GENERAL PEER REVIEW INFORMATION

- **What is Peer Review? [TOC §303.001(5)]**

Peer review is the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by nurses, the merits of a complaint concerning a nurse or nursing care, and a determination or recommendation regarding a complaints including:

(a) the evaluation of the accuracy of a nursing assessment and observation and the appropriateness and quality of the care rendered by a nurse;

(b) a report made to a nursing peer review committee concerning an activity under the committee’s review authority;

(c) a report made by a nursing peer review committee to another committee or to the Board as permitted or required by law; and

(d) implementation of a duty of a nursing peer review committee by a member, an agent, or an employee of the committee.

A Peer Review Committee may review the nursing practice of a LVN, RN, or APRN (RN with advanced practice authorization).

- **There are two kinds of nursing peer review:**

  1. **Incident-based**, in which case peer review is initiated by a facility, association, school, agency, or any other setting that utilizes the services of nurses; or

  2. **Safe Harbor**, which may be initiated by a LVN, RN or APRN prior to accepting an assignment or engaging in requested conduct that the nurse believes would place patients at risk of harm, thus potentially causing the nurse to violate his/her duty to the patient(s). Invoking safe harbor in accordance with rule 217.20 protects the nurse from licensure action by the BON as well as from retaliatory action by the employer.

See revised rules 217.19 (Incident-Based Nursing Peer Review and Whistleblower Protections) and 217.20 (Safe Harbor Peer Review and Whistleblower Protections){http://www.bon.state.tx.us/nursinglaw/rr.html}

- **What is a nursing peer review committee? [TOC §303.001(4); 22TAC 217.19(a)(14), 217.20(a)(14)]**

It is a committee established under the authority of the governing body of a national, state, or local nursing association; a school of nursing; the nursing staff of a hospital, health science center, nursing home, home health agency, temporary nursing service, or other health care facility; or state agency or political subdivision for the purpose of conducting nursing peer review. The nursing peer review process is one of fact-finding, analysis, and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event.

- **Who must have a peer review plan? [TOC §303.0015]**
Any person or entity that employs, hires, or contracts for the services of 10 or more nurses (RNs, LVNs or any combination thereof) must have a Peer Review Plan; however, peer review of RNs is not mandatory if the facility employs less than 5 RNs. A person or entity required to have nursing peer review may contract with another entity to conduct nursing peer review.

- **What is the Peer Review committee’s composition? (TOC §303.003)**

  Section 303.003(a): A Peer Review Committee that conducts a review that involves the practice of registered nurses and licensed vocational nurses must have registered nurses and licensed vocational nurses as \( \frac{3}{4} \) of its members;

  Section 303.003 (b): A Peer Review Committee that conducts a review that involves the practice of licensed vocational nurses must:

  (a) to the extent feasible, include licensed vocational nurses as members; and

  (b) have only registered nurses and licensed vocational nurses as voting members.

  Section 303.003 (c): A Peer Review Committee that conducts a peer review that involves the practice of professional nursing (including a RN with advanced practice authorization) must:

  (a) have registered nurses as \( \frac{2}{3} \) of its members;

  (b) have only registered nurses as voting members; and

  (c) where feasible, have at least one nurse with a working familiarity of the area of nursing practice of the nurse being reviewed. If APRN practice is reviewed, preferably have an APRN with authorization in the same role and specialty on peer review or advising peer review.

  In addition, rule 217.19(d)(3)(B) and rule 217.20(h)(2)(B)-(C) exclude from membership or attendance at the Peer Review Committee hearing any person(s) with administrative authority for personnel decisions directly relating to the nurse. A person with administrative authority over the nurse may only appear as a fact witness.

- **What part of the Peer Review process is confidential? (NPA §303.006-.007; §303.0075)**

  All proceedings of the nursing Peer Review committee are confidential and all communications made to the committee are privileged. All information made confidential is not subject to subpoena or discovery in any civil matter, is not admissible as evidence in any judicial or administrative proceeding, and may not be introduced into evidence in a nursing liability suit arising out of the provision of, or failure to provide, nursing services. SB993 (80th Legis Session (2007)) added §303.0075 that addresses protection of information shared between the peer review committee and a patient safety committee under §301.457(g).

