

## **Proposed Revisions to Rule 217.17 Peer Review**

### **Summary of Request:**

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. This report contains the work of the committee to incorporate changes in Texas Occupations Code chapters 301 and 303 as a result of SB 993, and one section of HB 2426, passed during the 80<sup>th</sup> Texas Legislative Session. Statute changes in these bills became effective 9/1/07. This agenda item is for review, discussion, and action by the board.

### **Historical Perspective:**

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In 2001, after a year of deliberations on revisions by NPAC, as well as response to public comments, the board repealed rule 217.17 *Minimal Procedural Standards During Peer Review*, and adopted two new rules that separated incident-based peer review [rule 217.19] and safe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. 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. It includes a new section that permits 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. Proposed revisions to Incident-Based Peer Review incorporate use of a workgroup and tie in the minor incident rule in evaluation of one or more nursing errors or a request for safe harbor by a peer review committee.

SB993 also 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 brief “initial” request for safe harbor at the time asked to engage in the conduct, with provision to complete the more detailed 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 the patients.

Due to the re-ordering of sections within each rule, staff will propose to repeal the old rules and adopt new rules, as it would be impossible to do a side-by-side comparison of old vs. new language in each rule. The attached tables for each rule do indicate by underlining and strikeouts new and deleted language from the current rules, though the sections and numbering are totally different. Due to space constraints in the table format, not all indentions and formatting rules are followed.

In addition, because of the availability of NPAC members as well as meeting rooms, all 3 NPAC meetings had to be scheduled on nearly consecutive days in September. The committee worked long and hard with a working lunch for all three meetings so that consensus could be reached and the rules brought back to the October board meeting. The committee left word-smithing of some sections in both rules to staff and to J. Willmann, General Counsel for TNA. These changes are noted in the attached table.

We wish to acknowledge the dedication, focus, and stamina of the committee members, including those attending as proxies for other members. Revisions to drafts were reviewed in a small span of time, with thoughtful and relevant comments and suggestions offered by all. We wish to especially thank Jim Willmann for his assistance and endurance in drafting, reviewing, and assuring consistency between and across both rules. Mr. Willmann also shared the proposed rules with TNA’s Governmental Affairs Committee on 9/28-29/07. Though a thorough review by this group was not possible, some additional stakeholder input has been added to the attached rule language.

## **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 not only congruent with the newest changes in NPA Ch. 301 and Peer Review Ch. 303, but have been re-arranged 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.

**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 repeal current rules 217.19 Incident-Based Nursing Peer Review, and 217.20 Safe Harbor Peer Review for Nurses, and propose adoption of new rules:

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 either or both proposed new rules for clarification purposes. Such non-substantive editorial changes may occur prior to publication in the Texas Register, or following publication and as a result of comments received during the public comment period.

If negative comments are not received, move to adopt new rules 217.19 and 217.20 as proposed.

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>a) <u>Definitions</u></p> <p>(1) <u>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.</u></p> <p>(2) <u>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.</u></p>		<p>(1) New Language</p> <p>(2) From 217.19(a)(11) w/ clarification language.</p>
<p>(3) <u>Conduct Subject to Reporting is conduct by a nurse that:</u></p> <p>(A) <u>violates chapter 301 of the Nursing Practice Act (NPA), or a board rule and contributed to the death or serious injury of a patient;</u></p>		<p>New Language; from SB993 changes to 301.401(1).</p>
<p>(B) <u>causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;</u></p>		<p>New Language; from SB993 changes to 301.401(1).</p>

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<p>(C) <u>constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or</u></p> <p>(D) <u>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.</u> [§301.401(1)]</p>		<p>New Language; from SB993 changes to 301.401(1).</p>
<p>(4) Duty to a Patient: Conduct required by standards of nursing practice (rule 217.11) <u>or unprofessional conduct (rule 217.12) prohibited by the NPA and board rules.</u> Includes administrative decisions directly affecting a nurse's ability to comply with that duty, as adopted by the board.</p>	<p>(4) Duty to a Patient: Conduct required by standards of nursing practice (rule 217.11), or <u>prohibited by unprofessional conduct (rule 217.12) including administrative decisions directly affecting a nurse's ability to comply with that duty, as adopted by the board.</u></p>	<p>(4) From current 217.20(a) with clarification language.</p> <p>Alternate language recommended for further clarification. Since rules 217.11 and 217.12 are board rules, last part of sentence deleted as does not add anything.</p>

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<p>(5) <u>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.</u></p>		<p>New language; not defined in current rule, but implied in 217.19(a)(9).</p>
<p>(6) <u>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. [Sec. 303.001(5)]</u></p>		<p>New Language.</p>
<p>(7) <u>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.</u></p>		<p>From rule 217.16. New language</p>

Rule 217.19 Incident-Based Peer Review   October 07 NPAC Proposed Revisions (SB 993 & HB 2426)		
NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments

	<p>(8) <u>Nursing Peer Review (NPR): 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.</u></p>	<p>New language; adapted from §303.001(5). Recommended addition by J. Willmann for brevity of repetition in rule and to promote ease in understanding.</p> <p>“TOC” also left in by staff recommendation as this is easier for a nurse’s attorney to understand</p> <p>Staff agree with addition of definition.</p>
	<p>(9) <u>Nursing Practice Act (NPA): Includes chapters 301, 304, and 305 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.</u></p>	<p>New language; adapted from §303.001(5). Recommended addition by J. Willmann for brevity of repetition in rule and to promote ease in understanding.</p> <p>“TOC” also left in by staff recommendation as this is easier for a nurse’s attorney to understand</p> <p>Staff agree with addition of definition.</p>

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<p>(10) <u>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:</u></p> <p>(A) <u>the entity's medical staff composed of individuals licensed under Subtitle B [Medical Practice Act, Occupations Code §151.001 et seq.] ;</u></p>		(10) New language; from SB 993
<p>(B) <u>a medical committee under Subchapter D, Chapter 161 Health and Safety Code [§§161.031-.033]; or</u></p> <p>(C) <u>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.</u></p>		(B) New language; from SB993  (C) New language; NPAC language

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<p>(11) <u>Peer Review: Defined in Nursing Peer Review Law (NPR law), contained within the 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 focussed on obtaining all relevant information about an event.</u></p>		<p>(11) New language; definition extracted from NPR law in part.</p>
<p>(12) <u>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</u></p>		<p>New Language: added to clarification</p>
<p>(13) <u>Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity for:</u></p> <p>(a) <u>a request made by a nurse under TOC §303.005(c) related to invoking safe harbor protections, or</u></p>		<p>New language; from SB993</p>

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<p>b) <u>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</u></p>		(Cont) new language; from SB993.
<p>(c) <u>a report made by a nurse under TOC §301.4025 (report of unsafe practices of non-nurse entities) and section subsection (i)(2) 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 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.</u></p>		(Cont) new language; from SB993.

