

Consideration of Proposed Amendments to 22 Tex. Admin. Code §217.19, relating to *Incident Based Nursing Peer Review and Whistleblower Protections*

Background: During the 85th Legislative Session, the Texas Legislature enacted House Bill (HB) 3296, which became effective September 1, 2017. HB 3296 amended the Occupations Code §303.0015(a) to require a nursing peer review committee to be established for vocational nurses, if a person regularly employs, hires, or contracts for the services of eight (8) or more nurses, and for professional nurses, if the person regularly employs, hires, or contracts for the services of eight (8) or more nurses, at least four (4) of whom are registered nurses. The proposed amendments, attached hereto as Attachment "A", are necessary to conform to these statutory changes.

Additionally, at its July 2014 meeting, the Board charged the Nursing Practice Advisory Committee (Committee) with reviewing and making recommendations for changes to Board Rule 217.16. As part of the Committee's response to the Board's charge, the Committee recommended relocating portions of the existing rule text relating to nursing peer review from 217.16 to Board Rule 217.19, as appropriate. The proposed amendments also include this re-located language.

The remainder of the changes are necessary for consistency in terminology throughout the rule text and are non-substantive in nature.

Board Action: Move to approve the proposed amendments to 22 Texas Administrative Code §217.19, relating to *Incident Based Nursing Peer Review and Whistleblower Protections*, with authority for the General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. If no negative comments and no request for a public hearing are received, move to adopt the amendments to 22 Texas Administrative Code §217.19, relating to *Incident Based Nursing Peer Review and Whistleblower Protections*, as proposed.

Attachment "A"

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

(a) Definitions.

(1) - (6) (No change).

(7) Incident-Based Nursing Peer Review--~~Incident-Based~~ [based] nursing peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to five (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) - (13) (No change).

(14) Peer Review--Defined by TOC §303.001(5) (NPR Law) 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 nursing care, and a determination or recommendation regarding a complaint. The term also includes the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of and protections for nurses who raise care concerns, report under Chapter 301, request nursing peer review, and the resolution of workplace and practice questions relating to nursing and patient care. The nursing 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. Nursing peer [Peer] review conducted

by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor nursing peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for nursing 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 or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which nursing peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) - (17) (No change).

(b) Purpose. The purpose of this rule is to:

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

(3) (No change).

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

(c) Applicability of Incident-Based Nursing Peer Review. TOC §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of eight (8) [ten (10)] or more nurses (for nursing peer review of an RN, at least four (4) [5] of the 8 [10] must be RNs) to conduct nursing peer review for purposes of TOC §301.401(1) and

§301.402(e) (NPA) (relating to alternate reporting by nurses to nursing peer review when a nurse engages in conduct subject to reporting), §301.403 (relating to nursing peer review committee reporting), §301.405(c) (relating to nursing peer review of external factors as part of employer reporting), and §301.407(b) (relating to alternate reporting by state agencies to nursing peer review).

(d) Minimum Due Process.

(1) A licensed nurse subject to incident-based nursing peer review is entitled to minimum due process under TOC §303.002(e) (NPR Law). Any person or entity that conducts incident-based nursing 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) of this section.

(2) A facility conducting incident-based nursing 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 nursing peer review hearing beyond that required by this subsection;

(B) - (C) (No change).

(D) reporting of nurses to the Board by incident-based nursing peer review committee in accordance with the 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 nursing 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 TOC Chapter 303

(NPR Law), the nursing peer review committee must:

(A) (No change).

(B) exclude from the committee, including attendance at the nursing 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) (No change).

(ii) the incident-based nursing 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 nursing 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

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

(iii) (No change).

(D) Include in the notice required by subparagraph (C) of this paragraph:

(i) - (ii) (No change.)

(iii) a copy of this rule (§217.19 of this title) and a copy of the

facility's incident-based nursing peer review plan, policies and procedures.

(E) - (F) (No change).

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

(H) (No change).

(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 nursing peer review record to be included whenever the committee's findings are disclosed;

(4) An incident-based nursing 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 paragraph. These rights are minimum requirements and a facility may allow the nurse more representation. The incident-based nursing 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 nursing peer review hearing must comply with the facility's incident-based nursing 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 nursing 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 nursing peer review committee is present at the incident-based nursing peer review hearing in any capacity, including serving as a member of the incident-based nursing 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 paragraph (3)(C) of this subsection. If a nurse elects not to participate in incident-based nursing peer review, the nurse waives any right to procedural due process under TOC §303.002 (NPR Law) and this subsection.

(e) Use of Informal Work Group In Incident Based Nursing Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based nursing peer review committee provided there are written policies for the informal workgroup that require:

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

group;

(2) 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 nursing 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) of this section;

(3) - (4) (No change).

