nursing Peer Review.” TNA suggests that be capitalized.
2. Use of “Peer Review” or “Nursing Peer Review.” TNA suggests “Nursing Peer Review.”
3. Capitalization of initial word of lists in subdivisions and paragraphs.
4. Use of periods and semi-colons – particularly in lists but also at other places such as subsection titles.
5. Terminology for internal references to other parts of rule and particularly how subdivisions of the rule are referenced. For statutes, the Texas Legislative Council uses section, subsection, subdivision, paragraph and subparagraph but that may be helpful only to attorneys. Maybe could use “Subdivision (__)(__)(__).”

TNA believes other stylistic changes would also improve readability.

1. Format of citations to NPA and NPR Law. If there is a need to reference the Texas Occupation Code, TNA recommends format be “§301.001 of NPA (TOC ch. 301).” TNA is not sure the TOC always has to be referenced since both “NPA” and “NPR Law” are defined terms.
2. Adding the qualifier “under this section” when referencing to other subsections is unnecessary and affects readability. In legislative drafting, any reference to a subsection is considered to refer to a subsection within the same section.

II. RULE 217.19 (INCIDENT-BASED NURSING PEER REVIEW)

A. Comments Recommending Substantive Changes

1. Application Of Good Faith, Bad Faith, Malice Standard.

TNA's recommended changes are set out in Exhibit 4A. See discussion of this issue under section on recommended substantive changes to Rule 217.20.

2. Addressing Nurse Whose Practice Is Impaired

Subsection (g) addresses the process to be followed when the practice of a nurse reported to or being reviewed by a Nursing Peer Review Committee is identified as being or suspected of being impaired due to chemical dependency or mental illness. Subsection (f) provides that the peer review process is to be suspended and that the due process requirements of Incident-Based Nursing Peer Review do not continue to apply. TNA is recommending substantial rewording of Subsections (f) and (g) to make clearer and to reflect the BON's proposed changes to Rule 217.13 addressing how board-approved peer assistance programs must handle third-party referrals with or without a practice violation.

TNA's recommended rewording of Subsections (f) and (g) is set out in Exhibit 4B.

3. Confidentiality

TNA recommends that before the Nursing Peer Review Committee notifies a nurse who reported to Nursing Peer Review in lieu of reporting to the BON of the committee's determination that the reporting nurse be required to agree in writing not to disclose the determination or any other peer review information except as authorized by the Nursing Peer Review Law. As proposed, Subsection (j) only states the nurse is subject to the confidentiality requirements of the NPR Law. The nurse is not required to agree to doing so.

TNA's recommended rewording to require a nurse to agree in writing to maintaining confidentiality is set out in Exhibit 4C

B. Comments Recommending Changes That While Editorial Are Extensive Enough To Have Substantive Implications

None of TNA's comments on Rule 217.19 fall into this category.

C. Comments Suggesting Changes That Are Only Editorial

TNA's recommended changes are set out in Exhibit 5. See discussion of editorial changes under section on suggested editorial changes to Rule 217.20.

III. CONCLUSION

TNA appreciates the opportunity to submit these comments on the proposed rules and is available to answer any questions you may have. TNA would again express its appreciation to the BON staff and its Nursing Practice Advisory Committee for their diligence and hard work in extensively revising current Rules 217.19 and 217.20 to improve both the Incident-Based Nursing Peer Review and the Safe Harbor Nursing Peer Review processes.

Respectfully submitted,

James H. Willmann, JD
General Counsel and Director Governmental Affairs

Attachments:
Exhibits 1-5 emailed as separate attachments

EXHIBITS 1A – 1E
TNA'S RECOMMEND SUBSTANTIVE CHANGES TO RULE §217.20

Page

Exhibit 1A - Engaging In Conduct Awaiting Nursing Peer Review Determination..... 1
Exhibit 1B - Invoking Safe Harbor Nursing Peer Review..... 4
Exhibit 1C – Application Of Good Faith. Bad Faith, Malice Standard..... 10
Exhibit 1D – Safe Harbor Protections and Exclusions..... 12

EXHIBIT 1A **ENGAGING IN CONDUCT AWAITING NURSING PEER REVIEW DETERMINATION** **[Changes to Subsection (g) of Proposed Rule]**		
TNA RECOMMENDED CHANGES **WITH CHANGES SHOWN**	***EXPLANATORY COMMENTS***	**FINAL** **WITH CHANGES NOT SHOWN**
	It is important Subsection (g) be carefully worded so that sends the correct message to the nurse. TNA believes that message should be that normally it is in the best interest of the patient and also the nurse for the nurse to engage in the conduct awaiting nursing peer review. Patient safety is more likely to be better promoted but there are exceptional situations in which this is not the case (e.g., a request to falsify a chart). The nurse also loses some of the safe harbor protections if refuses to engages in the conduct or assignment. TNA is concerned the proposed wording may not adequately convey this message.	
(g) Nurse's Decision ~~to Accept or Refuse Assignment When Invoking Safe Harbor and~~ Whether to Engage in Conduct or Assignment While Awaiting Determination of ~~Safe Harbor~~Nursing Peer Review ~~Committee~~.	*Change in heading is editorial only*	**(g) Nurse's Decision Whether to Engage in Conduct or Assignment While Awaiting Determination of Nursing Peer Review.**
(1) A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which: (~~1~~A) the nurse lacks the basic knowledge, skills, and abilities that would be	*Renumbering is a conforming change to reflect addition of Subsecs. (2) and (3)*	(1) A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which: (A) the nurse lacks the

necessary to render the care or engage in the conduct requested or assigned at a minimally competent level so patients are not exposed to an unjustifiable risk of harm; or (~~2~~B) the requested conduct or assignment would constitute ~~unprofessional conduct and/or~~ criminal conduct or a serious violation of Unprofessional Conduct Rule 217.12 involving intentional or unethical conduct such as fraud, theft, patient abuse or exploitation. - (2) The Safe Harbor protections provided a nurse under §303.005(c) of the NPR Law (TOC ch. 303) are affected by whether the nurse engages in the conduct or assignment awaiting the peer review determination: (A) If a nurse engages in the conduct or assignment, the protections apply if the nurse is acting on a good faith belief that engaging in the conduct or assignment awaiting peer review determination is permitted by Subdivision (1) even if the belief is determined later to be incorrect. (B) If a nurse does not engage in the conduct or assignment, the nurse may not have all the protections provided by §303.005(c) of the NPR Law (TOC ch. 303). (i) The protection provided by §303.005(c)(4) that a nurse may not be disciplined by the Board for engaging in the requested conduct or assignment awaiting nursing peer review is not applicable if the nurse refuses to engage in the conduct or assignment. (ii) If a nurse refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct. The determinations of the safe harbor peer review committee are not binding if the CNO or nurse administrator believes in good faith that the safe	*This change to (A) is editorial only.* *The reference to "unprofessional conduct" without qualification may be too broad since BON Unprofessional Rule 217.12 includes conduct such as accepting an unsafe assignment. The suggested new language is taken from BON Minor Incident Rule 217.16(c)((3).* *This new Subsection (2) language attempts to put nurse on notice that decision to not engage in conduct may affect protections she/he has under safe harbor.* *This new Paragraph (ii) repeats language currently set out at (i)(5) but it seems that should also be set out here since addresses what may happen if nurse refuses to engage in conduct awaiting NPR.*	basic knowledge, skills, and abilities that would be necessary to render the care or engage in the conduct requested or assigned at a minimally competent level so patients are not exposed to an unjustifiable risk of harm; or (B) the requested conduct or assignment would constitute criminal conduct or a serious violation of Unprofessional Conduct Rule 217.12 involving intentional or unethical conduct such as fraud, theft, patient abuse or exploitation. (2) The Safe Harbor protections provided a nurse under §303.005(c) of the NPR Law (TOC ch. 303) are affected by whether the nurse engages in the conduct or assignment awaiting the peer review determination: (A) If a nurse engages in the conduct or assignment, the protections apply if the nurse is acting on a good faith belief that engaging in the conduct or assignment awaiting peer review determination is permitted by Subdivision (1) even if the belief is determined later to be incorrect. (B) If a nurse does not engage in the conduct or assignment, the nurse may not have all the protections provided by §303.005(c) of the NPR Law (TOC ch. 303). (i) The protection provided by §303.005(c)(4) that a nurse may not be disciplined by the Board for engaging in the requested conduct or assignment awaiting nursing peer review is not applicable if the nurse refuses to engage in the conduct or assignment. (ii) If a nurse refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct. The determinations of the safe harbor peer review committee are not binding if the CNO or nurse

harbor peer review committee incorrectly determined a nurse's duty. The CNO's or nurse administrator's decision that the peer review committee's determinations are not binding does not affect protections provided the nurse by §303.005(c)(1) of the Nursing Peer Review Law (TOC ch. 303) (relating to protection from retaliation for requesting safe harbor) or §301.352 of the NPA (TOC ch. 301) (relating to protections for refusing to engage in conduct that violates the NPA or a Board rule). (3) If the nurse does not engage in the requested conduct or assignment awaiting the nursing peer review committee's determination, the nurse must document her/his rationale as part of the process of invoking Safe Harbor described in Subsection (d). The rationale should refer to one of the justifications described in Subdivision (2).	*Content is taken from Subsection (g)(4). TNA believes that would be beneficial to repeat here because of the importance of the nurse's decision.*	administrator believes in good faith that the safe harbor peer review committee incorrectly determined a nurse's duty. The CNO's or nurse administrator's decision that the peer review committee's determinations are not binding does not affect protections provided the nurse by §303.005(c)(1) of the Nursing Peer Review Law (TOC ch. 303) (relating to protection from retaliation for requesting safe harbor) or §301.352 of the NPA (TOC ch. 301) (relating to protections for refusing to engage in conduct that violates the NPA or a Board rule). (3) If the nurse does not engage in the requested conduct or assignment awaiting the nursing peer review committee's determination, the nurse must document her/his rationale as part of the process of invoking Safe Harbor described in Subsection (d). The rationale should refer to one of the justifications described in Subdivision (2).

EXHIBIT 1B INVOKING SAFE HARBOR NURSING PEER REVIEW [Changes to Subsections (a)(12), (b), (d), (e)(1) of Proposed Rule]		
TNA RECOMMENDED CHANGES WITH CHANGES SHOWN	***EXPLANATORY COMMENTS***	**FINAL WITH CHANGES NOT SHOWN**
(a) Definitions.		**(a) Definitions.**
(__) Assignment: Designating responsibility for the provision or supervision of nursing care for an individual or group of patients for a defined period of time in a defined work setting including the specified functions, duties, or amount of work designated as the individual nurse's responsibility. Changes in the clinical situation may occur due to volume, intensity, resource availability, or other variables. If the changes in the clinical situation modify the level of nursing care provided or level of supervision required including the specified functions, duties, or amount of work designated in the original assignment, the result is a new assignment.	*This is a new definition designed to emphasize that when clinical situation changes a new assignment result.*	(__) Assignment: Designating responsibility for the provision or supervision of nursing care for an individual or group of patients for a defined period of time in a defined work setting including the specified functions, duties, or amount of work designated as the individual nurse's responsibility. Changes in the clinical situation may occur due to volume, intensity, resource availability, or other variables. If the changes in the clinical situation modify the level of nursing care provided or level of supervision required including the specified functions, duties, or amount of work designated in the original assignment, the result is a new assignment.
(12) Safe Harbor: ~~a~~ A process allowing an individual to request in good faith a review of a situation, action, conduct, or assignment while being protected from retaliation and licensure liability. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which Safe Harbor is requested. ~~or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	*This is a conforming change to reflect similar changes made to (d)(1), (d)(2) and (e)(1)(B). The rationale for change is set out at (d)(2) below.*	(12) Safe Harbor: A process allowing an individual to request in good faith a review of a situation, action, conduct, or assignment while being protected from retaliation and licensure liability. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which Safe Harbor is requested.
(b) Purpose. The purpose of this rule is to: (1) to define the process for invoking safe harbor ~~to~~ ; (2) define minimum due process to which a nurse is entitled under safe harbor peer review~~, to~~ ; (3) provide guidance to facilities,	*Editorial Change. Formatting as a list may make easier to read.* *Setting out process for invoking Safe Harbor is important part of rule and should be listed as one of the purposes.*	**(b) Purpose**. The purpose of this rule is to: (1) define the process for invoking safe harbor; (2) define minimum due process to which a nurse is entitled under safe harbor nursing peer review; (3) provide guidance to facilities, agencies, employers of nurses, or anyone who

agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans; ~~to~~ (3) assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor, and ~~to~~ (4) provide guidance to the peer review committee in ~~its fact finding process~~making its determination of the nurse's duty to the patient. ~~Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	*Primary role of Safe Harbor NPR is to determine nurse's duty.* *Deleted because doesn't seem to fit well in this subsection and is already repeated several other places- (a)(12), (d)(1), (d)(2), (e)(1)(B)*	utilizes the services of nurses in the development and application of peer review plans; (4) assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor; and (5) provide guidance to the peer review committee in making its determination of the nurse's duty to the patient.
(d) Invoking Safe Harbor. (1) Safe Harbor must be invoked prior to engaging in the conduct or assignment and at one of the following times: A) when the conduct is requested or assignment made; B) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required, or the specified functions, duties, or amount of work originally assigned, that a new assignment occurs as defined by Subsec. (a)(__); or C) when the nurse refuses to engage in the requested conduct or assignment; ~~Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~ (2) ~~At the time the nurse is~~	*Reformatted to make more explicit for nurse when must invoke safe harbor. Added "prior to engaging in conduct or assignment" in stem to reinforce that safe harbor protections do not apply to conduct prior to making request.* *TNA is recommending adding a definition of "Assignment" so will need to add correct reference.* *The changes to Subsections (2), (3) and (4) are designed to make the process for invoking safe harbor as explicit and understandable as possible.*	**(d) Invoking Safe Harbor.** (1) Safe Harbor must be invoked prior to engaging in the conduct or assignment and at one of the following times: A) when the conduct is requested or assignment made; B) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required, or the specified functions, duties, or amount of work originally assigned, that a new assignment occurs as defined by Subsec. (a)(__); or C) when the nurse refuses to engage in the requested conduct or assignment;

~~requested to engage in the conduct or assignment, or refuses to engage in the requested conduct or assignment, he/she~~ The nurse must notify ~~in writing~~ the supervisor requesting the conduct or assignment, in writing, that the nurse is invoking Safe Harbor. The content of this notification must ~~at least~~ meet the minimum requirements for an ~~initial written request set out~~Initial Quick Request Form described in ~~paragraph~~ Paragraph (3)~~ of this subsection~~. ~~Full Detailed documentation~~A detailed written account of the Safe Harbor request that ~~complies with~~meets the minimum requirements for the Detailed Written Account described in paragraph (4) ~~of this subsection~~ must be completed before leaving the work setting at the end of the work period.	*The changes to Subsections (2), (3) and (4) are designed to make the process for invoking safe harbor as explicit and understandable as possible.*	(2) The nurse must notify the supervisor requesting the conduct or assignment, in writing, that the nurse is invoking Safe Harbor. The content of this notification must meet the minimum requirements for an Initial Quick Request Form described in Paragraph (3). A detailed written account of the Safe Harbor request that meets the minimum requirements for the Detailed Written Account described in paragraph (4) must be completed before leaving the work setting at the end of the work period.
(3)~~ An initial written notification or request for Safe Harbor must include:~~ Initial Quick Request Form (A) This form may be used to invoke safe harbor and may be in any format as long as it is in writing and contains the following information: (~~A~~ i) ~~The~~ the nurse(s) name ~~making the safe harbor request~~ and ~~his/her~~ signature(s); (~~B~~ ii) ~~The~~ the date and time of the request; (~~C~~ iii) the location of where the conduct or assignment is to be completed; (~~D~~ iv) ~~Name~~ the name of the person requesting the conduct or making the assignment; (~~E~~ v) ~~A~~ a brief explanation of why safe harbor is being requested. (B) If this form is used to invoke safe harbor, the nurse must complete the Detailed Written Account described in Subdivision (4) as a supplemental report before leaving the work setting at the end of the work period.	*The changes to Subsections (2), (3) and (4) are designed to make the process for invoking safe harbor as explicit and understandable as possible.*	(3) Initial Quick Request Form (A) This form may be used to invoke safe harbor and may be in any format as long as it is in writing and contains the following information: (i) the nurse(s) name and signature(s); (ii) the date and time of the request; (iii) the location of where the conduct or assignment is to be completed; (iv) the name of the person requesting the conduct or making the assignment; (v) a brief explanation of why safe harbor is being requested. (B) If this form is used to invoke safe harbor, the nurse must complete the Detailed Written Account described in Subdivision (4) as a supplemental report before leaving the work setting at the end of the work period.
(4) Detailed Written Account~~The~~		

~~detailed written account must include at a minimum:~~ (A) This form may be used to invoke safe harbor or to make the report required at the end of the work period under Subdivision (2)(B) to supplement the Initial Quick Request Form. It may be in any format as long as it is in writing and includes the following information: (~~A~~ i) the conduct assigned or requested, including the name and title of the person making the assignment or request; (~~B~~ ii) a description of the practice setting (e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation); (~~C~~ iii) a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (§217.11 of this title) or other section of the NPA and/or Board rules the nurse believes would have been violated. (iv) ~~If a nurse refuses to engage in the requested conduct or assignment, the nurse must document the existence of a rationale listed under subsection (g) of this section.~~ If applicable, the rationale for the nurse's not engaging in the requested conduct or assignment awaiting the nursing peer review committee's determination as to the nurse's duty. The rationale should refer to one of the justifications described in Subsection (g)(2) for not engaging in the conduct or assignment awaiting a peer review determination. (~~D~~ v) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and (~~E~~ vi) the nurse's name, title, and relationship to the supervisor making the assignment or request.	*Is an important requirement and making a separate paragraph gives emphasis.* *The nurse can always use the BON form to request safe harbor.* *Makes explicit that BON form includes a process for nurse and facility to follow.* *Added so that have a subdivision on BON form that parallels Subdivisions ((3) and (4) on Initial Request Form and Detailed Written Account.*	(4) Detailed Written Account (A) This form may be used to invoke safe harbor or to make the report required at the end of the work period under Subdivision (2)(B) to supplement the Initial Quick Request Form. It may be in any format as long as it is in writing and includes the following information: (i) the conduct assigned or requested, including the name and title of the person making the assignment or request; (ii) a description of the practice setting (e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation); (iii) a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (§217.11 of this title) or other section of the NPA and/or Board rules the nurse believes would have been violated. (iv) If applicable, the rationale for the nurse's not engaging in the requested conduct or assignment awaiting the nursing peer review committee's determination as to the nurse's duty. The rationale should refer to one of the justifications described in Subsection (g)(2) for not engaging in the conduct or assignment awaiting a peer review determination. (v) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and (vi) the nurse's name, title, and relationship to the supervisor making the assignment or request.

(B) If this form is used to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form, the facility and nurse must follow the Safe Harbor process as outlined in the BON Comprehensive Request Form described in Subdivision (4).	*Rewording only to make conform to other changes*	(B) If this form is used to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form, the facility and nurse must follow the Safe Harbor process as outlined in the BON Comprehensive Request Form described in Subdivision (4).
(5) BON Comprehensive Request Form (A) The BON Comprehensive Request Form is a board-developed form that can be found on the BON's website www.bon.state.tx.us. It includes a process for the nurse and facility to follow once the request for safe harbor has been made. (B) This form may be used to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form.		(5) BON Comprehensive Request Form (A) The BON Comprehensive Request Form is a board-developed form that can be found on the BON's website www.bon.state.tx.us. It includes a process for the nurse and facility to follow once the request for safe harbor has been made. (B) This form may be used to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form.
(~~5~~ 6) If the nurse does not use the BON Comprehensive Request Form described in Subdivision (5) to invoke safe harbor ~~submit the initial request for Safe Harbor using the form on the board web site~~or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form, the facility and nurse ~~shall adhere to~~must follow the Safe Harbor process as outlined ~~on~~ in this ~~the board's~~ form.		(6) If the nurse does not use the BON Comprehensive Request Form described in Subdivision (5) to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form, the facility and nurse must follow the Safe Harbor process as outlined in this form.
(~~6~~ 7) The nurse invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor.		(7) The nurse invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor.
(~~7~~ 8) A nurse may invoke Safe Harbor to question the medical reasonableness of a physician's order in accordance with Nursing Peer Review Law (TOC) §303.005(e). In this situation, the medical staff or medical director shall determine whether the order was reasonable.	*Conforming change to reflect changes made to Subsection (d)*	(8) A nurse may invoke Safe Harbor to question the medical reasonableness of a physician's order in accordance with Nursing Peer Review Law (TOC) §303.005(e). In this situation, the medical staff or medical director shall determine whether the order was reasonable.

(e) Safe Harbor Protections. (1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c) as set out in Subsection (2), the nurse shall: (A) Invoke Safe Harbor in good faith. (B) Notify the supervisor in writing that she/he ~~At the time the nurse is requested to engage in the conduct or assignment, notify the supervisor that the nurse~~ intends to invoke Safe Harbor in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at one of the following times: i) when the conduct is requested or assignment made; ii) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required or the specified functions, duties, or amount of work originally assigned that a new assignment occurs as defined by Subsec. (a)(__); or iii) when the nurse refuses to engage in the requested conduct or assignment. . ~~before accepting or refusing the assignment. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~ (2) _____ *[Changes to (2) are addressed in Exhibit 1D]*		**(e) Safe Harbor Protections**. (1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c) as set out in Subsection (2), the nurse shall: (A) Invoke Safe Harbor in good faith. (B) Notify the supervisor in writing that she/he intends to invoke Safe Harbor in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at one of the following times: i) when the conduct is requested or assignment made; ii) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required or the specified functions, duties, or amount of work originally assigned that a new assignment occurs as defined by Subsec. (a)(__); or iii) when the nurse refuses to engage in the requested conduct or assignment. (2) _____ *[no substantive changes to (2)]*

EXHIBIT 1C APPLICATION OF GOOD FAITH. BAD FAITH, MALICE STANDARD [Changes to Subsections (a)(1), (a)(5), (a)(__), (f)(1) of Proposed Rule]		
TNA RECOMMENDED CHANGES WITH CHANGES SHOWN	***EXPLANATORY COMMENTS***	**FINAL WITH CHANGES NOT SHOWN**
(a) Definitions.		**(a) Definitions.**
(1) Bad Faith: Knowingly or recklessly taking~~Taking~~ action not supported by a reasonable factual or legal basis. The term includes ~~falsely portraying~~misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity~~ towards the nurse~~, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	*Changes incorporate a mental element into bad faith* *Limiting to malice toward nurse seems too limiting since non-nurses are involved in peer review process. No harm is done by deleting.*	(1) Bad Faith: Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.
(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes ~~falsely portraying~~misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity~~ towards the nurse~~, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	*Changes incorporate a mental element into bad faith*	(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.
(__) Malice: Acting with a specific intent to cause substantial injury or harm to another	*Is a new definition. Content is a modification from definition in §41.001, Civil Remedies & Procedure Code*	(__) Malice: Acting with a specific intent to cause substantial injury or harm to another.
(f) Exclusions to Safe Harbor Protections.	*See Exhibit 1D.*	**(f) Exclusions to Safe Harbor Protections**.
(1) The protections provided from discipline or discrimination by a facility, agency, entity, or employer under ~~subsection~~ Subsection (e)(2) ~~of this section~~ do not apply to the nurse who does not invoke~~invokes~~ Safe Harbor in good~~bad~~ faith~~,~~. ~~or~~	*"Good faith" is terminology used in NPR Law and as defined above, "good faith" and "bad faith" are exact opposites. Wording in terms of "good faith" assures consistent with the NPR Law.*	(1) The protections provided from discipline or discrimination under Subsection (e)(2) do not apply to the nurse who does not invoke Safe Harbor in good faith
(2) -(3) _____ *[NOTE: Content not germane to this Exhibit.]*	*Substantive changes to Subdivisions(2) and (3) are addressed in Exhibit 1D .*	
(i) Safe Harbor Processes		

(3) ~~Texas Occupations Code chapter 303 (Nursing Peer Review), requires that~~ Safe Harbor Nursing ~~peer~~ Peer ~~review~~ Review must be conducted in good faith. A nurse who knowingly participates in nursing peer review in bad faith is subject to disciplinary action by the Board ~~under the Texas Occupations Code §301.452(b).~~	*The NPR Law may only do this implicitly. It refers to "bad faith" by NPR committee only once and that is in §303.006(f)(2) addressing a committee member reporting to board independently of committee when believes determination made in bad faith.* *Reference to §301.452(b) is not necessary and deleting helps readability.*	**(i) Safe Harbor Processes** (3) Safe Harbor Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in nursing peer review in bad faith is subject to disciplinary action by the Board.