- **To whom may the Peer Review committee disclose privileged information(NPA §303.007)?**

  Upon written request, the committee shall disclose written or oral communications and the records and proceedings of the committee to:

  (1) the State Board of registration or licensure of any state; or
(2) a law enforcement authority investigating a criminal matter.

A nursing peer review committee may disclose written or oral communications made to the committee and the records and proceedings of the committee to:

(1) a licensing agency of any state;
(2) a law enforcement agency investigating a criminal matter;
(3) the association, school, agency, facility, or other organization under whose authority the committee is established (i.e., employer);
(4) another nursing peer review committee;
(5) a peer assistance program approved by the board under Chapter 457, Health and Safety Code;
(6) an appropriate state or federal agency, or accrediting organization that accredits health care facility or school of nursing or surveys a facility for quality of care; or
(7) a person engaged in bona fide research, if all information that identifies a specific individual is deleted.

Is it acceptable to use an informal workgroup of the peer review committee for either incident-based or safe harbor peer review? [rule 217.19(e) or 217.20(j)]

Yes, any entity conducting peer review may choose to use a smaller workgroup of the peer review committee for either incident-based or safe-harbor peer review. A nurse involved as the primary party in peer review does not waive any due process rights, including the right to have an issue heard by the entire peer review committee by agreeing to cooperate with a smaller workgroup of peer review. See rule 217.19(e) or 217.20(j) for specific requirements when using a smaller workgroup of the peer review committee. Also review rule 217.16 Minor Incidents regarding smaller workgroup.

What whistleblower protections does a nurse have if he/she reports a facility, agency, school or other entity that provides healthcare services, or a physician or other licensed practitioner for endangering patients/clients or engaging in unethical or illegal conduct? [NPA (TOC) § 301.4025, §301.413]

The above listed sections of the NPA (TOC ch 301),and rules 217.19(m) and 217.20(l) address protections a nurse has when reporting unsafe practices of practitioners other than nurses (such as physicians, dentists, etc) or entities (such as hospitals, nursing homes, home health agencies, etc). The BON does not regulate practitioners who are not nurses, or facilities, agencies, or other entities that utilize the services of nurses. Thus, reports regarding other practitioners or entities should be reported to the appropriate licensing or regulatory agency. Should a nurse experience or be threatened with retaliatory measures for reporting unsafe conditions or practitioners, staff advise the nurse to seek his/her own legal counsel for guidance.

INCIDENT-BASED NURSING PEER REVIEW
What “due process” rights must the peer review committee provide to the nurse undergoing Incident-Based Peer Review (IBPR)? [rules 217.19(d)]

Review of NPA Chapter 303 in its entirety is recommended, as compliance with various sections of this chapter is necessary to assure compliance with “due process” and “good faith” peer review requirements. Rule 217.19(d) delineates specific requirements for minimum due process during IBPR. Committee membership and voting requirements are described in NPA §303.003(a)-(d); §303.0015, and §217.19(c) and (d)(3)(B).

The nurse being peer reviewed must receive notification of the peer review process as well as other components that are part of the nurse’s minimum due process rights under §217.19(d) including:

- that his/her practice is being evaluated by the nursing peer review committee,
- that the peer review committee will meet on a specified date not less than 21, but not more than 45 calendar days from the date of notice,
- a copy of the peer review plan, policies and procedures.
- the notice must include:
  - a description of the event(s) to be evaluated in enough detail to inform the nurse of the incident, circumstances and conduct, and should include date(s), time(s), location(s), and individual(s) involved. Any patient or client information shall be identified by initials or number to protect confidentiality, but the nurse shall be provided the name of the patient.
  - the name, address and telephone number of the contact person to receive the nurse’s response (typically the peer review chairperson).
- the nurse is provided the opportunity to review, in person or by attorney, at least 15 calendar days prior to appearing before the committee, documents concerning the event under review.
- the nurse is provided the opportunity to appear before the committee, make a verbal statement, ask questions and respond to questions of the committee and provide a written statement regarding the event under review.
- the nurse shall have the opportunity to:
  - call witnesses, question witnesses, and be present when testimony or evidence is being presented;
  - be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of the proceeding;
  - make an opening statement to the committee;
  - ask questions of the committee and respond to questions of the committee; and
  - make a closing statement to the committee after all evidence is presented.
- the committee must complete it’s evaluation within 14 calendar days from the date of the peer review hearing.
- within 10 calendar days of completion of the peer review hearing, the peer review committee must notify the nurse in writing of it’s determination.
- the nurse shall be given an opportunity, within 10 calendar days, to provide a written rebuttal to the committee’s findings which shall become a permanent part of the peer
May the employer take disciplinary action prior to Peer Review? [301.405(e)]

