

**Proposed Adoption of Amendments and Response to Comments to Proposed Amendments  
to 22 Texas Administrative Code §§ 213.28 and 213.33, Regarding the Nature of Certain  
Crimes and How they Relate to the Practice of Nursing in Discipline and  
Eligibility Matters and Factors Considered for Imposition of  
Penalties/Sanctions and/or Fines**

In September 2006, the Staff of the Sunset Advisory Commission recommended in its report that the Board more clearly identify which crimes relate to the practice of nursing. The Board proposed amendments to section 213.28 at its October 2006 meeting. These proposals were published in the November 10, 2006, edition of the *Texas Register*. Three comments were received in response to those proposed amendments: one from Texas Nurses Association (TNA) and two from individuals. These comments are attached.

The practice of nursing is in essence the "front lines" of health care provision. The scope of the nursing profession allows nurses to have unfettered access to people and their property more than any other profession. Nurses attend to people at their most vulnerable state and provide care to the most vulnerable individuals in our society – the elderly, children, the mentally ill, sedated and anesthetized patients, patients whose mental or cognitive ability is compromised and patients who are disabled and immobilized. The provision of care can be in private homes and home-like settings without direct or, at times, without any supervision. Because of this scope and level of trust required of a nurse, he/she must possess professional character and integrity. This is a licensure requirement recognized in Tex. Occ. Code Ann. § 301.252. The scope and nature of nursing require that nurses not commit crimes against persons, not commit crimes against property, be of sound mind and not under the influence of mood-altering substances, be truthful and honest, and be accountable for their actions. For these reasons, a wide variety of criminal acts affect the practice of nursing. The legislature has recognized the need to review criminal backgrounds prior to licensure, Tex. Occ. Code § 301.2511, and that crimes may affect licensure eligibility in general, Tex. Occ. Code ch. 53. To address these issues and the concerns of the Sunset Advisory Committee, the Board adopts amendments to 22 Texas Administrative Code § 213.28.

The Board also proposed amendments to section 213.33 at its October 2006 meeting. These proposals were also published in the November 10, 2006, edition of the *Texas Register*. The proposed amendments to § 213.33 relate to requesting a psychiatric/psychological evaluation or a more specialized forensic evaluation that addresses the criminal element of unprofessional conduct in cases of licensure eligibility or discipline. The underlying issues may deal with honesty, sexual misconduct, chemical dependency, and/or fitness to practice, etc. The board has utilized the forensic evaluation for several years, so the amendment is for the purpose of placing this practice in rule 213.33, Factors Considered for Imposition of Penalties/Sanctions and/or Fines, addressing risk assessment evaluation.

Staff recommends that the Board move to adopt amendments without changes along with the responses to comments to 22 Texas Administrative Code section 213.28 pertaining to the Licensure of Persons with Criminal Backgrounds. The amendments are to be effective 20 days after filing with the *Texas Register*.

Staff recommends that the Board move to adopt amendments with changes along with the responses to comments to 22 Texas Administrative Code section 213.33 pertaining to Factors Considered for Imposition of Penalties/Sanctions and/or Fines. The amendments are to be effective 20 days after filing with the *Texas Register*.

The Board of Nurse Examiners adopts amendments with changes to 22 Texas Administrative Code §§ 213.28 and 213.33 pertaining to Practice and Procedure. Sections 213.28 and 213.33 specifically address Licensure of Persons with Criminal Convictions and Factors Considered for Imposition of Penalties/Sanctions and/or Fines, respectively. These adopted amendments were reviewed by the Board's Eligibility and Disciplinary Task Force at its open meeting on October 13, 2006, and approved for recommendation to the Board for proposal and adoption. The proposed amendments were in the November 10, 2006, edition of the *Texas Register* at 31 TexReg 9196. In subsection 213.33(e), an additional sentence was added; and in paragraph (f)(3), a comma was replaced with a semicolon.

In September 2006, the staff of the Texas Sunset Advisory Commission recommended in its report that the Board more clearly identify which crimes relate to the practice of nursing. The proposed amendments to § 213.28 attempts to incorporate this recommendation into the Board's rules. The Board evaluated the crimes that other professions have identified as affecting their professions and the rationale provided by those professions. The Board believes that due to the nature of nursing, the crimes that may affect nursing are broad. The practice of nursing is in essence the "front line" of health care provision. The scope of the nursing profession allows nurses to have unfettered access to people and their property more than any other profession. Nurses attend to people at their most vulnerable state and provide care to the most vulnerable individuals in our society the elderly, children, the mentally ill, sedated and anesthetized patients, patients whose mental or cognitive ability is compromised and patients who are disabled and immobilized. The provision of care can be in private homes and home-like settings without direct or, at times, without any supervision. Because of this scope and level of trust required of a nurse, he/she must possess professional character and integrity. The legislature has recognized the need to review criminal backgrounds prior to licensure, Tex. Occ. Code § 301.2511, and that crimes may affect licensure eligibility in general, Tex. Occ. Code ch. 53. The legislature has recently identified specific crimes that bar licensure. *See* TEX. OCC. CODE § 301.4535. The scope and nature of nursing require that nurses not commit crimes against persons, not commit crimes against property, be of sound mind and not under the influence of mood-altering substances, be truthful and honest, and be accountable for their actions. For these reasons, a wide variety of criminal acts affect the practice of nursing. To better inform the public and profession of how crimes may affect licensure determination by the Board and to address these issues and the concerns of the Sunset Advisory Committee, the Board proposes amendments to 22 Texas Administrative Code §213.28.

The practice of nursing requires professional character and integrity. Due to the necessity of these qualities, the Board or the Executive Director may request that nurses under investigation or nurse applicants with eligibility issues undergo a psychiatric/psychological evaluation or a forensic psychological evaluation as prescribed by the Board to assess whether the individual may continue to pose a risk to the public health and safety of the public as a nurse that is suggested by the known criminal conduct. The evaluation is voluntary and must be obtained at the licensee's own expense. The evaluation may offer mitigating and/or aggravating information to the investigation of a nurse or nurse applicant.

The proposed amendment to § 213.33 relates to a psychological/psychiatric evaluation to determine mental fitness and a more specialized evaluation that addresses the criminal element of

unprofessional conduct. The underlying issues may deal with honesty, chemical dependency, and/or fitness to practice. The board has utilized the forensic evaluation for several years, so the amendment is for the purpose of placing this practice in §213.33, Factors Considered for Imposition of Penalties/Sanctions and/or Fines, to address the risk assessment evaluation. In § 213.33, the Board has attempted to generally outline the nature of the evaluation which it would view as credible and reliable. The rule is designed to be flexible and have general applicability.