EXHIBIT 1D SAFE HARBOR PROTECTIONS AND EXCLUSIONS [Changes to Subsections (e) and (f) of Proposed Rule]		
TNA RECOMMENDED CHANGES WITH CHANGES SHOWN	***EXPLANATORY COMMENTS***	**FINAL WITH CHANGES NOT SHOWN**
(e) Safe Harbor Protections. (1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c) as described in Subsection (2), the nurse shall: (A) ~~Invoke~~ invoke Safe Harbor in good faith. (B) notify the supervisor that she/he ~~At the time the nurse is requested to engage in the conduct or assignment, notify the supervisor that the nurse~~ intends to invoke Safe Harbor in writing in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at one of the following times: i) when the conduct is requested or assignment made; ii) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required or the specified functions, duties, or amount of work originally assigned that a new assignment occurs as defined by Subsec. (a)(__); or iii) when the nurse refuses to engage in the requested conduct or assignment. . ~~before accepting or refusing the assignment. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~ (2) Subsections 303.005(c) and (h) of the Nursing Peer Review Law (TOC Ch. 303), provide the following protections: (A) A nurse may not be	*Conforming change to reflect changes to Subdivision (2).* *Conforming change to reflect changes to Subsection (d). See Exhibit 1B* *This Subdivision (2) is expanded to set out in this rule the protections provided by NPR Law so that nurse does not have to go read the law to know what protections are.*	**(e) Safe Harbor Protections**. (1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c) as described in Subsection (2), the nurse shall: (A) invoke Safe Harbor in good faith. (B) notify the supervisor that she/he intends to invoke Safe Harbor in writing in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at one of the following times: i) when the conduct is requested or assignment made; ii) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required or the specified functions, duties, or amount of work originally assigned that a new assignment occurs as defined by Subsec. (a)(__); or iii) when the nurse refuses to engage in the requested conduct or assignment. (2) Subsections 303.005(c) and (h) of the Nursing Peer Review Law (TOC Ch. 303), provide the following protections: (A) A nurse may not be

suspended, terminated, or otherwise disciplined or discriminated against for requesting safe harbor in good faith;		suspended, terminated, or otherwise disciplined or discriminated against for requesting safe harbor in good faith;
(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination~~.~~; and ~~A violation of this subsection or Nursing Peer Review Law (TOC) §303.005(h) is subject to NPA (TOC) §301.413.~~	*Content moved to new Subdiv. (3)*	(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination; and
(~~3~~C) A nurse is not subject to being reported to the board and may not be disciplined by the board for engaging in the conduct awaiting the determination of the peer review committee as permitted by Subsection (g). A nurse's protections from ~~licensure~~ disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination ~~a good faith safe harbor request~~ remain in place ~~until~~ for 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not ~~apply~~ affect to the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor.~~under TOC §303.005(h).~~	*Content moved from last sentence of Subdiv. (2).*	(C) A nurse is not subject to being reported to the board and may not be disciplined by the board for engaging in the conduct awaiting the determination of the peer review committee as permitted by Subsection (g). A nurse's protections from disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination remain in place for 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not affect to the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor.
(3) Section 301.413 of the NPA provides a nurse or individual retaliated against in violation of §303.005(h) of the NPR Law (TOC ch. 303) a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.	*May need some worksmithing to make clearer.*	(3) Section 301.413 of the NPA provides a nurse or individual retaliated against in violation of §303.005(h) of the NPR Law (TOC ch. 303) a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.
(4) Safe Harbor protections ~~also~~ do not apply to any civil action that may result from the nurse's practice.	*Invoking safe harbor does not give a nurse a license to engage in reportable conduct with immunity. However, to have any value safe harbor must protect the nurse from licensure liability for engaging in conduct related to the request for safe harbor.*	(4) Safe Harbor protections do not apply to any civil action that may result from the nurse's practice.
(f) Exclusions to Safe Harbor Protections.		**(f) Exclusions to Safe Harbor Protections.**

(1) The protections provided from discipline or discrimination by a facility, agency, entity or employer under subsection (e)(2) of this section do not apply to the nurse who does not invokeinvokes Safe Harbor in goodbad faith,. or	*See Exhibit 1C for explanation of this change relating to good faith..*	(1) The protections provided from discipline or discrimination by a facility, agency, entity, or employer under subsection (e)(2) of this section does not apply to the nurse who does not invoke Safe Harbor in good faith.
(2) The protections provided from disciplinary action by the board under subsection (e)(3) do not apply to the nurse who does not invoke Safe Harbor in good faith, to conduct engaged in prior to the request for Safe Harbor, or to conduct engages in activity unrelated to the reason for the request for Safe Harbor or that constitutes reportable conduct of a nurse.	*The "reportable conduct" terminology is too broad and may negate the value of safe harbor since the requested conduct or assignment itself may turn out to be "reportable conduct." The nurse is invoking safe harbor because believes conduct violates duty to patient and if it does may be reportable conduct. It is because nurse believed requested conduct may be reportable that nurse needs protection from BON action if engages in conduct awaiting peer review.*	(2) The protections provided from disciplinary action by the board under subsection (e)(3) do not apply to the nurse who does not invoke Safe Harbor in good faith, to conduct engaged in prior to the request for Safe Harbor, or to conduct unrelated to the reason for the request for Safe Harbor.
	Editorial	
(2A) In addition to consideration of the nurse's request for Safe Harbor, the safe harbor peer review committee may consider whether an exclusion to Safe Harbor peer review applies, and evaluate whether a nurse has engaged in reportable conduct not related to the request for safe harbor provided such review is conducted in accordance with the requirements of §217.19 (iIncident-bBased pPeer rReview) of this title. (3B) If the safe harbor peer review committee determines that a nurse's conduct was not related to the nurse's request for Safe Harbor and would otherwise be reportable to the Board, the committee shall report the nurse to the Board as required in NPA (TOC) §301.403.	*See comment for (2) above*	(A) In addition to consideration of the nurse's request for Safe Harbor, the peer review committee may consider whether a nurse has engaged in reportable conduct not related to the request for safe harbor provided such review is conducted in accordance with the requirements of §217.19 (Incident-Based Peer Review) of this title. (B) If the safe harbor peer review committee determines that a nurse's conduct was not related to the nurse's request for Safe Harbor and would otherwise be reportable to the Board, the committee shall report the nurse to the Board as required in NPA (TOC) §301.403.

EXHIBIT 2
TNA'S RECOMMENDED EDITORIAL CHANGES TO RULE 217.20 THAT HAVE SUBSTANTIVE IMPLICATIONS
Recommended Changes to (a)(13), (c), and (i)

TNA SUGGESTED CHANGES WITH CHANGES SHOWN	*EXPLANATORY COMMENTS*	FINAL WITH CHANGES NOT SHOWN
(a) Definitions (13) Safe Harbor Nursing Peer Review: The determination if ~~the~~ requested conduct or assignment could ~~have potentially endangered a patient, resulting~~ result in the nurse violating his/her duty to the patient. A ~~safe harbor~~ Nursing ~~p~~Peer ~~r~~Review ~~c~~Committee reviewing a nurse's request for safe harbor must also ascertain if external factors ~~in the systematic approach and/or~~ contributed to the nurse's request and whether system changes or changes in nursing policies ~~related to the conduct under review~~ could prevent the recurrence of the same or similar ~~unsafe~~ situation. In accordance with Nursing Peer Review Law (TOC) §303.011(b), if the committee determines that external factors contributed to a nurse's request for safe harbor, the committee ~~is to~~shall report to a patient safety committee.	*"Endangering patients" terminology is too limiting since wouldn't include conduct like falsifying reimbursement records.* *This change is editorial. The wording seems difficult to read.* *May not want to assume that unsafe.* *Editorial*	**(a) Definitions.** (13) Safe Harbor Nursing Peer Review: The determination if the requested conduct or assignment could result in the nurse violating his/her duty to the patient. A Nursing Peer Review Committee reviewing a nurse's request for safe harbor must also ascertain if external factors contributed to the nurse's request and whether system changes or changes in nursing policies could prevent the recurrence of the same or similar situation. In accordance with Nursing Peer Review Law (TOC) §303.011(b), if the committee determines that external factors contributed to a nurse's request for safe harbor, the committee shall report to a patient safety committee.
(c) Applicability of Safe Harbor Nursing Peer Review. (1) Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient. (2) Any person or entity that conducts Safe Harbor Nursing ~~p~~Peer ~~r~~Review is required to comply with the requirements of this rule.	*NPR Law §303.0015 requires for RNs only if at least 5 of the 10 nurses are RNs.* *Editorial*	**(c) Applicability of Safe Harbor Nursing Peer Review.** (1) Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient. (2) Any person or entity that conducts Safe Harbor Nursing Peer Review is required to comply with the requirements of this rule.

(i) Safe Harbor Process		**(i) Safe Harbor Process**
(5) If the CNO or ~~(~~nurse administrator~~)~~ in good faith disagrees with the decision of the peer review committee, the rationale for disagreeing with a peer review committee's determination must be recorded and retained with the peer review records.	*Editorial. Rationale for change is addressed in Exhibit 3 (Editorial Changes).*	(5) If the CNO or nurse administrator in good faith disagrees with the decision of the peer review committee, the rationale for disagreeing with a peer review committee's determination must be recorded and retained with the peer review records.
(A) If the CNO or ~~(~~nurse administrator~~)~~ believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and §217.11(1)(K) of this title.	*Editorial*	(A) If the CNO or nurse administrator believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and §217.11(1)(K) of this title.
(B) If a nurse requests a ~~s~~Safe ~~h~~Harbor ~~p~~Peer ~~r~~Review determination under Nursing Peer Review Law (TOC) §303.005(b), and refuses to engage in the requested conduct or assignment pending ~~the safe harbor~~ peer review, the determination of the ~~safe harbor~~ peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct, The determinations of the ~~safe harbor peer review~~ committee are not binding if the CNO or ~~(~~nurse administrator~~)~~ believes in good faith that the safe harbor peer review committee incorrectly determined a nurse's duty~~;~~. ~~however, this~~The CNO's or nurse administrator's decision that the peer review committee's determination as to the nurse's duty to the patient is not binding does not affect the protections provided ~~for~~ the nurse ~~under~~ by Nursing Peer Review Law (TOC) §303.005(c)(1) or NPA (TOC) §301.352 and does not invalidate the committee's determination as to the nurse's duty to the patient.	*Changes to beginning of sentence are editorial only.* *Nurse administrator's decision to disagree with NPR determination does not overrule or change the NPR's determination of the nurse's duty to the patient. It still exists and has significant implications for nurse. For example, the nurse should definitely not continue to engage in the conduct (beyond the 48 hours) because now a nursing peer review committee has agreed with the nurse that the conduct violates the nurse's duty to patient.*	(B) If a nurse requests a Safe Harbor Peer Review determination under Nursing Peer Review Law (TOC) §303.005(b), and refuses to engage in the requested conduct or assignment pending peer review, the determination of the peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct, The determinations of the committee are not binding if the CNO or nurse administrator believes in good faith that the safe harbor peer review committee incorrectly determined a nurse's duty. The CNO's or nurse administrator's decision that the peer review committee's determination as to the nurse's duty to the patient is not binding does not affect the protections provided the nurse by Nursing Peer Review Law (TOC) §303.005(c)(1) or NPA (TOC) §301.352 and does not invalidate the committee's determination as to the nurse's duty to the patient.

EXHIBIT 3
TNA'S SUGGESTED EDITORIAL CHANGES TO §217.20 THAT DO NOT HAVE SUBSTANTIVE IMPLICATIONS

NOTE: There are several editorial consistency issues on which decisions should be made. Once made, the Rule will need to be reviewed to be sure issue is addressed consistently throughout rule. These issues include:

3. Capitalization of "Safe Harbor" and "Safe Harbor Nursing Peer Review" TNA recommends that be capitalized.
4. Use of "Peer Review" or "Nursing Peer Review." TNA recommends "Nursing Peer Review."
5. Capitalization of initial word of lists in subdivisions and paragraphs.
6. Format of citations to NPA and NPR Law. If need to reference the Texas Occupation Code, TNA recommends format be "§301.001 of NPA (TOC ch. 301)." TNA is not sure that always need to reference TOC since both NPA and NPR Law are defined terms.
7. Use of periods and semi-colons – particularly in lists but also at other places such as subsection titles.
8. Consistent terminology for internal references to other parts of rule. For statutes, the Texas Legislative Council uses section, subsection, subdivision, paragraph and subparagraph but that may be helpful only to attorneys. Maybe could use Subdivision (__)(__)(__)
9. Adding the qualifier "under this section" when referencing to other subsections is unnecessary and affects readability. In legislative drafting, any reference to a subsection is consider to refer to a subsection within the same section.

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	***EXPLANATORY COMMENT***	**FINAL**
(a) Definitions. (1) (2) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses. (3) Conduct Subject to Reporting: Defined by §301.401 of the Nursing Practice Act as ~~means~~ conduct by a nurse that: (A) violates the Nursing Practice Act ~~(NPA) chapter 301~~ or a board rule and contributed to the death or serious injury of a patient; (B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse; (C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or	*TNA is recommending substantive changes to definition of "bad faith." See Exhibit 1C.*	(a) Definitions. (1) (2) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses. (3) Conduct Subject to Reporting: Defined by §301.401 of the Nursing Practice Act as conduct by a nurse that: (A) violates the Nursing Practice Act or a board rule and contributed to the death or serious injury of a patient; (B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse; (C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or (D) indicates that the

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. ~~(NPA §301.401(1))~~		nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.
(4) Duty to a patient: a nurse's duty to comply with the ~~conduct required by~~ standards of nursing practice (§217.11) ~~or~~ and not to engage in ~~prohibited under~~ unprofessional conduct (§217.12) including administrative decisions directly affecting a nurse's ability to comply with that duty.	*TNA is recommending substantive changes to definition of "good faith." See Exhibit 1C.*	(4) Duty to a patient: a nurse's duty to comply with the standards of nursing practice (§217.11) and not to engage in unprofessional conduct (§217.12) including administrative decisions directly affecting a nurse's ability to comply with that duty.
(5)		(5)
(6) Minor incident: Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16.		(6) Minor incident: Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16.
(7) Nurse Administrator: Chief Nursing Officer (CNO) or the CNO's designee.		(7) Nurse Administrator: Chief Nursing Officer (CNO) or the CNO's designee.
(8) Nursing Peer Review Law (NPR Łław): ~~Consists of chapter~~ Chapter 303 of the Texas Occupations Code (TOC) ~~and can only be changed by the Texas Legislature~~. Nurses involved in nursing peer review must comply with the NPR ~~statutes~~Law.	*"Change by the Texas Legislature" language moved to definition of TOC.*	(8) Nursing Peer Review Law (NPR Law): Chapter 303 of the Texas Occupations Code (TOC). Nurses involved in nursing peer review must comply with the NPR Law.
(9) Nursing Practice Act (NPA): ~~Includes chapter~~Chapter 301 of the Texas Occupations Code (TOC) ~~and can only be changed by the Texas Legislature.~~ Nurses must comply with the NPA.		(9) Nursing Practice Act (NPA): Chapter 301 of the Texas Occupations Code (TOC) Nurses must comply with the NPA.
(10) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety ~~that includes~~including:	*Phrase "that includes" could be read as stating that only the entities listed in (A), (B) or (C) qualify as patient safety committees.*	(10) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:
(A) the entity's medical staff composed of individuals licensed under		(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, TOC §151.001 et seq.);

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
Subtitle B (Medical Practice Act, TOC §151.001 et seq.);		
(B) a medical committee under subchapter D, chapter 161, Health & Safety Code (§§161.031 - 161.033); or	*Phrase "as appropriate" seems unnecessary and somewhat confusing.*	(B) a medical committee under subchapter D, chapter 161, Health & Safety Code (§§161.031 - 161.033); or
(C) a multi-disciplinary committee including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety~~, as appropriate~~.	*See comment for (a)(15)(C) below.*	(C) a multi-disciplinary committee including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety.
(11) Peer Review: Defined by §303.001(5) of NPR Law (TOC ch. 303)~~ in the NPR law, contained within Texas Occupations Code (TOC) §303.001(5), it is~~as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event including influence of systems on the event.	*Addition is intended to emphasize that role of NPR includes evaluation of system factors.* *TNA is recommending substantive changes to definition of "safe harbor." See Exhibit 1B* *TNA is recommending changes to definition of "safe harbor peer review" that are editorial with substantive implications. See Exhibit 2.*	(11) Peer Review: Defined by §303.001(5) of NPR Law (TOC ch. 303)as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event including influence of systems on the event.
(12)		(12)
(13)		(13)
(14) Texas Occupations Code (TOC): ~~One part of the Texas Statutes, or laws. The Nursing Practice Act (NPA) and Nursing Peer Review (NPR law) statutes are but a few of the chapters of Texas laws contained within the TOC~~One of the topical subdivisions or "codes" into which the Texas statutes or laws are organized. The Occupation Code contains the statutes governing occupations and professions including the health professions and includes both the NPA and NPR Law. The Occupations Code can be		(14) Texas Occupations Code (TOC): One of the topical subdivisions or "codes" into which the Texas statutes or laws are organized. The Occupation Code contains the statutes governing occupations and professions including the health professions and includes both the NPA and NPR Law. The Occupations Code can be changed only by the Texas Legislature.

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
changed only by the Texas Legislature. - (15) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity ~~for~~because the nurse: (A) ~~a request made by a nurse~~requested safe harbor nursing peer review under ~~Nursing Peer Review (TOC)~~ §303.005(c) of NPR Law (TOC ch. 303) ~~regarding invoking safe harbor protections, or~~ (B) refused under the ~~NPA (TOC)~~ §301.352 of NPA (TOC ch. 301) ~~regarding a nurse's refusal~~ to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the NPA or board rules; or (C) made a report ~~made by a nurse~~ under ~~NPA (TOC)~~ §301.4025 of the NPA (TOC ch. 301)(related to reporting patient safety concerns) and subsection (k) of this section, that may also be protected under other laws or regulations, concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.	*Grammatical changes to fit with stem whether stem is "prohibit retaliatory action ... for" or "prohibit retaliatory action ... because the nurse."* *The way proposed rule formats references to NPA or NPR Law seems to read awkwardly. If decision is to use different format, then that format will need to be used consistently throughout rule*	(15) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse: (A) requested safe harbor nursing peer review under §303.005(c) of NPR Law (TOC ch. 303), (B) refused under the §301.352 of NPA (TOC ch. 301) to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the NPA or board rules; or (C) made a report under §301.4025 of the NPA (TOC ch. 301)(related to reporting patient safety concerns) and subsection (k) of this section, that may also be protected under other laws or regulations, concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.
(b) Purpose. The purpose of this rule is to: (1) define the process for invoking safe harbor; (2) define minimum due process to which a nurse is entitled under safe harbor peer review~~, to~~; (3) provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans; ~~to~~ (4) assure that nurses have knowledge of the plan as well as their right to	*Setting out as a list may make easier to read* *Determining nurse's duty is primary role of Safe*	(b) Purpose. The purpose of this rule is to: (1) define the process for invoking safe harbor; (2) define minimum due process to which a nurse is entitled under safe harbor peer review; (3) provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans; (4) assure that nurses have knowledge of the plan as well as their right to

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
invoke Safe Harbor~~, and to~~ ; and (4) provide guidance to the peer review committee in ~~its fact finding process~~making its determination of the nurse's duty to the patient. ~~Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	*Harbor NPR and not fact finding per se.* *Deleted sentences don't seem to fit well in this subsection here and content is repeated several other places- (a)(12), (d)(1), (d)(2), (e)(1)(B). See Exhibit 1B relating to substantive changes to this subsection. .*	invoke Safe Harbor; and (5)provide guidance to the peer review committee in making its determination of the nurse's duty to the patient.
(c) Applicability of Safe Harbor Peer Review:	*TNA is recommending editorial changes to Subsection (c) that have substantive implications. See Exhibit 2.*	(c) Applicability of Safe Harbor Peer Review.
(d) Invoking Safe Harbor	*TNA is recommending substantive changes to Subsection (d). See Exhibit 1B.*	(d) Invoking Safe Harbor.
(e) Safe Harbor Protections.	*TNA is recommending substantive changes to Subsection (e). See Exhibit 1D*	(e) Safe Harbor Protections.
(f) Exclusions to Safe Harbor Protections.	*TNA is recommending substantive changes to Subsection (f). See Exhibit 1C and 1E*	(f) Exclusions to Safe Harbor Protections.
(g) Nurse's Decision to Accept or Refuse Assignment When Invoking Safe Harbor and While Awaiting Determination of Safe Harbor Peer Review Committee.	*TNA is recommending substantive changes to Subsection (g). See Exhibit 1A.*	(g) Nurse's Decision to Accept or Refuse Assignment When Invoking Safe Harbor and While Awaiting Determination of Safe Harbor Peer Review Committee.
(h) Minimum Due Process. (1) A person or entity required~~ to comply with Nursing Peer Review (TOC) §303.005(i)~~ by §303.0015 of the NPR Law (TOC ch. 303) to provide nursing peer review shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Nursing Peer Review) and the procedure for making a request. (2) In order to meet the minimum due process required by Nursing Peer Review Law (TOC) chapter 303, the nursing peer review	*Reference should be to §303.0015.* *Reorganized so (A)-(D) are set out as required components of minimum due process.*	(h) Minimum Due Process. (1) A person or entity required by §303.0015 of the NPR Law (TOC ch. 303) to provide nursing peer review shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Nursing Peer Review) and the procedure for making a request. (2) In order to meet the minimum due process required by Nursing Peer Review Law (TOC) chapter 303, the nursing peer review committee shall:

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
committee shall: - (A) comply with the membership and voting requirements as set forth in TOC §303.003~~(a) - (d)~~; (~~3~~B) ~~The peer review committee shall~~ exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse~~.~~ ; (~~4~~C) limit attendance ~~Attendance~~ at the safe harbor peer review hearing by a CNO, nurse ~~(~~administrator,~~)~~ or other ~~persons~~ individual with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, ~~is limited~~ to appearing before the safe harbor peer review committee to speak as a fact witness~~.~~ ; and (~~5~~D) permit the ~~The~~ nurse requesting safe harbor ~~shall be permitted~~ to: (~~A~~i) appear before the committee; (~~B~~ii) ask questions and respond to questions of the committee; and (~~C~~iii) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.	*Need only refer to 303.003 since it consists only of Subsecs. (a)-(d).*	(A) comply with the membership and voting requirements as set forth in TOC §303.003; (B) exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse; (C) limit attendance at the safe harbor peer review hearing by a CNO, nurse administrator, or other individual with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, to appearing before the safe harbor peer review committee to speak as a fact witness; and (D) permit the nurse requesting safe harbor to: (i) appear before the committee; (ii) ask questions and respond to questions of the committee; and (iii) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.
(i) Safe Harbor ~~Processes~~Timelines. ~~(1) The following timelines shall be followed:~~ (~~A~~1) T~~t~~he safe harbor peer review committee shall complete its review and notify the CNO ~~(~~ or nurse administrator~~)~~ within 14 calendar days of when the nurse requested Safe Harbor~~;~~. (~~B~~2) W~~w~~ithin 48 hours of receiving the committee's determination, the CNO ~~(~~or nurse administrator~~)~~ shall review these findings and	*Seems to make clearer if have a separate section for timelines.*	(i) Safe Harbor Timelines. (1) The safe harbor peer review committee shall complete its review and notify the CNO or nurse administrator within 14 calendar days of when the nurse requested Safe Harbor. (2) Within 48 hours of receiving the committee's determination, the CNO or nurse administrator shall review these findings and notify

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
notify the nurse requesting safe harbor ~~peer review~~ of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect. (3) The nurse's protection from disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination expire 48 hours after the nurse is advised of the peer review committee's determination. The expiration of this protection does not affect to the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor.	*Repeats language currently set out at (e)(2(C) but seems appropriate to repeat here so all timelines are together.*	the nurse requesting Safe Harbor of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect. (3) The nurse's protection from disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination expire 48 hours after the nurse is advised of the peer review committee's determination. The expiration of this protection does not affect to the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor.
~~(i)~~ (j) General Provisions (~~2~~1) The Chief Nursing Officer (CNO) of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the Nursing Practice Act (TOC ch. 301) and Nursing Peer Review Law (TOC ch 303). (~~3~~2) ~~Texas Occupations Code chapter 303 (Nursing Peer Review), requires that~~ Nursing ~~peer~~ Peer ~~review~~ Review must be conducted in good faith. A nurse who knowingly participates in peer review in bad faith is subject to disciplinary action by the Board under the Texas Occupations Code §301.452(b). (~~4~~3) The peer review committee and participants shall comply with the confidentiality requirement of Nursing Peer Review Law (TOC) §303.006 and §303.007 relating to confidentiality and limited disclosure of peer review information. (~~5~~4) If the CNO ~~(~~ or nurse administrator~~)~~ in good faith disagrees with the	*New subsection reflecting TNA's recommendation to divide Subsection (i) into two subsections.* *The NPR Law may only do this implicitly. It refers to "bad faith" by NPR committee only once and that is in §303.006(f)(2) addressing a committee member reporting to board independently of committee when believes determination made in bad faith.* *Needs to be consistent through out rule. "CNO or nurse administrator"' seems easiest to read.*	(j) General Provisions (1) The Chief Nursing Officer (CNO) of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the Nursing Practice Act (TOC ch. 301) and Nursing Peer Review Law (TOC ch 303). (2) Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in peer review in bad faith is subject to disciplinary action by the Board under the Texas Occupations Code §301.452(b). (3) The peer review committee and participants shall comply with the confidentiality requirement of Nursing Peer Review Law (TOC) §303.006 and §303.007 relating to confidentiality and limited disclosure of peer review information. (4) If the CNO or nurse administrator in good faith disagrees with the

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
decision of the peer review committee, the rationale for disagreeing with ~~a peer review~~ the committee's determination must be recorded and retained with the peer review records. (A) If the CNO ~~(~~or nurse administrator~~)~~ believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and §217.11(1)(K) of this title. (B) _____	*TNA is recommending changes to Paragraph (B) that are editorial with substantive implications. See Exhibit 2.*	decision of the peer review committee, the rationale for disagreeing with the committee's determination must be recorded and retained with the peer review records. (A) If the CNO or nurse administrator believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and §217.11(1)(K) of this title. (B) _____
(~~j~~ k) Use of Informal Work Group In Safe Harbor Nursing Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing peer review committee provided that the final determination of the nurse's duty complies with the time lines set out in this rule and there are written policies for the informal workgroup that require: (1) the nurse: (A) be informed how the informal workgroup will function and that the nurse does not waive any right to peer review by accepting or rejecting the use of an informal workgroup~~,~~; and (B) consent, in writing, to the use of an informal workgroup~~.~~; (2) the informal workgroup comply with the membership and voting requirements of ~~subsection~~ Subsection (h)~~ of this section.~~ ; (3) the nurse ~~to~~ be provided the opportunity to meet with the informal workgroup; (4) the nurse has the right to reject any decision of the informal workgroup and have the ~~safe harbor peer review~~entire committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the informal workgroup shall not participate in that determination; ~~and~~ ; (5) ratification by the safe harbor peer review committee chair person of any	*Renumbered to reflect dividing Subsection (i) into two subsections* *Seems more confusing than helpful.*	(k) Use of Informal Work Group In Safe Harbor Nursing Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing peer review committee provided that the final determination of the nurse's duty complies with the time lines set out in this rule and there are written policies for the informal workgroup that require: (1) the nurse: (A) be informed how the informal workgroup will function and that the nurse does not waive any right to peer review by accepting or rejecting the use of an informal workgroup; and (B) consent, in writing, to the use of an informal workgroup;~~.~~ (2) the informal workgroup comply with the membership and voting requirements of Subsection (h); (3) the nurse be provided the opportunity to meet with the informal workgroup; (4) the nurse has the right to reject any decision of the informal workgroup and have the entire committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the informal workgroup shall not participate in that determination; (5) ratification by the safe harbor peer review committee chair person of any

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full peer review committee to review the conduct in question~~.~~; and (6) the peer review chair person ~~must~~ communicate any decision of the informal work group to the CNO ~~/~~or nurse administrator.	*Need to be consistent throughout rule. "CNO or nurse administrator"' seems easiest to read.*	decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full peer review committee to review the conduct in question; and (6) the peer review chair person communicate any decision of the informal work group to the CNO or nurse administrator.
(~~k~~ l) Reporting Conduct of ~~other~~ Practitioners or Entities~~/~~; Whistleblower Protections. (1) This subsection does not expand the authority of any safe harbor peer review committee or the board to make determinations outside the practice of nursing. (2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to: (A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or (B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility. (3) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or	*Renumbered to reflect dividing Subsection (i) into two subsections*	(l) Reporting Conduct of Practitioners or Entities; Whistleblower Protections. (1) This subsection does not expand the authority of any safe harbor peer review committee or the board to make determinations outside the practice of nursing. (2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to: (A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or (B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility. (3) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

PROPOSED RULES WITH TNA'S SUGGESTED NONSUBSTANTIVE EDITORIAL CHANGES	*EXPLANATORY COMMENT*	FINAL
entity. (4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to NPA (TOC) §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.		(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to NPA (TOC) §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.