Employment and licensure issues are separate. An employer may take disciplinary action before review by the peer review committee is conducted, as peer review cannot determine issues related to employment. The role of peer review is to determine if licensure violations have occurred and, if so, if the violations require reporting to the board.

Does an employer have to report to the Board if they terminate an employee? [Section 301.405 (b)]

If an employer terminates a nurse for non-practice-related reasons (such as too many absences, or non-patient-related misconduct) this is an employment, not licensure, issue and is not board-reportable.

If an employer terminates a nurse (voluntarily or involuntarily), suspends for seven (7) or more days, or takes other substantive disciplinary action against a nurse or substantially equivalent action against an agency nurse for nursing practice violations, the employer shall report to the Board in writing:

- the identity of the nurse;
- the conduct subject to reporting that resulted in the termination, suspension or other substantive disciplinary action or substantially equivalent action; and
- any additional information the board requires.

Does the Peer Review Committee have to meet if the nurse voluntarily resigns or is involuntarily terminated for practice related reasons? Does the nurse have due process rights under peer review if a report to the BON is already mandatory under NPA §301.405(c) or §301.402(b)? [NPA §301.405(c) and rule 217.19(j)(1)]

SB993 (80th Legis. Session, 2007) amended NPA (TOC) §301.405(c) requiring that even if a mandatory report by the employer has been, or will be, made to the BON under §301.405(b), the peer review committee must still meet to determine if external factors beyond the nurse’s control impacted the nurse’s deficiency in care. If the peer review committee believes external factors were involved in the incident for which the nurse is being reported to the BON, the committee is now required to report the issue to the entity’s patient safety committee, or to the CNO/nurse administrator if there is no patient safety committee. Because the peer review committee is reviewing the incident solely to determine existence of external factors, due process rights of incident-based peer review do not apply. In addition, a peer review committee cannot make a determination that would negate the duty of the employer to report the nurse under §301.405(b) or of the CNO/nurse administrator to report the nurse under §301.402(b).

Must the recommendations made by the Peer Review committee be followed by the employer?

The nursing peer review committee does not have authority to make employment or disciplinary decisions. The employer must make their own decision about appropriate disciplinary actions; however, the employer may choose to utilize the decisions of the peer...
review committee in determining what action they wish to take with regard to the nurse’s employment. In addition, an employer may not prohibit a peer review committee from filing a report to the BON if the PRC has determined in good faith that a nurse’s practice must be reported to the Board in compliance with §301.403, rule 217.11(1)(K), and rule 217.19.

- **What is a Minor Incident?**  [TOC §301.419(a), rule §217.16(b)]
  
  A "minor incident" is defined by Texas Occupations Code (Nursing Practice Act) §301.419(a) as "conduct that does not indicate that the continuing practice of nursing by an affected nurse poses a risk of harm to the client or other person."

- **Are there Exclusions to What Can Be Considered a Minor Incident?**  [rule 217.16]
  
  Yes. Rule 217.16(c) defines 3 types of circumstances in which the conduct cannot be considered a minor incident:

  (1) Any error that contributed to a patient’s death;
  
  (2) Criminal conduct defined in NPA §301.4535; or
  
  (3) A serious violation of the board’s Unprofessional Conduct rule 217.12 involving intentional or unethical conduct such as fraud, theft, patient abuse or patient exploitation.