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<p>(b) <u>Purpose</u></p> <p>The purpose of this rule is to define minimum due process <u>to which a nurse is entitled under incident-based peer review</u>, to provide guidance to facilities, agencies, schools, or anyone who utilizes the services of nurses in the development and application of <u>incident-based peer review plans</u>, to assure that nurses have knowledge of the plan, and to provide guidance to the <u>incident-based peer review committee</u> in its fact finding process.</p>		<p>From 217.19(a)(2) with clarification language.</p>
<p>(c) <u>Applicability of Incident-Based Peer Review</u></p> <p><u>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).</u></p>		<p>New Language.</p> <p>Revised membership requirements from SB 993. Previous membership requirements in current 217.19(a)(4)(A)</p>

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<p>(d) <u>Minimum Due Process</u></p> <p>(1) <u>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).</u></p>		<p>From 217.19(a)(2) with clarification language.</p>
<p>(2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address:</p> <p>(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;</p>		<p>From 217.19(a)(3)(A)</p>

Rule 217.19 Incident-Based Peer Review		October 07 NPAC Proposed Revisions (SB 993 & HB 2426)
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<p>(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;</p> <p>(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, <u>drug or alcohol abuse, substance abuse/misuse, "intemperate use,"</u> mental illness, <u>or diminished mental capacity</u> in accordance with the NPA (TOC) §301.410, and <u>subsection (g) of this rule;</u></p>		<p>From 217.19(a)(3)(B)</p> <p>From 217.19(a)(3)(C) with clarification language added.</p>
<p>(D) reporting of nurses to the board by incident-based peer review committee in accordance with the NPA (TOC) §301.403, <u>and subsection (i) of this rule; and</u></p>		<p>From 217.19(a)(3)(D)</p>
<p>(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.</p>		<p>From 217.19(a)(3)(E)</p>

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<p>(3) In order to meet the minimum due process required by Nursing Peer Review (TOC) chapter 303, the nursing peer review committee must:</p> <p>(A) comply with the membership and voting requirements as set forth in Nursing Peer Review (TOC) §303.003(a)-(d);</p>		<p>From 217.19(a)(4)(A)</p>
<p>(B) exclude from the committee, <u>including attendance at the incident-based peer review hearing</u>, any person or persons with administrative authority for personnel decisions directly relating to the nurse. <u>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.</u></p>		<p>From 217.19(a)(4)(B), with clarification that both membership and attendance are prohibited.</p>
<p>(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:</p> <p>(i) the nurse's practice is being evaluated;</p>		<p>From 217.19(a)(4)(C).</p>

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<p>(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:</p> <p>(I) <u>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</u></p> <p>(II) otherwise agreed upon by the nurse and incident-based peer review committee.</p>		<p>From 217.19(a)(4)(C).</p> <p>Adds provision for PRC and nurse to agree to extended time period if PRC determines external factors impacted the error and PRC desires additional information from review by a patient safety committee before making determination regarding the nurse.</p>
<p>iii) Said notice must include a written copy of the incident-based peer review plan, policies and procedures.</p>		<p>From 217.19(a)(4)(D)(iii)</p>

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<p>(D) Include in the written notice:</p> <p>(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;</p>		From 217.19(a)(4)(D)(i)-(iii).
<p>(ii) name, address, telephone number of contact person to receive the nurse's response; and</p> <p>(iii) a copy of this rule (§217.19) and a copy of the facility's incident-based peer review plan, policies and procedures.</p>		From 217.19(a)(4)(D)(i)-(iii).
<p>(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;</p>		From 217.19(a)(4)(E).

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<p>(F) provide the nurse the opportunity to:</p> <ul style="list-style-type: none"> <li>(i) submit a written statement regarding the event under review;</li> <li>(ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented;</li> </ul>		<p>From 217.19(a)(4)(F).</p>
<ul style="list-style-type: none"> <li>(iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding;</li> <li>(iv) make an opening statement to the committee;</li> <li>(v) ask questions of the committee and respond to questions of the committee; and</li> <li>(vi) make a closing statement to the committee after all evidence is presented;</li> </ul>		<p>From 217.19(a)(4)(F).</p>

Rule 217.19 Incident-Based Peer Review		October 07 NPAC Proposed Revisions (SB 993 & HB 2426)
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(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;		From 217.19(a)(4)(G).
(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;		From 217.19(a)(4)(H).  From 217.19(a)(4)(I).
(J) <u>An incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.</u>		New language. FAQ to BON staff; not specified in current rule.

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<p>(4) Nurse's Right To Representation</p> <p>(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.</p>		<p>From 217.19(a)(5); NO change in language from current rule.</p>
<p>(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.</p>		<p>From 217.19(a)(5); NO change in language from current rule.</p>

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<p>(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.</p>		<p>From 217.19(a)(5); NO change in language from current rule.</p>
<p>(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.</p>		<p>From 217.19(a)(5); NO change in language from current rule.</p>

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<p>(5) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under <u>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 <u>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.</u></u></p>		Clarification language added from recently repealed TOC section 301.405(h).
<p>(e) <u>Use of Informal Work Group In Incident Based Peer Review</u></p> <p>(A) <u>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:</u></p>		New language; expanded and tied in with same concept in rule 217.16 <i>Minor Incidents</i> .
<p>(i) <u>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;</u></p>		New language; expanded and tied in with same concept in rule 217.16 <i>Minor Incidents</i> .

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<p>(ii) <u>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;</u></p>		<p>New language; expanded and tied in with same concept in rule 217.16 <i>Minor Incidents</i>.</p>
<p>(iii) <u>the informal workgroup to comply with the membership and voting requirements of Sections (d)(3)(A) and (B) of this rule;</u></p> <p>(iv) <u>the nurse be provided the opportunity to meet with the informal workgroup;</u></p>		<p>New language; expanded and tied in with same concept in rule 217.16 <i>Minor Incidents</i>.</p>
<p>(v) <u>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</u></p>		<p>New language; expanded and tied in with same concept in rule 217.16 <i>Minor Incidents</i>.</p>

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<p>(vi) ratification by the incident-based peer review committee of any decision made by the informal workgroup.</p>	<p>(vi) ratification by the incident-based peer review committee <u>chair person</u> of any decision made by the informal workgroup. <u>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.</u></p>	<p>New language; expanded and tied in with same concept in rule 217.16 <i>Minor Incidents</i>.  Staff changed language to report to PR chair versus having to get entire committee together—need oversight but also to keep “informal.”</p>
	<p>vii) <u>the peer review chair person must communicate any decision of the informal work group to the CNO.</u></p>	<p>New language. As above. Also want to be certain CNO knows of decisions since this person has ultimate accountability that PR is done in good faith.</p>
<p>(f) <u>Exclusions to Minimum Due Process Requirements</u>  <u>The minimum due process requirements set out in subsection (d) of this rule do not apply to:</u></p> <p>(1) <u>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</u></p>		<p>New language; NPA 301.405(c) {SB 993} requires PRC to report to Pt Safety Committee (PSC) if believe external factors impacted nsg. error—nurse’s conduct not being reviewed by PSC, so due process not applic.</p>