Three comments were received in response to proposed amendments to sections 213.28 and 213.333. A letter of comment was received from the Texas Nurses Association (TNA) and from two individuals. The comments to section 213.28 are as follows:

Comment: TNA and one individual contend that the proposed amendments to rules 213.28 do not achieve their stated goal of implementing the Sunset staff report Recommendation 2.1 (Require the Board to more clearly identify which crimes relate to the practice of nursing). In citing Recommendation 2.1, TNA states:

2.1 Require the Board to more clearly identify which crimes relate to the practice of nursing.

This recommendation would clarify the Board's responsibility to adopt guidelines that follow the requirements of Chapter 53 of the Occupations Code by specifically requiring the Board to develop rules defining which crimes relate to an individual's ability to practice nursing. Reading the Nursing Practice Act with Chapter 53 would allow the Board to take action against an applicant or licensee who committed a crime – including a crime that resulted in a disposition other than a conviction, such as deferred adjudication – identified by the Board as relating to the practice of nursing. While the Board should have authority to consider each case on its own merits, identifying those crimes that most directly and consistently relate to the practice of nursing would allow the Board to prioritize its licensing and enforcement efforts related to criminal activity, and thus allow the Board to better allocate its resources. Simply defining all crimes as related to the practice of nursing does not meet the intent of the Legislature and is not the norm among health licensing agencies. [emphasis added]

The individual states that the "Occupations Code states that the Board may take action for a felony or a misdemeanors involving moral turpitude or conduct resulting in revocation of probation. The Legislature determined which crimes they consider to be of concern and those are listed in section 301.4535 of the Occupations Code. These rules need to be withdrawn and re-drafted to reflect crimes that directly relate to the practice of nursing."

Response: The Board disagrees that it has not more clearly identified the types of crimes that relate to nursing. Although the amendments do not list specific crimes, it does identify those categories of crimes whose elements would constitute unprofessional conduct as defined by the Legislature and Board rules. The Board's rule is to provide guidance to nurses who want to practice in this state. The Board has not gone through the Penal Code in its rule to specifically identify each offense listed therein to determine its applicability to nursing. Likewise, the Board does not intend to go through each State's Penal Code to identify those specific crimes that nurses

who come in from other states need to be aware may be an impediment to an unencumbered license. The Board, however, has adopted a disciplinary grid that lists specific crimes listed in the Texas Penal Code that the Board views as affecting the practice of nursing and how. Sunset recommended that the Board look at the Department of Licensing and Regulation's (TDLR) guidelines. TDLR's guidelines are categorized similarly as the Board has implemented into rule; therefore, the Board believes that the amendments define and provide ample guidance regarding types of crimes it feels affect the practice of nursing in compliance with the Sunset Advisory report. In addition, the Board disagrees with the individual's comment that seems to imply that the only crimes that directly relate to the practice of nursing were defined by the Legislature in section 301.4535. The crimes listed in § 301.4535 are bars to licensure. Crimes exist that are not serious enough to automatically prevent an individual from being a nurse but are serious enough to be considered an impediment to licensure or an unencumbered license. The Board disagrees that the rules should be withdrawn and redrafted to reflect crimes that directly relate to nursing, because the requirements of chapter 53 do not require the individual crimes to be listed in rule but in guidelines.

Comment: TNA and one individual contend that the amendments appear to be based on a standard of what crimes "relate" to nursing as opposed to "directly relate" to nursing per ch. 53 of the Occupations Code. While TNA does believe the crimes that directly relate to nursing are quite broad, it does not believe that all crimes do so. While it may be difficult, TNA believes it should be possible to draw more useful lines than is done by the proposed amendments. At the very least, it should be possible to exclude certain offenses, for example, Class B or C Misdemeanors or possibly crimes in which the culpable mental state is criminal negligence (though this would include negligent homicide)."

Response: The Board agrees with TNA that the crimes that relate to nursing are quite broad. The Board disagrees that it needs to specifically identify the types of crimes that relate to nursing in its rule. Chapter 53 of the Occupations Code requires guidelines that delineate specific crimes, and the Board has created the guidelines in the disciplinary grid which states each specific crime. Although the amendments do not list specific crimes, it does identify those categories of crimes whose elements would constitute unprofessional conduct as defined by the Legislature and Board rules. The Board's rule is to provide guidance to nurses who want to practice in this state. The Board has not gone through the Penal Code in its rule to specifically identify each offense listed therein to determine its applicability to nursing. Likewise, the Board does not intend to go through each State's Penal Code to identify in its rule those specific crimes that nurses who come in from other states need to be aware may be an impediment to an unencumbered license. The Board, however, has adopted a disciplinary grid that lists specific crimes listed in the Texas Penal Code that the Board views as affecting the practice of nursing and how. Sunset recommended that the Board look at the Department of Licensing and Regulation's (TDLR) guidelines. TDLR's guidelines are categorized similarly as the Board has implemented into rule; therefore, the Board believes that it has defined and provided ample guidance regarding types of crimes it feels affect the practice of nursing in compliance with the Sunset Advisory report. The Board cannot make a distinction regarding the level of crime without knowing the specific nature of the crime. "Indecent exposure" is a class B misdemeanor, yet if an individual gets two misdemeanor "indecent exposures," he/she is required to register with the sex offender registry, and pursuant to

Tex. Occ. Code Ann. § 301.4535(16), he/she is barred from licensure; therefore, the Board is not comfortable making a specific distinction. The Board, however, does give weight to the level of the criminal conduct.

Comment: An individual states that subsection (j) is not required "because the authority to take action on any nurse's license is already granted under section 301.4535 of the Occupations Code. The proposed section (j) is too vague and appears to exceed statutory authority."

Response: The Board agrees that the authority to take action on any nurse's license for the offenses in 301.4535 is granted. Subsection (j) clarifies that the authority under 301.4535 extends to authorization to practice. The Board believes subsection (j) is a reasonable and consistent interpretation of its statutory authority under § 301.4535. The Board, therefore, disagrees that subsection (j) is too vague and exceeds statutory authority.

Comment: TNA states that the use of terminology "criminal offense"[used in title, Subsec (a), and Subsec. (c)] is confusing since the "offense" is the underlying conduct regardless of any action (arrest, deferred adjudication, conviction) taken by the criminal justice system on the basis of the offense or conduct. Is the intent that the BNE could take disciplinary action on basis of conduct that constitutes a criminal offense even though there has been no action taken against the nurse by the criminal justice system? If the intent is to authorize the taking of action based on an arrest, then that should be explicitly stated. If not, then terminology should probably be "conviction or deferred adjudication" rather than "offense." The individual comments that the term "offense" is overly broad.

Response: The Board disagrees that the term "offense" is confusing and too broad and that its terminology needs to be clarified. The Board agrees that the amendment seeks to make the term "offense" general enough to include deferred adjudication or other criminal action other than "conviction." Not all criminal conduct is prosecuted by the judicial system as a "conviction," so the Board may take action on conduct which is a violation of the Nursing Practice Act (NPA) even though no action was taken by the criminal justice system. For example, when a nurse misappropriates drugs, the facility may not report the conduct to the authorities, but the conduct is still a criminal offense and in violation of the Health and Safety Code. Though the criminal justice system does not take action, the offense may involve theft, falsification of medical documents, being under the influence of drugs, etc. The conduct is criminal and the Board will take the appropriate steps to assure the public that the nurse can safely practice nursing. The Board disagrees that the use of "offense" can be interpreted to authorize agency action based on arrest information. The Board, however, may be interested in investigating the underlying conduct when there is pending criminal charges due to the nature of the conduct and impending judicial action which may be a violation of the NPA.