- **What are the criteria for determining if Minor Incidents are Board reportable?**
  
  Rule 217.16(d) establishes when a minor incident is or is not board-reportable:

  (1) **Criteria for Determining if Minor Incident is Board-Reportable.**

    - A nurse involved in a minor incident need not be reported to the Board unless the conduct:

      (A) creates a significant risk of physical, emotional or financial harm to the client;
      
      (B) indicates the nurse lacks a conscientious approach to or accountability for his/her practice;
      
      (C) indicates the nurse lacks the knowledge and competencies to make appropriate clinical judgments and such knowledge and competencies cannot be easily remediated; or
      
      (D) indicates a pattern of multiple minor incidents demonstrating that the nurse's continued practice would pose a risk of harm to clients or others.

  (2) **Evaluation of Multiple Incidents.**

    (A) Evaluation of Conduct. In evaluating whether multiple incidents constitute grounds for reporting it is the responsibility of the nurse manager or supervisor or peer review committee to determine if the minor incidents indicate a pattern of practice that demonstrates the nurse's continued practice poses a risk and should be reported.

    (B) Evaluation of Multiple Incidents. In practice settings with nursing peer review, the nurse shall be reported to peer review if a nurse commits five minor incidents within a 12-month period.
In practice settings with no nursing peer review, the nurse who commits five minor incidents within a 12 month period shall be reported to the Board.

What is the Peer Review committee required to report? [NPA §301.401, 301.403, & rule 217.11, rule 217.12, rule 217.16]

A peer review committee is required to make a report to the Board if they believe in good faith that a nurse has engaged in conduct subject to reporting as defined under the Nursing Practice Act (NPA), §301.401(1). This nearly always involves one or more suspected violations of Rules 217.11, Standards of Nursing Practice, or 217.12, Unprofessional Conduct, or may fail to meet the criteria for consideration as a minor incident [217.16(c) Exclusions, or 217.16(d) discussed above].

If a Peer Review committee finds that a nurse engaged in conduct that is subject to reporting, the committee must file a signed, written report to the BON that includes:

- the identity of the nurse;
- a description of any corrective action that was taken;
- (3) a recommendation whether the Board should take formal disciplinary action against the nurse and the basis for the recommendation;
- a description of the conduct subject to reporting (defined under 301.401(1));
- (5) the extent to which any deficiency in care provided by the nurse was the result of a factor beyond the nurse’s control; and
- (6) any additional information the board requires.

* Failure to classify an event appropriately in order to avoid reporting the nurse to the BON may result in action against the nurse or nurses on the peer review committee responsible for reporting, and/or the CNO who failed to report to the board under his/her duty as a nurse in compliance with TOC 301.402.

If a nurse’s practice is suspected of being impaired secondary to chemical dependency, drug or alcohol abuse, substance abuse/misuse, “intemperate use,” mental illness, or diminished mental capacity, must Peer Review be conducted and a report filed with the Board? [NPA §301.410 & Rule 217.19(g)]

It depends. If there is no evidence of nursing practice violations, a nurse may be reported to either the BON or to a peer assistance program [217.19(g)(1)].

However, if, during the course of an incident-based peer review process, there is evidence of nursing practice violations in conjunction with evidence of impaired nursing practice, the incident-based peer review process shall be suspended, and the nurse reported to the board in accordance with NPA (TOC) §301.410(b) (relating to a required report to the board when practice errors exist with suspected or known impairment of the nurse. The BON will determine in such cases whether or not the nurse is eligible to take part in a peer assistance program.

Who conducts Peer Review for a temporary or contract employee? (NPA §303.004)

The nurse who works through a temporary agency or contractor may be subject to Peer Review by either the facility where services are provided, the compensating agency, or both. For purposes of exchange of information, the Peer Review committee reviewing the conduct is considered as established under the authority of both so that confidentiality requirements of peer review are enforceable against any nurse involved in the
investigation or peer review proceeding. The two entities may choose to have a contract with respect to which entity will conduct Peer Review of the nurse.