Rule 217.19 Incident-Based Peer Review   October 07 NPAC Proposed Revisions (SB 993 & HB 2426)		
NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments

<p>(2) <u>when during the course of the incident-based peer review process, a practice violation is identified as resulting from the nurse's impairment under subsection (g) of this rule; or</u></p>	<p>(2) when during the course of the incident-based peer review process, a practice violation is identified as a <u>possible consequence of the nurse's practice being impaired as described under subsection (g) of this rule; or</u></p>	<p>New language. NPA 301.410(b) {HB2426}</p>
<p>(3) <u>when a person required to report a nurse believes that a nurse's impairment or suspected impairment has also resulted in a practice violation under NPA (TOC) §301.410(b), which prohibits reporting to either a peer review committee or to peer assistance.</u></p>	<p>(3) when a person required to report a nurse believes that a <u>nurse's practice is impaired</u> or suspected of being impaired has also resulted in a violation under NPA (TOC) §301.410(b), that <u>requires a direct report to the board.</u></p>	<p>New language. NPA 301.410(b) {HB2426}</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(g) <u>Incident-Based Peer Review of Impaired Nursing Practice/Lack of Fitness</u></p> <p>(1) <u>Instead of requesting review by a peer review committee, a nurse who 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:</u></p> <p style="padding-left: 40px;">(A) <u>the board; or</u>                      (B) <u>a board-approved peer assistance program.</u></p>	<p>(g) <u>Incident-Based Peer Review of a Nurse's Impaired <del>Nursing</del> Practice/Lack of Fitness</u></p> <p>(1) <u>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:</u></p> <p style="padding-left: 40px;">(A) <u>the board; or</u>                      (B) <u>a board-approved peer assistance program.</u></p>	<p>New Language. NPA 301.410(A) {HB2426}</p> <p>Alternate language suggested by M. Vandoren (TPAPN) through J. Willmann. Staff agree.</p>
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NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(2) <u>If during the course of an incident-based peer review process, there is a reasonable factual basis for a determination of impairment or suspected 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).</u></p>	<p>(2) If during the course of an incident-based peer review process, there is a reasonable factual basis for a determination <u>that a practice violation occurred due to a nurse's practice impairment</u> or suspected <u>practice impairment</u> or lack of fitness due to chemical dependency, drug or alcohol abuse....</p>	<p>Alternate language suggested by M. Vandoren (TPAPN) through J. Willmann. Staff agree.</p>
<p>(A) <u>Following suspension of peer review of the nurse, the incident-based peer review committee shall proceed to evaluate external factors to determine if:</u></p> <p>(i) <u>any factors beyond the nurse's control contributed to a practice violation,</u></p>		<p>New language. New 301.405(c) {SB993} with NPAC interpretation to implementation in peer review process.</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(ii) <u>if any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct, and</u></p> <p>(iii) <u>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.</u></p>		<p>New language. New 301.405(c) {SB993} with NPAC interpretation to implementation in peer review process</p>
<p>(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 <u>this paragraph (2).</u></p>		<p>New language. New 301.405(c) {SB993} with NPAC interpretation to implementation in peer review process</p>
<p>(3) Neither (1) or (2) above preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.</p>		<p>New language.</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(h) Confidentiality of Proceedings</p> <p>(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 <u>§303.0075</u>. 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.</p>		<p>From current 217.19(a)(6) with clarification language.</p>
<p>(2) <u>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.</u></p>		<p>New language. From new 303.0075 {SB 993}</p>

Rule 217.19 Incident-Based Peer Review		October 07 NPAC Proposed Revisions (SB 993 & HB 2426)	
NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments	
<p>(A) <u>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.</u></p> <p>(B) <u>This section does not affect the application of Nursing Peer Review (TOC) §303.007 (relating to a nursing peer review committee).</u></p>	<p>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.</p>	<p>New language. From new 303.0075 {SB 993}</p> <p>New language. From new 303.0075 {SB 993}</p> <p><b>This is Jim's correction but language seems awkward—he says applies to both required and permissive disclosure so should read this way.</b></p>	
<p>(C) <u>A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.</u></p>		<p>New language. From new 303.0075 {SB 993}</p>	
<p>(5) <u>A CNO shall assure that policies relating to sharing of documents with the incident-based peer review committee at a minimum, address:</u></p> <p>(A) <u>methods in which shared committee communications and documents are labelled and maintained as to which committee originated the documents or communications;</u></p>		<p>New language. From new 303.0075 {SB 993} NPAC interpretation for implementation and accountability for confidentiality of shared information.</p>	