Comment: One individual comments that the following statements are overly broad and include matters outside the Board's authority in sections 301.452 and 301.4535 of the Texas Occupations Code and the Board should be required to specifically delineate precisely which crimes pertain to each:

- (a)(1) Offenses against the person similar to those outlined in Title 5 of the Texas Penal Code...;
- (a)(2) Offenses against property, e.g., robbery, burglary, and theft, etc.,....;
- (a)(3) Offenses involving fraud and deception...;
- (a)(4) Offenses involving lying and falsification....

Response: The Board disagrees that the statements are overly broad and include matters outside the Board's authority in sections 301.452 and 301.4535 of the Nursing Practice Act. The behaviors outlined in the proposed rule language constitute unprofessional conduct in almost any profession. The categorized offenses in the rule are specifically in violation of the Board's criteria for "professional character" as defined in rule 213.27 through 213.28. Due to the nature of nursing and the potential unfettered access nurses have to personal information, belongings, and dwellings without supervision, the Board believes that it does have the authority to expect and require nurses to have professional character and, therefore, not commit criminal offenses against individuals and their property and to be truthful, forthright, and accountable for their actions. The public expects nurses to have professional character and the legislature has granted the Board the authority to require it.

Comment: One individual states that "subsection (i) is not required because this issue is covered under chapter 53 of the Occupations Code. The inclusion of "deferred adjudication" goes beyond the statutory authority."

Response: The Board disagrees that subsection (i) is not required. This subsection is not in conflict with chapter 53 and the Board has found that many nurses and their attorneys are unfamiliar with the requirements of chapter 53. The subsection is in rule to reiterate the requirement of chapter 53. In addition, the Board's enabling legislation, Tex. Occ. Code § 301.452(b)(3), specifically includes "deferred adjudications" with "convictions."

Comment: TNA states that although "Subdivisions (1)-(8) of Subsection (c) are not proposed for amendment, Subdivisions (1)-(2) would appear to become unnecessary if proposed new specific crimes language in (b)(1)-(5) are adopted and likewise, Subdivisions (7)-(8) would appear to become unnecessary if proposed new Sections (i)-(j) relating to imprisonment are adopted.

Response: The Board disagrees that the subdivisions cited are not necessary due to the proposed amendments. Subdivisions (1)-(2) repeat the statutory language of Occ. Code § 301.452(b) and do not conflict or create ambiguity with the proposed language. Subdivision (1) may or may not constitute criminal conduct and the proposed amendments more clearly delineate the felony or misdemeanor conduct of subdivision (2) that concerns the Board. Subdivisions (7) and (8) state considerations for the Board but the proposed sections (i) and (j) reflect the language of chapter 53 of the Occupations Code. The proposed rule language appears to complement the existing language; however, the Board will continue its review of all of the rule for ambiguity and redundancy when it conducts its rule review of chapter 213, if not sooner.

Comment: One individual states that the "board places no time limit on the date of convictions or deferred Orders. Prior to the merger of the Board of Nurse Examiners and the Board of Vocational Nurse Examiners, LVNs were not even asked about deferred adjudication. For the

Board to now consider criteria previously not applicable to vocational nurses is over-reaching. The Board did not have statutory authority to discipline any nurse for deferred adjudication until September 1, 2005. The date of the offense should confer jurisdiction and a limitations period is necessary.”

Response: The Board agrees that no time limit has been placed on the date of convictions or deferred Orders and that LVNs were not asked about deferred adjudications prior to the merger of the Board of Vocational Nurse Examiners and the Board of Nurse Examiners in February 2004. Jurisdiction, however, is not conferred by the Board but by the legislature and the legislature alone provides a limitations period. The Board agrees that it did not have the statutory authority to discipline for the deferred order on its face; however, it disagrees that it did not have the statutory authority to discipline nurses for the underlying conduct that served as the basis for the deferred order if the conduct is otherwise a violation of the standards associated with LVN licensure. Prior to the statutory authority granted by the Legislature regarding deferred adjudications, both Boards had statutory authority to discipline for “unprofessional conduct” and both boards had rules that addressed specific acts of “unprofessional conduct” which served and serve as the basis for investigating deferred adjudications. The Board’s concern for its failure to investigate deferred adjudications was heightened when it became aware that nurses who had admitted guilt, received deferred orders, and were registered sex offenders, were practicing nursing without restrictions, and were providing care to the most vulnerable members of the public in autonomous situations. Subsequent to this awareness, the legislature specifically included “deferred adjudications” in the Board’s enabling legislation. The Board believes it has and had the statutory authority to take action on conduct deemed to be unprofessional and, therefore, has not overreached its statutory authority.

Comment: One individual states that the board needs to provide data to support the following statement in (a)(5), “offenses regarding delivery, possession, manufacture or use of or dispensing or prescribing a controlled substance, dangerous drug or mood altering drug may raise questions as to whether the same misconduct will be repeated in the workplace....”

Response: The Board disagrees that it needs to provide the specific data the individual requests in response to a comment. The Board would point out that the definition of professional nurse includes “administering of medication” and it seems axiomatic that when the quintessential function of nursing is “dispensing and giving medication” that any offense regarding delivery, possession, or use of a controlled substance in an illegal manner raises questions about whether that misconduct can occur in the workplace. The Board’s experience with and concern regarding individuals who are chemically dependent on mood altering substances, abuse controlled substances, or who engage in criminal behavior involving the same is that an individual’s need or desire for the mood-altering substance may potentially override the responsibility to provide appropriate care to the patients. Because the practice of nursing provides more opportunity for an individual to have access to and, therefore, engage in the use of mood altering substances, the potential threat to the safety of patients will be investigated by the Board.

Comment: One individual states that the board needs to provide data to support the statement, regarding nurses who commit offenses against property, e.g., robbery, burglary, and theft, outside

the workplace may raise questions as to whether the same misconduct will be repeated by the nurse in the workplace, and therefore, place patient's property at risk.

Response: The Board disagrees that it needs to provide the specific data the individual requests in response to a comment. The Board's concern as stated in the rule with individuals who possess the propensity to commit crimes against property, however, is that the practice of nursing would allow further opportunity for an individual to further engage in crimes against property. Nurses have access to people's valuables, their homes, their personal information, etc., and the Board is concerned that this access will allow the recidivism of the previous criminal conduct unless the factors listed in rule 213.33 provide mitigation to the contrary. In addition, the public would have concerns with an individual who has a criminal past involving offenses against property providing care to them in a vulnerable state and having access to their personal items.