EXHIBITS 4A – 4C
TNA RECOMMENDED SUBSTANTIVE CHANGES TO RULE §217.19.INCIDENT-BASED NURSING PEER REVIEW

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EXHIBIT 4A **APPLICATION OF GOOD FAITH. BAD FAITH, MALICE STANDARD** **[Subsections (a), (j), (l) and (m) of Proposed Rule]**		
RECOMMENDED CHANGES WITH CHANGES SHOWN	***EXPLANATORY COMMENTS***	**FINAL WITH CHANGES NOT SHOWN**
(a) Definitions. (1) Bad Faith: Knowingly or recklessly taking~~Taking~~ action not supported by a reasonable factual or legal basis. The term includes ~~falsely portraying~~misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity~~ towards the nurse~~, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	*Changes incorporate a mental element into bad faith.* *Limiting to malice toward nurse seems too limiting since non-nurses are involved in peer review process. No harm is done by deleting.*	**(a) Definitions**. (1) Bad Faith: Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.
(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes ~~falsely portraying~~misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity~~ towards the nurse~~, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	*Changes incorporate a mental element into bad faith* *Limiting to malice toward nurse seems too limiting since non-nurses are involved in peer review process. No harm is done by deleting.* *Is a new definition. Content is from definition in §41.001, Civil Remedies & Procedure Code*	(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.
(__) Malice: Acting with a specific		(__) Malice: Acting with a specific

intent to cause substantial injury or harm to another.		intent to cause substantial injury or harm to another.
(j) Nurse's Duty to Report. (1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the board under NPA (TOC) §301.402 (mandatory report by a nurse) provided that the following conditions are met: (A) ____ *[NOTE: Paragraph (A) is not relevant to this issue.]* (B) The nurse has no reason to believe the incident-based peer review committee made ~~it's~~its determination in bad faith.		**(j) Nurse's Duty to Report.** (1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the board under NPA (TOC) §301.402 (mandatory report by a nurse) provided that the following conditions are met: (A) ____ *[NOTE: Paragraph (A) is not relevant to this issue.]* (B) The nurse has no reason to believe the incident-based peer review committee made its determination in bad faith.
(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made ~~in good faith~~without malice under this rule and NPA §301.402(f) (retaliation for a ~~good faith~~ report made without malice prohibited). A violation of this subsection or NPA §301.402(f) is subject to NPA §301.413 ~~(retaliatory action prohibited)~~ that provides a nurse retaliated against a right to file suit to recover damages. The nurse or individual may file a complaint with an appropriate licensing agency.	*'Without malice" is standard used in NPA §301.402. It is also consistent with Subparagraph (m)(2)(B)(ii) set out below.* *Sets out nature of remedy in more detail.*	(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made without malice under this rule and NPA §301.402(f) (retaliation for a report made without malice prohibited). A violation of this subsection or NPA §301.402(f) is subject to NPA §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual may file a complaint with an appropriate licensing agency.
(l) Integrity of Incident-Based Peer Review Process. (1) ~~NPA chapter 303, requires that incident-based peer review~~Incident Based Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the board ~~under the NPA §301.452(b).~~	*Chapter 303 is the NPR Law.* *The NPR Law may only do this implicitly. It refers to "bad faith" by NPR committee only once and that is in §303.006(f)(2) addressing a committee member reporting to board independently of committee when believes determination made in bad faith.* *Deletion of citation is editorial.*	**(l) Integrity of Incident-Based Peer Review Process.** (1) Incident-Based Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the board

(m) Reporting Conduct of ~~other~~ Practitioners or Entities/Whistleblower Protections. (2) (B) (ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to §301.413 ~~(retaliatory action prohibited)~~ that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual may file a complaint with the appropriate licensing agency.	*Sets out nature of remedy in more detail.*	**(m) Reporting Conduct of Practitioners or Entities/Whistleblower Protections.** (2) (B) (ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual may file a complaint with the appropriate licensing agency.

EXHIBIT 4B ADDRESSING NURSING WHOSE PRACTICE IS IMPAIRED [Subsections (f) and (g) of Proposed Rule]		
RECOMMENDED CHANGES WITH CHANGES SHOWN	***EXPLANATORY COMMENTS***	**FINAL WITH CHANGES NOT SHOWN**
(f) Exclusions to Minimum Due Process Requirements. The minimum due process requirements set out in ~~subsection~~ Subsection (d) ~~of this section~~ do not apply to:	*"... of this section" seems to make harder to read.*	**(f) Exclusions to Minimum Due Process Requirements**. The minimum due process requirements set out in Subsection (d) do not apply to:
(1) peer review conducted solely in compliance with NPA (TOC) §301.405(c) relating to ~~incident-based peer~~ review of external factors~~,~~ after a report of a nurse to the board has already occurred under NPA (TOC) §301.405(b) (relating to mandatory report by employer, facility or agency); or	*Editorial* *Editorial*	(1) peer review conducted solely in compliance with NPA (TOC) §301.405(c) relating to review of external factors after a report of a nurse to the board has already occurred under NPA (TOC) §301.405(b) (relating to mandatory report by employer, facility or agency); or
(2) reviews governed by Subsection (g) involving nurses whose practice is suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity. ~~when during the course of the incident-based peer review process, a practice violation is identified as a possible consequence of the nurse's practice being impaired as described under subsection (g) of this section; or~~ ~~(3) when a person required to report a nurse believes that a nurse's practice is impaired or suspected of being impaired has also resulted in a violation under NPA (TOC) §301.410(b), that requires a direct report to the board.~~	*Rewritten to try to simplify by simply stating that if Subsec. (g) (relating to impaired practice) applies then due process governed by that section*	(2) reviews governed by Subsection (g) involving nurses whose practice is suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity.
(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness. (1) ~~Instead of requesting review by a peer review committee,~~ When a nurse's ~~whose~~	*Subdivisions (1) and (2) have been combined by using a common stem.*	**(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness.** (1) When a nurse's practice is

practice is impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, ~~with no evidence of nursing practice violations,~~ peer review shall be suspended, and the nurse shall be reported to the board or a board-approved peer assistance program~~,~~ in accordance with NPA (TOC) §301.410~~(a)~~ (~~related~~ relating to reporting of impairment):~~, to either:~~ (A) if there is no reasonable factual basis for determining that a practice violation is involved, the nurse shall be reported to: (i) the board; or (~~B~~ ii) a board-approved peer assistance program which shall handle report in accordance with Rule 217.13~~.~~; or (~~2~~ B) if ~~If during the course of an incident-based peer review process,~~ there is a reasonable factual basis for a determination that a practice violation is involved, the nurse shall be reported to the board. ~~occurred due to a nurse's practice impairment or suspected practice impairment or lack of fitness due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity of a reported nurse, the incident-based peer review process shall be suspended, and the nurse reported to the board in accordance with NPA (TOC) §301.410(b) (related to required report to board when practice violations exist with suspected practice impairment/lack of fitness).~~	*Because of difficulty of determining if practice violation may be involved, Rule 217.13 (with proposed change published in Tex Reg.) requires all third-party reports to TPAPN (even if no practice violation) be reviewed with BON and so may want to refer to Rule 217.13.*	impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, peer review shall be suspended, and the nurse shall be reported to the board or a board-approved peer assistance program in accordance with NPA (TOC) §301.410 (relating to reporting of impairment): (A) if there is no reasonable factual basis for determining that a practice violation is involved, the nurse shall be reported to: (i) the board; or (ii) a board-approved peer assistance program which shall handle report in accordance with Rule 217.13. (B) if there is a reasonable factual basis for a determination that a practice violation is involved, the nurse shall be reported to the board; or
(~~A~~ 2) Following suspension of peer review of the nurse, the ~~incident-based peer review~~ committee shall proceed to evaluate external factors to determine if: (i) any factors beyond the nurse's control contributed to a practice	*Content made a separate Subsec. (2) so that applicable to entire Subsec. (g) and not just when a practice violation is involved. This makes review of external factors apply even if no practice violation involved. If want to limit only to situations in which practice violations are involved\, then would begin (2) with "Following suspension of peer review of the*	(2) Following suspension of peer review of the nurse, the committee shall proceed to evaluate external factors to determine if: (i) any factors beyond the nurse's control contributed to a practice violation, and

violation, and (ii) ~~if~~ any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct, and (~~iii~~ 3) If the committee determines under Subdivision (2) that external factors do exist for either clause (i) or (ii) of this subparagraph, the committee shall report ~~it's~~ its findings to a patient safety committee or to the CNO if there is no patient safety committee.	*nurse under Paragraph (1)(B)*	(ii) any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct, and (3) If the committee determines under Subdivision (2) that external factors do exist, the committee shall report its findings to a patient safety committee or to the CNO if there is no patient safety committee.
(~~B~~ 4) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under Subsection (d) ~~TOC §303.002(e) relating to peer review~~ by suspending the committee's review and reporting the nurse to the Board in accordance with ~~paragraph~~ Subdivision (2) ~~of this subsection~~.	*Editorial. Easier for nurse to look at (d) and (d) refers to 303.002(e).* *Editorial. Need to decide on consistent way to refer to other sections of rule.*	(4) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under Subsection (d) by suspending the committee's review and reporting the nurse to the Board in accordance with Subdivision (2).
(~~3~~ 5) ~~Neither paragraph (1) or (2) of this subsection above~~ Subdivision (1) does not preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.	*Conforming change to reflect that (1) and (2) have been combined.*	(5) Subdivision (1)does not preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.

EXHIBIT 4C CONFIDENTIALITY [Subsection (j) of Proposed Rule]		
RECOMMENDED CHANGES WITH CHANGES SHOWN	***EXPLANATORY COMMENTS***	**FINAL WITH CHANGES NOT SHOWN**
(j) Nurse's Duty to Report. (1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the board under NPA (TOC) §301.402 (mandatory report by a nurse) provided that the following conditions are met: (A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings subject to the nurse's agreeing in writing not to disclose that information except as permitted by §303.006 of the NPR Law (TOC ch. 303) ~~and shall be subject to Nursing Peer Review (TOC) §303.006 (confidentiality of peer review proceedings);~~ and (B) ___ *[NOTE: Remainder of Subsec. (j) is not relevant to confidentiality issue.]*	*Strengthens requirement by requiring nurse agree in writing not to disclose information.*	**(j) Nurse's Duty to Report.** (1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the board under NPA (TOC) §301.402 (mandatory report by a nurse) provided that the following conditions are met: (A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings subject to the nurse's agreeing in writing not to disclose that information except as permitted by §303.006 of the NPR Law (TOC ch. 303) and (B) ___ *[NOTE: Remainder of Subsec. (j) is not relevant to confidentiality issue.]*

EXHIBIT 5
SUGGESTED EDITORIAL CHANGES TO RULE §217.19. INCIDENT-BASED NURSING PEER REVIEW

NOTE: There are several editorial consistency issues on which decisions should be made. Once made, the rule will need to be reviewed to be sure issue is addressed consistently throughout rule. These issues include:

10. Capitalization of "Incident Based Nursing Peer Review" TNA recommends that be capitalized.
11. Use of "Peer Review" or "Nursing Peer Review." TNA recommends "Nursing Peer Review."
12. Capitalization of initial word of lists in subdivisions and paragraphs.
13. Use of periods and semi-colons – particularly in lists but also at other places such as subsection titles.
14. Format of citations to NPA and NPR Law. If need to reference the Texas Occupation Code, TNA recommends format be "§301.001 of NPA (TOC ch. 301)." TNA is not sure that always need to reference TOC since both NPA and NPR Law are defined terms.
15. Consistent terminology for internal references to other parts of rule. For statutes, the Texas Legislative Council uses section, subsection, subdivision, paragraph and subparagraph but that may be helpful only to attorneys. Maybe could use Subdivision (__)(__)(__).
16. Adding the qualifier "under this section" when referencing to other subsections is unnecessary and affects readability. In legislative drafting, any reference to a subsection is consider to refer to a subsection within the same section.

TNA SUGGESTED EDITORIAL CHANGES WITH CHANGES SHOWN	*COMMENTS*	FINAL WITH CHANGES NOT SHOWN
(a) Definitions. (1) Bad Faith: (2) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses. (3) Conduct Subject to Reporting: Defined by §301.401 of the Nursing Practice Act as ~~is~~ conduct by a nurse that: (A) violates ~~chapter 301 of~~ the Nursing Practice Act ~~(NPA),~~ or a board rule and contributed to the death or serious injury of a patient; (B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse; (C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or	*TNA is recommending substantive changes to definition of "bad faith." See Exhibit 4A.*	**(a) Definitions.** (1) Bad Faith: (2) Chief Nursing Officer (CNO): The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses. (3) Conduct Subject to Reporting: Defined by §301.401 of the Nursing Practice Act as conduct by a nurse that: (A) violates the Nursing Practice Act or a board rule and contributed to the death or serious injury of a patient; (B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse; (C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or (D) indicates that the nurse

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. ~~(§301.401(1));~~		lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.
(4) Duty to a Patient: A nurse's duty to comply with the ~~Conduct required by~~ standards of nursing practice (§217.11) ~~or~~ and not to engage in ~~prohibited by~~ unprofessional conduct (§217.12), including administrative decisions directly affecting a nurse's ability to comply with that duty~~, as adopted by the board~~.	*TNA is recommending substantive changes to definition of "good faith." See Exhibit 4A*	(4) Duty to a Patient: A nurse's duty to comply with the standards of nursing practice (§217.11) and not to engage in unprofessional conduct (§217.12), including administrative decisions directly affecting a nurse's ability to comply with that duty.
(5) Good Faith:		(5) Good Faith:
(6) Incident-Based Peer Review: Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to 5 minor incidents by the same nurse within a year's period of time) should be reported to the board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable. ~~(§303.001(5))~~	*Adding citation doesn't seem to be helpful unless tracking language of statute and then may be better to state "As defined by ..."*	(6) Incident-Based Peer Review: Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to 5 minor incidents by the same nurse within a year's period of time) should be reported to the board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.
(7) Minor incident: ~~conduct~~ Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16.	*Moved to definition of Texas Occupations Code*	(7) Minor incident: Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16.
(8) Nursing Peer Review (NPR): ~~Consists of chapter~~Chapter 303 of the Texas Occupations Code~~ (TOC) and can only be changed by the Texas Legislature~~. Nurses involved in nursing peer review must comply with the NPR ~~statutes~~Law.	*Moved to definition of Texas Occupations Code*	(8) Nursing Peer Review (NPR): Chapter 303 of the Texas Occupations Code. Nurses involved in nursing peer review must comply with the NPR Law.
		(9) Nursing Practice Act (NPA): Chapter 301 of the Texas Occupations Code.

(9) Nursing Practice Act (NPA): ~~Includes chapters 301, 304, and 305~~Chapter 301 of the Texas Occupations Code~~ (TOC) and can only be changed by the Texas Legislature~~. Nurses must comply with the NPA.		Nurses must comply with the NPA.
(10) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety ~~that includes~~including:	*Phrase "that includes" could be misread as stating that only the entities listed in (A), (B) or (C) qualify as patient safety committees.*	(10) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:
(A) the entity's medical staff composed of individuals licensed under Subtitle B ~~(~~Medical Practice Act, Occupations Code (§§151.001 et seq.);		(A) the entity's medical staff composed of individuals licensed under Subtitle B Medical Practice Act, Occupations Code (§§151.001 et seq.);
(B) a medical committee under Subchapter D, Chapter 161, Health & Safety Code (§§161.031 - 161.033); or		(B) a medical committee under Subchapter D, Chapter 161, Health & Safety Code (§§161.031 - 161.033); or
(C) a multi-disciplinary committee, including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety, ~~may apply as appropriate.~~	*Phrase "as appropriate" seems unnecessary and somewhat confusing.* *See comment for (a)(13) below.*	(C) a multi-disciplinary committee, including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety,
(11) Peer Review: Defined by §303.001(5) of NPR Law (TOC ch. 303) ~~in Nursing Peer Review Law (NPR law), contained within the Texas Occupations Code (TOC) §303.001(5), it is~~ as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event including influence of systems on the event.	*Addition is intended to emphasize that role of NPR includes evaluation of system factors.*	(11) Peer Review: Defined by §303.001(5) of NPR Law (TOC ch. 303) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event including influence of systems on the event.
(12) Texas Occupations Code (TOC): One of the topical subdivisions or "codes" into which the Texas statutes are organized. The Occupation Code contains the statutes governing occupations and professions including the health professions and includes both the NPA and NPR Law. The Occupations Code can be changed only		(12) Texas Occupations Code (TOC): One of the topical subdivisions or "codes" into which the Texas statutes are organized. The Occupation Code contains the statutes governing occupations and professions including the health professions and includes both the NPA and NPR Law. The Occupations Code can be changed only by the Texas Legislature.

by the Texas Legislature. ~~One part of the Texas Statutes, or laws. The Nursing Practice Act (NPA) and Nursing Peer Review (NPR) statutes are but a few of the chapters of Texas laws contained within the TOC~~. (13) Whistleblower Protections: ~~p~~Protections available to a nurse that prohibit retaliatory action by an employer or other entity ~~for~~because the nurse: (A) ~~a request made by a nurse~~made a good faith request for safe harbor peer review under ~~TOC~~ §303.005(c) of the NPR Law (TOC ch. 303);~~related to invoking safe harbor protections, or~~ (B) ~~a nurse's refusal~~refused under ~~TOC~~ §301.352 of the NPA (TOC Ch. 303) to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the Nursing Practice Act or board rules; or (C) ~~a report made by a nurse~~made a report under ~~TOC~~ §301.4025 of the NPA (TOC ch. 301) (report of unsafe practices of non-nurse entities),~~ and~~ subsection (i)(2) of this section, or~~that may also be protected under other~~another law~~s~~ or regulation~~s, concerning~~ that authorizes reporting of unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action affects a report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.	*Grammatical changes to fit with stem whether stem is "prohibit retaliatory action ... for" or "prohibit retaliatory action ... because the nurse."* *The way proposed rule formats references to NPA or NPR Law seems to read awkwardly. If decision is to use different format, then that format will need to be used consistently throughout rule.* *Making a separate paragraph and Indenting this sentence makes it part of entire definition and not just part (C).*	(13) Whistleblower Protections: Protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse: (A) made a good faith request for safe harbor peer review under §303.005(c) of the NPR Law (TOC ch. 303); (B) refused under §301.352 of the NPA (TOC Ch. 303) to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the Nursing Practice Act or board rules; or (C) made a report under §301.4025 of the NPA (TOC ch. 301) (report of unsafe practices of non-nurse entities), subsection (i)(2) of this section, or under another law or regulation that authorizes reporting of unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action affects a report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.
(b) Purpose. The purpose of this rule is to: (1) define minimum due process to which a nurse is entitled under incident-based peer review,~~ to~~ (2) provide guidance to facilities, agencies, schools, or ~~anyone~~ other persons or entities who utilizes the services of nurses in the development and application of incident-based peer	*Setting out as a list makes easier to read*	**(b) Purpose.** The purpose of this rule is to: (1) define minimum due process to which a nurse is entitled under incident-based peer review; (2) to provide guidance to facilities, agencies, schools, or other persons or entities who utilizes the services of nurses in the development and application of incident-based peer review plans;

review plans~~, to~~ (3) assure that nurses have knowledge of the plan~~, and to~~ ;and (4) provide guidance to the incident-based peer review committee in its fact finding process.		(3) to assure that nurses have knowledge of the plan; and (4) to provide guidance to the incident-based peer review committee in its fact finding process.
(c) Applicability of Incident-Based Peer Review. ~~Nursing Peer Review (TOC) §~~Section 303.0015 of the NPR Law (TOC ch. 303) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of a RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of NPA §§301.402(e) (relating to alternate reporting by nurses to peer review), 301.403 (relating to peer review committee reporting), 301.405(c) (relating to peer review of external factors as part of employer reporting), and 301.407(b) (relating to alternate reporting by state agencies to peer review).		**(c) Applicability of Incident-Based Peer Review**. Section 303.0015 of the NPR Law (TOC ch. 303) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of a RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of NPA §§301.402(e) (relating to alternate reporting by nurses to peer review), 301.403 (relating to peer review committee reporting), 301.405(c) (relating to peer review of external factors as part of employer reporting), and 301.407(b) (relating to alternate reporting by state agencies to peer review).
(d) Minimum Due Process. (1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under Nursing Peer Review (TOC) §303.002(e).~~,~~ ~~any~~ Any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if ~~they~~the person or entity do not utilize the number of nurses described by ~~subsection~~ Subsection (c)~~ of this section~~. (2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address: (A) the level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by ~~subsection~~ Subsection (d)(3)(F)~~ of this section~~; (B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by Nursing Peer Review Law (TOC) §303.006, ~~and~~		**(d) Minimum Due Process.** (1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under Nursing Peer Review (TOC) §303.002(e). Any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if the person or entity do not utilize the number of nurses described by Subsection (c). (2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address: (A) the level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by Subsection (d)(3)(F); (B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by Nursing Peer Review Law (TOC) §303.006, 303.007, 303.0075 and Subsection (h) of this rule;

§303.007, 303.0075 and Subsection (h) of this rule; (C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the NPA (TOC) §301.410, and subsection Subsection (g) of this section; (D) reporting of nurses to the board by incident-based peer review committee in accordance with the NPA (TOC) §301.403, and subsection Subsection (i) of this section; and (E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed to in writing by the nurse being reviewed. (3) In order to meet the minimum due process required by Nursing Peer Review Law (TOC) chapter 303, the nursing peer review committee must: (A) comply with the membership and voting requirements as set forth in Nursing Peer Review (TOC) §303.003(a) - (d); (B) exclude from the committee, including attendance at the incident-based peer review hearing, any person or persons with administrative authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person, who is administratively responsible over the nurse, being incident-based peer reviewed from appearing before the incident-based peer review committee to speak as a fact witness; (C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that: (i) the nurse's practice is being evaluated; (ii) that the	*§303.003 consists only of (a)-(d) so can just reference 303.003.*	(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the NPA (TOC) §301.410, and Subsection (g); (D) reporting of nurses to the board by incident-based peer review committee in accordance with the NPA (TOC) §301.403, and Subsection (i); and (E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed to in writing by the nurse being reviewed. (3) In order to meet the minimum due process required by Nursing Peer Review Law (TOC) chapter 303, the nursing peer review committee must: (A) comply with the membership and voting requirements as set forth in Nursing Peer Review (TOC) §303.003; (B) exclude from the committee, including attendance at the peer review hearing, any person or persons with administrative authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person, who is administratively responsible over the nurse, being reviewed from appearing before the committee to speak as a fact witness; (C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that: (i) the nurse's practice is being evaluated; (ii) the incident-

incident-based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless: (I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee, or is (II) otherwise agreed upon by the nurse and incident-based peer review committee. (iii) includes the information required by Paragraph (D). ~~Said notice must include a written copy of the incident-based peer review plan, policies and procedures.~~ (D) include in the notice required by Paragraph (C):~~Include in the written notice:~~ (i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality, but the nurse shall be provided the name of the patient/client; (ii) the name, address, telephone number of contact person to receive the nurse's response; and (iii) a copy of this rule (§217.19 of this title) and a copy of the facility's incident-based peer review plan, policies and procedures. (E) provide the nurse the opportunity to review, in person or by attorney, the documents concerning the event under review, at least 15 calendar days prior to appearing before the committee; (F) provide the nurse the opportunity to:	*It would be possible to combine this (iii) and Paragraph (D) below. If so. (iii) would read:* *"(iii) includes the following information:* *(I) [(D)(i)]* *(II) [(D)(ii)]* *(III) [(D(iii)]"* *and current Paragraph (D) would be deleted and remaining subdivisions renumbered.*	based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless: (I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee, or is (II) otherwise agreed upon by the nurse and incident-based peer review committee. (iii) includes the information required by Paragraph (D). (D) include in the notice required by Paragraph (C): (i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality, but the nurse shall be provided the name of the patient/client; (ii) the name, address, telephone number of contact person to receive the nurse's response; and (iii) a copy of this rule (§217.19 of this title) and a copy of the facility's incident-based peer review plan, policies and procedures. (E) provide the nurse the opportunity to review, in person or by attorney, the documents concerning the event under review, at least 15 calendar days prior to appearing before the committee; (F) provide the nurse the opportunity to: (i) submit a written