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<p>(B) <u>separation of confidential information under incident-based peer review from the nurse’s human resource file;</u></p> <p>(C) <u>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.</u></p>		<p>New language. From new 303.0075 {SB 993} NPAC interpretation for implementation and accountability for confidentiality of shared information.</p>
<p>(i) <u>Committee Responsibility to Evaluate and Report</u></p> <p>(1) In evaluating a nurse’s conduct, the <u>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.</u></p>		<p>From 217.19(a)(7) with clarification language.</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(2) <u>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:</u></p> <p>(A) <u>can be remediated to correct the deficiencies identified in the nurse’s judgment, knowledge, training, or skill, or</u></p>		<p>New Language. Incorporates peer review of minor incidents from Rule 217.16.</p>
<p>(B) <u>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).</u></p>		<p>New Language. Incorporates peer review of minor incidents from Rule 217.16.</p>
<p>(3) <u>Report Not Required: A nursing incident-based peer review committee is not required to submit a report to the board if:</u></p> <p>(A) <u>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</u></p>		<p>New Language. New 301.403(b) {SB 993}. Also incorporates peer review of minor incidents from Rule 217.16.</p>
<p>(B) <u>the nurse has already been reported to the board under NPA (TOC) §301.405(b) (employer reporting requirements).</u></p>		<p>New language. New 301.403(b) {SB 993}.</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(4) If a <u>incident-based</u> peer review committee finds that a nurse has engaged in conduct <u>subject to reporting</u> to the board, the committee <u>shall submit to the board a written, signed</u> report that includes:</p>		<p>New language. From both previous and current NPA section 301.403 {SB 993}.</p>
<p>(A) <u>the identity of the nurse;</u></p>		<p>New language. From both previous and current NPA section 301.403 {SB 993}.</p>
<p>(B) <u>a description of the conduct subject to reporting;</u></p>		<p>New language. From both previous and current NPA section 301.403 {SB 993}.</p>
<p>(C) a description of any corrective action taken against the nurse;</p>		<p>New language. From both previous and current NPA section 301.403 {SB 993}.</p>
<p>(D) <u>a recommendation</u> as to whether the board should take formal disciplinary action against the nurse, <u>and the basis for the recommendation;</u></p>		<p>New language. From both previous and current NPA section 301.403 {SB 993}.</p>
<p>(E) <u>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</u></p>		<p>New language. From both previous and current NPA section 301.403 {SB 993}.</p>
<p>(F) <u>any additional information the board requires.</u></p>		<p>New language. From both previous and current NPA section 301.403 {SB 993}.</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(5) <u>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.</u></p>		<p>New language. From NPA 301.405(c) {SB 993}</p>
<p>(6) <u>An incident-based peer review committee is not required to withhold it's 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.</u></p>		<p>New language. NPAC interpretation to implement provisions of SB 993.</p>
<p>(A) <u>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.</u></p>		<p>New language. NPAC interpretation to implement provisions of SB 993 [301.405(c)]. New language.</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(B) <u>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.</u></p>		<p>New language. NPAC interpretation to implement provisions of SB 993 [301.405(c)].</p>
<p>(6) <u>A incident-based peer review committee's determination to report a nurse to the board cannot be overruled, changed, or dismissed.</u></p>		<p>New Language.</p>
<p>(j) <u>Nurse's Duty to Report</u></p> <p>(1) <u>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:</u></p>		<p>New language in re: 301.402(e).</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(A) <u>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</u></p> <p>(B) <u>The nurse has no reason to believe the incident-based peer review committee made it's determination in bad faith.</u></p>		<p>New language in re: 301.402(e).</p>
<p>(2) <u>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).</u></p>		<p>New language in re: <u>301.402(e) and 301.413.</u></p>
<p>(k) <u>State Agency Duty to Report</u></p> <p><u>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:</u></p> <p>(A) <u>the board or</u></p> <p>(B) <u>the applicable nursing peer review committee in lieu of reporting to board.</u></p>		<p>New language. From both previous and current language in NPA 301.407.</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(1) <u>Integrity of Incident-Based Peer Review Process</u></p> <p>(1) NPA (TOC) chapter 303, requires that <u>incident-based</u> 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).</p>		<p>From 217.19(a)(9) with editing for clarification.</p>
<p>(2) The CNO of a facility, <u>association, school, agency, or of any other setting that utilizes the services of nurses</u> is responsible for knowing the requirements of this rule and for taking reasonable steps to assure that <u>incident-based</u> peer review is implemented and conducted in compliance with the <u>NPA, Nursing Peer Review</u>, and this rule.</p>		<p>From 217.19(a)(11) with clarification language.</p>
<p>(3) <u>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.</u></p>		<p>New language.</p>

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<p>(m) <u>Reporting Conduct of other Practitioners or Entities/Whistleblower Protections</u></p> <p>(1) <u>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.</u></p>		<p>New language; copied from SB993 language (NPA 301.413).</p>
<p>(2) <u>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:</u></p>		<p>New language; copied from SB993 language (NPA 301.413).</p>
<p>(A) <u>minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or</u></p> <p>(B) <u>statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.</u></p>		<p>New language; copied from SB993 language (NPA 301.413).</p>

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(l) <u>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.</u></p>		<p>New language; copied from SB993 language (NPA 301.413).</p>
<p>(ii) <u>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).</u></p>		<p>New language; copied from SB993 language (NPA 301.413).</p>

*NPAC REVISIONS TO 217.19*  
*October Board Meeting 2007*  
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**217.19. Incident-Based Nursing Peer Review and Whistleblower Protections.**

(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) 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;
  - (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)]
- (4) Duty to a Patient: Conduct required by standards of nursing practice (rule 217.11) or prohibited by unprofessional conduct (rule 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. [Sec. 303.001(5)]

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- (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 rule 217.16.
  
- (8) Nursing Peer Review (NPR): 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.
  
- (9) Nursing Practice Act (NPA): Includes chapters 301, 304, and 305 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.
  
- (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, may apply as appropriate.
  
- (11) Peer Review: Defined in Nursing Peer Review Law (NPR law), contained within the 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 focussed 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 section subsection (i)(2) of this rule, that may also

1 be protected under other laws or regulations, concerning unsafe practitioners  
2 or unsafe patient care practices or conditions. Protection from retaliatory  
3 action affects a report made to a licensing agency, accrediting body,  
4 regulatory entity, or administrative personnel within the facility or organization  
5 that the nurse believes has the power to take corrective action.  
6

7 (b) Purpose  
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9 The purpose of this rule is to define minimum due process to which a nurse is entitled under  
10 incident-based peer review, to provide guidance to facilities, agencies, schools, or anyone  
11 who utilizes the services of nurses in the development and application of incident-based  
12 peer review plans, to assure that nurses have knowledge of the plan, and to provide  
13 guidance to the incident-based peer review committee in its fact finding process.  
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15 (c) Applicability of Incident-Based Peer Review  
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17 Nursing Peer Review (TOC) §303.0015 requires a person who regularly employs, hires or  
18 contracts for the services of ten (10) or more nurses (for peer review of a RN, at least 5 of  
19 the 10 must be RNs) to conduct nursing peer review for purposes of NPA §§301.402(e)  
20 (relating to alternate reporting by nurses to peer review), 301.405(c) (relating to peer review  
21 of external factors as part of employer reporting), and 301.407(b) (relating to alternate  
22 reporting by state agencies to peer review).  
23

24 (d) Minimum Due Process  
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26 (1) A licensed nurse subject to incident-based peer review is entitled to minimum due  
27 process under Nursing Peer Review (TOC) §303.002(e), any person or entity that  
28 conducts incident-based peer review must comply with the due process requirements  
29 of this section even if they do not utilize the number of nurses described by  
30 subsection (c).  
31

32 (2) A facility conducting incident-based peer review shall have written policies and  
33 procedures that, at a minimum, address:  
34

35 (A) level of participation of nurse or nurse's representative at an incident-based  
36 peer review hearing beyond that required by subsection (d)(3)(F) of this rule;  
37

38 (B) confidentiality and safeguards to prevent impermissible disclosures including  
39 written agreement by all parties to abide by Nursing Peer Review (TOC)  
40 §§303.006 and 303.007;  
41

42 (C) handling of cases involving nurses who are impaired or suspected of being  
43 impaired by chemical dependency, drug or alcohol abuse, substance  
44 abuse/misuse, "intemperate use," mental illness, or diminished mental  
45 capacity in accordance with the NPA (TOC) §301.410, and subsection (g) of  
46 this rule;  
47

48 (D) reporting of nurses to the board by incident-based peer review committee in  
49 accordance with the NPA (TOC) §301.403, and subsection (i) of this rule; and  
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51 (E) effective date of changes to the policies which in no event shall apply to  
52 incident-based peer review proceedings initiated before the change was  
53 adopted unless agreed in writing by the nurse being reviewed.