In response to section 213.33, the comments are as follows:

Comment: TNA states that "Subsections (e) and (f)(1)(E) state that the evaluation be "designed to test the ... veracity of the applicant or licensee." TNA assumes the intent of this language is to permit or recognize the use of a polygraph test as part of the evaluation. TNA has significant reservations about the use of polygraph tests, and believes that if polygraph tests are to be performed as part of the evaluation, then this should be explicitly stated in the rules. It also believes the rules should set out specific guidelines or criteria for when a polygraph test will be used as part of the evaluation and for assuring there are safeguards in place against inappropriate use. TNA also believes that the consent signed by the nurse/applicant for the evaluation state explicitly that the evaluation will/may include a polygraph test." One individual comment voices a similar concern and also states that a polygraph is "not reliable, valid or admissible in Texas" and she does not believe "that polygraphy could withstand a Daubert challenge."

Response: The Board agrees that the polygraph exam may be used as a tool by the forensic evaluator. The Board's experience with the evaluator's use of polygraph is varied, but generally, the polygraph has been a tool reasonably relied upon in performing evaluations. It is but one assessment tool which may be used. Therefore, the rule recognizes the broader category of tests used to evaluate veracity. The Board's experience is that polygraphs can be beneficial when conflicting stories are presented regarding allegations being investigated by the Board. The polygraph does not stand alone. It is one of several factors that may be used by the evaluator. The individual is informed when a polygraph is requested in conjunction with the evaluation, but the Board will modify the consent form for the evaluation to include the specific language regarding the possibility of a polygraph. Polygraphs are not generally requested in psychological/psychiatric evaluations, but are more prevalent in the forensic psychological evaluation when the "veracity" of the individual's version of the event is in question, e.g., the individual's interpretation of events versus the police report or other witnesses' testimony. The Board is aware of the limitations of the use of a polygraph exam in evidentiary hearings, but has relied on its common use by evaluators. The request is not mandatory and the individual has the right to refuse to obtain an evaluation.

Comment: TNA contends that "Subsections (e) and (f)(1) use the terminology "the Board or

Executive Director may request . . .” which makes it unclear if the nurse or applicant can refuse the evaluation. TNA’s understanding is that the evaluation is voluntary, and if so the rule should make this clear.”

Response: The Board disagrees that the “may request” language is unclear regarding whether the evaluation is voluntary. The evaluation is a factor considered in determining the appropriate sanction, if any, that should be imposed. It is not uncommon for the Board to request an evaluation from individuals whose past conduct would be a barrier to licensure, but a positive evaluation would justify the Board’s approval. The Board, however, will consider guidelines regarding evaluations to be posted on its web site in the near future after the rule amendments are adopted and the Board’s Eligibility and Disciplinary task force has had the opportunity to review and advise the Board.

Comment: One individual states that § 213.33 is intended for use once a determination has been made that discipline is indicated. Psychological evaluations determine whether a need for disciplinary action exists, so these proposed rules do not belong under section 213.33.

Response: The Board disagrees. The evaluations are a factor used in making a determination in resolution of a case. Evaluations are generally requested to provide additional information to the Board as to whether an individual is safe to practice nursing or whether an individual poses a threat to patient safety based on the factors considered by the evaluator; therefore, the conclusions and recommendations of a qualified evaluator who has reviewed the case constitute factors to be considered by the Board in determining an appropriate remedy.

Comment: TNA contends that neither “Subsection (e) nor (f) set out any standards or criteria for when a nurse would be requested to have a psychological/psychiatric examination nor are any parameters set on how the evaluation will be used. Rather, both sections only address the process to be used once a decision is made that an evaluation will be requested.” An individual states in her comment that the criteria should be stated in the appropriate rules relating to criminal conduct, mental or chemical dependency fitness issues, or in the cases involving sexual misconduct. One individual does not believe that a forensic evaluation is beneficial and that a psychiatric/psychologist evaluation is sufficient.

Response: The Board disagrees that no standards are specifically set out, since the Board assumes that the “factors” in § 213.33 will be considered, and specifically relevant information about “evidence of present fitness to practice” as stated in 213.33(a)(5). The psychological/ psychiatric evaluation is designed to provide an expert opinion regarding the mental fitness of an individual and the forensic evaluation would provide an expert opinion regarding “fitness” to be a safe practitioner, the “potential harm” the nurse may provide to clients or the public, provide mitigating or aggravating factors, and forensic evaluations are provided in the criminal justice system to determine the potential that the person will engage in subsequent conduct that may make him/her unsafe to practice. The parameters of an evaluation are dictated mainly by the professional expertise of the evaluator. The evaluators are recognized and approved based on their knowledge of how to conduct the evaluation. The Board does not have jurisdiction to dictate the scope of practice for a psychologist or psychiatrist who has the expertise to perform the fitness

evaluation. The criminal justice system uses forensic evaluations and the Board has found these evaluations governed by the forensic credentialing entities may be very beneficial when considering an appropriate sanction that protects the public but is fair to the nurse.

Comment: TNA contends that the “release the nurse is required to sign by both Subsections (e) and (f)(2) is very broad and apparently the evaluation is not limited in what it can cover or how the information uncovered can be used – even if unrelated to the original reason for evaluation. If the nurse is consenting to the BNE’s using the evaluation for any purpose the BNE determines appropriate, then the scope of use should be clearly stated in the consent the nurse is asked to sign. TNA also believes it would be desirable if the consent identify that the evaluation will be performed by a psychologist/psychiatrist selected or approved by the BNE. In summary, TNA believes that the consent signed by the nurse include sufficient detail that the nurse knows precisely what she or he is consenting to.” One individual commented that instead of “forcing a nurse to utilize an evaluator on an approved ‘list,’ the Board should publish the minimum acceptable criteria with regard to education, specific credentials and experience for a psychologist or psychiatrist to possess in order to conduct an evaluation that is acceptable to the Board.” Another individual stated that the board should not approve evaluators.

Response: The Board agrees that it uses a general release form for all of its evaluations and the evaluation is not limited. The Board’s only purpose for the evaluation is to obtain an expert opinion determining whether an individual is safe to practice nursing or poses a risk when evidence, e.g., criminal conduct, behavior at work, etc., may suggest that he/she does. The evaluation based on objective criteria, however, may show that the individual’s potential risk is minimized because of the individual’s subsequent maturity, rehabilitation or that the risk is minimized if his/her license is subject to stipulations, e.g., counseling, supervision, education, etc. The evaluation may also show that the individual is not safe to practice. The Board admits that information often emerges in an evaluation that was beyond the Board’s knowledge prior to obtaining the evaluation.

The Board disagrees that it is “forcing” the nurse to submit to an approved list. The Board also disagrees that it should not approve evaluators. The Board has a forensic evaluator list that is Board-approved; however, it is not an all-inclusive list and the Board does not force a nurse to use the list. If a nurse wants to use an evaluator who is not on the list, the evaluator can be approved by the Executive Director. The Executive Director approves forensic evaluators whose credentials and resumé evidence experience in doing forensic evaluations and whose names may not be on the list. If that evaluator submits credible evaluations based on objective criteria and professional expertise, he/she is asked whether he/she can be added to the list. Psychological/ Psychiatric evaluators are approved based on licensure and no board-approved list exists.