(i) submit a written statement regarding the event under review; (ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented; (iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding; (iv) make an opening statement to the committee; (v) ask questions of the committee and respond to questions of the committee; and (vi) make a closing statement to the committee after all evidence is presented; (G) ~~conclude~~ complete its review no more than fourteen (14) calendar days ~~from~~ after the incident-based peer review hearing, or in compliance with subsection (d)(3)(C)(ii) of this section relating to consultation with a patient safety committee; (H) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility of the findings of the committee within ten (10) calendar days of when the committee's review has been completed; and (I) permit the nurse to file a written rebuttal statement within ten (10) calendar days of the notice of the committee's findings and make the statement a permanent part of the incident-based peer review record to be included whenever the committee's findings are disclosed; (~~J~~ 4) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed. (~~4~~ 5) Nurse's Right To Representation (A) A nurse shall have a	*Terminology "complete" is used in (H)* *Seems to be more appropriately numbered as Subdivision (4) of Subsection (d) than as Paragraph (J) of Subdiv. (3)* *Renumbered because added a Subdiv. (4)* *Use of "section" may be wrong terminology. Texas Legislative Council Drafting Manual using following breakdown for sec., subsec., etc:* *Section.* *(a) Subsection* *(1) Subdivision* *(A) Paragraph* *(i) Subparagraph* *(a) Sub-subparagraph* *Texas Register may have its own terminology. Whatever terminology is used, should be consistent throughout this rule and with other BON rules.*	statement regarding the event under review; (ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented; (iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding; (iv) make an opening statement to the committee; (v) ask questions of the committee and respond to questions of the committee; and (vi) make a closing statement to the committee after all evidence is presented; (G) complete its review no more than fourteen (14) calendar days after the incident-based peer review hearing, or in compliance with subsection (d)(3)(C)(ii) of this section relating to consultation with a patient safety committee; (H) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility of the findings of the committee within ten (10) calendar days of when the committee's review has been completed; and (I) permit the nurse to file a written rebuttal statement within ten (10) calendar days of the notice of the committee's findings and make the statement a permanent part of the incident-based peer review record to be included whenever the committee's findings are disclosed; (4) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed. (5) Nurse's Right To Representation (A) A nurse shall have a right of representation as set out in this Subdivision

right of representation as set out in this ~~section~~Subdivision (4). ~~The~~ These rights ~~set out in this section~~ are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required. (B) The nurse has the right to be accompanied to the hearing by a nurse peer or an attorney. Representatives attending the incident-based peer review hearing must comply with the facility's incident-based peer review policies and procedures regarding participation beyond conferring with the nurse. (C) If either the facility or nurse will have an attorney or representative present at the incident-based peer review hearing in any capacity, the facility or nurse must notify the other at least seven (7) calendar days before the hearing that they will have an attorney or representative attending the hearing and in what capacity. (D) Notwithstanding any other provisions of these rules, if an attorney representing the facility or incident-based peer review committee is present at the incident-based peer review hearing in any capacity, including serving as a member of the incident-based peer review committee, the nurse is entitled to "parity of participation of counsel." "Parity of participation of counsel" means that the nurse's attorney is able to participate to the same extent and level as the facility's attorney; e.g., if the facility's attorney can question witnesses, the nurse's attorney must have the same right. (~~5~~ 6) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under subsection (d)(3)(~~H~~C) of this section. ~~Nursing Peer Review (TOC) §303.002(d) prohibits nullifying by contract any right a nurse has~~	*Renumbered because added a Subdiv. (4)* *(H) appears to be incorrect reference.* *Content of sentence moved to a new Subdiv. (7) since seems more appropriate to make a separate subdivision applicable to entire Subsec. (d)* *Moved form Subdiv (6)*	(5). These rights are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required. (B) The nurse has the right to be accompanied to the hearing by a nurse peer or an attorney. Representatives attending the incident-based peer review hearing must comply with the facility's incident-based peer review policies and procedures regarding participation beyond conferring with the nurse. (C) If either the facility or nurse will have an attorney or representative present at the incident-based peer review hearing in any capacity, the facility or nurse must notify the other at least seven (7) calendar days before the hearing that they will have an attorney or representative attending the hearing and in what capacity. (D) Notwithstanding any other provisions of these rules, if an attorney representing the facility or incident-based peer review committee is present at the incident-based peer review hearing in any capacity, including serving as a member of the incident-based peer review committee, the nurse is entitled to "parity of participation of counsel." "Parity of participation of counsel" means that the nurse's attorney is able to participate to the same extent and level as the facility's attorney; e.g., if the facility's attorney can question witnesses, the nurse's attorney must have the same right. (6) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under subsection (d)(3)(C) of this section. If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 and Ssubsection (d)

~~under the incident-based peer review process.~~ If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 and ~~subsection~~ Subsection (d)~~ of this section~~. (7) As provided by §303.002(d) of the NPR Law (TOC ch. 303) a right a nurse has under this Subsection (d) cannot be nullified by contract.		(7) As provided by §303.002(d) of the NPR Law (TOC ch. 303) a right a nurse has under this Subsection (d) cannot be nullified by contract.
(e) Use of Informal Work Group In Incident Based Peer Review. ~~(1)~~ A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the informal workgroup that require: (~~A~~1) the nurse to be informed of how the informal workgroup will function, and to consent, in writing, to the use of an informal workgroup. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal workgroup; (~~B~~2) if the informal workgroup ~~believes that a practice violation has occurred and~~ suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity, the committee chair must be notified to determine if peer review should be terminated and the nurse reported to the board or a board-approved peer assistance program as required by Subsec. (g); (~~C~~3) the informal workgroup to comply with the membership and voting requirements of ~~subsection~~ Subsections (d)(3)(A) and (B) of~~ this section~~; (~~D~~4) the nurse be provided the opportunity to meet with the informal workgroup; (~~E~~5) the nurse to have the right to reject any decision of the informal workgroup and to then have his/her conduct reviewed by the incident-based peer review committee, in which event members of the informal workgroup shall not	*There is no (2) so (1) needs to be the stem and (A)-(G) renumbered as (1)-(7)* *Makes consistent with Subsec. (g)*	**(e) Use of Informal Work Group In Incident Based Peer Review**. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the informal workgroup that require: (1) the nurse to be informed of how the informal workgroup will function, and to consent, in writing, to the use of an informal workgroup. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal workgroup; (2) if the informal workgroup suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity, the committee chair must be notified to determine if peer review should be terminated and the nurse reported to the board or a board-approved peer assistance program as required by Subsec. (g); (3) the informal workgroup to comply with the membership and voting requirements of Subsections (d)(3)(A) and (B); (4) the nurse be provided the opportunity to meet with the informal workgroup; (5) the nurse to have the right to reject any decision of the informal workgroup and to then have his/her conduct reviewed by the incident-based peer review committee, in which event members of the informal workgroup shall not participate in that determination; and

participate in that determination; and (~~F~~6) ratification by the incident-based peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup to remediate a nurse for one or more minor incidents, the chair person shall convene the full peer review committee to review the conduct in question. (~~G~~7) the peer review chair person must communicate any decision of the informal work group to the CNO.		(6) ratification by the incident-based peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup to remediate a nurse for one or more minor incidents, the chair person shall convene the full peer review committee to review the conduct in question. (7) the peer review chair person must communicate any decision of the informal work group to the CNO.
(f) Exclusions to Minimum Due Process Requirements.	*TNA is making substantive comments on this Subsection. See Exhibit 1*	(f) Exclusions to Minimum Due Process Requirements.
(g) Incident-Based Peer Review of a Nurse's Impaired Practice/Lack of Fitness.	*TNA is making substantive comments on this Subsection. See Exhibit 1*	(g) Incident-Based Peer Review of a Nurse's Impaired Practice/Lack of Fitness.
(h) Confidentiality~~ of Proceedings~~. (1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and the information not disclosed except as provided by Nursing Peer Review Law(TOC) §§303.006, 303.007, and §303.0075. Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse. (2)~~ Sharing of Information~~: In accordance with Nursing Peer Review Law (TOC) §303.0075, a nursing incident-based peer review committee and any patient safety committee established by ~~or contracted with~~ the same entity, may share information. (A) A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee. (~~A~~B) The privileges under	*Don't use headings for other subdivisions.* *§303.0075 just uses established.* *Making second sentence a Paragraph (A) seems better way to organize..*	**(h) Confidentiality**. (1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and the information not disclosed except as provided by Nursing Peer Review Law (TOC) §§303.006, 303.007, and §303.0075. Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse. (2) In accordance with Nursing Peer Review Law (TOC) §303.0075, a nursing incident-based peer review committee and any patient safety committee established by the same entity, may share information. (A) A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee. (B) The privileges under

this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee. (~~B~~C) This section does not affect the application of Nursing Peer Review Law (TOC) §303.007 (relating to disclosures by peer review committee) to a nursing peer review committee. (~~C~~D) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.	*Subdiv. (3) may need wordsmithing to make clearer.*	this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee. (C) This section does not affect the application of Nursing Peer Review Law (TOC) §303.007 (relating to disclosures by peer review committee) to a nursing peer review committee. (D) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.
(3) A CNO shall assure that policies are in place relating to sharing of information and documents ~~with the~~ between an ~~i~~Incident-~~b~~Based Nursing ~~p~~Peer ~~r~~Review committee and a patient safety committee(s) that at a minimum, address: (A) separation of confidential Incident-Based Nursing Peer Review information from the nurse's human resource file; (~~A~~ B) methods in which shared ~~committee~~ communications and documents are ~~labelled~~ labeled and maintained as to which committee originated the documents or communications; ~~(B) separation of confidential information under incident-based peer review from the nurse's human resource file;~~ (C) the confidential and separate nature of incident-based peer review and patient safety committees proceedings ~~as well as~~including shared information and documents ~~that are shared with incident-based peer review,~~ ; and (D) the treatment of nurses who violate the ~~that violations of said~~ policies ~~are subject to~~ including when a violation may result in a nurse being reported to the board or a nursing peer review,	*Subdivisions (A) and (B) are switched to put (A), (B) and (C) in more logical order.* *(C) is difficult to read* *Reads better if make a new Paragraph (D)*	(3) A CNO shall assure that policies are in place relating to sharing of information and documents between an Incident- Based Nursing Peer Review Committee and a patient safety committee(s) that at a minimum, address: (A) separation of confidential Incident-Based Nursing Peer Review information from the nurse's human resource file; (B) methods in which shared communications and documents are labeled and maintained as to which committee originated the documents or communications; (C) the confidential and separate nature of incident-based peer review and patient safety committees proceedings including shared information and documents; and (D) the treatment of nurses who violate the policies including when a violation may result in a nurse being reported to the board or nursing peer review,
(i) Committee Responsibility to Evaluate and Report. (1) In evaluating a nurse's conduct, the incident-based peer review committee shall		**(i) Committee Responsibility to Evaluate and Report.** (1) In evaluating a nurse's conduct, the incident-based peer review committee shall

review the evidence to determine the extent to which any deficiency in care by the nurse was the result of deficiencies in the nurse's judgment, knowledge, training, or skill rather than other factors beyond the nurse's control. A determination that a deficiency in care is attributable to a nurse must be based on the extent to which the nurse's conduct was the result of a deficiency in the nurse's judgment, knowledge, training, or skill.		review the evidence to determine the extent to which any deficiency in care by the nurse was the result of deficiencies in the nurse's judgment, knowledge, training, or skill rather than other factors beyond the nurse's control. A determination that a deficiency in care is attributable to a nurse must be based on the extent to which the nurse's conduct was the result of a deficiency in the nurse's judgment, knowledge, training, or skill.
(2) ~~A~~ An incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under §217.16, Minor Incidents, of this title. In accordance with ~~this~~ that rule, the ~~incident-based peer review~~ committee may determine that the nurse: (A) can be remediated to correct the deficiencies identified in the nurse's judgment, knowledge, training, or skill, or (B) should be reported to the board for either a pattern of practice that fails to meet minimum standards, or for one or more events that the incident-based peer review committee determines cannot be categorized as a minor incident(s).		(2) An incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under §217.16, Minor Incidents, of this title. In accordance with that rule, the committee may determine that the nurse: (A) can be remediated to correct the deficiencies identified in the nurse's judgment, knowledge, training, or skill, or (B) should be reported to the board for either a pattern of practice that fails to meet minimum standards, or for one or more events that the incident-based peer review committee determines cannot be categorized as a minor incident(s).
(3) ~~Report Not Required:~~ A ~~nursing~~ incident-based nursing peer review committee is not required to submit a report to the board if: (A) the committee determines that the reported conduct was a minor incident ~~that is~~ not required to be reported in accordance with provisions of §217.16, Minor Incidents, of this title; or (B) the nurse has already been reported to the board under NPA (TOC) §301.405(b) (employer reporting requirements).	*Headings are not used for other subdivisions.*	(3) A incident-based nursing peer review committee is not required to submit a report to the board if: (A) the committee determines that the reported conduct was a minor incident not required to be reported in accordance with provisions of §217.16, Minor Incidents, of this title; or (B) the nurse has already been reported to the board under NPA (TOC) §301.405(b) (employer reporting requirements).
(4) If ~~a incident-based peer review~~ the committee determines it is required to report a nurse ~~finds that a nurse has engaged in conduct subject to reporting~~ to the board, the committee shall submit to the board a written, signed report	*"Conduct subject to reporting" may not be actually reportable, e.g,, nurse can be remediated.*	(4) If the committee determines it is required to report a nurse to the board, the committee shall submit to the board a written, signed report that includes:

that includes: (A) the identity of the nurse; (B) a description of the conduct subject to reporting; (C) a description of any corrective action taken against the nurse; (D) a recommendation as to whether the board should take formal disciplinary action against the nurse, and the basis for the recommendation; (E) the extent to which any deficiency in care provided by the reported nurse was the result of a factor beyond the nurse's control~~,~~; and (F) any additional information the board requires. (5) If an incident-based peer review committee determines that a deficiency in care by the nurse was the result of a factor(s) beyond the nurse's control, in compliance with TOC §303.011(b) (related to required peer review committee report when external factors contributed to a nurse's deficiency in care), the committee must submit a report to the applicable patient safety committee, or to the CNO if there is no patient safety committee. A patient safety committee must report its findings back to the incident-based peer review committee. (6) An incident-based peer review committee is not required to withhold ~~it's~~ its determination of the nurse being incident-based peer reviewed, pending feedback from a patient safety committee, unless the committee believes that a determination from a patient safety committee is necessary in order for the incident-based peer review committee to determine if the nurse's conduct is reportable. (A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a ~~nurse's error~~deficiency in care, in addition to reporting to a patient safety committee, the incident-based peer	*"Deficiency in care" is terminology used in the NPA and the deficiency may not necessarily relate to an error by the nurse.*	(A) the identity of the nurse; (B) a description of the conduct subject to reporting; (C) a description of any corrective action taken against the nurse; (D) a recommendation as to whether the board should take formal disciplinary action against the nurse, and the basis for the recommendation; (E) the extent to which any deficiency in care provided by the reported nurse was the result of a factor beyond the nurse's control; and (F) any additional information the board requires. (5) If an incident-based peer review committee determines that a deficiency in care by the nurse was the result of a factor(s) beyond the nurse's control, in compliance with TOC §303.011(b) (related to required peer review committee report when external factors contributed to a nurse's deficiency in care), the committee must submit a report to the applicable patient safety committee, or to the CNO if there is no patient safety committee. A patient safety committee must report its findings back to the incident-based peer review committee. (6) An incident-based peer review committee is not required to withhold its determination of the nurse being incident-based peer reviewed, pending feedback from a patient safety committee, unless the committee believes that a determination from a patient safety committee is necessary in order for the incident-based peer review committee to determine if the nurse's conduct is reportable. (A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a deficiency in care, in

review committee may also make recommendations for the nurse, up to and including reporting to the board. (B) ~~an~~ An incident-based peer review committee may extend the time line for completing the incident-based peer review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete ~~the incident-based peer~~ its review of the nurse within this 90-day time frame. (7) ~~A~~ An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.		addition to reporting to a patient safety committee, the incident-based peer review committee may also make recommendations for the nurse, up to and including reporting to the board. (B) An incident-based peer review committee may extend the time line for completing the incident-based peer review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete its review of the nurse within this 90-day time frame. (7) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.
(j) Nurse's Duty to Report.	*TNA is making substantive comments on this Subsection. See Exhibit 1.*	(j) Nurse's Duty to Report.
(k) State Agency Duty to Report. A state agency that has reason to believe that a nurse has engaged in conduct subject to reporting shall report the nurse in writing to: (1) the board; or (2) the applicable nursing peer review committee in lieu of reporting to the board.		
(l) Integrity of Incident-Based Peer Review Process. (1) (2) The CNO of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this rule and for taking reasonable steps to assure that incident-based peer review is implemented and conducted in compliance with the NPA, Nursing Peer Review, and this rule. (3) A determination by an incident-based peer review committee, a CNO, or an individual nurse to report a nurse to the board cannot be overruled, dismissed, changed, or	*TNA is making substantive comments on this Subdivision (1). See Exhibit 1*	**(l) Integrity of Incident-Based Peer Review Process.** (1) (2) The CNO of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this rule and for taking reasonable steps to assure that incident-based peer review is implemented and conducted in compliance with the NPA, Nursing Peer Review, and this rule. (3) A determination by an incident-based peer review committee, a CNO, or an individual nurse to report a nurse to the board cannot be overruled, dismissed, changed, or

reversed. An incident-based peer review committee, CNO, and individual nurse each have a separate responsibility to protect the public by reporting a nurse to the board as set forth in NPA §301.402, §301.405, §217.11(1)(K), and this rule.		reversed. An incident-based peer review committee, CNO, and individual nurse each have a separate responsibility to protect the public by reporting a nurse to the board as set forth in NPA §301.402, §301.405, §217.11(1)(K), and this rule.
(m) Reporting Conduct of other Practitioners or Entities/ Whistleblower Protections. (1) This section does not expand the authority of any incident-based peer review committee or the board to make determinations outside the practice of nursing. (2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025 (report of unsafe practices of non-nurse entities), a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to: (A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or (B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility. (i) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity. (ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this	*Makes remedies explict.*	**(m) Reporting Conduct of other Practitioners or Entities/ Whistleblower Protections.** (1) This section does not expand the authority of any incident-based peer review committee or the board to make determinations outside the practice of nursing. (2) In a written, signed report to the appropriate licensing board or accrediting body, and in accordance with §301.4025 (report of unsafe practices of non-nurse entities), a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to: (A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or (B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility. (i) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity. (ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this

section. A violation of this subsection is subject to §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.~~(retaliatory action prohibited).~~		section. A violation of this subsection is subject to §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.

TEXAS NURSES ASSOCIATION

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January 15, 2008

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Re: Re-Proposed Rules 217.19 (Incident-Based Nursing Peer Review) and 217.20 (Safe Harbor Nursing Peer Review) as Posted on BON Website for Agenda Item 6.8, January 2008 BON Meeting,.

Dear Ms. Marshal and Ms. Sparks:

TNA's Governmental Affairs Committee (GAC) held a conference call on 1/14 to discuss re-proposed Rules 217.19 and 217.20 as posted on the BON website for Agenda Item 6.8, BON January 2008 meeting. With the few exceptions set out below, GAC supports the re-proposed rules. TNA would hope the BON would incorporate these suggested changes into the re-proposed rules before they are published in the Texas Register.

A. Incident-Based Nursing Peer Review (Rule 217.19)

TNA does not have requested changes.

B. Safe Harbor Nursing Peer Review (Rule 217.20)

1. 217.20(a)(1) Definition of Assignment.

TNA requests the phrase "nurse's licensure responsibilities" in last sentence of definition be replaced with "nurse's assignment."

GAC feels 1) the use of "nurse's licensure responsibilities" introduces new terminology into the rule that is not used elsewhere, 2) that nurses do not agree on what "nurse's licensure responsibilities" means in the context of this definition, and 3) using "nurse's assignment" is more understandable and more consistent with rest of rule.

With this change definition would read:

> *(1) Assignment: Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. This includes but is not limited to the specified functions, duties, practitioner orders, supervisory directives, and amount of work designated as the individual nurse's responsibility. Changes in the nurse's assignment may occur at any time during the work period.*

2. Rule 217.20(d)(1) Invoking Safe Harbor.

TNA requests that a (C) be added that reads:

> C) when the nurse refuses to engage in the requested conduct or assignment;

This language was in the language TNA recommended in its comments and also tracks the re-proposed wording in 217.20(e)(1)(B).

GAC believes that without (C), the rule fails to address the situation in which the assignment (or requested conduct) has not really changed but the nurse's perception or understanding of the level of nursing care does after the nurse has begun the assignment. GAC believes that it is in the interest of patient safety that a nurse be able to request Safe Harbor in this situation. The BON staff's responses to changes do not address the omission of TNA's recommended C), and re-proposed (e)(1)(B) does include C) so its omission in (d)(1) may be an oversight. The re-proposed rules change the language of (d)(1)(B) and in Subsec. (e)(1)(B), change the wording in the stem from "... and at one of the following times:" to "... and at any of the following times:" TNA agrees with these changes.

With these changes (d)(1) would track the language currently in (e)(1) and read:

> *(d) Invoking Safe Harbor*
>
> *(1) Safe Harbor must be invoked prior to engaging in the conduct or assignment and at any of the following times:*
>
> *A) when the conduct is requested or assignment made;*
>
> *B) when changes occur in the request or assignment that so modify the level of nursing care or supervision required compared to what was originally requested or assigned that a nurse believes in good faith that patient harm may result; or.*
>
> *C) when the nurse refuses to engage in the requested conduct or assignment.*

3. 217.20(d)(2)-(4)Forms Used to Invoke Safe Harbor.

TNA supports re-proposed rule language

TNA had suggested substantial revisions but its comments were based on there being three forms – Quick Request, End of Work Period Detailed Account and BON-Developed Comprehensive Form (eight pages). TNA's understanding is that the BON's intent is to have only two forms – BON Quick Request Form and a **new** BON Comprehensive Form. The new BON Comprehensive Form will contain content for end of work period detailed account.

Based on this understanding, re-proposed rules appear to represent desirable simplification and GAC supports. While the current BON Comprehensive Form did set out a complete process that would be helpful if followed, the only thing nurses say about the form is that it an "eight page form."

4. 217.20(d)(5). Process to be followed if do not use BON Forms.

TNA requests (d)(5) be deleted.

The re-proposed (d)(5) reads:

> (5) If the nurse does not use the BON Quick Request and Comprehensive Request Forms to invoke Safe Harbor, the facility and nurse must follow the Safe Harbor process as outlined in this rule.

With the changes in the BON forms, GAC feels (d)(5) is unnecessary and more confusing than helpful. It is always true that the nurses involved must follow the process outlined in Rule 217.20 whether use the BON form or not. A BON form cannot override a BON rule. What the forms do is provide assistance to the nurse in actually complying with the required process. Finally, unlike current rules, the revised rules include the process to be followed and the new BON Comprehensive Form will not set out the process in detail as does the current website form.

5. Rule 217.20(e)(3). Protections from retaliation if CNO decides not to follow Peer Review Committee's determination as to nurse's duty.

TNA requests the phrase "If retaliated against," be added at beginning of first sentence.

Re-proposed Subsection (e)(3) reads

> (3) Section 301.413 of the NPA provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the appropriate regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

GAC believes that the first sentence lacks a context so is difficult to read and understand. Adding the phrase "If retaliated against," adds the necessary context.

With this change (e)(3) would read:

> *(3) <u>If a nurse is retaliated against</u>, Section 301.413 of the NPA provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the appropriate regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.*

6. 217.20(e)(4). Civil Liability if a patient is injured pending a Safe Harbor Request. See Attachment Page 7.

TNA requests the phrase "civil action" be replaced with "civil action for patient injury"

The re-proposed rule reads: BON proposes that Section (e)(4) read:

> (e) Safe Harbor Protections
>
> (4) Safe Harbor protections do not apply to any civil action that may result from the nurse's practice.

Although this does not represent any change from the rules as originally proposed and TNA did not comment on, GAC feels that the sentence lacks context and that adding "for patient injury" will add this context.

With this change (e)(4) would read:

> *(4) Safe Harbor protections do not apply to any civil action <u>for patient injury</u> that may result from the nurse's practice.*

7. 217.20(g) Process If Nurse Does Not Engage in Conduct Pending Nursing Peer Review.

TNA supports re-proposed rule language.

GAC feels that the re-proposed language is an improvement over any of the prior language on this issue and strongly supports the BON staff rewrite.

8. 217.20(i)(4)(B). CNO not following nursing peer review committee's determination.

TNA requests a sentence be added to (4)(B) that reads

> (B) . . . The nurse's legal protections from retaliation for requesting Safe Harbor or from refusing to engage in conduct that violates the NPA or BON rules is not negated by the CNO's or nurse administrator's decision.

