

**Consideration of Proposed Amendments to 22 Tex. Admin. Code §217.19, Pertaining to *Incident-Based Nursing Peer Review and Whistleblower Protections* and §217.20, Pertaining to *Safe Harbor Peer Review and Whistleblower Protections***

**Summary of Request:** Consider proposed amendments to 22 Tex. Admin. Code §217.19, pertaining to *Incident-Based Nursing Peer Review and Whistleblower Protections* and §217.20, pertaining to *Safe Harbor Peer Review and Whistleblower Protections*.

**Background:** During the past legislative session, the Legislature passed Senate Bill (SB) 192. This bill enhances patient advocacy protections that currently exist for nurses (relating to safe harbor, mandatory reporting requirements, and request for peer review). For example, the bill extends non-retaliation protections to situations in which an individual advises a nurse on the nurse's rights to engage in protected patient advocacy activities, extends nurse liability immunity when making a protected report (to include immunity from criminal liability), and deters retaliation against nurses for engaging in protected patient advocacy activities<sup>1</sup>.

While SB 192 strengthened the patient advocacy protections that currently exist for nurses, the Board's current rules already address these protections in extensive detail. As a result, few modifications are needed to the Board's current rules. The proposed amendments, attached as Attachment "A", merely add clarifying and conforming language to the Board's existing rules related to peer review, safe harbor, and mandatory reporting for consistency with the provisions of SB 192.

**Board Action:** Move to approve the proposed amendments to 22 Tex. Admin. Code §217.19, pertaining to *Incident-Based Nursing Peer Review and Whistleblower Protections* and §217.20, pertaining to *Safe Harbor Peer Review and Whistleblower Protections*, with authority for General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. If no negative comments and no request for a public hearing are received, move to adopt the proposed amendments to 22 Tex. Admin. Code §217.19, pertaining to *Incident-Based Nursing Peer Review and Whistleblower Protections* and §217.20, pertaining to *Safe Harbor Peer Review and Whistleblower Protections*, as proposed.

---

<sup>1</sup> See Bill Analysis, Enrolled Version, 8/4/11.

## Attachment "A"

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

#### (a) Definitions.

(1) - (13) (No change).

(14) Peer Review--Defined by TOC §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or nursing care, and a determination or recommendation regarding a complaint. The term also includes the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of and protections for nurses who raise care concerns, report under Chapter 301, request peer review, and the resolution of workplace and practice questions relating to nursing and patient care. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.

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

when the initial assignment changes.

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

(b) (No change).

(c) Applicability of Incident-Based Peer Review. TOC §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of TOC §301.401(1) and §301.402(e) (NPA) (relating to alternate reporting by nurses to nursing peer review when a nurse engages in conduct subject to reporting), §301.403 (relating to nursing peer review committee reporting), §301.405(c) (relating to nursing peer review of external factors as part of employer reporting), and §301.407(b) (relating to alternate reporting by state agencies to peer review).

(d) - (i) (No change).

(j) Nurse's Duty to Report.

(1) (No change).

(2) A nurse may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for filing a report in good faith [~~made without malice~~] under this section and TOC §301.402(f) (retaliation for a report made in good faith [~~without malice~~] prohibited) or advising a nurse of the nurse's rights and obligations under this section and §301.402(f). A violation of this subsection or TOC §301.402(f) is subject to TOC §301.413 that provides a nurse the right to file a civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the

nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

(k) - (l) (No change).

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

(1) - (3) (No change).

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

#### **§217.20. Safe Harbor Peer Review and Whistleblower Protections.**

(a) Definitions.

(1) - (13) (No change).

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

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

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

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

(b) - (d) (No change).

(e) Safe Harbor Protections.

(1) (No change).

(2) TOC §303.005(c) and (h) (NPR Law) and §301.352[;] provide the following protections:

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

(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for advising a nurse in good faith

of the nurse's right to request a determination, or of the procedures for requesting a determination.

(C) (No change).

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

(f) - (k) (No change).

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

(1) - (3) (No change).

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