Comment: TNA contends that there exists “no requirement in Subsection (e) that the applicant/nurse be provided a copy of the evaluation as there is in Subsection (f)(3).”

Response: The Board agrees that no requirement exists but the Board assumes that a copy will be provided, because the nurse/applicant paid for it. If no copy is provided by the evaluator, the Board provides a copy to the nurse/applicant. The Board will add the requirement to subsection

(e).

Comment: TNA contends that "Subsection (e) describes the evaluation as "designed to test the psychological stability and veracity of the applicant or licensee" and Subsection (f)(1)(E) as "designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the nurse applicant or licensee." Is the intent that the scope of the two evaluations be different other than the fact that the one involves a criminal history?"

Response: Generally, the purpose of the evaluations is to determine whether an individual is safe to practice nursing. The underlying concern, e.g., mental issue, criminal conduct, etc., for seeking the evaluation is different.

Comment: TNA contends that neither "Subsection (e) or (f) addresses maintaining the confidentiality of the evaluations. If an evaluation is done, TNA believes that disclosure to or use by the BNE should not result in the evaluation becoming a public record subject to disclosure under the open records act."

Response: The evaluation is subject to the open records act only if it is admitted into evidence at a public hearing. An agreed order may include a finding of fact that addresses the evaluation to justify the Board's action.

Comment: Individual comment states that the individual subject to evaluation "should have the opportunity to review the information submitted to the evaluator and provide additional information to ensure the evaluation is done fairly and is based on the evidence. In addition, the applicant or licensee must have the opportunity to obtain all information the BNE gets from the evaluator at the same time that the BNE obtains it; the applicant/licensee is paying for the examination and is entitled to the results." Another individual stated that the evaluator should be allowed to review the complete file, other than confidential information.

Response: The Board does not agree that an individual should have access to the Board's work product, but the Board believes that the individual being evaluated should be able to know what the evaluator has reviewed and to provide additional information, and it is the Board's experience that the individual usually does provide such information. The Board also agrees that the individual should be given the results.

Comment: One individual states that the "board must substantiate the usefulness of an evaluation that predicts the recidivism of a nurse or applicant."

Response: The board disagrees that it must substantiate the usefulness of a recidivism prediction in response to its rule. The board, however, believes it is logical to presume that such a prediction is useful in determining whether an individual's practice would potentially place the public at risk due to past behaviors or a fitness issue.

Comment: One individual states that the Board should not order which tests are required to be administered, but rather should accept the opinion of the evaluator without influence.

Response: The Board does not order testing but disagrees that it should not request which tests are required to be administered. The Board wants the evaluator to use objective testing that is the generally accepted tools used by an evaluator and to address certain issues that are of concern to the Board whether it be a sexual predator component, chemical dependency test, or polygraph, etc. It is not the Board's experience that the tests requested influence the evaluator's conclusion.

<p>The amendments are adopted pursuant to the authority of Texas Occupations Code § 301.151 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. Texas Occupations Code §§ 301.452 and 301.4535 are affected by these proposed amendments.

*§213.28. Licensure of Persons with Criminal Offenses.*

(a) This section sets out the considerations and criteria on the eligibility of persons with criminal offenses to obtain a license as a registered or vocational nurse or those already licensed who renew their license. The Board may refuse to approve persons to take the licensure examination, may refuse to issue or renew a license or certificate of registration, or may refuse to issue a temporary permit to any individual that has been convicted of or received a deferred disposition for a felony, a misdemeanor involving moral turpitude, or engaged in conduct resulting in the revocation of probation.

(b) The practice of nursing involves clients, their families, significant others and the public in diverse settings. The registered and vocational nurse practices in an autonomous role with individuals who are physically, emotionally and financially vulnerable. The nurse has access to personal information about all aspects of a person's life, resources and relationships. Therefore, criminal behavior whether violent or non-violent, directed against persons, property or public order and decency is considered by the Board as highly relevant to an individual's fitness to practice nursing. The Board considers the following categories of criminal conduct to relate to and affect the practice of nursing:

(1) offenses against the person similar to those outlined in Title 5 of the Texas Penal Code because:

(A) nurses have access to persons who are vulnerable by virtue of illness or injury and are frequently in a position to be exploited;

(B) nurses have access to persons who are especially vulnerable including the elderly, children, the mentally ill, sedated and anesthetized patients, those whose mental or cognitive ability is compromised and patients who are disabled or immobilized and may be subject to harm by similar criminal behavior;

(C) nurses are frequently in situations where they provide intimate care to patients or have contact with partially clothed or fully undressed patients who are vulnerable to exploitation both physically and emotionally;

(D) nurses are in the position to have access to privileged information and opportunity to exploit patient vulnerability; and

(E) nurses who commit these crimes outside the workplace may raise questions as to whether that same misconduct will be repeated in the workplace and raises serious questions regarding the individual's ability to provide safe, competent care to patients.

(2) offenses against property, e.g., robbery, burglary and theft, etc., because:

(A) nurses have access to persons who are vulnerable by virtue of illness or injury and are frequently in a position to be exploited;

(B) nurses have access to persons who are especially vulnerable including the elderly, children, the mentally ill, sedated and anesthetized patients, those whose mental or cognitive ability is compromised and patients who are disabled or immobilized and may provide easy opportunity to be victimized;

(C) nurses have access to persons who frequently bring valuables (medications, money, jewelry, items of sentimental value, checkbook, or credit cards) with them to a health care facility with no security to prevent theft or exploitation;

(D) nurses frequently provide care in private homes and home-like settings where all of the patient's property and valuables are accessible to the nurse;

(E) nurses frequently provide care autonomously without direct supervision and may have access to and opportunity to misappropriate property; and

(F) nurses who commit these crimes outside the workplace may raise questions as to whether that same misconduct will be repeated in the workplace and, therefore, place patients' property at risk.

(3) offenses involving fraud or deception because:

(A) nurses have access to persons who are vulnerable by virtue of illness or injury and are frequently in a position to be exploited;

(B) nurses have access to persons who are especially vulnerable including the elderly, children, the mentally ill, sedated and anesthetized patients, those whose mental or cognitive ability is compromised and patients who are disabled or immobilized;

(C) nurses are in the position to have access to privileged information and opportunity to exploit patient vulnerability;

(D) nurses are frequently in situations where they must report patient condition, record objective/subjective information, provide patients with information, and report errors in the nurse's own practice or conduct;

(E) the nurse-patient relationship is of a dependent nature; and

(F) nurses who commit these crimes outside the workplace may raise questions as to whether that same misconduct will be repeated in the workplace and, therefore, place patients at risk.