TNA had suggested a rewording of the last sentence of (i)(4)(B) and the re-proposed rules deletes the sentence. The sentence tracks the language in 303.005((d) that reads "This subsection does not affect the protections provided by Subsection (c)(1) or section 301.352." GAC believes it important the CNO/administrator and the nurse both realize that the CNO's/administrator's decision does not either negate the nursing peer review

committee's determination nor does it negate the nurse's protections from retaliation for requesting Safe Harbor or refusing to engage in conduct that would violate the NPA or BON rules. Without the addition of a qualifying language, (i)(4)(B) can give the false impression that the CNO/administrator can override the nursing peer review committee and if so, the nurse loses all protection from retaliation and the right to refuse to engage in the conduct if convinced that it violates the NPA or BON rule.

With this change (i)(4)(B) would read:

> *If a nurse requests a Safe Harbor Peer Review determination under Nursing Peer Review Law (TOC) §303.005(b), and refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct, The determinations of the committee are not binding if the CNO or nurse administrator believes in good faith that the safe harbor peer review committee incorrectly determined a nurse's duty. <u>The nurse's legal protections from retaliation for requesting Safe Harbor or from refusing to engage in conduct that violates the NPA or BON rules are not negated by the CNO's or nurse administrator's decision.</u>*

If you have any questions about these requested changes, please call me. TNA appreciates the effort that you and other BON staff have been devoted to making these rules much more useable rules for nurses.

Respectfully submitted,

James H. Willmann, JD
General Counsel and Director Governmental Affairs

Attachment D:
Response to Comments Not Suggesting Specific Language Changes to Peer Review Rule 217.19 Incident-Based Peer Review and/or 217.20 Safe Harbor Peer Review

(1) Multiple concerns about the potential impact of the definitions of "good faith" and "bad faith"(same in both rules) submitted in the attached comments received. Please see re-proposed rules for amendments to these definitions, and the addition of a definition of "malice." Staff believe the suggested changes to the proposed definitions address the concerns raised in multiple comments.

(2) Two comments requested clarification and a definition for what constitutes a "practice violation. Also requested was how this relates to minor incidents and "conduct subject to reporting."

Staff Response: BON staff appreciate the need for such clarification, however it would be potentially too restrictive to attempt to define specific parameters within rule language, and would no doubt add to the length and complexity of §217.19. The endless variety of situations, practice settings, and individual and system factors would make it difficult, if not impossible, to make a list of all or even most of the possible types of practice examples that could potentially constitute violations of either rules 217.11 or 217.12, or other sections of the NPA or board rules.

SB993 clarified language in NPA 301.401 addressing "conduct subject to reporting." Two of the rules that compliment this section of the statute and that are applicable to nursing practice in any setting are Rules 217.11 Standards of Nursing Practice and 217.12 Unprofessional Conduct. Both rules still fit well within the new statutory criteria. Section §301.452 *Grounds for Disciplinary Action* provides further statutory basis for rules 217.11 and 217.12.

As explained in Rule 217.16 Minor Incidents, there are clearly errors that do not rise to the level of requiring a report to the board. This rule was last revised 5/17/06. Section 217.16(c) addresses exclusion criteria for what can be considered a minor incident. An error that contributed to a patient's death, for example, can never be considered a minor incident. Criteria in §217.16(d) addresses when a nurse would be reportable to the board. As stated in proposed §217.19(i)(2), applying §217.16 to an incident-based peer review is necessary in order for the peer review committee to accurately make it's determination regarding reporting or not reporting the nurse.

Additional board rules and resource documents that may be applicable to situations being peer reviewed, and may also be important for the individual nurse to review in determining if a report to the BON is required include:

§213.27 *Good* Professional Character
§213.29 *Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters*
Under the *Nursing Practice section of the BON web page*:

Board Position Statements
Documents listed under"Scope of Practice" (including the Six-Step Decision-Making Model for Determining Nursing Scope of Practice)

Under Disciplinary Action:

the Board's Disciplinary Sanction Policies

Staff feel these questions would be an excellent addition to Peer Review FAQs on the new rules.

(3) One comment asked for definitions of "intemperate use" and "diminished mental capacity." A related comment asked if there was a difference in reporting responsibility for a nurse or a peer review committee related to a nurse who is impaired w/no known practice violation vs. a nurse who is impaired with a known practice violation.

Staff Response: In the re-proposed incident-based peer review rule 217.19, the reporting requirements for a nurse who is impaired with and without a known practice violation are noted in 217.19(g)(1)(A) and (B).

In accordance with NPA (TOC) 301.401(1)(B), 301.410, and rule (TAC) 217.11(1)(K)(v), a nurse is required to report another nurse who is believed to be impaired by reason of chemical dependency, drug or alcohol abuse, or diminished mental capacity. Unprofessional conduct under Rule 217.12 further addresses behaviors indicating possible impairment that relate to the practice of nursing in sections (8), (9), and (10). Whether or not there is a practice violation, a nurse who is believed to be cognitively impaired is never a minor incident.

Rule 213.29 addresses "intemperate use" and "lack of fitness" related to the practice of nursing. Intemperate use is a generic term widely used in regulatory language with the general meaning of excessively engaging in self-indulgent activities, typically referring to excessive use of intoxicating substances. As the Board's mission is to protect the public, the BON is concerned about the risk of harm to a patient when the nurse's ability to make accurate assessments and take timely intervention is impaired to any degree.

The title to NPA §301.410 was revised by HB2426 to now read as "Report Regarding Impairment by Chemical Dependency, Mental Illness, or Diminished Mental Capacity." Only the latter term was added to the previous title for this section of the statute. As with the already existing terms, the Legislature did not define the term "diminished mental capacity." Because concerns of intemperate use, mental illness, and diminished mental capacity may involve medical diagnosis and treatment, the Board cannot prescriptively define these terms in rule language. This is also why the Board often requires forensic evaluation by an approved medical professional to assist the Board in determining a nurse's ability to practice in compliance with the NPA and Board rules.

Proposed rule 217.19 allows for the possibility that an incident-based peer review committee could begin it's fact-finding mission only to discover that the error under review was related to a nurse's impaired practice. For example, a failure to document could be found to be misappropriation of narcotics for personal use/abuse while on duty.

The Sunset Commission mandated changes through the Legislature in HB2426 requiring that all nurses found to have practice violations plus impairment be reported to the BON–not to the Texas Peer Assistance Program for Nurses (TPAPN) as has been allowed in the past.

The risk to patient safety when a nurse is practicing, or potentially practicing while impaired physically and/or mentally is well appreciated by the public. The Sunset Commission believed it imperative that the BON be aware of and be responsible for determining appropriate BON action to assure public safety.

This is but one example of how laws can and do change, sometimes becoming more rigorous because of the patterns of errors/public endangerment that have been found to be related to given conditions over time. Greater public concern with regard to impaired nurses and nurses with criminal backgrounds are both examples of how and why recent legislative sessions have led the board to implement rules with heightened criteria to obtain, retain, or regain nursling licensure.

(4) One comment asked re: §217.19(c) "Use of Informal Work Group," if it would be permissible to use an informal work group to conduct initial review of any report to incident-based peer review or only conduct that appears to be a minor incident? Can the informal work group conduct an initial review of external factors after a report of a nurse to the board has already occurred?

Staff Response: The questions relating to use of an Informal Work Group of the peer review committee would also relate to section (j) in Rule 217.20 (also relating to use of Informal Work Groups).

If not specifically prohibited in rule language or in statute, it would be up to facility policy to determine how to utilize the informal work group. As discussed in the historical perspective, part of the intent of permitting utilization of the informal work group is to make peer review less intimidating for the nurse, and less of a burden (finding staff to relieve the staff involved in peer review, etc) for a facility/agency. Remember in both rules, the nurse who is the subject of (incident-based peer review) or who requested (safe harbor peer review) must agree to the use of the informal work group as part of the process.

(5) One comment re: §217.19(j) stated that this section "requires that two conditions be met before a report made to an incident-based peer review committee satisfies the nurse's duty to report to the BON; however, both of thse conditions are outside of the reporting nurse's control..." Concern related to a peer review committee being found to have acted in bad faith if a nurse were given 20 days notice of the hearing instead of 21 days notice of the hearing was also part of this comment [see #6 in comments from Texas Health Resources for this comment in its' entirety.]

Staff Response: Staff believe the recommended changes to the definitions of good faith, bad faith, and the addition of a definition of "malice" will address the latter concern in the above comment.

With regard to the first stated concern, proposed §217.19(j)(1)(A) and (B) are the same requirements as in current §217.19(b)(2) and (3), and date back to at least 2002 in peer review language. In that time, no situation has been brought to the Board's attention with regard to these requirements. Neither NPAC or board staff believed these requirements to be outside of the reporting nurse's control.

If the peer review committee refuses to tell or simply does not tell the reporting nurse it's findings, or if peer review is never conducted, then the reporting nurse must assume after the applicable time period has expired that he/she must report to the BON in order to fulfill his/her duty to report. If the reporting nurse is made aware of the committee's findings, the nurse must make his/her own judgment whether the nurse believes the decision is an honest, unbiased decision that complies with the NPA and board rules. The reporting nurse's judgement should be primarily based upon the facts known to them and that served as the basis for the report to peer review in the first place.

If the nurse feels the peer review committee reached it's decision in bad faith (see revised definition), then he/she still has a duty to report to the BON. Bear in mind also that it is not a violation to report to the BON when there is any doubt about a violation of the NPA or board rules.

(5) One comment suggested "Whistleblower protections need to be strengthened; penalties for a hospitals' refusal to give a nurse safe harbor peer review (beyond reporting the DON or CNO to the BON) should be considered. Otherwise, the Board will be inundated with complaints that an already overburdened staff would have to deal with."

Staff Response: The BON does not regulate hospitals or practice settings of any kind; therefore, the BON has no authority to propose sanctions on a facility, agency, or other employer of nurses. The NPA also prohibits board members and staff from lobbying the Texas Legislature regarding bills that would amend the parts of the Texas Occupations Code relating to the practice of nursing. Nurses are encouraged to work through their professional organizations, as these organizations can lobby the Legislature for bills that can impact work setting and employment issues for nurses.

(6) A question received asked if the list of committees contained within the definition of "Patient Safety Committee" (in both rules) intended to be exclusive with regard to the specified entities, or do you mean "including but not limited to"? The additional concern added to this question was permitting a hospital to "completely control a patient safety committee is tantamount to a self evaluation which is completely subjective; the likelihood of a self report to a licensing or accrediting body is unlikely."

Staff Response: In both rules, definition (*10) Patient Safety Committee*, (A) and (B) come straight from the statute language in §303.0075. The Nursing Practice Advisory Committee (NPAC) added proposed language in (C) to include provision for *"a multi-disciplinary team* ***that includes nursing representation*** *"****or any committee established by the same entity*** *to promote best practices and patient safety, may apply as appropriate."*

Staff believe the NPAC proposed language in (C) makes it clear that there is no limitation strictly to the entities listed in the definition. The term "patient safety committee" itself is seen as a generic term used legislatively since it would be impossible to know the names of every committee active within a given setting to investigate error events and recommend changes appropriate to the setting.

As stated in staff's response to #5, the BON does not regulate hospitals or practice settings of any kind; therefore, the BON has no authority to mandate who "controls the patient safety committee." The BON's jurisdiction extends up to the Chief Nursing Officer (CNO), nurse administrator, or top nursing position by any other title. A CNO, nurse administrator or other nurse in a similar nursing leadership position can be reported to the BON and investigated for failing to assure peer review processes are conducted in good faith (see amended definition re-proposed new rules).

(7) One comment proposed to delete the term "nurse administrator" and leave only the term Chief Nursing Officer (CNO).

Staff Response: NPAC specifically added both terms because some entities, such as long-term care and home health, do not have CNO's but they do have "nurse administrators." One of the issues brought forward was the mis-interpretation (intentional or not) that CNO responsibilities for oversight of peer review did not apply because the entity in question did not have anyone by that title. This suggested language change was not adopted.

(8) Comment that definitions and "like" sections in both rules should be the same between the rules.

Staff Response: NPAC intended some differences with like-name sections between the two rules. For example, Use of Informal Work Groups, and Whisteblower Protections. The two peer review processes are different and, therefore, the way these two sections must be implemented vary. Rule language cannot be the same for these two sections between the rules. Though NPAC originally made the definitions between the rules slightly varied, BON staff recommend the same definitions between the rules to prevent confusion. For any other "duplicate" sections, staff will re-look at both rules and make adjustments as appropriate (please see Attachments E and F).

(9) Board staff appreciate but will not address grammatical suggestions. Board legal staff will format rules appropriately before they are entered on the web page or appear in TAC. This includes consistency in citations, rule formatting, and grammar/spelling.

(10) One comment re: duplication of certain information in different sections of both rules.

Staff Response: This redundancy is intentional on the part of NPAC and recommended to help the rules be more understandable, or "plain speak," for nurses who must comply with the

requirements of the rule. In some instances, it is also to place emphasis on particularly important parts of the peer review process for the given rule.

(11) If not otherwise addressed in BON Responses to Comments in this attachment or in Attachments E and F, additional clarifications, suggestions, and/or examples offered in comments will be considered for inclusion in FAQs on peer review.

ATTACHMENT E
BON Responses to Comments
Proposed Rule 217.19 Incident-Based Peer Review
Published in November 2, 2007 Texas Register (Vol. 32; No. 44)

NOTE: Only Includes Sections w/Changes; NOT Complete Rule Language (See Attachment A)

Suggested Language from Comments: Blue **BON Recommended Language: Green**
Formatting sacrificed for space purposes.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
1 **(a) Defini-tions**		**(a) Definitions.** (__) Assignment: Designating responsibility for the provision or supervision of nursing care for an individual or group of patients for a defined period of time in a defined work setting including the specified functions, duties, or amount of work designated as the individual nurse's responsibility. Changes in the clinical situation may occur due to volume, intensity, resource availability, or other variables. If the changes in the clinical situation modify the level of nursing care provided or level of supervision required including the specified functions, duties, or amount of work designated in the original assignment, the result is a new assignment	*New definition proposed by TNA to emphasize that when the clinical situation changes a new assignment may result.* **Staff Response**: Safe Harbor applies to non-clinical situations as well as clinical situations. Staff propose the more generic definition. Specifications for when safe harbor is appropriate to invoke are included more appropriately elsewhere in the rule language: (1) Assignment: Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. **This includes but is not limited to** the specified functions, duties, **practitioner orders, supervisory directives, and** amount of work designated as the individual nurse's responsibility. Changes in the **nurse's licensure responsibilities** may occur **at any time during the work period .**

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
2 **(a) Defini-tions**	**(a) Definitions.** (1) Bad Faith: Taking action not supported by a reasonable factual or legal basis. The term includes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process	(2) Bad Faith: Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	*See multiple comments on "good faith," "bad faith." and "malice." TNA comment letter(page 3) #3 Application of Good Faith, Bad faith and Malice Standards particularly helpful background.* **Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
3 **(a) Defini-tions**	(1) Bad Faith: Taking action not supported by a reasonable factual or legal basis. The term includes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process	~~(1)~~ (2) Bad Faith: Knowingly or recklessly taking taking action not supported by a reasonable factual or legal basis. The term includes ~~falsely portraying~~ misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process	*See multiple comments on "good faith," "bad faith." and "malice." TNA comment letter(page 3) #3 Application of Good Faith, Bad faith and Malice Standards particularly helpful background.* **Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
4 **(a) Defini-tions**	(3) Conduct Subject to Reporting means conduct by a nurse that: (A) violates the Nursing Practice Act (NPA) chapter 301 or a board rule and contributed to the death or serious injury of a patient;	~~(3)~~(4) Conduct Subject to Reporting ~~means~~ defined by §301.401 of the Nursing Practice Act as conduct by a nurse that: (A) violates the Nursing Practice Act (NPA) ~~chapter 301~~ or a board rule and contributed to the death or serious injury of a patient;	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
5 **(a) Defini-tions**	(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. [NPA Section 301.401(1)]	(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. ~~[NPA Section 301.401(1)]~~	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
6 **(a) Defini-tions**	(4) Duty to a patient: conduct required by standards of nursing practice [rule 217.11] or prohibited under unprofessional conduct [rule 217.12] including administrative decisions directly affecting a nurse's ability to comply with that duty.	(5) Duty to a patient: ~~conduct required by~~ a nurse's duty to comply with the standards of nursing practice (§ 217.11) ~~or prohibited under~~ and not to engage in unprofessional conduct (§ 217.12) including administrative decisions directly affecting a nurse's ability to comply with that duty.	**Staff Response:** Agree and make the following additional clarification changes in language: A nurse's duty **is to always advocate for patient safety, including any nursing action necessary** to comply with the standards of nursing practice (§ 217.11) and ~~not~~ to **avoid** engag**ing** in unprofessional conduct (§ 217.12). **This includes** ~~including~~ administrative decisions directly affecting a nurse's ability to comply with that duty.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
7 **(a) Defini-tions**	(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process.	~~(5)~~(6) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting ~~falsely portraying~~ the facts surrounding the events under review, acting out of malice or personal animosity ~~towards the nurse~~, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	See multiple comments and discussion on "good faith," "bad faith." and "malice." **Staff Response:** Staff agree with language changes as suggested in column 3. Definitions will be the same for both rules 217.19 and 217.20. Additional clarification suggestions and/or examples offered in comments will be considered for inclusion in FAQs on peer review.
8 **(a) Defini-tions**		(7) Malice: Acting with a specific intent to do substantial injury or harm to another.	*Added by TNA-- modified from definition in §41.001, Civil Remedies & Procedure Code See multiple comments on "good faith," "bad faith." and "malice." TNA comment letter(page 3) #3 Application of Good Faith, Bad faith and Malice Standards particularly helpful background.* **Staff Response:** See multiple comments and discussion on "good faith," "bad faith." and "malice." Staff agree with language changes as suggested in column 3.
9 **(a) Defini-tions**	(8) Nursing Peer Review (NPR law): Consists of chapter 303 of the Texas Occupations Code (TOC). Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature. Nurses involved nursing peer review must comply with the NPR statutes.	(10) Nursing Peer Review Law (NPR law): ~~Consists of~~ Chapter 303 of the Texas Occupations Code (TOC). ~~Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature.~~ Nurses involved in nursing peer review must comply with the NPR Law ~~statutes~~.	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
10 **(a) Defini-tions**	(9) Nursing Practice Act (NPA): Includes chapter 301 of the Texas Occupations Code (TOC). Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature. Nurses must comply with the NPA statutes.	(11) Nursing Practice Act (NPA): ~~Includes~~ Chapter 301 of the Texas Occupations Code (TOC). ~~Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature.~~ Nurses must comply with the NPA ~~statutes~~.	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
11 **(a) Defini-tions**	(10) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety that includes: (A) the entity's medical staff composed of individuals licensed under Subtitle B [Medical Practice Act, Occupations Code §151.001 et seq.]; (B) a medical committee under Subchapter D, chapter 161 Health and Safety Code (§§161.031-.033); or (C) a multi-disciplinary committee including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety, as appropriate.	(12) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety ~~that includes~~ including: (A) the entity's medical staff composed of individuals licensed under Subtitle B [Medical Practice Act, Occupations Code §151.001 et seq.]; (B) a medical committee under Subchapter D, chapter 161 **of the** Health and Safety Code (§§161.031-.033); or (C) a multi-disciplinary committee including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety~~, as appropriate.~~	**Staff Response:** Staff agree with language changes as suggested in column 3 with one minor editorial revision as noted in **green.** J. Hopkins requested inclusion of "medical peer review committees as defined in Section 151.002(8)." **Staff Response:** Language in proposed definition of Pt. Safety Committee (12)(A) comes directly from the statute language and "et seq." includes the above mentioned section of the MPA. Therefore, addition seems duplicative, and was not added. This comment will be considered as explanatory in FAQ documents on peer review. §303.0015 addresses contracting peer review, but not pt safety committee: (C) a multi-disciplinary committee including nursing representation, or any committee established by ~~or contracted within~~ the same entity to promote best practices and patient safety~~, as appropriate.~~

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
12 **(a) Defini-tions**	(11) Peer Review: Defined in the NPR law, contained within Texas Occupations Code (TOC) §303.001(5), it is the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event.	(13) Peer Review: Defined ~~in the NPR law, contained within Texas Occupations Code (TOC)~~ by §303.001(5) of NPR Law (TOC ch. 303), ~~it is~~ as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event.	**Staff Response:** Staff agree with language changes as suggested in column 3. One comment requested addition of the following to definition: "the performance of incident-based peer review, safe harbor peer review, or any other review required by the Nursing Practice Act or TBON rules." **Staff response**: Agree in concept. Recommend adding the following language: **Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.**

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
13 **(a) Defini-tions**	(12) Safe Harbor: a process allowing an individual to request in good faith a review of a situation, action, conduct, or assignment while being protected from retaliation and licensure liability. Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.	(14) Safe Harbor: A ~~a~~ process allowing an individual to request in good faith a review of a situation, action, conduct, or assignment while being protected from retaliation and licensure liability. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which Safe Harbor is requested. ~~or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	Definition added to make definitions same in both rules. Definition of "assignment" as orig. added also deleted language here re: changes occurring at any time during the shift. BON staff believe it is beneficial to leave in language that clarifies a changes in assignment may occur at anytime. Staff also believe need to avoid term "liability" as nurses already confuse licensure responsibility with civil liability. BON staff further suggest clarification within the definition as follows: Safe Harbor: A process **that protects a nurse from employer retaliation and licensure sanction** ~~liability~~ ~~allowing an individual to~~ **when a nurse makes a** ~~request in~~ good faith ~~a~~ **request for peer** review of ~~a situation, action~~, ~~conduct or~~ **an** assignment or conduct **that** the nurse ~~is requested to perform and a nurse~~ ~~while being protected from retaliation and licensure liability~~. **believes could result in a violation of the NPA (TOC) or board rules.** Safe Harbor must be invoked prior to engaging in the conduct or assignment for which ~~Safe Harbor~~ **peer review** is requested, **and may be invoked at anytime during the work period when the initial assignment changes.**

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
14 **(a) Defini-tions**	(13) Safe Harbor Peer Review: The determination if the requested conduct or assignment could have potentially endangered a patient, resulting in the nurse violating his/her duty to the patient. A safe harbor peer review committee reviewing a nurse's request for safe harbor must also ascertain if external factors in the systematic approach and/or nursing policies related to the conduct under review could prevent the recurrence of the same or similar unsafe situation. In accordance with Nursing Peer Review (TOC) §303.011(b), if the committee determines that external factors contributed to a nurse's request for safe harbor, the committee is to report to a patient safety committee.	(15) Safe Harbor Nursing Peer Review: The determination if the requested conduct or assignment could ~~have potentially endangered a patient, resulting~~ result in the nurse violating his/her duty to the patient. A ~~safe harbor~~ Nursing Peer Review Committee reviewing a nurse's request for Safe Harbor must also ascertain if external factors contributed to the nurse's request and whether system changes or changes in nursing policies could prevent the recurrence of the same or similar situation. ~~reviewing a nurse's request for safe harbor must also ascertain if external factors in the systematic approach and/or nursing policies related to the conduct under review could prevent the recurrence of the same or similar unsafe situation.~~ In accordance with Nursing Peer Review (TOC) §303.011(b), if the committee determines that external factors contributed to a nurse's request for safe harbor, the committee ~~is to~~ shall report to a patient safety committee.	**Staff Response:** Staff agree with language changes as suggested in column 3. Definition added to make definitions same in both rules.
15 **(a) Defini-tions**	(14) Texas Occupations Code (TOC): One part of the Texas Statutes, or laws. The Nursing Practice Act (NPA) and Nursing Peer Review (NPR law) statutes are but a few of the chapters of Texas laws contained within the TOC.	(16) Texas Occupations Code (TOC): One ~~part~~ of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The Occupations Code contains the statutes governing occupations and professions including the health professions and includes both the NPA and NPR Law. The Occupations Code can be changed only by the Texas Legislature. ~~The Nursing Practice Act (NPA) and Nursing Peer Review (NPR law) statutes are but a few of the chapters of Texas laws contained within the TOC.~~	**Staff Response:** Staff agree with language changes as suggested in column 3, with minor editing as below. Definitions are the same for both rules 217.19 and 217.20. The Occupations Code contains the statutes governing occupations and professions including the health professions. ~~and includes~~ **B**oth the NPA and NPR Law **are located in the TOC.**

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
16 **(a) Defini-tions**	(15) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity for: (A) a request made by a nurse under Nursing Peer Review (TOC) §303.005(c) regarding invoking safe harbor protections, or	(17) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse: (A) ~~a~~ made ~~by a nurse~~ a good faith request for Safe Harbor Nursing Peer Review under ~~Nursing Peer Review (TOC)~~ §303.005(c) of NPR Law (TOC ch. 303) ~~regarding invoking safe harbor protections,~~ , or	**Staff Response:** Staff agree with language changes as suggested in column 3 with minor editorial change. Definitions are the same for both rules 217.19 and 217.20. (A) ~~a~~ made ~~by a nurse~~ a good faith request for Safe Harbor Nursing Peer Review under ~~Nursing Peer Review (TOC)~~ §303.005(c) of NPR Law (TOC ch. 303) ~~regarding invoking safe harbor protections,~~ **and rule 217.20;** **or**
17 **(a) Defini-tions**	(B) under the NPA (TOC) §301.352 regarding a nurse's refusal to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the NPA or board rules; or	(B) refused under §301.352 of the NPA (TOC ch. 301) ~~regarding a nurse's refusal~~ to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the NPA or board rules; or	**Staff Response:** Staff believe the definition under (b) should be simplified for ease in understanding, and greater detail placed either later in rule or in FAQs as needed (B) refused ~~under §301.352 of the NPA (TOC ch. 301) regarding a nurse's refusal~~ to engage in an act or omission relating to patient care that would constitute ~~grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates~~ **a violation of** the NPA or board rules as permitted by §301.352 of the NPA (TOC ch. 301) **(Protection for Refusal to Engage in Certain Conduct)** ; or

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
18 **(a) Defini-tions**	(C) a report made by a nurse under NPA (TOC) §301.4025 (related to patient safety concerns) and section (k) of this rule, that may also be protected under other laws or regulations, concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.	(C) ~~a report~~ made a report ~~by a nurse~~ under NPA (TOC) §301.4025 (report of unsafe practices of non-nurse entities) and section (i)(2) of this section ~~rule~~, ~~that may also be protected under other~~ or another law or regulations that authorizes reporting of ~~concerning~~ unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.	**Staff Response:** Staff believe definition under (C) should be simplified for ease in understanding, and greater detail placed either later in rule or in FAQs as needed: (C) made a **lawful** report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance ~~under~~ with NPA (TOC) §301.4025 (report of unsafe practices of non-nurse entities) and ~~section (i)~~**(j)(2)** of this section ~~or another law or regulations that authorizes reporting of concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.~~

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
19 **(b) Purpose**	**(b) Purpose** The purpose of this rule is to define minimum due process to which a nurse is entitled under incident-based peer review, to provide guidance to facilities, agencies, schools, or anyone who utilizes the services of nurses in the development and application of incident-based peer review plans, to assure that nurses have knowledge of the plan, and to provide guidance to the incident-based peer review committee in its fact finding process.	**(b) Purpose** The purpose of this rule is to: (1) define minimum due process to which a nurse is entitled under incident-based peer review, (2) provide guidance to facilities, agencies, schools, or anyone who utilizes the services of nurses in the development and application of incident-based peer review plans, (3) assure that nurses have knowledge of the plan, and (4) provide guidance to the incident-based peer review committee in its fact finding process.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
20 **(c) Applica-bility of Incident-Based Peer Review**	**(c) Applicability of Incident-Based Peer Review** Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of a RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of NPA §§301.402(e) (relating to alternate reporting by nurses to peer review), 301.405(c) (relating to peer review of external factors as part of employer reporting), and 301.407(b) (relating to alternate reporting by state agencies to peer review).	**(c) Applicability of Incident-Based Peer Review** ~~Nursing Peer Review (TOC)~~ ~~§~~ Section 303.0015 of the NPR Law (TOC ch. 303) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of a RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of NPA §§301.402(e) (relating to alternate reporting by nurses to peer review), 301.403 (relating to peer review committee reporting), 301.405(c) (relating to peer review of external factors as part of employer reporting), and 301.407(b) (relating to alternate reporting by state agencies to peer review).	**Staff Response:** Staff agree with language changes as suggested in column 3.
21 **(d) Minimum Due Process**	**(d) Minimum Due Process** (1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under Nursing Peer Review (TOC) §303.002(e), any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if they do not utilize the number of nurses described by subsection (c).	**(d) Minimum Due Process** (1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under Nursing Peer Review (TOC) §303.002(e). Any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if ~~they~~ the person or entity ~~do~~ **does** not utilize the number of nurses described by Subsection (c).	**Staff Response:** Staff agree with language changes as suggested in column 3, with minor editing (see **green** font).