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- (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) and a copy of the facility's incident-based peer review plan, policies and procedures.

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

- 1 (C) If either the facility or nurse will have an attorney or representative present at  
2 the incident-based peer review hearing in any capacity, the facility or nurse  
3 must notify the other at least seven (7) calendar days before the hearing that  
4 they will have an attorney or representative attending the hearing and in what  
5 capacity.  
6
- 7 (D) Notwithstanding any other provisions of these rules, if an attorney  
8 representing the facility or incident-based peer review committee is present  
9 at the incident-based peer review hearing in any capacity, including serving  
10 as a member of the incident-based peer review committee, the nurse is  
11 entitled to “parity of participation of counsel.” “Parity of participation of  
12 counsel” means that the nurse’s attorney is able to participate to the same  
13 extent and level as the facility’s attorney; e.g., if the facility’s attorney can  
14 question witnesses, the nurse’s attorney must have the same right.  
15
- 16 (5) A nurse whose practice is being evaluated may properly choose not to participate in  
17 the proceeding after the nurse has been notified under subsection (d)(3)(H) of this  
18 rule. Nursing Peer Review (TOC) §303.002(d) prohibits nullifying by contract any  
19 right a nurse has under the incident-based peer review process. If a nurse elects not  
20 to participate in incident-based peer review, the nurse waives any right to procedural  
21 due process under TOC §303.002 and subsection (d) of this rule.  
22
- 23 (e) Use of Informal Work Group In Incident Based Peer Review  
24
- 25 (A) A facility may choose to initiate an informal review process utilizing a workgroup of  
26 the nursing incident-based peer review committee provided there are written policies  
27 for the informal workgroup that require:  
28
- 29 (i) the nurse to be informed of how the informal workgroup will function, and to  
30 consent, in writing, to the use of an informal workgroup. A nurse does not  
31 waive any right to incident-based peer review by accepting or rejecting the  
32 use of an informal workgroup;  
33
- 34 (ii) if the informal workgroup believes that a practice violation has occurred and  
35 suspects that the nurse’s practice is impaired by chemical dependency or  
36 diminished mental capacity, the committee chair must be notified to  
37 determine if peer review should be terminated and the nurse reported to the  
38 board;  
39
- 40 (iii) the informal workgroup to comply with the membership and voting  
41 requirements of Sections (d)(3)(A) and (B) of this rule;  
42
- 43 (iv) the nurse be provided the opportunity to meet with the informal workgroup;  
44
- 45 (v) the nurse to have the right to reject any decision of the informal workgroup  
46 and to then have his/her conduct reviewed by the incident-based peer review  
47 committee, in which event members of the informal workgroup shall not  
48 participate in that determination; and  
49
- 50 (vi) ratification by the incident-based peer review committee chair person of any  
51 decision made by the informal workgroup. If the chair person disagrees with  
52 a determination of the informal workgroup to remediate a nurse for one or  
53 more minor incidents, the chair person shall convene the full peer review  
54 committee to review the conduct in question.

1  
2 (vii) the peer review chair person must communicate any decision of the informal  
3 work group to the CNO.  
4

5 (f) Exclusions to Minimum Due Process Requirements  
6

7 The minimum due process requirements set out in subsection (d) of this rule do not apply  
8 to:  
9

- 10 (1) Peer review conducted solely in compliance with NPA (TOC) §301.405(c) relating  
11 to incident-based peer review of external factors, after a report of a nurse to the  
12 board has already occurred under NPA (TOC) §301.405(b); or  
13  
14 (2) when during the course of the incident-based peer review process, a practice  
15 violation is identified as a possible consequence of the nurse's practice being  
16 impaired as described under subsection (g) of this rule; or  
17  
18 (3) when a person required to report a nurse believes that a nurse's practice is  
19 impaired or suspected of being impaired has also resulted in a violation under NPA  
20 (TOC) §301.410(b), that requires a direct report to the board.  
21  
22

23 (g) Incident-Based Peer Review of a Nurse's Impaired Nursing Practice/Lack of Fitness  
24

- 25 (1) Instead of requesting review by a peer review committee, a nurse whose practice  
26 is impaired or suspected of being impaired due to chemical dependency, drug or  
27 alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or  
28 diminished mental capacity, with no evidence of nursing practice violations, shall be  
29 reported, in accordance with NPA (TOC) §301.410(a) (related to reporting of  
30 impairment), to either:  
31  
32 (A) the board; or  
33 (B) a board-approved peer assistance program.  
34  
35 (2) If during the course of an incident-based peer review process, there is a reasonable  
36 factual basis for a determination that a practice violation occurred due to a nurse's  
37 practice impairment or suspected practice impairment or lack of fitness due to  
38 chemical dependency, drug or alcohol abuse, substance abuse/misuse,  
39 "intemperate use," mental illness, or diminished mental capacity of a reported  
40 nurse, the incident-based peer review process shall be suspended, and the nurse  
41 reported to the board in accordance with NPA (TOC) §301.410(b) (related to  
42 required report to board when practice violations exist with suspected practice  
43 impairment/lack of fitness).  
44  
45 (A) Following suspension of peer review of the nurse, the incident-based peer  
46 review committee shall proceed to evaluate external factors to determine if:  
47  
48 (i) any factors beyond the nurse's control contributed to a practice  
49 violation,  
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51 (ii) if any deficiency in external factors enabled the nurse to engage in  
52 unprofessional or illegal conduct, and  
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(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.

(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).

(3) Neither (1) or (2) 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.

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

(A) methods in which shared committee communications and documents are labelled 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 rule 217.16, Minor Incidents. In accordance with this 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).
- (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).
- (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) 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.