(4) offenses involving lying and falsification because:

(A) nurses have access to persons who are vulnerable by virtue of illness or injury;

(B) nurses have access to persons who are especially vulnerable including the elderly, children, the mentally ill, sedated and anesthetized patients, those whose mental or cognitive ability is compromised and patients who are disabled or immobilized;

(C) nurses are frequently in situations where they must report patient condition, record objective/subjective information, provide patients with information, and report errors in the nurse's own practice or conduct;

(D) honesty, accuracy and integrity are personal traits valued by the nursing profession, and

considered imperative for the provision of safe and effective nursing care;

(E) falsification of documents regarding patient care, incomplete or inaccurate documentation of patient care, failure to provide the care documented, or other acts of deception raise serious concerns whether the nurse will continue such behavior and jeopardize the effectiveness of patient care in the future;

(F) falsification of employment applications and failing to answer specific questions that would have affected the decision to employ, certify, or otherwise utilize a nurse raises concerns about a nurse's propensity to lie and whether the nurse possesses the qualities of honesty and integrity;

(G) falsification of documents or deception/lying outside of the workplace, including falsification of an application for licensure to the Board, raises concerns about the person's propensity to lie, and the likelihood that such conduct will continue in the practice of nursing; and

(H) a crime of lying or falsification raises concern that the person may engage in similar conduct while practicing nursing and place patients at risk.

(5) offenses involving the delivery, possession, manufacture, or use of, or dispensing or prescribing a controlled substance, dangerous drug, or mood-altering substance because:

(A) nurses have access to persons who are vulnerable by virtue of illness or injury;

(B) nurses have access to persons who are especially vulnerable including the elderly, children, the mentally ill, sedated and anesthetized patients, those whose mental or cognitive ability is compromised and patients who are disabled or immobilized;

(C) nurses provide care to critical care, geriatric, and pediatric patients who are particularly vulnerable given the level of vigilance demanded under the circumstances of their health condition;

(D) nurses are able to provide care in private homes and home-like setting without supervision;

(E) nurses who are chemically dependent or who abuse drugs or alcohol may have impaired judgment while caring for patients and are at risk for harming patients; and

(F) an offense regarding delivery, possession, manufacture, or use of, or dispensing or prescribing a controlled substance, dangerous drug or mood altering drug may raise questions as to whether that same misconduct will be repeated in the workplace.

(c) In considering whether a criminal offense renders the individual ineligible for licensure or renewal of licensure as a registered or vocational nurse, the Board shall consider:

(1) - (8) (No change.)

(d) In addition to the factors that may be considered under subsection (c) of this section, the Board, in determining the present fitness of a person who has been convicted of or received a deferred order for a crime, shall consider:

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

(e) It shall be the responsibility of the applicant, to the extent possible, to obtain and provide to the Board the recommendations of the prosecution, law enforcement, and correctional authorities as required under this Act. The applicant shall also furnish proof in such form as may be required by the Board that he or she has maintained a record of steady employment and has supported his or her dependents and has otherwise maintained a record of good conduct and has paid all

outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted or received a deferred order .

(f) - (h) (No change.)

(i) The board shall revoke a license or authorization to practice as an advanced practice nurse upon the imprisonment of the licensee following a felony conviction or deferred adjudication, or revocation of felony community supervision, parole, or mandatory supervision.

(j) The board shall revoke or deny a license or authorization to practice as an advanced practice nurse for the crimes listed in Texas Occupations Code §301.4535.

*§213.33.Factors Considered for Imposition of Penalties/Sanctions and/or Fines.*

(a) - (d) (No change.)

(e) When determining evidence of present fitness to practice, the Board or Executive Director may request an evaluation by a psychologist or psychiatrist, who is licensed by the Texas State Board of Examiners of Psychologists or the Texas Medical Board, respectively. The evaluator must be familiar with the duties appropriate to the nursing profession. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the psychological stability and veracity of the applicant or licensee. The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board. The applicant or licensee should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the individual a copy.

(f) When determining evidence of present fitness to practice by a licensee or applicant for licensure:

(1) the Board or Executive Director may request an individual risk assessment conducted by a Board-approved forensic psychologist or psychiatrist who:

(A) evaluates the criminal history of a person; and

(B) seeks to predict:

(i) the likelihood that the person will engage in criminal activity that may result in the person receiving a second or subsequent reportable adjudication or conviction; and

(ii) the continuing danger, if any, that the person poses to the community.

(C) is familiar with the duties appropriate to the nursing profession.

(D) conducts the evaluation pursuant to professionally recognized standards and methods; and

(E) utilizes objective tests and instruments that, at a minimum, are designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the nurse applicant or licensee.

(2) The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board.

(3) The applicant or licensee should be provided a copy of the evaluation upon completion by the



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DELIVERED VIA EMAIL

December 8, 2006

Kathy Thomas  
Executive Director  
Board of Nurse Examiners  
333 Guadalupe, Suite 3-460  
Austin, TX 78701

Re: Proposed Amendments to Rules 213.28 (Crimes Relating to Nursing) and 213.33 (Psychological/Psychiatric Evaluations); 31 TexReg 9126 (11/10/06)

Dear Ms. Thomas:

The Texas Nurses Association (TNA) opposes adoption of the amendments to both Rules 213.28 and 213.33 as proposed.

**Rule 213.28 (Crimes related to nursing)**

TNA opposes the proposed amendments to Rule 213.28 (crimes relating to nursing) because it does not believe the amendments achieve their stated goal of implementing the Sunset staff report Recommendation 2.1. That recommendation was:

***2.1 Require the Board to more clearly identify which crimes relate to the practice of nursing.***

*This recommendation would clarify the Board's responsibility to adopt guidelines that follow the requirements of Chapter 53 of the Occupations Code by specifically requiring the Board to develop rules defining which crimes relate to an individual's ability to practice nursing. Reading the Nursing Practice Act with Chapter 53 would allow the Board to take action against an applicant or licensee who committed a crime – including a crime that resulted in a disposition other than a conviction, such as deferred*

*adjudication – identified by the Board as relating to the practice of nursing. While the Board should have authority to consider each case on its own merits, identifying those crimes that most directly and consistently relate to the practice of nursing would allow the Board to prioritize its licensing and enforcement efforts related to criminal activity, and thus allow the Board to better allocate its resources. Simply defining all crimes as related to the practice of nursing does not meet the intent of the Legislature and is not the norm among health licensing agencies. [emphasis added]*

TNA reads the proposed amendments as having the practical effect of stating that all crimes are relevant to the practice of nursing. TNA does not believe that adoption of the proposed amendments will provide guidance as to what crimes “relate most directly and consistently to the practice of nursing” as the Sunset staff report recommended. For example, the proposed rules identify all crimes involving possession of a mood-altering substance as related to the practice of nursing. This would include a single instance of the possession of less than two ounces of marijuana (a Class B misdemeanor) or possession of an open alcoholic beverage in a motor vehicle (Class C misdemeanor).

While TNA does believe the crimes that directly relate to nursing are quite broad, it does not believe that all crimes do so. While it may be difficult, TNA believes it should be possible to draw more useful lines than is done by the proposed amendments. At the very least, it should be possible to exclude certain offenses, for example, Class B or C Misdemeanors or possibly crimes in which the culpable mental state is criminal negligence (though this would include negligent homicide).