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
22 **(d) Minimum Due Process**	(2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address: (A) level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by subsection (d)(3)(F) of this rule;	(2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address: (A) the level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by Subsection (d)(3)(F) of this rule;	**Staff Response:** Staff agree with language changes as suggested in column 3.
23 **(d) Minimum Due Process**	(B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by Nursing Peer Review (TOC) §§303.006 and 303.007;	(B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by Nursing Peer Review Law (TOC) §§303.006 and 303.007, 303.0075 and Subsection (h) ~~of this rule;~~	**Staff Response:** Staff agree with language changes as suggested in column 3.
24 **(d) Minimum Due Process**	(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the NPA (TOC) §301.410, and subsection (g) of this rule;	(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the NPA (TOC) §301.410, and Subsection (g) ~~of this rule~~;	**Staff Response:** Staff agree with language changes as suggested in column 3.
25 **(d) Minimum Due Process**	(D) reporting of nurses to the board by incident-based peer review committee in accordance with the NPA (TOC) §301.403, and subsection (i) of this rule; and	(D) reporting of nurses to the board by incident-based peer review committee in accordance with the NPA (TOC) §301.403, and subsection (i) ~~of this rule~~; and	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
26 **(d) Minimum Due Process**	(E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed in writing by the nurse being reviewed.	(E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed to in writing by the nurse being reviewed.	**Staff Response:** Staff agree with language changes as suggested in column 3.
27 **(d) Minimum Due Process**	(3) In order to meet the minimum due process required by Nursing Peer Review (TOC) chapter 303, the nursing peer review committee must: (A) comply with the membership and voting requirements as set forth in Nursing Peer Review (TOC) §303.003(a)-(d);	(3) In order to meet the minimum due process required by Nursing Peer Review Law (TOC) chapter 303, the nursing peer review committee must: (A) comply with the membership and voting requirements as set forth in Nursing Peer Review (TOC) §303.003~~(a)-(d)~~;	**Staff Response:** Staff agree with language changes as suggested in column 3.
28 **(d) Minimum Due Process**	(B) exclude from the committee, including attendance at the incident-based peer review hearing, any person or persons with administrative authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person who is administratively responsible over the nurse being incident-based peer reviewed from appearing before the incident-based peer review committee to speak as a fact witness;	(B) exclude from the committee, including attendance at the ~~incident-based~~ peer review hearing, any person or persons with administrative authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person who is administratively responsible over the nurse being ~~incident-based peer~~ reviewed from appearing before the ~~incident-based peer review~~ committee to speak as a fact witness;	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
29 **(d) Minimum Due Process**	(C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that: (i) the nurse's practice is being evaluated; (ii) that the incident-based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless: (I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee, or is (II) otherwise agreed upon by the nurse and incident-based peer review committee. (iii) Said notice must include a written copy of the incident-based peer review plan, policies and procedures.	(C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that: (i) the nurse's practice is being evaluated; (ii) ~~that~~ the incident-based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless: (I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee, or is (II) otherwise agreed upon by the nurse and incident-based peer review committee. (iii) ~~Said notice must~~ includes ~~a written copy of the incident-based peer review plan, policies and procedures~~ the information required by Paragraph (D).	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
30 **(d) Minimum Due Process**	(D) Include in the written notice: (i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality but the nurse shall be provided the name of the patient/client;	(D) Include in the ~~written~~ notice required by Paragraph (C): (i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality but the nurse shall be provided the name of the patient/client;	**Staff Response:** Staff agree with language changes as suggested in column 3.
31 **(d) Minimum Due Process**	(ii) name, address, telephone number of contact person to receive the nurse's response; and (iii) a copy of this rule (§217.19) and a copy of the facility's incident-based peer review plan, policies and procedures.	(ii) the name, address, telephone number of contact person to receive the nurse's response; and (iii) a copy of this rule (§217.19 of this title) and a copy of the facility's incident-based peer review plan, policies and procedures.	**Staff Response:** Staff agree with language changes as suggested in column 3.
32 **(d) Minimum Due Process**	(G) conclude its review no more than fourteen (14) calendar days from the incident-based peer review hearing, or in compliance with subsection (d)(3)(C)(ii) of this rule relating to consultation with a patient safety committee;	(G) ~~conclude~~ complete its review no more than fourteen (14) calendar days ~~from~~ after the incident-based peer review hearing, or in compliance with subsection (d)(3)(C)(ii) of this rule relating to consultation with a patient safety committee;	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
33 **(d) Minimum Due Process**	(J) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.	~~(J)~~(4) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.	**Staff Response:** Staff agree with language changes as suggested in column 3.
34 **(d) Minimum Due Process**	(4) Nurse's Right To Representation (A) A nurse shall have a right of representation as set out in this section. The rights set out in this section are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required.	~~(4)~~(5) Nurse's Right To Representation (A) A nurse shall have a right of representation as set out in this ~~section~~ Subdivision (4). These rights ~~set out in this section~~ are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required.	**Staff Response:** Staff agree with language changes as suggested in column 3, with one editorial correction. (A) A nurse shall have a right of representation as set out in this ~~section~~ Subdivision ~~(4).~~ **(5)**... Note: No changes suggested or made to (5)(B)-(D).
35 **(d) Minimum Due Process**	(5) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under subsection (d)(3)(H) of this rule. Nursing Peer Review (TOC) §303.002(d) prohibits nullifying by contract any right a nurse has under the incident-based peer review process. If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 and subsection (d) of this rule.	~~(5)~~(6) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under subsection (d)(3)(C) of this ~~rule.~~ section. ~~Nursing Peer Review (TOC) §303.002(d) prohibits nullifying by contract any right a nurse has under the incident-based peer review process.~~ If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 and Subsection (d) ~~of this section~~.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
36 **(e)** **Use of Informal Work Group In Incident Based Peer Review**	**(e) Use of Informal Work Group In Incident Based Peer Review** (A) A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the informal workgroup that require: (i) the nurse to be informed of how the informal workgroup will function, and to consent, in writing, to the use of an informal workgroup. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal workgroup;	**(e) Use of Informal Work Group In Incident Based Peer Review** ~~(1)~~A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the informal workgroup that require: ~~(1)~~**(A)** the nurse to be informed of how the informal work group will function, and to consent, in writing, to the use of an informal work group. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal work group;	*Comment was because no (2), make (1) stem and then use numbers for subsections.* **Staff Response:** Correct formatting is that stem is "implied" (1), so still used (A)-(G) for subsequent subsections.
37 **(e)** **Use of Informal Work Group In Incident Based Peer Review**	(ii) if the informal workgroup believes that a practice violation has occurred and suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity, the committee chair must be notified to determine if peer review should be terminated and the nurse reported to the board;	~~(2)~~**(B)** if the informal work group ~~believes that a practice violation has occurred and~~ suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity, the ~~committee~~ chair **person** must be notified to determine if peer review should be terminated and the nurse reported to the board or to a board-approved peer assistance program as required by Subsection (g);	*Comment was because no (2), make (1) stem and then use numbers for subsections.* **Staff Response:** Correct formatting is that stem is "implied" (1), so still used (A)-(G) for subsequent subsections. Staff agree with language changes in column #3 with minor edit for consistency re: reference to chair person.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
38 **(e)** **Use of Informal Work Group In Incident Based Peer Review**	(iii) the informal workgroup to comply with the membership and voting requirements of Sections (d)(3)(A) and (B) of this rule; (iv) the nurse be provided the opportunity to meet with the informal workgroup;	~~(3)~~**(C)** the informal work group to comply with the membership and voting requirements of Subsection (d)(3)(A) and (B)~~ of this rule~~; ~~(4)~~**(D)** the nurse be provided the opportunity to meet with the informal work group;	*Comment was because no (2), make (1) stem and then use numbers for subsections.* **Staff Response:** Correct formatting is that stem is "implied" (1), so still used (A)-(G) for subsequent subsections. Staff agree with language deletions and correction in column #3.
39 **(e)** **Use of Informal Work Group In Incident Based Peer Review**	(v) the nurse to have the right to reject any decision of the informal workgroup and to then have his/her conduct reviewed by the incident-based peer review committee, in which event members of the informal workgroup shall not participate in that determination; and	~~(5)~~**(E)** the nurse to have the right to reject any decision of the informal work group and to then have his/her conduct reviewed by the ~~incident-based~~ peer review committee, in which event members of the informal work group shall not participate in that determination; and	*Comment was because no (2), make (1) stem and then use numbers for subsections.* **Staff Response:** Correct formatting is that stem is "implied" (1), so still used (A)-(G) for subsequent subsections. Staff agree with language deletions in column #3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
40 **(e) Use of Informal Work Group In Incident Based Peer Review**	(vi) ratification by the incident-based peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup to remediate a nurse for one or more minor incidents, the chair person shall convene the full peer review committee to review the conduct in question.	~~(6)~~**(F)** ratification by the ~~incident-based peer review~~ committee chair person of any decision made by the informal work group. If the chair person disagrees with a determination of the informal work group to remediate a nurse for one or more minor incidents, the chair person shall convene the full peer review committee to ~~review~~ **make a determination regarding** the conduct in question.	*Comment was because no (2), make (1) stem and then use numbers for subsections.* **Staff Response:** Correct formatting is that stem is "implied" (1), so still used (A)-(G) for subsequent subsections. Staff agree with language deletions in column #3, and recommend addition of language as indicated in **green.**
41 **(e) Use of Informal Work Group In Incident Based Peer Review**	(vii) the peer review chair person must communicate any decision of the informal work group to the CNO.	~~(7)~~**(G)** the ~~peer review~~ chair person must communicate any decision of the informal work group to the CNO.	*Comment was because no (2), make (1) stem and then use numbers for subsections.* **Staff Response:** Correct formatting is that stem is "implied" (1), so still used (A)-(G) for subsequent subsections. Staff agree with language deletion in column #3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
42 **(f) Exclu-sions to Minimum Due Process Require-ments**	**(f) Exclusions to Minimum Due Process Requirements** The minimum due process requirements set out in subsection (d) of this rule do not apply to: (1) Peer review conducted solely in compliance with NPA (TOC) §301.405(c) relating to incident-based peer review of external factors, after a report of a nurse to the board has already occurred under NPA (TOC) §301.405(b); or	**(f) Exclusions to Minimum Due Process Requirements** The minimum due process requirements set out in Subsection (d) ~~of this rule~~ do not apply to: ~~(1)~~(A) peer review conducted solely in compliance with NPA (TOC) §301.405(c) relating to ~~incident-based peer~~ review of external factors, after a report of a nurse to the board has already occurred under NPA (TOC) §301.405(b) (relating to mandatory report by employer, facility or agency); or	**Staff Response:** Staff agree with language changes as suggested in column 3.
43 **(f) Exclu-sions to Minimum Due Process Require-ments**	(2) when during the course of the incident-based peer review process, a practice violation is identified as a possible consequence of the nurse's practice being impaired as described under subsection (g) of this rule; or	(2) reviews governed by Subsection (g) involving nurses whose practice is suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity; ~~(2) when during the course of the incident-based peer review process, a practice violation is identified as a possible consequence of the nurse's practice being impaired as described under subsection (g) of this rule; or~~	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
44 **(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness**	**(g) Incident-Based Peer Review of a Nurse's Impaired ~~Nursing~~ Practice/Lack of Fitness** (1) Instead of requesting review by a peer review committee, a nurse whose practice is impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, with no evidence of nursing practice violations, shall be reported, in accordance with NPA (TOC) §301.410(a) (related to reporting of impairment), to either:	**(g) Incident-Based Peer Review of a Nurse's Impaired ~~Nursing~~ Practice/ Lack of Fitness** (1) ~~Instead of requesting review by a peer review committee~~, When a nurse's ~~whose~~ practice is impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, ~~with no evidence of nursing practice violations,~~ peer review shall be suspended, and the nurse shall be reported to the board or to a board-approved peer assistance program in accordance with NPA (TOC) §301.410~~(a)~~ (related to reporting of impairment): ~~to either:~~	**Staff Response:** Staff agree with language changes as suggested in column 3. **(g) Incident-Based Peer Review of a Nurse's Impaired ~~Nursing~~ Practice and Lack of Fitness** peer review **of the nurse** shall be suspended. ~~and~~ **T**he nurse shall be reported to the board or to a board-approved peer assistance program in accordance with NPA (TOC) §301.410~~(a)~~ (related to reporting of impairment):

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
45 **(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness**	(A) the board; or (B) a board-approved peer assistance program.	(A) if there is no reasonable factual basis for determining that a practice violation is involved, the nurse shall be reported to: ~~(A)~~(i) the board; or ~~(B)~~(ii) a board-approved peer assistance program, ~~which~~ **that** shall handle report**ing the nurse** in accordance with Rule 217.13, or	**Staff Response:** Staff agree with language changes as suggested in column 3.
46 **(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness**	(2) If during the course of an incident-based peer review process, there is a reasonable factual basis for a determination that a practice violation occurred due to a nurse's practice impairment or suspected practice impairment or lack of fitness due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity of a reported nurse, the incident-based peer review process shall be suspended, and the nurse reported to the board in accordance with NPA (TOC) §301.410(b) (related to required report to board when practice violations exist with suspected practice impairment/lack of fitness).	~~(2)~~(B) if there is a reasonable factual basis for a determination that a practice violation is involved, the nurse shall be reported to the board. ~~2) If during the course of an incident-based peer review process, there is a reasonable factual basis for a determination that a practice violation occurred due to a nurse's practice impairment or suspected practice impairment or lack of fitness due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity of a reported nurse, the incident-based peer review process shall be suspended, and the nurse reported to the board in accordance with NPA (TOC) §301.410(b) (related to required report to board when practice violations exist with suspected practice impairment/lack of fitness).~~	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
47 **(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness**	(A) Following suspension of peer review of the nurse, the incident-based peer review committee shall proceed to evaluate external factors to determine if: (i) any factors beyond the nurse's control contributed to a practice violation, (ii) if any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct, and	~~(A)~~(2) Following suspension of peer review of the nurse, the ~~incident-based peer review~~ committee shall proceed to evaluate external factors to determine if: (i) any factors beyond the nurse's control contributed to a practice violation, and (ii) ~~if~~ any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct. ~~and~~	**Staff Response:** Staff agree with language changes as suggested in column 3.
48 **(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness**	(iii) if the committee determines external factors do exist for either (i) or (ii), the committee shall report it's findings to a patient safety committee or to the CNO if there is no patient safety committee	~~(iii)~~(3) If the committee determines under Subdivision (2) that external factors do exist for either (i) or (ii) of this Subparagraph, the committee shall report its findings to a patient safety committee or to the CNO if there is no patient safety committee.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
49 **(g) Incident-Based Peer Review of a Nurse's Impaired Practice/ Lack of Fitness**	(B) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under TOC §303.002(e) relating to peer review by suspending the committee's review and reporting the nurse to the Board in accordance with this paragraph (2).	~~(B)~~(4) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under Subsection (d) ~~TOC §303.002(e) relating to peer review~~ by suspending the committee's review **of the nurse** and reporting the nurse to the Board in accordance with ~~this paragraph~~ Subdivision (2).	**Staff Response:** Staff agree with language changes as suggested in column 3 with addition of clarifying language in **green.**
50 **(g) Incident-Based Peer Review of a Nurse's Impaired Practice /Lack of Fitness**	(3) Neither (1) or (2) above preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.	~~(3)~~(5) ~~Neither (1) or (2) above~~ Subdivision (1) does not preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
51 **(h)** **Confi-dentiality of Proceed-ings**	**(h) Confidentiality of Proceedings** (1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and not disclosed except as provided by Nursing Peer Review (TOC) §§303.006, 303.007, and §303.0075. Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse	**(h) Confidentiality of Proceedings** (1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and the information not disclosed except as provided by Nursing Peer Review Law (TOC) §§303.006, 303.007, and §303.0075. Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse.	**Staff Response:** Staff agree with language changes as suggested in column 3 with one editorial correction. Peer Review Law (TOC) §§303.006, 303.007, and ~~§~~303.0075. {strike out section symbol}
52 **(h)** **Confi-dentiality of Proceed-ings**	(2) Sharing of Information: In accordance with Nursing Peer Review (TOC) §303.0075, a nursing incident-based peer review committee and any patient safety committee established by or contracted with the same entity, may share information. A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee.	(2) ~~Sharing of Information:~~ In accordance with Nursing Peer Review Law (TOC) §303.0075, a nursing incident-based peer review committee and any patient safety committee established by ~~or contracted with~~ the same entity, may share information. (A) A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee.	**Staff Response:** Staff agree with rationale for striking "contracted with" as worded, since it implies a patient safety committee could be contracted out. The enabling statute in §303.0015(b) permits conducting of peer review to be contracted out. Staff recommend replacement language as follows: In accordance with Nursing Peer Review Law (TOC) §303.0075, a nursing incident-based peer review committee, **including an entity contracted to conduct peer review under §303.0015(b)**, and any patient safety committee established by the same entity, may share information. Staff agree with other changes as suggested in column #3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
53 **(h)** **Confi-dentiality of Proceed-ings**	(A) The privileges under this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee.	~~(A)~~(B) The privileges under this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee.	**Staff Response:** Staff agree with re-ordering as suggested in column 3.
54 **(h)** **Confi-dentiality of Proceed-ings**	(B) This section does not affect the application of Nursing Peer Review (TOC) §303.007 (relating to disclosures by peer review committee) to a nursing peer review committee.	~~(B)~~(C) This section does not affect the application of Nursing Peer Review Law (TOC) §303.007 (relating to disclosures by peer review committee) to a nursing peer review committee.	**Staff Response:** Staff agree with language changes as suggested in column 3.
55 **(h)** **Confi-dentiality of Proceed-ings**	(C) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.	~~(C)~~(D) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.	**Staff Response:** Staff agree with re-ordering as suggested in column 3.
56 **(h)** **Confi-dentiality of Proceed-ings**	(5) A CNO shall assure that policies relating to sharing of documents with the incident-based peer review committee at a minimum, address:	~~(5)~~(3) A CNO shall assure that policies are in place relating to sharing of information and documents ~~with the~~ between an Incident-Based Nursing Peer Review committee and a patient safety committee(s) that at a minimum, address:	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
57 **(h)** **Confi-dentiality of Proceed-ings**	(B) separation of confidential information under incident-based peer review from the nurse's human resource file; (A) methods in which shared committee communications and documents are labelled and maintained as to which committee originated the documents or communications;	~~(B)~~(A) separation of confidential Incident-Based Nursing Peer Review information form the nurse's human resource file; ~~(A)~~(B) methods in which shared ~~committee~~ communications and documents are labeled and maintained as to which committee originated the documents or communications;	**Staff Response:** Staff agree with language changes and re-ordering as suggested in column 3.
58 **(h)** **Confi-dentiality of Proceed-ings**	(C) the confidential and separate nature of incident-based peer review as well as documents that are shared with incident-based peer review, and that violations of said policies are subject to being reported to the board,	(C) the confidential and separate nature of incident-based peer review and patient safety committee proceedings ~~as well as~~ including shared information and documents; and ~~that are shared with incident-based peer review, and that violations of said policies are subject to being reported to the board~~	Also see new (D) below. **Staff Response:** Staff agree with language changes as suggested in column 3.
59 **(h)** **Confi-dentiality of Proceed-ings**		(D) the treatment of nurses who violate the policies including when a violation may result in a nurse being reproted to the board or a nursing peer review **committee.**	**Staff Response:** Staff agree with language changes as suggested in column 3 with one minor edit for consistency and clarity.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
60 **(i)** **Committee Responsibility to Evaluate and Report**	(2) A incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under rule 217.16, Minor Incidents. In accordance with this rule, the incident-based peer review committee may determine that the nurse: (A) & (B)	(2) An incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under rule 217.16, Minor Incidents. In accordance with ~~this~~ that rule, the ~~incident-based peer review~~ committee may determine that the nurse: (A) & (B) no change	**Staff Response:** Staff agree with language changes as suggested in column 3.
61 **(i)** **Committee Responsibility to Evaluate and Report**	(3) Report Not Required: A nursing incident-based peer review committee is not required to submit a report to the board if: (A) the committee determines that the reported conduct was a minor incident that is not required to be reported in accordance with provisions of rule §217.16 Minor Incidents; or (B) the nurse has already been reported to the board under NPA (TOC) §301.405(b) (employer reporting requirements).	(3) ~~Report Not Required:~~ An ~~nursing~~ incident-based nursing peer review committee is not required to submit a report to the board if: (A) the committee determines that the reported conduct was a minor incident that is not required to be reported in accordance with provisions of rule §217.16 Minor Incidents; or (B) the nurse has already been reported to the board under NPA (TOC) §301.405(b) (employer reporting requirements).	**Staff Response:** Staff agree with language changes as suggested in column 3 with grammatical edit.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
62 **(i) Committee Responsibility to Evaluate and Report**	(4) If a incident-based peer review committee finds that a nurse has engaged in conduct subject to reporting to the board, the committee shall submit to the board a written, signed report that includes: (A)-(F)	4) If ~~a incident-based peer review~~ the committee determines it is required to report a nurse ~~finds that a nurse has engaged in conduct subject to reporting~~ to the board, the committee shall submit to the board a written, signed report that includes: (A)-(F) No changes	**Staff Response:** Staff agree with language changes as suggested in column 3.
63 **(i) Committee Responsibility to Evaluate and Report**	(6)(A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a nurse's error, in addition to reporting to a patient safety committee, the incident-based peer review committee may also make recommendations for the nurse, up to and including reporting to the board. (6)(B) an incident-based peer review committee may extend the time line for completing the incident-based peer review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete the incident-based peer review of the nurse within this 90-day time frame.	(6)(A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a deficiency in care ~~nurse's error~~, in addition to reporting to a patient safety committee, the incident-based peer review committee may also make recommendations for the nurse, up to and including reporting to the board. (6)(B) An incident-based peer review committee may extend the time line for completing the incident-based peer review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete the incident-based peer its review of the nurse within this 90-day time frame.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
64 **(i)** **Committee Responsibility to Evaluate and Report**	(7) A incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.	(7) An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.	**Staff Response:** Staff agree with grammatical edit as suggested in column 3.
65 **(j) Nurse's Duty to Report**	**(j) Nurse's Duty to Report** (1)(A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings and shall be subject to Nursing Peer Review (TOC) §303.006 (confidentiality of peer review proceedings); and	**(j) Nurse's Duty to Report** (1)(A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings subject to the nurse's agreeing in writing not to disclose that information except as permitted by §303.006 of the NPR Law (TOC ch. 303) ~~and shall be subject to Nursing Peer Review (TOC) §303.006 (confidentiality of peer review proceedings)~~; and	**Staff Response:** Staff disagree with language changes as suggested in column 3. Reporting nurse clearly has knowledge of incident reported outside of peer review proceeding and is not prohibited from reporting to BON. §303.006(f) applies to information PR member or person attending proceeding obtained solely through the PR proceeding. No statutory basis for written agreement. Staff recommend leave language as originally submitted by NPAC. (1)(A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings ~~subject to the nurse's agreeing in writing not to disclose that information except as permitted by §303.006 of the NPR Law (TOC ch. 303)~~ and shall be subject to Nursing Peer Review (TOC) §303.006 (confidentiality of peer review proceedings); and

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
66 **(j) Nurse's Duty to Report**	(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made in good faith under this rule and NPA (TOC) §301.402(f)(retaliation for a good faith report prohibited). A violation of this subsection or NPA (TOC) §301.402(f) is subject to NPA (TOC) §301.413 (retaliatory action prohibited).	(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made ~~in good faith~~ without malice under this rule and NPA (TOC) §301.402(f)(retaliation for a ~~good faith~~ report made without malice prohibited). A violation of this subsection or NPA (TOC) §301.402(f) is subject to NPA (TOC) §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency, ~~(retaliatory action prohibited)~~.	**Staff Response re:** The BON does not regulate "individuals" so regardless of broader application of statutes, BON rule can only address "nurses." Also, needs further clarification re: employment vs. licensure issues vs. facility regulation. Staff recommend the following language: (2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made ~~in good faith~~ without malice under this rule and NPA (TOC) §301.402(f) (retaliation for a ~~good faith~~ report made without malice prohibited). A violation of this subsection or NPA (TOC) §301.402(f) is subject to NPA (TOC) §301.413 that provides a nurse ~~or individual retaliated against~~ **the** right to file **civil** suit to recover damages. The nurse ~~or individual also~~ may **also** file a complaint with ~~an~~ **the** ~~appropriate licensing~~ **regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability**.
67 **(l) Integrity of Incident-Based Peer Review Process**	**(l) Integrity of Incident-Based Peer Review Process** (1)NPA (TOC) chapter 303, requires that incident-based peer review be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the board under the NPA (TOC) §301.452(b).	**(l) Integrity of Incident-Based Peer Review Process** (1) ~~NPA (TOC) chapter 303, requires that~~ Incident-Based Peer Review must be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the board ~~under the NPA (TOC) §301.452(b)~~.	**Staff Response:** Staff agree with language changes as suggested in column 3.