SAFE HARBOR PEER REVIEW

- **What is the purpose of Safe Harbor? [NPA §303.005(b)]**

  The purpose of Safe Harbor is to allow the RN or LVN to question an assignment that the nurse believes in good faith may cause the nurse to violate his/her duty to a patient. It allows the nurse to request a peer review on a specific conduct or task that the nurse believes may be harmful to a patient.

  Safe Harbor also allows for a nurse to request that a determination be made on the medical reasonableness of a physician’s order [303.005(c)].

- **What protections of a nurse’s license are applicable under Safe Harbor? [NPA §301.352, §301.413, §303.005(c), (d), and (h).]**

  A nurse who in good faith requests Safe Harbor peer review:

  (1) may not be disciplined or discriminated against for making the request;

  (2) may engage in the requested conduct pending the peer review;

  (3) is not subject to the reporting requirement under Subchapter I, Chapter 301; and

  (4) may not be disciplined by the board for engaging in that conduct while the peer review is pending.

- **How does a nurse invoke these protections? [Rule 217.20(c)]**

  To activate Safe Harbor protections outlined in the above noted sections of the NPA, the nurse shall:

  - Invoke Safe Harbor in good faith. “Good faith” means that the nurse believes that the requested conduct violates a nurse’s duty to a patient and that belief is one a reasonable nurse could hold.

  - At the time the nurse is requested to engage in the activity, notify the supervisor making the assignment that the nurse is invoking Safe Harbor.

  - At the time of supervisor notification, also submit a written request for Safe Harbor that includes a minimum of the following information:

    (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 conduct would have violated the nurse’s duty to a patient or any other provision of the Nursing Practice Act and Board Rules. If possible, reference the specific standard (Rule 217.11) or other section of the Nursing Practice Act and/or Board rules the nurse believes would have been violated;
(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.

The initial written request for safe harbor may be brief, but before leaving at the end of the work period, the nurse must submit the detailed account (comprehensive request) of his/her request for safe harbor. As in (D) above, additional supporting documents may still be supplied at a later date. Quick Request and Comprehensive Request for Safe Harbor forms are available on the BON web site under the Nursing Practice link.

When Can a Nurse Invoke Safe Harbor and Refuse the Assignment? [NPA (TOC) §301.352, rule 217.20(g)]

The NPA, section 301.352 permits a nurse to refuse an assignment when the nurse believes in good faith that the requested conduct or assignment could jeopardize patient safety. This is referred to as “violating the nurse’s duty to the patient” because all nurses have a duty under rule 217.11(1)(B) to maintain a safe environment for patients/clients. Safe Harbor enables a nurse in most circumstances to accept the assignment, thus allowing the nurse to protect his/her nursing license from board sanctions while at the same time delivering the best care possible to a patient(s).

Patients are better off with the nurse than without the nurse in the vast majority of cases; however, a nurse would be justified in refusing to engage in an assignment or requested conduct that:

1. constitutes a criminal act
2. constitutes unprofessional conduct, or
3. is an assignment or conduct that the nurse is lacks the knowledge, skills, and abilities necessary to deliver nursing care that is safe and that meets the minimum standards of care.

A request to falsify a patient record is an example of conduct that a nurse should refuse to engage in while awaiting a peer review committee determination, since there is no legal or factual basis that would support a nurse falsifying a patient record. A request to accept an assignment when a nurse believes the nurse staffing levels are unsafe would be conduct a nurse normally would engage in pending peer review’s determination since the supervisor normally would have some reasonable legal or factual basis to support her/his belief that the requested assignment does not violate a nurse’s duty to a patient, even if peer review ultimately determines otherwise.

Does Safe Harbor Protect a Nurse from Civil or Criminal Liability? [TOC 303.005(h), 217.20(e)(2) & (3)]

No. Safe Harbor has no effect on a nurse’s civil or criminal liability for his/her nursing practice. The BON does not have any authority over civil or criminal liability issues. Safe Harbor does protect the nurse from retaliation by an employer or contracted entity for whom the nurse performs nursing services. There is no expiration of the protection against
retaliatory actions such as demotion, forced change of shifts, pay cut, or other retaliatory action against the nurse.