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

(6) 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, the chair person shall convene the full nursing peer review committee to make a determination regarding the conduct in question; and

(7) (No change).

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

(2) - (3) (No change).

(g) Incident-Based Nursing 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, nursing peer review of the nurse shall be suspended. The nurse shall be reported to the Board or to a Board-approved peer assistance program in accordance with TOC §301.410 (related to reporting of impairment):

(A) - (B) (No change).

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

(A) - (B) (No change).

(3) - (5) (No change).

(h) Confidentiality of Proceedings.

(1) Confidentiality of information presented to and/or considered by the incident-based nursing peer review committee shall be maintained and the information not disclosed except as provided by TOC §§303.006, 303.007, and 303.0075 (NPR Law). 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 TOC §303.0075, a nursing incident-based nursing peer review committee, including an entity contracted to conduct nursing peer review under TOC §303.0015(b), and any patient safety committee established by the same entity, may share information.

(A) - (B) (No change).

(C) This section does not affect the application of TOC §303.007 (NPR

Law) (relating to disclosures by nursing peer review committee) to a nursing peer review committee.

(D) (No change).

(3) A CNO or Nurse Administrator shall assure that policies are in place relating to sharing of information and documents between an incident-based nursing peer review [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 [Incident-Based Nursing Peer Review] information from the nurse's human resource file;

(B) (No change).

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

(D) (No change).

(i) Committee Responsibility to Evaluate and Report.

(1) In evaluating a nurse's conduct, the incident-based nursing 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.

(A) For errors involving the death or serious injury of a patient, if a nursing peer review committee makes a determination that a nurse has not engaged in

conduct subject to reporting to the Board, the committee must maintain documentation of the rationale for its belief that the nurse's conduct failed to meet each of the factors in the definition of "conduct subject to reporting", as defined in TOC §301.401(1)(A)-(D) & subsection(a)(4)(A)-(D) of this section.

(i) Conduct subject to reporting means conduct by a nurse that:

(I) violates this chapter or a Board rule and contributed to the death or serious injury of a patient;

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

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

(IV) 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.

(2) An incident-based nursing peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under §217.16 of this title. A nursing peer review committee receiving a report involving a minor incident or incidents must review the incident(s) and other conduct of the nurse during the previous 12 months to determine if the nurse's continued practice poses a risk of harm to patients or other persons and whether remediation would be reasonably expected to adequately mitigate such risk, if it exists. The committee must consider the factors set out in §217.16(d) of this title. In accordance with §217.16, 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 nursing peer review committee determines cannot be categorized as a minor incident(s); or [.]

(C) if a nurse terminates employment while undergoing remediation activities as directed by a nursing peer review under paragraph (2)(A) of this subsection, the nursing peer review committee may:

(I) report the nurse to the Board;

(II) report to the nursing peer review committee of the new employer, if known, with the nurse's written consent; or

(III) re-evaluate the nurse's current conduct to determine if the nurse did complete sufficient remediation and is deemed safe to practice.

(3) (No change).

(4) Unless the exceptions outlined in paragraph (3)(A)&(B) of this subsection are met, an incident-based nursing peer review committee shall report a nurse to the Board if it is determined that the nurse has engaged in conduct subject to reporting.

(5)[(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) 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.

(6)[(5)] If an incident-based nursing 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) (NPR Law) (related to required nursing 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 or nurse administrator if there is no patient safety committee. A patient safety committee must report its findings back to the incident-based nursing peer review committee.

(7)[6] An incident-based nursing peer review committee is not required to withhold its determination of the nurse being incident-based nursing 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 nursing peer review committee to determine if the nurse's conduct is reportable.

(A) If an incident-based nursing 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 nursing peer review committee may also make recommendations for the nurse, up to and including reporting to the Board.

(B) An incident-based nursing peer review committee may extend the time line for completing the incident-based nursing 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 nursing peer review committee must complete its review of the nurse within this 90-day time frame.

(8)[(7)] An incident-based nursing 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 nursing peer review committee will satisfy the nurse's duty to report to the Board under 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 nursing peer review committee's actions or findings and shall be subject to TOC §303.006 (confidentiality of nursing peer review proceedings); and

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

(2) (No change).

(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) (No change).

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

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

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

(2) The CNO or nurse administrator 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 nursing peer review is implemented and conducted in compliance with the NPA, NPR Law, and this section.

(3) A determination by an incident-based nursing peer review committee, a CNO, nurse administrator, or an individual nurse to report a nurse to the Board cannot be overruled, dismissed, changed, or reversed. An incident-based nursing 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 TOC §§301.402, 301.405, 217.11(1)(K) of this title, and this section.

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

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

(2) - (4) (No change).