- 1           (3)(5)    If an incident-based peer review committee determines that a deficiency in care by  
2                   the nurse was the result of a factor(s) beyond the nurse's control, in compliance  
3                   with TOC §303.011(b) [related to required peer review committee report when  
4                   external factors contributed to a nurse's deficiency in care], the committee must  
5                   submit a report to the applicable patient safety committee, or to the CNO if there is  
6                   no patient safety committee. A patient safety committee must report its findings  
7                   back to the incident-based peer review committee.  
8
- 9           (4)(6)    An incident-based peer review committee is not required to withhold its  
10                   determination of the nurse being incident-based peer reviewed, pending feedback  
11                   from a patient safety committee, unless the committee believes that a determination  
12                   from a patient safety committee is necessary in order for the incident-based peer  
13                   review committee to determine if the nurse's conduct is reportable.  
14
- 15                   (A)    If an incident-based peer review committee finds that factors outside the  
16                   nurse's control contributed to a nurse's error, in addition to reporting to a  
17                   patient safety committee, the incident-based peer review committee may  
18                   also make recommendations for the nurse, up to and including reporting to  
19                   the board.  
20
- 21                   (B)    an incident-based peer review committee may extend the time line for  
22                   completing the incident-based peer review process (extending the 45 days  
23                   by no more than an additional 45 days) if the committee members believe  
24                   they need input from a patient safety committee. The incident-based peer  
25                   review committee must complete the incident-based peer review of the  
26                   nurse within this 90-day time frame.  
27
- 28           ~~(5)    If the incident-based peer review committee determines there is reason to believe~~  
29           ~~factors beyond the nurse's control contributed to or resulted in a deficiency of care~~  
30           ~~by the nurse, the committee shall report those factors to a patient safety committee~~  
31           ~~of the facility or if no patient safety committee exists to the CNO.~~  
32
- 33           (6)    A incident-based peer review committee's determination to report a nurse to the  
34                   board cannot be overruled, changed, or dismissed.  
35
- 36    (j)    Nurse's Duty to Report  
37
- 38           (1)    A report made by a nurse to a nursing incident-based peer review committee will  
39                   satisfy the nurse's duty to report to the board under NPA (TOC) §301.402  
40                   (mandatory report by a nurse) provided that the following conditions are met:  
41
- 42                   (A)    The reporting nurse shall be notified of the incident-based peer review  
43                   committee's actions or findings and shall be subject to Nursing Peer Review  
44                   (TOC) §303.006 (confidentiality of peer review proceedings); and  
45
- 46                   (B)    The nurse has no reason to believe the incident-based peer review  
47                   committee made it's determination in bad faith.  
48
- 49           (2)    A nurse may not be suspended, terminated, or otherwise disciplined or  
50                   discriminated against for filing a report made in good faith under this rule and NPA  
51                   (TOC) §301.402(f)(retaliation for a good faith report prohibited). A violation of this  
52                   subsection or NPA (TOC) §301.402(f) is subject to NPA (TOC) §301.413  
53                   (retaliatory action prohibited).  
54

1 (k) State Agency Duty to Report  
2

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

5  
6 (A) the board or

7  
8 (B) the applicable nursing peer review committee in lieu of reporting to board.  
9

10 (l) Integrity of Incident-Based Peer Review Process  
11

12 (1) NPA (TOC) chapter 303, requires that incident-based peer review be conducted in  
13 good faith. A nurse who knowingly participates in incident-based peer review in bad  
14 faith is subject to disciplinary action by the board under the NPA (TOC)  
15 §301.452(b).  
16

17 (2) The CNO of a facility, association, school, agency, or of any other setting that  
18 utilizes the services of nurses is responsible for knowing the requirements of this  
19 rule and for taking reasonable steps to assure that incident-based peer review is  
20 implemented and conducted in compliance with the NPA, Nursing Peer Review,  
21 and this rule.  
22

23 (3) A determination by an incident-based peer review committee, a CNO, or an  
24 individual nurse to report a nurse to the board cannot be overruled, dismissed  
25 changed, or reversed. An incident-based peer review committee, CNO, and  
26 individual nurse each have a separate responsibility to protect the public by  
27 reporting a nurse to the board as set forth in NPA (TOC) §301.402, §301.405, rule  
28 217.11(1)(K), and this rule.  
29

30 (m) Reporting Conduct of other Practitioners or Entities/Whistleblower Protections  
31

32 (1) This section does not expand the authority of any incident-based peer review  
33 committee or the board to make determinations outside the practice of nursing.  
34

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

40  
41 (A) minimum standards of acceptable and prevailing professional practice, for  
42 a report made regarding a practitioner; or

43  
44 (B) statutory, regulatory, or accreditation standards, for a report made regarding  
45 an agency or facility.  
46

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

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** 2007, **Tex Reg**

**NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]**

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(a) <u>Definitions</u></p> <p>(1) <u>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.</u></p> <p>(2) <u>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.</u></p>		<p>(1) New language</p> <p>(2) From current 217.20(f) w/clarification language</p>
<p>(3) <u>Conduct Subject to Reporting means conduct by a nurse that:</u></p> <p>(A) <u>violates the Nursing Practice Act(NPA) chapter 301 or a board rule and contributed to the death or serious injury of a patient;</u></p>		<p>(3) New Language; from SB993 changes to 301.401(1).</p>

NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(B) <u>causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;</u></p> <p>(C) <u>constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or</u></p> <p>(D) <u>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)]</u></p>		<p>New language; from SB993 changes to 301.401(1).</p>
<p>(4) Duty to a patient: Conduct required by standards of nursing practice <u>[rule 217.11]</u> or <u>unprofessional conduct [rule 217.12]</u> including administrative decisions directly affecting a nurse's ability to comply with that duty, as adopted by the board.</p>	<p>(4) Duty to a Patient: Conduct required by standards of nursing practice (rule 217.11), or <u>prohibited by</u> unprofessional conduct (rule 217.12) including administrative decisions directly affecting a nurse's ability to comply with that duty, <del>as adopted by the board.</del></p>	<p>(4) From current 217.20(a) with clarification language.</p> <p>Alternate language recommended for further clarification. Since rules 217.11 and 217.12 are board rules, last part of sentence deleted as does not add anything.</p>

**NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]**

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(5) <u>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.</u></p>		<p>(5) New language; similar language embedded in current 217.20(c)(1)</p>
<p>(6) <u>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.</u></p>		<p>(6) From rule 217.16. New language</p>
<p>(7) <u>Nurse Administrator: Chief Nursing Officer (CNO) or the CNO's designee.</u></p>		<p>(7) New language</p>

**NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]**

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
	<p>(8) <u>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.</u></p> <p>(9) <u>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.</u></p>	<p>(8) New to rule; adapted from §303.001(5). Recommended addition by J. Willmann for brevity of repetition in rule and to promote ease in understanding.</p> <p>“TOC” also left in by staff recommendation as this is easier for a nurse’s attorney to understand</p> <p>(9) New language; same rationale as above.</p> <p>Staff agree with addition of both definitions.</p>
<p>(10) <u>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:</u></p> <p>(A) <u>the entity’s medical staff composed of individuals licensed under Subtitle B [Medical Practice Act, Occupations Code §151.001 et seq.];</u></p>		<p>(10) New language; from SB 993</p>

**NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]**

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(B) <u>a medical committee under Subchapter D, Chapter 161 Health and Safety Code [§§161.031-.033]; or</u></p> <p>(C) <u>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.</u></p>		<p>(B) New language; from SB993</p> <p>(C) New language; NPAC language</p>
<p>(11) <u>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.</u></p>		<p>(11) New language; definition extracted from NPR law in part.</p>

**NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]**

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
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<p>(12) <u>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.</u></p> <p><u>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 acuties 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.</u></p>		(12) New language
<p>(13) <u>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.</u></p>		(13) New language

**NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (October 2007) [SB993, HB2426]**

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<p>(14) <u>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.</u></p>		(14) New language
<p>(15) <u>Whistleblower Protections: protections available to a nurse that prohibit retaliatory action by an employer or other entity for:</u></p> <p>(A) <u>a request made by a nurse under Nursing Peer Review (TOC) §303.005(c) regarding invoking safe harbor protections, or</u></p>		(15) New language; from SB993.
<p>(B) <u>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</u></p>		(Cont) new language; from SB993.