In addition to its general opposition based on the proposed amendments not achieving their stated intent, TNA would raise three more specific concerns about the proposed amendments:

1. The proposed amendments appear to be based on a standard of what crimes “relate” to the practice of nursing rather than on the standard of what crimes “directly relate” which is the standard used in Chapter 53 of the Occupations Code.
2. Use of terminology “criminal offense”[used in title, Subsec (a), and Subsec. (c)] is confusing since the “offense” is the underlying conduct regardless of any action (arrest, deferred adjudication, conviction) taken by the criminal justice system on the basis of the offense or conduct. Is the intent that the BNE could take disciplinary action on basis of conduct that constitutes a criminal offense even though there has been no action taken against the nurse by the criminal justice system? If the intent is to authorize the taking of action based on an arrest, then that should be explicitly stated. If not, then terminology should probably be “conviction or deferred adjudication” rather than “offense.”
3. Although Subdivisions (1)-(8) of Subsection (c) are not proposed for amendment, Subdivisions (1)-(2) would appear to become unnecessary if proposed new specific crimes language in (b)(1)-(5) are adopted and likewise, Subdivisions (7)-(8) would appear to

become unnecessary if proposed new Sections (i)-(j) relating to imprisonment are adopted. The four subdivisions read:

- (c) In considering . . .
  - (1) the knowing or intentional practice of nursing without a license issued under the NPA;
  - (2) any felony or misdemeanor involving moral turpitude;
  - (3)-(6) omitted
  - (7) whether imprisonment followed a felony conviction, felony community supervision revocation, revocation of parole or revocation of mandatory supervision; and
  - (8) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude.

### **Rule 213.33 (Psychological/psychiatric evaluations)**

TNA has several specific concerns about the proposed amendments to Rule 213.33 and these are set out below. Of particular concern is that the proposed rule appears implicitly to authorize or recognize the use of polygraph tests as part of an evaluation without setting out specific guidelines for their use or safeguards against inappropriate use. TNA's concerns about the use of polygraph tests are discussed under Item 1 below.

1. Both Subsections (e) and (f)(1)(E) state that the evaluation be "designed to test the ... veracity of the applicant or licensee." TNA assumes the intent of this language is to permit or recognize the use of a polygraph test as part of the evaluation. TNA has significant reservations about the use of polygraph tests, and believes that if polygraph tests are to be performed as part of the evaluation, then this should be explicitly stated in the rules. It also believes the rules should set out specific guidelines or criteria for when a polygraph test will be used as part of the evaluation and for assuring there are safeguards in place against inappropriate use. TNA also believes that the consent signed by the nurse/applicant for the evaluation state explicitly that the evaluation will/may include a polygraph test.
2. Both Subsections (e) and (f)(1) use the terminology "the Board or Executive Director may request . . ." which makes it unclear if the nurse or applicant can refuse the evaluation. TNA's understanding is that the evaluation is voluntary, and if so the rule should make this clear.
3. Neither Subsection (e) nor (f) set out any standards or criteria for when a nurse would be requested to have a psychological/psychiatric examination nor are any parameters set on how the evaluation will be used. Rather, both sections only address the process to be used once a decision is made that an evaluation will be requested.
4. The release the nurse is required to sign by both Subsections (e) and (f)(2) is very broad and apparently the evaluation is not limited in what it can cover or how the information uncovered can

be used – even if unrelated to the original reason for evaluation. If the nurse is consenting to the BNE’s using the evaluation for any purpose the BNE determines appropriate, then the scope of use should be clearly stated in the consent the nurse is asked to sign. TNA also believes it would be desirable if the consent identify that the evaluation will be preformed by a psychologist/psychiatrist selected or approved by the BNE. In summary, TNA believes that the consent signed by the nurse include sufficient detail that the nurse knows precisely what she or he is consenting to.

5. There is no requirement in Subsection (e) that the applicant/nurse be provided a copy of the evaluation as there is in Subsection (f)(3).

6. Subsection (e) describes the evaluation as “designed to test the psychological stability and veracity of the applicant or licensee” and Subsection (f)(1)(E) as “designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the nurse applicant or licensee.” Is the intent that the scope of the two evaluations be different other than the fact that the one involves a criminal history?

7. Neither Subsection (e) or (f) addresses maintaining the confidentiality of the evaluations. If an evaluation is done, TNA believes that disclosure to or use by the BNE should not result in the evaluation becoming a public record subject to disclosure under the open records act.

Respectfully submitted,

A handwritten signature in black ink on a light gray background. The signature reads "James H. Willmann" in a cursive script. The first letter of "James" is a large, stylized capital "J". The signature ends with a long horizontal flourish.

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

# MCDONALD, MACKAY, & WEITZ, L.L.P.

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Jeff B. McDonald, J.D.†

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Jon E. Porter, J.D.

December 8, 2006

Katherine Thomas, Executive Director  
Board of Nurse Examiners  
333 Guadalupe, Tower III, Suite 3-460  
Austin, Texas 78701-3944

RE: Proposed Rule Changes 22 TAC §213.28, §213.33 and Disciplinary Sanction Policies

Dear Ms. Thomas:

The following are offered as comments on the proposed rules and policies published in the November 10, 2006 Texas Register:

22 TAC §213.28

1. The Sunset Advisory Commission issued its report and stated that the Board needed to clearly identify which crimes directly relate to the practice of nursing. The report stated that the Board's rules were too broad. The Sunset Commission's staff report specifically stated that "simply defining all crimes as related to the practice of nursing does not met the intent of the Legislature..." The proposed rules remain broad and the preamble states that the Board considers a wide variety of criminal acts to affect the practice of nursing which ignores what the Sunset Advisory Commission recommended and what the Legislature directed. Section 301.452 of the Occupations Code (the Nurse Practice Act) states that the Board may take action for a felony or a misdemeanors involving moral turpitude or conduct resulting in revocation of probation. The Legislature determined which crimes they consider to be of concern and those are listed in section 301.4535 of the Occupations Code. These rules need to be withdrawn and re-drafted to reflect crimes that directly relate to the practice of nursing.
2. Subsection (i): This section is not required because this issue is covered under Chapter 53 of the Occupations Code. The inclusion of "deferred adjudication" goes beyond the statutory authority.
3. Subsection (j): This section is not required because the authority to take action on any nurse's license is already granted under section 301.4535 of the Occupations Code. The proposed section (j) is too vague and appears to exceed statutory authority.