68 **(m) Report-ing Conduct of other Practi-tioners or Entities: Whistle-blower Protec-tions**	**(m) Reporting Conduct of other Practitioners or Entities/Whistleblower Protections** (ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to §301.413(retaliatory action prohibited).	**(m) Reporting Conduct of other Practitioners or Entities: Whistleblower Protections** (ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency, ~~(retaliatory action prohibited)~~.	**Staff Response re:** The BON does not regulate "individuals" so regardless of broader application of statutes, BON rule can only address "nurses." Also, needs further clarification re: employment vs. licensure issues vs. facility regulation. Staff recommend the following language: (ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to §301.413 that provides a nurse **the** right to file **civil** suit to recover damages. The nurse ~~or individual also~~ may **also** file a complaint with ~~an~~ **the** ~~appropriate licensing~~ **regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability**.

BON Responses to Comments
Proposed Rule 217.20 Safe Harbor Peer Review
Published in November 2, 2007 Texas Register (Vol. 32; No. 44)

NOTE: Only Includes Sections w/Changes; NOT Complete Rule Language (See Attachment B)

Suggested Language from Comments: Blue **BON Recommended Language: Green**
Formatting sacrificed for space purposes.

Table Section	Proposed Rule Language	Recommended Changes	BON Response to Comments {see Attachments C-1 & C-2}
1 (a) Defi-nitions		**(a) Definitions.** (__) Assignment: Designating responsibility for the provision or supervision of nursing care for an individual or group of patients for a defined period of time in a defined work setting including the specified functions, duties, or amount of work designated as the individual nurse's responsibility. Changes in the clinical situation may occur due to volume, intensity, resource availability, or other variables. If the changes in the clinical situation modify the level of nursing care provided or level of supervision required including the specified functions, duties, or amount of work designated in the original assignment, the result is a new assignment	*New definition proposed by TNA to emphasize that when the clinical situation changes a new assignment may result.* **Staff Response**: Safe Harbor applies to non-clinical situations as well as clinical situations. Staff propose the more generic definition. Specifications for when safe harbor is appropriate to invoke are included more appropriately elsewhere in the rule language: Assignment: Designat**ed** responsibility for the provision or supervision of nursing care ~~for an individual or group of patients~~ for a defined period of time in a defined work setting. **This includes but is not limited to** ~~including~~ the specified functions, duties, **practitioner orders, supervisory directives,** ~~or~~ **and** amount of work designated as the individual nurse's responsibility. Changes in the ~~clinical situation~~ **nurse's licensure responsibilities** may occur **at any time during the work period** .~~due to volume, intensity, resource availability, or other variables. If the changes in the clinical situation modify the level of nursing care provided or level of supervision required including the specified functions, duties, or amount of work designated in the original assignment~~, ~~the result is a new assignment.~~

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
2 **(a) Defi-nitions**	(a) Definitions. (1) Bad Faith: Taking action not supported by a reasonable factual or legal basis. The term includes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process.	~~(1)~~ (2) Bad Faith: Knowingly or recklessly taking taking action not supported by a reasonable factual or legal basis. The term includes ~~falsely portraying~~ misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	*See multiple comments on "good faith," "bad faith." and "malice." TNA comment letter(page 3) #3 Application of Good Faith, Bad faith and Malice Standards particularly helpful background.* **Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
3 **(a) Defi-nitions**	(3) Conduct Subject to Reporting means conduct by a nurse that: (A) violates the Nursing Practice Act (NPA) chapter 301 or a board rule and contributed to the death or serious injury of a patient;	~~(3)~~(4) Conduct Subject to Reporting ~~means~~ defined by §301.401 of the Nursing Practice Act as conduct by a nurse that: (A) violates the Nursing Practice Act (NPA) ~~chapter 301~~ or a board rule and contributed to the death or serious injury of a patient;	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
4 **(a) Defi-nitions**	(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. [NPA Section 301.401(1)]	(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior. ~~[NPA Section 301.401(1)]~~	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
5 **(a) Defi-nitions**	(4) Duty to a patient: conduct required by standards of nursing practice [rule 217.11] or prohibited under unprofessional conduct [rule 217.12] including administrative decisions directly affecting a nurse's ability to comply with that duty.	(5) Duty to a patient: ~~conduct required by~~ a nurse's duty to comply with the standards of nursing practice (§ 217.11) ~~or prohibited under~~ and not to engage in unprofessional conduct (§ 217.12) including administrative decisions directly affecting a nurse's ability to comply with that duty.	**Staff Response:** Agree and make the following additional clarification changes in language: (5) Duty to a patient: A nurse's duty **is to always advocate for patient safety, including any nursing action necessary** to comply with the standards of nursing practice (§ 217.11) and ~~not~~ to **avoid** engag**ing** in unprofessional conduct (§ 217.12). This includes ~~including~~ administrative decisions directly affecting a nurse's ability to comply with that duty.
6 **(a) Defi-nitions**	(5) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes falsely portraying the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or denying a nurse due process.	~~(5)~~(6) Good Faith: Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting ~~falsely portraying~~ the facts surrounding the events under review, acting out of malice or personal animosity ~~towards the nurse~~, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.	*See multiple comments on "good faith," "bad faith." and "malice." TNA comment letter(page 3) #3 Application of Good Faith, Bad faith and Malice Standards particularly helpful background.* **Staff Response:** Staff agree with language changes as suggested in column 3. Definitions will be the same for both rules 217.19 and 217.20. Additional clarification suggestions and/or examples offered in comments will be considered for inclusion in FAQs on peer review.
7 **(a) Defi-nitions**		(7) Malice: Acting with a specific intent to do substantial injury or harm to another.	*Added by TNA-- modified from definition in §41.001, Civil Remedies & Procedure Code*; *See multiple comments on "good faith," "bad faith." and "malice." TNA comment letter(page 3) #3 Application of Good Faith, Bad faith and Malice Standards particularly helpful background.* **Staff Response:** See multiple comments and discussion on "good faith," "bad faith." and "malice." Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
8 **(a) Defi-nitions**	(8) Nursing Peer Review (NPR law): Consists of chapter 303 of the Texas Occupations Code (TOC). Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature. Nurses involved nursing peer review must comply with the NPR statutes.	(10) Nursing Peer Review Law (NPR law): ~~Consists of~~ Chapter 303 of the Texas Occupations Code (TOC). ~~Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature.~~ Nurses involved in nursing peer review must comply with the NPR Law ~~statutes~~.	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
9 **(a) Defi-nitions**	(9) Nursing Practice Act (NPA): Includes chapter 301 of the Texas Occupations Code (TOC). Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature. Nurses must comply with the NPA statutes.	(11) Nursing Practice Act (NPA): ~~Includes~~ Chapter 301 of the Texas Occupations Code (TOC). ~~Part of the Texas statutes, or laws, and can only be changed by the Texas Legislature.~~ Nurses must comply with the NPA ~~statutes~~.	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
10 **(a) Defi-nitions**	(10) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety that includes: (A) the entity's medical staff composed of individuals licensed under Subtitle B [Medical Practice Act, Occupations Code §151.001 et seq.]; (B) a medical committee under Subchapter D, chapter 161 Health and Safety Code [§§161.031-.033]; or (C) a multi-disciplinary committee including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety, as appropriate.	(12) Patient Safety Committee: Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety ~~that includes~~ including: (A) the entity's medical staff composed of individuals licensed under Subtitle B [Medical Practice Act, Occupations Code §151.001 et seq.]; (B) a medical committee under Subchapter D, chapter 161 Health and Safety Code [§§161.031-.033]; or (C) a multi-disciplinary committee including nursing representation, or any committee established by or contracted within the same entity to promote best practices and patient safety~~, as appropriate.~~.	**Staff Response:** Staff agree with language changes as suggested in column 3. J. Hopkins requested inclusion of "medical peer review committees as defined in Section 151.002(8)." **Staff Response:** Language in proposed definition of Pt. Safety Committee (12)(A) comes directly from the statute language and "et seq." includes the above mentioned section of the MPA. Therefore, addition seems duplicative, and was not added. This comment will be considered as explanatory in FAQ documents on peer review. §303.0015 addresses contracting peer review, but not pt safety committee: (C) a multi-disciplinary committee including nursing representation, or any committee established by ~~or contracted within~~ the same entity to promote best practices and patient safety~~, as appropriate.~~

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
11 **(a) Defi-nitions**	(11) Peer Review: Defined in the NPR law, contained within Texas Occupations Code (TOC) §303.001(5), it is the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event.	(13) Peer Review: Defined ~~in the NPR law, contained within Texas Occupations Code (TOC)~~ by §303.001(5) of NPR Law (TOC ch. 303), ~~it is~~ as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event.	BON agrees to changes at left. One comment requested addition of the following to definition: "the performance of incident-based peer review, safe harbor peer review, or any other review required by the Nursing Practice Act or TBON rules." **Staff response**: Agree in concept. Recommend adding the following language: **Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.**

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
12 **(a) Defi-nitions**	(12) Safe Harbor: a process allowing an individual to request in good faith a review of a situation, action, conduct, or assignment while being protected from retaliation and licensure liability. Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.	(14) Safe Harbor: A ~~a~~ process allowing an individual to request in good faith a review of a situation, action, conduct, or assignment while being protected from retaliation and licensure liability. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which Safe Harbor is requested. ~~or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	Definition of "assignment" as orig. added also deleted language here re: changes occurring at any time during the shift. BON staff believe it is beneficial to leave in language that clarifies a changes in assignment may occur at anytime. Staff also believe need to avoid term "liability" as nurses already confuse licensure responsibility with civil liability. BON staff further suggest clarification within the definition as follows: Safe Harbor: A process **that protects a nurse from employer retaliation and licensure sanction** ~~liability~~ ~~allowing an individual to~~ **when a nurse makes a** ~~request in~~ good faith ~~a~~ **request for peer** review of ~~a situation, action, conduct or~~ **an** assignment or conduct **that** the nurse ~~is requested to perform and a nurse while being protected from retaliation and licensure liability~~. **believes could result in a violation of the NPA (TOC) or board rules.** Safe Harbor must be invoked prior to engaging in the conduct or assignment for which ~~Safe Harbor~~ **peer review** is requested, **and may be invoked at anytime during the work period when the initial assignment changes.**

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
13 **(a) Defi-nitions**	(13) Safe Harbor Peer Review: The determination if the requested conduct or assignment could have potentially endangered a patient, resulting in the nurse violating his/her duty to the patient. A safe harbor peer review committee reviewing a nurse's request for safe harbor must also ascertain if external factors in the systematic approach and/or nursing policies related to the conduct under review could prevent the recurrence of the same or similar unsafe situation. In accordance with Nursing Peer Review (TOC) §303.011(b), if the committee determines that external factors contributed to a nurse's request for safe harbor, the committee is to report to a patient safety committee.	(15) Safe Harbor Nursing Peer Review: The determination if the requested conduct or assignment could ~~have potentially endangered a patient, resulting~~ result in the nurse violating his/her duty to the patient. A ~~safe harbor~~ Nursing Peer Review Committee reviewing a nurse's request for Safe Harbor must also ascertain if external factors contributed to the nurse's request and whether system changes or changes in nursing policies could prevent the recurrence of the same or similar situation. ~~reviewing a nurse's request for safe harbor must also ascertain if external factors in the systematic approach and/or nursing policies related to the conduct under review could prevent the recurrence of the same or similar unsafe situation.~~ In accordance with Nursing Peer Review (TOC) §303.011(b), if the committee determines that external factors contributed to a nurse's request for safe harbor, the committee ~~is to~~ shall report to a patient safety committee.	**Staff Response:** Staff agree with language changes as suggested in column 3. Definitions are the same for both rules 217.19 and 217.20.
13 **(a) Defi-nitions**	(14) Texas Occupations Code (TOC): One part of the Texas Statutes, or laws. The Nursing Practice Act (NPA) and Nursing Peer Review (NPR law) statutes are but a few of the chapters of Texas laws contained within the TOC.	(16) Texas Occupations Code (TOC): One ~~part~~ of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The Occupations Code contains the statutes governing occupations and professions including the health professions and includes both the NPA and NPR Law. The Occupations Code can be changed only by the Texas Legislature. ~~The Nursing Practice Act (NPA) and Nursing Peer Review (NPR law) statutes are but a few of the chapters of Texas laws contained within the TOC.~~	**Staff Response:** Staff agree with language changes as suggested in column 3, with minor editing as below. Definitions are the same for both rules 217.19 and 217.20. The Occupations Code contains the statutes governing occupations and professions including the health professions. ~~and includes~~ **B**oth the NPA and NPR Law **are located in the TOC.**

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
14 **(a) Defi-nitions**	(15) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity for: (A) a request made by a nurse under Nursing Peer Review (TOC) §303.005(c) regarding invoking safe harbor protections, or	(17) Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse: (A) ~~a~~ made ~~by a nurse~~ a good faith request for Safe Harbor Nursing Peer Review under ~~Nursing Peer Review (TOC)~~ §303.005(c) of NPR Law (TOC ch. 303) ~~regarding invoking safe harbor protections,~~ , or	**Staff Response:** Staff agree with language changes as suggested in column 3 with minor editorial change. Definitions are the same for both rules 217.19 and 217.20. (A) ~~a~~ made ~~by a nurse~~ a good faith request for Safe Harbor Nursing Peer Review under ~~Nursing Peer Review (TOC)~~ §303.005(c) of NPR Law (TOC ch. 303) ~~regarding invoking safe harbor protections,~~ **and rule 217.20;** **or**
15 **(a) Defi-nitions**	(B) under the NPA (TOC) §301.352 regarding a nurse's refusal to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the NPA or board rules; or	(B) refused under §301.352 of the NPA (TOC ch. 301) ~~regarding a nurse's refusal~~ to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates the NPA or board rules; or	**Staff Response:** Staff believe the definition under (b) should be simplified for ease in understanding, and greater detail placed either later in rule or in FAQs as needed (B) B) refused under §301.352 of the NPA (TOC ch. 301) **(Protection for Refusal to Engage in Certain Conduct)** ~~regarding a nurse's refusal~~ to engage in an act or omission relating to patient care that would constitute ~~grounds for reporting the nurse to the board, that constitutes a minor incident, or that violates~~ **a violation of** the NPA or board rules; or

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
16 **(a) Defi-nitions**	(C) a report made by a nurse under NPA (TOC) §301.4025 (related to patient safety concerns) and section (k) of this rule, that may also be protected under other laws or regulations, concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.	(C) ~~a report~~ made a report ~~by a nurse~~ under NPA (TOC) §301.4025 (report of unsafe practices of non-nurse entities) and section (i)(2) of this section ~~rule~~, ~~that may also be protected under other~~ or another law or regulations that authorizes reporting of ~~concerning~~ unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.	**Staff Response:** Staff believe the definition under (c) should be simplified for ease in understanding, and greater detail placed either later in rule or in FAQs as needed: (C) made a **lawful** report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance ~~under~~ with NPA (TOC) §301.4025 (report of unsafe practices of non-nurse entities) and ~~section (i)~~**(j)(2)** of this section ~~or another law or regulations that authorizes reporting of concerning unsafe practitioners or unsafe patient care practices or conditions. Protection from retaliatory action applies to any report made to a licensing agency, accrediting body, regulatory entity, or administrative personnel within the facility or organization that the nurse believes has the power to take corrective action.~~

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
17 **(b) Purpose**	(b) Purpose The purpose of this rule is to define minimum due process to which a nurse is entitled under safe harbor peer review, to provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans; to assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor, and to provide guidance to the peer review committee in its fact finding process. Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.	(b) Purpose The purpose of this rule is to (1) define the process for invoking Safe Harbor; (2) define minimum due process to which a nurse is entitled under safe harbor peer review, (3) ~~to~~ provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans; (4) ~~to~~ assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor; ~~and to~~	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
18 **(b) Purpose**		(5) provide guidance to the peer review committee in making its determination of the nurse's duty to the patient. ~~fact finding process~~. ~~Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	**Staff Response:** Staff agree with language changes as suggested in column 3.
19 **(c) Applica-bility of Safe Harbor Peer Review**	(c) Applicability of Safe Harbor Peer Review: (1) Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient. (2) Any person or entity that conducts Safe Harbor peer review is required to comply with the requirements of this rule.	(c) Applicability of Safe Harbor Nursing Peer Review: (1) Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient. (2) Any person or entity that conducts Safe Harbor Nursing Peer Review is required to comply with the requirements of this rule.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
20 **(d) Invoking Safe Harbor**	(d) Invoking Safe Harbor (1) Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.	(d) Invoking Safe Harbor (1) Safe Harbor must be invoked prior to engaging in the conduct or assignment and at one of the following times: A) when the conduct is requested or assignment made; B) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required, or the specified functions, duties, or amount of work originally assigned, that a new assignment occurs as defined by Subsec. (a)( ); or ~~(1) Safe Harbor must be invoked prior to or at the time the assignment is made or conduct requested. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	**Staff Response:** Staff agree with language changes as suggested in column 3 with the additional amendments to language as follows: B) when changes ~~in the clinical situation may~~ occur ~~or the nurse's assessment of the~~ **in the request or** assignment **that** so modify the level of nursing care **or supervision** required **compared to what was originally requested or assigned** that ~~or~~ **a nurse believes in good faith that patient harm may result.** ~~specified functions, duties, or amount of work originally assigned, that a new assignment occurs as defined by Subsec. (a)( ); or~~

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
21 **(d) Invoking Safe Harbor**	(2) At the time the nurse is requested to engage in the conduct or assignment, or refuses to engage in the requested conduct or assignment, he/she must notify in writing the supervisor requesting the conduct or assignment that the nurse is invoking Safe Harbor. The content of this notification must at least meet the requirements for an initial written request set out in subsection (3) below. ~~Full~~ Detailed documentation of the Safe Harbor request that complies with subsection (4) below must be completed before the end of the work period.	(2) ~~At the time the nurse is requested to engage in the conduct or assignment, or refuses to engage in the requested conduct or assignment, he/she~~ The nurse must notify ~~in writing~~ the supervisor requesting the conduct or assignment in writing that the nurse is invoking Safe Harbor. The content of this notification must ~~at least~~ meet the requirements for an Initial Quick Request Form described ~~written request set out~~ in paragraph ~~subsection~~ (3) ~~below~~. A ~~Full~~ Detailed written account ~~documentation~~ of the Safe Harbor request that meets the minimum requirements for the Detailed Written Account described in paragraph ~~complies with subsection~~ (4) below must be completed before leaving the work setting at the end of the work period.	**Staff Response**: Agree w/language changes in column #3 except as follows. Change recommended to simplify and avoid similar language ("initial" and "quick") that could be conceived as different means of invoking safe harbor. ...for ~~an Initial~~ **a** Quick Request Form described ....

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
22 **(d) Invoking Safe Harbor**	(3) An initial written notification or request for Safe Harbor must include: (A) The nurse(s) name making the safe harbor request and his/her signature(s); (B) The date and time of the request; (C) location of where the conduct or assignment is to be completed; (D) Name of the person requesting the conduct or making the assignment; (E) A brief explanation of why safe harbor is being requested.	(3) Initial Quick Request Form ~~An initial written notification or request for Safe Harbor must include:~~ (A) This form may be used to invoke safe harbor and may be in any format as long as it is in writing and contains the following information: ~~(A)~~ (i) the nurse(s) name making the safe harbor request and his/her signature(s); ~~(B)~~ (ii) the date and time of the request; ~~(C)~~ (iii) the location of where the conduct or assignment is to be completed; ~~(D)~~ (iv) the name of the person requesting the conduct or making the assignment; ~~(E)~~ (v) a brief explanation of why safe harbor is being requested.	**BON Staff Response:** Suggested (3)(A) references "this form" but is not clear that a BON form exists. Staff recommend the following substitute language: (3) ~~Initial~~ Quick Request Form **(3) (A) A nurse wishing to invoke Safe Harbor must make an initial request in writing that at a minimum includes the following.** **(i)-(v) unchanged** **(B) The *BON Safe Harbor* ~~Initial~~ *Quick Request Form* may be used to invoke the initial request for Safe Harbor, but use of the form is not required. The initial written request may be in any written format provided the above minimum information is provided.**

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
23 **(d) Invoking Safe Harbor**	(4) The detailed written account must include at a minimum: (A) the conduct assigned or requested, including the name and title of the person making the assignment or request; (B) a description of the practice setting (e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation); (C) a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (Rule 217.11) or other section of the NPA and/or Board rules the nurse believes would have been violated. If a nurse refuses to engage in the requested conduct or assignment, the nurse must document the existence of a rationale listed under subsection (g) of this rule.	(4) ~~The~~ Detailed Written Account ~~must include at a minimum:~~ ~~(A) This form may be used to invoke safe harbor and may be in any format as long as it is in writing and contains the following information:~~ ~~(A)~~ (i) the conduct assigned or requested, including the name and title of the person making the assignment or request; ~~(B)~~ (ii) a description of the practice setting (e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation); ~~(C)~~ (iii)a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (Rule 217.11) or other section of the NPA and/or Board rules the nurse believes would have been violated. If a nurse refuses to engage in the requested conduct or assignment, the nurse must document the existence of a rationale listed under subsection (g) of this rule.	**BON Staff Response:** Suggested (4)(A) references a "form" but is not clear that this is the same "form" [BON Comprehensive Request Form] addressed in suggested subsection (5) below. Staff recommend the following substitute language: (4) **Comprehensive** ~~Detailed~~ Written ~~Account~~ **Request for Safe Harbor Peer Review** **(4) (A) A nurse who invokes Safe Harbor must supplement the initial written Quick Request Form under section (3)(A) by submitting a comprehensive request in writing before leaving the work setting at the end of the work period. This comprehensive written request must include a minimum of the following information:** **(i)-(vi) unchanged** **(B) The *BON Safe Harbor* ~~Initial~~ *Comprehensive Request for Safe Harbor Form* may be used when submitting the detailed request for Safe Harbor, but use of the form is not required. The comprehensive written request may be in any written format provided the above minimum information is included.** ~~(A)~~**(i)** This form may be used to invoke safe harbor or to make the report required at the end of the work period under Paragraph (3)(B) to supplement the ~~Initial~~ Quick Request Form .