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<p>(C) <u>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.</u></p>		<p>(Cont) new language</p>
<p>(b) <u>Purpose</u></p> <p><u>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.</u></p>		<p>(b) New language</p>

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<p>(c) <u>Applicability of Safe Harbor Peer Review:</u></p> <p>(1) <u>Nursing Peer Review (TOC) §303.0015</u> requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses <u>(for safe harbor peer review of a RN, at least 5 of the 10 must be RNs)</u> to permit a nurse to request <u>Safe Harbor Peer Review</u> when <u>the nurse is requested or assigned</u> to engage in conduct that the nurse believes is in violation of his/her duty to a patient.</p>		<p>New Language.</p> <p>(c)(1) Revised membership requirements from SB 993. Previous membership requirements in current 217.20(a)</p>
<p>(2) <u>Any person or entity that conducts Safe Harbor peer review is required to comply with the requirements of this rule.</u></p>		<p>(2) New language; obvious to nurses, but not to those who are not nurses.</p>
<p>(d) <u>Invoking Safe Harbor</u></p> <p>(1) <u>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 acuties 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.</u></p>		<p>(d)(1) New language, though need to invoke at time requested to engage in the activity expressed in current rule 217.20(c)(2).</p>

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<p>(2) At the time the nurse is requested to engage in the <u>conduct or assignment, or refuses to engage in the requested conduct or assignment</u>, he/she must notify <u>in writing</u> the supervisor requesting the <u>conduct or assignment</u> that the nurse is invoking Safe Harbor. <u>Full documentation of the Safe Harbor request must be completed before the end of the work period.</u></p>	<p>(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. <u>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</u> must be completed before the end of the work period.</p>	<p>(2) Language clarification recommended by J. Willmann after final NPAC draft circulated. Staff agree. Staff recommend change the term “full” to “detailed” with regard to Safe Harbor request to be congruent with term used elsewhere in this rule.</p> <p>Process in part explained in current rule 217.20(c)(2) &amp; (3).</p>
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<p>(3) An initial request must include:</p> <p>(A) The nurse(s) name making the safe harbor request and his/her signature(s);</p> <p>(B) The date and time of the request;</p> <p>(C) location of where the conduct or assignment is to be completed;</p> <p>(D) Name of the person requesting the conduct or making the assignment;</p> <p>(E) A brief explanation of why safe harbor is being requested.</p>	<p>(3) An initial <u>written notification or request for Safe Harbor</u> must include:</p> <p>(A) The nurse(s) name making the safe harbor request and his/her signature(s);</p> <p>(B) The date and time of the request;</p> <p>(C) location of where the conduct or assignment is to be completed;</p> <p>(D) Name of the person requesting the conduct or making the assignment;</p> <p>(E) A brief explanation of why safe harbor is being requested.</p>	<p>(3) Language clarification recommended by J. Willmann after final NPAC draft circulated. Staff agree.</p>
<p><u>(4)The detailed written account must include at a minimum:</u></p> <p>(A) the conduct assigned or requested, including the name and title of the person making the assignment or request;</p>	<p><i>(4) The written full documentation under subsection (2) must include at a minimum.</i></p>	<p>(4) Recommended language by J. Willmann; staff disagree; keep committee language, and term “detail” used consistently throughout to differentiate this report from the “initial brief” request.</p> <p>(A) current language in 217.20(c)(3)(A).</p>
<p>(B) a description of the practice setting (e.g., the nurse’s responsibilities, resources available, extenuating or contributing circumstances impacting the situation);</p>		<p>(B) Current language in 217.20(C)(3)(B).</p>

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<p>(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. <u>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.</u></p>		<p>(C) Current language in 217.20 (C)(3)(C). New language added to address situations where nurse in good faith refuses to engage in conduct or accept an assignment.</p>
<p>(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</p> <p>(E) the nurse's name, title, and relationship to the supervisor making the assignment or request.</p>		<p>(D) and (E): Current language; in 217.20(C)(3)(D) and (E).</p>
<p>(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.</p> <p>(6) The nurse invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor.</p>		<p>(5) Current language in (c)(4).</p> <p>(6) Current language in (d)(3).</p>

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<p>(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.</p>		(7) Current language in (d)(2).
<p>(e) Safe Harbor Protections</p> <p>(1) To activate protections outlined in Nursing Peer Review (TOC) §303.005(c), the nurse shall:</p> <p>(A) Invoke Safe Harbor in good faith.</p>		Current language in 217.20(c)(1).
<p>(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 change may occur at any time.</p>		(B) From current language in (c)(2); amended for clarity.

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NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(2) <u>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.</u></p>		<p>(2) New language from §303.005(h) [SB 993].</p>
<p>(3) <u>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.</u></p>		<p>(3) Similar language to current 217.20(d)(1)(B). Language changed for clarification purposes, but no change in time limit for notifying nurse.</p>
<p>(f) Exclusions to Safe Harbor Protections</p> <p>(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.</p>		<p>(f)(1)-(3) same as current language in (e)(1)-(3)</p>
<p>(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).</p>		<p>(f)(1)-(3) same as current language in (e)(1)-(3)</p>

**NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]**

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(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.</p>		<p>(f)(1)-(3) same as current language in (e)(1)-(3)</p>
<p>(g) <u>Nurse's Decision to Accept or Refuse Assignment When Invoking Safe Harbor and While Awaiting Determination of Safe Harbor Peer Review Committee</u></p> <p><u>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:</u></p> <p>(A) <u>the nurse is so lacking in knowledge, skills, and abilities that the nurse is incompetent to render the care or engage in the conduct requested or assigned; or</u></p>	<p>(A) the nurse <u>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;</u> or</p>	<p>NPA 301.352 permits a nurse to refuse an assignment under certain circumstances. Rule 217.12(1)(E) also makes it unprofessional conduct for a nurse to accept an assignment when it "could reasonably be expected to result in unsafe or ineffective client care."</p> <p>Safe Harbor originally developed to allow nurse to accept assignment w/o fear of board action, since patients are almost always better off w/the nurse than w/o the nurse. However, since addressed in NPA and rule 217.12, all agree important to add, but concern for language to limit refusal to engage in conduct to those circumstances when, as first stated, the nurse is essentially not competent to deliver safe pt care in the given setting or to the given patient.</p> <p>J. Willmann suggested including examples and modifying draft language. Staff suggest examples go in FAQs for the rule. In addition to NPAC discussing this section at length, J. Willmann took draft rules to TNA's GAC committee 9/28-29. After much discussion, GAC agreed with staff's alternate language on this section.</p>

NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(B) <u>the requested conduct or assignment would constitute unprofessional conduct and/or criminal conduct.</u></p>		<p>New Language; Examples will be provided in Rule FAQ.</p>
<p>(h) Minimum Due Process</p> <p>(1) <u>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.</u></p>		<p>New language/new requirement under SB993.</p>
<p>(2) <u>In order to meet the minimum due process required by Nursing Peer Review (TOC) chapter 303, the nursing peer review committee shall:</u></p> <p>(A) <u>comply with the membership and voting requirements as set forth in TOC §303.003(a)-(d);</u></p>	<p>(2) <u>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);</u></p>	<p>New language; membership requirements currently addressed in peer review statute. Added for clarification purposes.</p> <p>See (B) below; deleting (B) then need to combine stem with (A).</p>
<p><del>(B) <u>exclude from the committee, including attendance at the safe harbor 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 requesting peer review from appearing before the safe harbor peer review committee to speak as a fact witness;</u></del></p>		<p>(B) Current rule addresses in 217.20(b), but does not clarify that exclusion from being a committee member also excludes from attending the hearing.</p> <p>Same requirements repeated in (3) and (4) below. Duplication not helpful here/recommend delete.</p>

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NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(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.</p>		<p>From 217.20(b)</p>
<p>(4) <u>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.</u></p>		<p>New language; previous rule did not address attendance at the meeting, just membership, so added to this rule.</p>
<p>(5) The nurse requesting safe harbor shall be permitted to:</p> <ul style="list-style-type: none"> <li>(A) appear before the committee;</li> <li>(B) ask questions and respond to questions of the committee; and</li> <li>(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.</li> </ul>		<p>Language unchanged from current rule in 217.20(b).</p>

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NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(i) Safe Harbor Processes</p> <p>(1) The following timelines shall be followed:</p> <p>(A) the safe harbor peer review committee shall complete its review and notify the <u>CNO</u> (nurse administrator) within 14 calendar days of when the nurse requested Safe Harbor;</p>		<p>Same timeline as current rule in (d)(1).</p>
<p>(B) within 48 hours of receiving the committee's determination, the <u>CNO</u> (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.</p>		<p>Same as current rule in (d)(1) with clarification language.</p>
<p>(2) The Chief Nursing Officer (CNO) of a facility, <u>association, school, agency, or of any other setting that utilizes the services of nurses is</u> 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 and Nursing Peer Review.</p>	<p>...conducted in compliance with the Nursing Practice Act (TOC ch.301) and Nursing Peer Review (TOC ch 303).</p>	<p>Same as current 217.20 (f) but with clarification language.</p>
<p>(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).</p>		<p>Same as current 217.20(g).</p>

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<p>(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.</p>		<p>Same as current 217.20(h).</p>
<p>(5) <u>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.</u></p> <p>(A) <u>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).</u></p>		<p>New language. No provision for recording difference of opinion in current rule. Clarifies that CNO and Peer Review have separate and distinct duty to report a nurse as set forth in the NPA and rules.</p>

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<p>(B) <u>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.</u></p>		<p>New language that mirrors new language in NPR law §303.005(d).</p>
<p>(j) <u>Use of Informal Work Group In Safe Harbor Peer Review</u></p> <p><u>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:</u></p>		<p>New language; expanded and tied in with same concept in rule 217.16 <i>Minor Incidents</i>.</p>

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NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(A) <u>the nurse:</u></p> <p>(i) <u>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</u></p> <p>(ii) <u>consent, in writing, to the use of an informal workgroup.</u></p>		<p>New language; similar to that adopted in rule 217.16.</p>
<p>(B) the informal workgroup comply with the membership and voting requirements of subsection (h) of this rule.</p> <p>(C) <u>the nurse to be provided the opportunity to meet with the informal workgroup;</u></p> <p>(D) <u>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; and</u></p>		<p>New language; similar to that adopted in rule 217.16.</p>
<p>(E) ratification by the safe harbor peer review committee of any decision made by the informal workgroup.</p>	<p>(E) ratification by the safe harbor peer review committee <u>chair person</u> of any decision made by the informal workgroup. <u>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.</u></p>	<p>New language. Concern that need oversight for workgroup, but that making peer review ratify could defeat the purpose of saving time and resources with same result (patient safety). Staff suggested PR chair oversight since this person should be the in-house expert on PR.</p>

NPAC Proposed Revisions to Rule 217.20 Safe Harbor Peer Review (Oct 07) [SB993, HB2426]

NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
	(F) <u>the peer review chair person must communicate any decision of the informal work group to the CNO/nurse administrator.</u>	(F) was added by staff in conjunction with the above change to assure that the CNO/ nurse administrator, who is ultimately accountable, knows about any action taken by an informal workgroup.
<p>(k) <u>Reporting Conduct of other Practitioners or Entities/Whistleblower Protections</u></p> <p>(1) <u>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.</u></p> <p>(2) <u>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:</u></p>		(k) (1)-(4) New language; copied from SB993 language (NPA 301.413).
<p>(A) <u>minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or</u></p> <p>(B) <u>statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.</u></p>		(k) (1)-(4) New language; copied from SB993 language.

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NPAC Proposed Rule Language	Alternate Language Recommendations	Current/New Language & Staff Comments
<p>(3) <u>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.</u></p>		<p>(k) (1)-(4) New language; copied from SB993 language.</p>
<p>(4) <u>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.</u></p>		<p>(k) (1)-(4) New language; copied from SB993 language.</p>

**Proposed Rule 217.20**  
**Safe Harbor Peer Review**  
**October 2007**

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(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) **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** 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 Section 301.401(1)]
- (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) **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 rule 217.16.
- (7) **Nurse Administrator:** Chief Nursing Officer (CNO) or the CNO's designee.
- (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.

- (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.
- (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.
- (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.
- (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.

- (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.
- (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.
- (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
- (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 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.

(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.

(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 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.

- (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.
  
- (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.
  - (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.
  - (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 change may occur at any time.
- (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) 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 rule 217.19 (incident-based peer review).
- (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:

- (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; or
- (B) 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 (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.
- (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 (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.
- (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).

- (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).
  - (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 (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).
    - (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
- (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:

- (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 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 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; and

(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. {won't format}

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

(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 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.