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
24 **(d) Invoking Safe Harbor**	(D) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and (E) the nurse's name, title, and relationship to the supervisor making the assignment or request.	(iv) If applicable, the rationale for the nurse's not engaging in the requested conduct or assignment awaiting the nursing peer review committee's determination as to the nurse's duty. The rationale should refer to one of the justifications described in Subsection (g)(2) for not engaging in the conduct or assignment awaiting a peer review determination. ~~(D)~~ (v) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and ~~(E)~~ (vi) the nurse's name, title, and relationship to the supervisor making the assignment or request.	**Staff Response:** Staff agree with language changes as suggested in column 3 (see above section).
25 **(d) Invoking Safe Harbor**		(B) If this form is used to invoke safe harbor, the nurse must complete the Detailed Written Account described in Subdivision (4) as a supplemental report before leaving the work setting at the end of the work period.	**BON Staff Response:** BON staff recommend delete. See substitute language in (4)(A) above. ~~(B) If this form is used to invoke safe harbor, the nurse must complete the Detailed Written Account described in Subdivision (4) as a supplemental report before leaving the work setting at the end of the work period.~~

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
26 **(d) Invoking Safe Harbor**		(5) BON Comprehensive Request Form (A) The BON Comprehensive Request Form is a board - developed form that can be found on the BON's website www.bon.state.tx.us. It includes a process for the nurse and facility to follow once the request for safe harbor has been made. (B) This form may be used to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form.	**BON Staff Response:** Suggested subsection (d)(5)(A) seems more appropriate for addition to FAQs on peer review than in rule language. Recommend delete (d)(5)(A) in rule language and incorporate (d)(5)(B) into subsection (4). ~~(5) BON Comprehensive Request Form~~ ~~(A) The BON Comprehensive Request Form is a board - developed form that can be found on the BON's website www.bon.state.tx.us. It includes a process for the nurse and facility to follow once the request for safe harbor has been made.~~ ~~(B) This form may be used to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the Initial Quick Request Form.~~
27 **(d) Invoking Safe Harbor**	(5) If the nurse does not submit the initial request for Safe Harbor using the form on the board web site, the facility and nurse shall adhere to the Safe Harbor process as outlined on the board's form.	~~(5)~~(6) If the nurse does not use the BON Comprehensive Request Form described in Subdivision (5) to invoke safe harbor or to make the report required at the end of the work period under Paragraph (2)(B) to supplement the ~~Initial~~ Quick Request Form, the facility and nurse must follow the Safe Harbor process as outlined in this form.	**Staff Response**: Simplify language (5)~~(6)~~ If the nurse does not use the BON **Quick Request and Comprehensive** Request Form**s** ~~described in Subdivision **(d)(2)**~~ to invoke safe harbor ~~or to make the detailed report required at the end of the work period under Paragraph (2)(B) to supplement the Quick Request Form~~, the facility and nurse must follow the Safe Harbor process as outlined in this **rule**.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
28 **(e) Safe Harbor Protec-tions**	(e) Safe Harbor Protections (1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c), the nurse shall: (A) Invoke Safe Harbor in good faith. (B) At the time the nurse is requested to engage in the conduct or assignment, notify the supervisor that the nurse intends to invoke Safe Harbor in accordance with subsection (d). This must be done before accepting or refusing the assignment. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This	(e) Safe Harbor Protections (1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c) as set out in Subsection (2), the nurse shall: (A) invoke Safe Harbor in good faith. (B) ~~At the time the nurse is requested to engage in the conduct or assignment,~~ notify the supervisor in writing that he/she ~~that the nurse~~ intends to invoke Safe Harbor in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at one of the following times: i) when the conduct is requested or assignment made; ii) when changes in the clinical situation or the nurse's assessment of the assignment so modify the level of nursing care required or the specified functions, duties, or amount of work originally assigned that a new assignment occurs as defined by Subsec. (a)( ); or	**Staff Response:** Staff agree with language changes and concepts in column #3 with the following clarification language recommendations: This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at ~~one~~ **any** of the following times: ii) when changes ~~in the clinical situation may~~ occur ~~or the nurse's assessment of the~~ **in the request or** assignment **that** so modify the level of nursing care **or supervision** required **compared to what was originally requested or assigned** that ~~or~~ **a nurse believes in good faith that patient harm may result.**

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
29 **(e) Safe Harbor Protec-tions**	[see this column, table section 29 above]	iii) when the nurse refuses to engage in the requested conduct or assignment. ~~before accepting or refusing the assignment. This includes changes in initial practice situation, assignments, or patient acuities that adversely impact the conduct or assignment requested of the nurse such that a nurse believes in good faith that his/her duty to the patient would be violated. This change may occur at any time.~~	**Staff Response:** Staff agree with suggested changes in column #3.
30 **(e) Safe Harbor Protec-tions**	(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination. A violation of this subsection or Nursing Peer Review (TOC) §303.005(h) is subject to NPA (TOC) §301.413.	(2) Subsections 303.005(c) and (h) of the Nursing Peer Review Law (TOC Ch. 303), provide the following protections: (A) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for requesting Safe Harbor in good faith;	**Staff Response:** See recommended changes in definitions for good and bad faith; staff agree with suggested changes.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
31 **(e) Safe Harbor Protec-tions**		(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination. ~~A violation of this subsection or Nursing Peer Review (TOC) §303.005(h) is subject to NPA (TOC) §301.413.~~	Staff Response: Staff agree with suggested deletion in column #3.
32 **(e) Safe Harbor Protec-tions**	(3) A nurse's protections from licensure action by the board for a good faith safe harbor request remain in place until 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not apply to the nurse's protections from retaliation under TOC §303.005(h). Safe Harbor protections also do not apply to any civil action that may result from the nurse's practice.	~~(3)~~(C) A nurse is not subject to being reported to the board and may not be disciplined by the board for engaging in the conduct awaiting the determination of the peer review committee as permitted by Subsection (g). A nurse's protections from disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination remain in place for 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not affect to the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor. (3) Section 301.413 of the NPA provides a nurse or individual retaliated against in violation of §303.005(h) of the NPR Law (TOC ch. 303) a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.	**Staff Response:** Staff agree with language changes as suggested in column 3 re: (2)(C). **Staff Response re:(e) (3):** The BON does not regulate "individuals" so regardless of broader application of statutes, BON rule needs to address "nurses." Also, needs further clarification re: employment vs. licensure issues vs. facility regulation. Staff recommend the following language: (3) Section 301.413 of the NPA provides a nurse ~~or individual retaliated against in violation of §303.005(h) of the NPR Law (TOC ch. 303) a~~ **the** right to file **civil** suit to recover damages. The nurse ~~or individual also~~ may **also** file a complaint with ~~an~~ **the** ~~appropriate licensing~~ **regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability**.

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
33 **(e) Safe Harbor Protec-tions**		(4) Safe Harbor protections ~~also~~ do not apply to any civil action that may result from the nurse's practice.	**Staff Response:** Staff agree with language changes as suggested in column 3.
34 **(f) Exclu-sions to Safe Harbor Protec-tions**	(f) Exclusions to Safe Harbor Protections (1) The protections provided under subsection (e) do not apply to the nurse who invokes Safe Harbor in bad faith, or engages in activity unrelated to the reason for the request for Safe Harbor or that constitutes reportable conduct of a nurse.	(f) Exclusions to Safe Harbor Protections (1) The protections provided from discipline or discrimination by a facility, agency, entity, or employer under subsection (e)(2) do not apply to the nurse who does not invoke~~s~~ Safe Harbor in ~~bad~~ good faith,	**Staff Response:** Staff agree with concepts and make the following clarifying amendments (stating in the positive (action taken)versus the negative (action failed to take; definitions amended in re-proposed rule language.). See next section of table. ~~(1) The protections provided from discipline or discrimination by a facility, agency, entity, or employer under subsection (e)(2) do not apply to the nurse who does not invokes Safe Harbor in bad good faith,~~

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
35 **(f) Exclu-sions to Safe Harbor Protec-tions**	(2) In addition to consideration of the nurse's request for Safe Harbor, the safe harbor peer review committee may consider whether an exclusion to Safe Harbor peer review applies, and evaluate whether a nurse has engaged in reportable conduct provided such review is conducted in accordance with the requirements of rule 217.19 (incident-based peer review).	(2) The protections provided from disciplinary action by the board under subsection (e)(3) do not apply to the nurse who does not invoke Safe Harbor in good faith, to conduct engaged in prior to the request for Safe Harbor, or to conduct unrelated to the reason for the request for Safe Harbor. ~~or engages in activity unrelated to the reason for the request for Safe Harbor or that constitutes reportable conduct of a nurse.~~ ~~(2)~~ (A) In addition to consideration of the nurse's request for Safe Harbor, the ~~safe harbor~~ peer review committee may consider whether ~~an exclusion to Safe Harbor peer review applies, and evaluate whether~~ a nurse has engaged in reportable conduct not related to the request for Safe Harbor provided such review is conducted in accordance with the requirements of ~~rule~~ § 217.19 (Incident-Based Peer Review) of this title.	**Staff Response:** (e)(3) as revised relates to a nurse's protections from employer retaliation and ability to file suit under §301.413----not to board sanction of the nurse's license. ~~(2)~~**(1)** ~~The protections provided~~ **A nurse's protections** from disciplinary action by the board under subsection (e)**(2)** ~~(3)~~ do not apply to: ~~does not invoke Safe Harbor in good faith~~, **(A)** the nurse who invokes Safe Harbor in bad faith; **(B)** conduct **the nurse** engages in prior to the request for Safe Harbor; or **(C)** conduct unrelated to the reason for **which** the **nurse** requested ~~for~~ Safe Harbor. ~~(A)~~(2) ~~In addition to consideration of the nurse's request for Safe Harbor, the safe harbor peer review committee may consider whether~~ **If the peer review committee determines that** a nurse has engaged in ~~reportable~~ conduct **subject to reporting that is** not related to the request for Safe Harbor, **the committee must comply with the requirements of § 217.19 Incident-Base Peer Review** of this title. ~~provided such review is conducted in accordance with the requirements of §217.19 (Incident-Based Peer Review) of this title.~~

Table Section	Proposed Rule Language	Recommended Changes {see comment documents}	BON Response to Comments {see Attachments C-1 & C-2}
36 **(f) Exclu-sions to Safe Harbor Protec-tions**	(3) If the safe harbor peer review committee determines that a nurse's conduct was not related to the nurse's request for Safe Harbor and would otherwise be reportable to the Board, the committee shall report the nurse to the Board as required in NPA (TOC) §301.403.	~~(3)~~ (B) If the safe harbor peer review committee determines that a nurse's conduct was not related to the nurse's request for Safe Harbor and would otherwise be reportable to the Board, the committee shall report the nurse to the Board as required in NPA (TOC) §301.403.	**Staff Response:** With new #2 language, this section unnecessary since committee would either operate under IBPR (217.19) or a different peer review committee would do the same, and § 217.19 provides this directive. ~~(3) (B) If the safe harbor peer review committee determines that a nurse's conduct was not related to the nurse's request for Safe Harbor and would otherwise be reportable to the Board, the committee shall report the nurse to the Board as required in NPA (TOC) §301.403.~~
37 **(g) Engag-ing in Conduct Prior to Peer Review**	(g) Nurse's Decision to Accept or Refuse Assignment When Invoking Safe Harbor and While Awaiting Determination of Safe Harbor Peer Review Committee A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which:	(g) Nurse's Decision Whether to Engage in Conduct or Assignment While Awaiting Determination of Safe Harbor Nursing Peer Review ~~Committee.~~ (1) A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which:	**Staff Response:** For section (g) BON staff recommended language in 3rd and 4th columns in **green and underlined**.} Staff appreciate that nurses do not routinely know that they have a statutory basis {§301.352(a)} for refusing certain assignments, but that this also doesn't mean it's OK to just go home. Need to have clear section heading so nurses and others can find the information in the rule. **(g) Nurse's Right To Refuse To Engage In Certain Conduct Pending Nursing Safe Harbor Peer Review Determination**

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
38 **(g) Engag-ing in Conduc t Prior to Peer Review**	(1) the nurse lacks the basic knowledge, skills, and abilities that would be necessary to render the care or engage in the conduct requested or assigned at a minimally competent level ; or	(A) the nurse lacks the basic knowledge, skills, and abilities that would be necessary to render the care or engage in the conduct requested or assigned at a minimally competent level so patients are not exposed to an unjustifiable risk of harm; or	**Staff Response:** For section (g) BON staff recommended language in 3rd and 4th column in **green and underlined**.} ...minimally competent level ~~so~~ **such that engaging in the requested conduct or assignment** would ~~patients are not~~ expose~~d~~ **one or more patients** to an unjustifiable risk of harm; or
39 **(g) Engag-ing in Conduct Prior to Peer Review**	(2) the requested conduct or assignment would constitute unprofessional conduct and/or criminal conduct.	(B) the requested conduct or assignment would constitute unprofessional conduct and/or criminal conduct ~~or a serious violation of Unprofessional Conduct Rule 217.12 involving intentional or unethical conduct~~ such as fraud, theft, **falsification,** patient abuse or exploitation.	**Staff Response: 1)** "serious violation" may be too restrictive within context of safe harbor. Unprofessional and criminal conduct are described in NPA and other rules, not just 217.12. **2)** Language doesn't address GAC/TNA example of "falsification" which is probably better example for safe harbor (3) As revised, language would be too duplicative. **Staff Rec: leave examples; add falsification**.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
40 **(g) Engag-ing in Conduct Prior to Peer Review**		~~(2) The Safe Harbor protections provided a nurse under §303.005(c) of the NPR Law (TOC ch. 303) are affected by whether the nurse engages in the conduct or assignment awaiting the peer review determination:~~ ~~(A) If a nurse engages in the conduct or assignment, the protections apply if the nurse is acting on a good faith belief that engaging in the conduct or assignment awaiting peer review determination is permitted by Subdivision (1) even if the belief is determined later to be incorrect~~	**Staff Response:** Conflicts with rule 217.11(1) (B) and (T). Nurses are expected to know under (1) that conduct is beyond scope and/or would constitute illegal or unprofessional conduct. Also feel this language would make some nurses think they must accept the assignment *always* or face being in trouble. BON has not sanctioned a nurse who invoked safe harbor and engaged in conduct the nurse could reasonably believe was in his/her scope. Too difficult to enforce if add language; nurse may engage because wants challenge even though not competent in care–and then claims safe harbor but keeps caring for pt w/adverse outcome (bad faith).
41 **(g) Engag-ing in Conduc t Prior to Peer Review**		~~(B) If a nurse does not engage in the conduct or assignment, the nurse may not have all the protections provided by §303.005(c) of the NPR Law (TOC ch. 303).~~	**Staff Response: Unclear; Alt. language:** **(2) if a nurse refuses to engage in the conduct or assignment because it is beyond the nurse's scope as described under (1)(A) of this paragraph:** **(A) the nurse and supervisor must collaborate in an attempt to identify an acceptable assignment that is within the nurse's scope and enhances the delivery of safe patient care; and** **(B) The results of this collaborative effort must be documented in writing and maintained in peer review records by the chair of the peer review committee.**

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
42 **(g) Engaging in Conduct Prior to Peer Review**		~~(i) The protection provided by §303.005(c)(4) that a nurse may not be disciplined by the Board for engaging in the requested conduct or assignment awaiting nursing peer review is not applicable if the nurse refuses to engage in the conduct or assignment~~	**Staff Response:** Conflicts with TOC 301.352 that allows nurse to refuse assignment that would violate NPA or Board rules. **Staff Rec:** Do not add suggested language. If evidence that nurse invoked in bad faith, rule language already has this covered.
43 **(g) Engaging in Conduct Prior to Peer Review**		~~(ii) If a nurse refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct. The determinations of the Safe Harbor Peer Review Committee are not binding if the CNO or nurse administrator believes in good faith that the Safe Harbor Peer Review Committee incorrectly determined a nurse's duty. The CNO's or nurse administrator's decision that the peer review committee's determinations are not binding does not affect protections provided the nurse by §303.005(c)(1) of the Nursing Peer Revew Law (TOC ch. 303)(relating to protections for refusing to engage in conduct that violates the NPA or a Board rule).~~	*Suggested repetition of language found in section (d)(4)(C).* **Staff Response**: As preceding (2)(A), (B), and (B)(i) deleted, staff do not feel repetition of language from (d)(4)(C) in section (g) is helpful. However, see clarification language added above to emphasize the intent of accepting the assignment unless exclusion criteria are met. Also added is provision that intent is for nurse and supervisor to collaborate in good faith effort to do what is best for the patient(s), and to document this effort.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
44 **(g) Engaging in Conduct Prior to Peer Review**		(3) If the nurse does not engage in the requested conduct or assignment awaiting the nursing peer review committee's determination, the nurse must document his/her rationale as part of the process of invoking Safe Harbor described in Subsection (d). The rationale should refer to one of the justifications described in Subdivision (2).	**Staff Response:** Documenting rationale minimum requirement when invoke Safe Harbor; New #2 requires collaboration between supervisor and nurse when assignment beyond nurses scope, so also assures rationale will be documented. ~~(3) If the nurse does not engage in the requested conduct or assignment awaiting the nursing peer review committee's determination, the nurse must document his/her rationale as part of the process of invoking Safe Harbor described in Subsection (d). The rationale should refer to one of the justifications described in Subdivision (2). **(g)(1)(A) or (B) of this subsection.**~~
45 **(h) Minimum Due Process**	(h) Minimum Due Process (1) A person or entity required to comply with Nursing Peer Review (TOC) §303.005(i) shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Peer Review) and the procedure for making a request.	(h) Minimum Due Process (1) A person or entity required ~~to comply with~~ by ~~Nursing Peer Review (TOC)~~ §303.005(i) of NPR Law (TOC ch. 303) to provide nursing peer review shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Nursing Peer Review) and the procedure for making a request**.**	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
46 **(h) Mini-mum Due Process**	(2) In order to meet the minimum due process required by Nursing Peer Review (TOC) chapter 303, the nursing peer review committee shall comply with the membership and voting requirements as set forth in TOC §303.003(a)-(d); (3) The peer review committee shall exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse.	(2) In order to meet the minimum due process required by ~~Nursing Peer Review~~ NPR Law (TOC) chapter 303, the nursing peer review committee shall (A) comply with the membership and voting requirements as set forth in TOC §303.003~~(a)-(d)~~; ~~(3)~~(B) ~~The peer review committee shall~~ exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse;	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
47 **(h) Mini-mum Due Proces s**	(4) Attendance at the safe harbor peer review hearing by a CNO (administrator) or other persons with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, is limited to appearing before the safe harbor peer review committee to speak as a fact witness. (5) The nurse requesting safe harbor shall be permitted to: (A) appear before the committee; (B) ask questions and respond to questions of the committee; and (C) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.	~~(4)~~(C) Limit attendance at the safe harbor peer review hearing by a CNO, nurse administrator, or other ~~persons~~ individual with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, ~~is limited~~ to appearing before the safe harbor peer review committee to speak as a fact witness, and ~~(5)~~(D) Permit the nurse requesting safe harbor ~~shall be permitted~~ to: ~~(A)~~(i) appear before the committee; ~~(B)~~ (ii) ask questions and respond to questions of the committee; and ~~(C)~~(iii) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.	**Staff Response:** Staff agree with language changes as suggested in column 3 with the following additional changes (for consistency with remainder of rule): (C) Limit attendance at the **S**afe **H**arbor **Nursing** **P**eer **R**eview hearing by a...

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
48 **(i) Safe Harbor Time-lines**	(i) Safe Harbor Processes (1) The following timelines shall be followed: (A) the safe harbor peer review committee shall complete its review and notify the CNO (nurse administrator) within 14 calendar days of when the nurse requested Safe Harbor; (B) within 48 hours of receiving the committee's determination, the CNO (nurse administrator) shall review these findings and notify the nurse requesting safe harbor peer review of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect.	(i) Safe Harbor ~~Processes~~ Timelines ~~(1) The following timelines shall be followed:~~ ~~(A)~~(1) The safe harbor peer review committee shall complete its review and notify the CNO or nurse administrator within 14 calendar days of when the nurse requested Safe Harbor. ~~(B)~~(2) Within 48 hours of receiving the committee's determination, the CNO or nurse administrator shall review these findings and notify the nurse requesting safe harbor ~~peer review~~ of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
49 **(i) Safe Harbor Time-lines**		(3) The nurse's protection from disciplinary action by the board for engaging in the conduct or assignment awaiting peer review determination expires 48 hours after the nurse is advised of the peer review committee's determination. The expiration of this protection does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under §303.005(h) of the NPR Law (TOC ch. 303) for requesting Safe Harbor.	Repeats language from (e)(2)(C). Assures all timelines are in one section of the rule. **Staff Response:** Staff agree with language changes as suggested in column 3. Duplication in this section on purpose to emphasize and to make rule more in "plain speak" terms.
50 **(j) General Provi-sions**	(2) The Chief Nursing Officer (CNO) of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the Nursing Practice Act (TOC ch.301) and Nursing Peer Review (TOC ch 303).	(j) General Provisions ~~(2)~~(1) The Chief Nursing Officer (CNO) of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the Nursing Practice Act (TOC ch.301) and Nursing Peer Review Law (TOC ch 303).	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
51 **(j) General Provi-sions**	(3) Texas Occupations Code chapter 303 (Nursing Peer Review), requires that peer review be conducted in good faith. A nurse who knowingly participates in peer review in bad faith is subject to disciplinary action by the Board under the Texas Occupations Code §301.452(b)	~~(3)~~(2) ~~Texas Occupations Code chapter 303 (Nursing Peer Review), requires that~~ Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in nursing peer review in bad faith is subject to disciplinary action by the Board ~~under the Texas Occupations Code §301.452(b).~~	**Staff Response:** Staff agree with language changes as suggested in column 3.
52 **(j) General Provi-sions**	(4) The peer review committee and participants shall comply with the confidentiality requirement of Nursing Peer Review (TOC) §§303.006 and 303.007 relating to confidentiality and limited disclosure of peer review information.	(4)(3) The peer review committee and participants shall comply with the confidentiality requirement of Nursing Peer Review Law(TOC) § § 303.006 and 303.007 relating to confidentiality and limited disclosure of peer review information.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
53 **(j) General Provi-sions**	(5) If the CNO (nurse administrator) in good faith disagrees with the decision of the peer review committee, the rationale for disagreeing with a peer review committee's determination must be recorded and retained with the peer review records. (A) If the CNO (nurse administrator) believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and rule 217.11(1)(K).	~~(5)~~(4) If the CNO or ~~(~~nurse administrator~~)~~ in good faith disagrees with the decision of the peer review committee, the rationale for disagreeing with a peer review committee's determination must be recorded and retained with the peer review records. (A) If the CNO or ~~(~~nurse administrator~~)~~ believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under NPA (TOC) §301.402 and rule 217.11(1)(K).	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
54 **(j) General Provi-sions**	(4)(B) If a nurse requests a safe harbor peer review determination under Nursing Peer Review (TOC) §303.005(b), and refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct, The determinations of the safe harbor peer review committee are not binding if the CNO (nurse administrator) believes in good faith that the safe harbor peer review committee incorrectly determined a nurse's duty; however, this does not affect protections provided for the nurse under Nursing Peer Review (TOC) §303.005(c) or NPA (TOC) §301.352	(4)(B) If a nurse requests a Safe Harbor Peer Review determination under Nursing Peer Review Law (TOC) §303.005(b), and refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct, The determinations of the ~~safe harbor peer review~~ committee are not binding if the CNO or ~~(~~nurse administrator~~)~~ believes in good faith that the safe harbor peer review committee incorrectly determined a nurse's duty. ~~; however, this~~ The CNO's or nurse administrator's decision that the peer review committee's determination as to the nurse's duty to the patient is not binding does not affect the protections provided ~~for~~ the nurse ~~under~~ by Nursing Peer Review Law (TOC) §303.005(c)(1) or NPA (TOC) §301.352 and does not invalidate the committee's determination as to the nurse's duty to the patient	**Staff Response:** Staff agree with language changes as suggested in column 3, except for added language at end of subsection. Do not believe language helps understanding in rule language; will consider this input for use with FAQs on peer review if it is helpful to nurses in interpreting this section of the rule. ~~The CNO's or nurse administrator's decision that the peer review committee's determination as to the nurse's duty to the patient is not binding does not affect the protections provided for the nurse under by Nursing Peer Review Law (TOC) §303.005(c)(1) or NPA (TOC) §301.352 and does not invalidate the committee's determination as to the nurse's duty to the patient~~
55 **(k) Use of Informal Work Group**	(j) Use of Informal Work Group In Safe Harbor Peer Review	~~(j)~~(k) Use of Informal Work Group In Safe Harbor Nursing Peer Review	**Staff Response:** *Comments made minor changes to this section as noted in partial sections copied in table. The implied (1) in the introductory paragraph was ignored thus subsections were designated with numbers vs. letters. BON legal counsel believes the original formatting is correct and will leave as submitted.*

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
57 **(k) Use of Informal Work Group**	(D) the nurse has the right to reject any decision of the informal workgroup and have the safe harbor peer review committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the informal workgroup shall not participate in that determination;	~~(D)~~(4) the nurse ~~has~~ **to have** the right to reject any decision of the informal workgroup and have the entire ~~safe harbor peer review~~ committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the informal workgroup shall not participate in that determination; ~~and~~	**Staff Response:** Staff agree with language changes as suggested in column 3 w/one editorial correction.
56 **(k) Use of Informal Work Group**	(E) ratification by the safe harbor peer review committee of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full peer review committee to review the conduct in question;	~~(E)~~(5) ratification by the safe harbor peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full peer review committee to review the conduct in question; and	**Staff Response:** Staff agree with language changes as suggested in column 3.
57 **(k) Use of Informal Work Group**	(F) the peer review chair person must communicate any decision of the informal work group to the CNO (nurse administrator).	(F) the peer review chair person ~~must~~ communicate any decision of the informal work group to the CNO or nurse administrator.	**Staff Response:** Staff agree with language changes as suggested in column 3.

Table Section	Proposed Rule Language	GAC Recommended Changes	BON Response to Comments
58 **(l)** **Whistle-blower Protec-tions**	(k) Reporting Conduct of other Practitioners or Entities/ Whistleblower Protections (1) This section does not expand the authority of any safe harbor peer review committee or the board to make determinations outside the practice of nursing.	~~(k)~~(l) Reporting Conduct of other Practitioners or Entities; Whistleblower Protections (1) This subsection does not expand the authority of any safe harbor peer review committee or the board to make determinations outside the practice of nursing.	**Staff Response:** Staff agree with language changes as suggested in column 3.
59 **Whistle-blower Protec-tions**	(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to NPA (TOC) §301.413.	(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to NPA (TOC) §301.413 that provides a nurse or individual retaliated against a right to file suit to recover damages. The nurse or individual also may file a complaint with an appropriate licensing agency.	**Staff Response:** Same as (e)(3). The BON does not regulate "individuals" so regardless of broader application of statutes, BON rule needs to address "nurses." A violation of this subsection is subject to NPA (TOC) §301.413 that provides a nurse ~~or individual retaliated against a~~ **the** right to file **civil** suit to recover damages. The nurse ~~or individual also~~ may **also** file a complaint with **the** ~~appropriate licensing~~ **regulatory** agency **that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability**.