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22 TAC §213.33(e) and (f)

1. These proposed rules involve determinations of fitness to practice, while section 213.33 is used to “dispose of a disciplinary case” or to determine “the appropriate penalty/sanction in disciplinary cases”; in other words, this section is used once a determination has been made that discipline is indicated. Psychological or psychiatric evaluations are often used to determine whether there is an addiction or mental illness and since the answer frequently is “No”, there is no requirement for disciplinary action. These proposed rules do not belong under section 213.33.
2. Determining whether a nurse has a chemical dependency problem, a mental illness or psychological issues can be determined by psychologists or psychiatrists without the additional requirement that the practitioner be trained in forensics. Forensic psychology involves the application of psychological knowledge to legal issues, it does not indicate a better potential for evaluating individuals. Many nurses live in isolated, underserved areas of Texas that do not have many psychologists or psychiatrists, much less a forensic psychologist or psychiatrist. The applicant or licensee is already being subjected to an added expense of approximately \$900-\$2500 for the evaluation and to impose the extra burden of traveling to a large metropolitan area in order to hopefully find a forensic evaluator is an expense that adds nothing to the evaluation.
3. The Board should not approve evaluators. As long as an evaluator has the required education and training, the evaluator should be acceptable to issue an opinion of present fitness to practice. Furthermore, the use of an approved provider list can easily be seen as selective advertising for those providers. The current list does not include all psychologists or psychiatrists that are competent by way of education or experience to evaluate nurses.
4. Subsection (f)(1)(E): Need to add, “Which tests or instruments required to determine fitness of an applicant or licensee are at the discretion of the evaluator.” The Board should not order which tests are required to be administered, but rather should accept the opinion of the evaluator without influence. For example, the Board routinely orders applicants to undergo forensic evaluations with a polygraph when there is no indication of an issue with truthfulness (like when a nurse admits to a DWI). This results in added expense to the applicant. There has also not been consistency in the use of the polygraph examination (the test frequently ordered by the Board to test veracity). Allowing the psychologist or psychiatrist to determine which tests are required would hopefully provide an unbiased assessment of the applicant or licensee.
5. Subsection (f)(2): It is extremely concerning that it has been reported that the Board selects which file materials are released to an evaluator rather than supplying the complete record to the evaluator. This rule needs to be changed to “...allowing the evaluator to review the complete file, other than confidential information, and a release that permits...”

Disciplinary Sanction Policies

While the Disciplinary Sanction Policies were not published for comment since they are not rules, the policies do guide the Board in regulation of nurses and thus, I believe it is important to comment on the policies. The policy that has continued to be problematic is the Chemical Dependency policy. The requirement for a year of documented sobriety has hindered nurses' motivation to seek treatment. The nurse is often faced with the expense of a treatment program while having no insurance to pay for the treatment (unlike physicians that typically have their treatment costs covered) and the knowledge that they will not have a nursing position to return to makes treatment often cost prohibitive. There are no reported studies that show that a nurse is more likely to remain in recovery if the nurse is removed from practice for one year. In fact, the added stress of unemployment helps to place trigger stressors on the nurse, which can hinder the road to recovery and can lead to relapse.

There is no argument that nurses must not be impaired by chemical dependency, but the current policies do more to encourage nurses to hide their addiction and to not seek help. The policies should provide incentives for nurses that seek treatment. The policy should read, "If the Board finds that disciplinary action is warranted and the nurse has been diagnosed as being addicted to substances, the nurse will not be eligible for an unencumbered license until the nurse successfully completes an approved treatment program and subsequent probationary monitoring by the Board for a minimum of three (3) years." With the nursing shortage, there is a need to retain nurses in nursing. Those nurses in recovery are not the ones to be feared. The nurses that are afraid to seek treatment and that are continuing their impairment should be the focus.

Recovery is a different process for each addict. Some "get" the program on the first try, some relapse a few times before the importance of sobriety gains a place in their heart and mind. Some flourish in traditional treatment programs and aftercare programs, some need a program that is unique. The key appears to be flexibility, determination in supporting and directing the recovery, and understanding of the process. Rather than focusing on punishment of nurses with diseases, the focus should be on providing structure and boundaries to assist in the recovery process.

Thank you and please contact me if you have any questions.

Sincerely,

  
Taralynn R. Mackay

## HIGGINBOTHAM & ASSOCIATES LLC

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December 8, 2006

Ms. Katherine Thomas  
Executive Director  
Board of Nurse Examiners  
333 Guadalupe Street, Ste. III-460  
Austin, Texas 78701

Re: Comments to the Proposed Rule Changes Ch. 213

Dear Ms. Thomas:

Please allow this correspondence to serve as comments to the proposed rule changes in 22 TAC Ch. 213, entitled Practice and Procedure.

As a threshold matter, this writer objects to the proposed amendment to § 213.33 as that appears to give the Board broad authority to impose a psychological/psychiatric evaluation requirement on any nurse for any reason. I make this comment because § 213.33 is utilized in every disciplinary case to determine the penalty/fine or sanction. If the Board feels that nurses with criminal convictions or substance abuse/mental fitness issues require evaluation, the requirement should be added as a factor or condition in each particularized rule.

In addition, the Board makes a distinction between a psychological/psychiatric evaluation and a more "specialized" evaluation which addresses the "criminal element of unprofessional conduct." There is no explanation of what the "specialized" examination entails. This writer objects to this distinction or requirement to the extent that it requires a polygraph examination as a component of a forensic psychiatrist's or a psychologist's opinion. Polygraphy is not reliable, valid or admissible in Texas (and most other) courts. Moreover, neither the APA, SOAH's rules nor the Texas Rules for Civil Procedure recognize or require polygraphy as part of any type of "physical or mental examination." This writer does not believe that polygraphy could withstand a Daubert challenge.

With regard to the use of polygraphy, it is recognized as a component of testing for sex offenders. In fact, the Commission on Sex Offender Treatment has published standards which require persons who treat sex offenders to be licensed. Serial Polygraphy by a JPCOT Certified Polygrapher is a required component of a sex offender evaluation.

The Board of Nurse Examiners failed to make this distinction and would benefit from a separate rule related to persons who have been convicted of, received deferred adjudication for sexual crimes or are accused of sexually assaulting a patient. The "specialized evaluation" needs to be clearly delineated based on IDENTIFIED reliable and valid scientific/professional standards.

Rule § 213.28 – Licensure of Persons With Criminal Offenses

- (a) The change of wording from "convictions" to "offenses" is overly broad. Further, it is inconsistent with and exceeds the Board's authority to discipline nurses in accordance with 301.452 (b) (3).
- (1) Offenses against the person similar to those outlined in Title 5 of the Texas Penal Code because ...

Comment: This language is overly broad in that it includes matters outside of the Board of Nurse Examiners' statutory authority in Texas Occupations Code 301.452 and 301.4535. The Board should be required to specifically delineate precisely which crimes against property relate to and affect the practice of nursing, and provide rationale.

- (2) Offenses against property e.g. robbery burglary and theft, etc. because ...

Comment: This language is overly broad in that it includes matters outside the Board of Nurse Examiners' statutory authority in Texas Occupations Code 301.452 and 301.4535. The Board should be required to specifically delineate precisely which crimes against property relate to and affect the practice of nursing and provide rationale.

- (F) Nurses who commit these crimes outside the workplace may raise questions as to whether this same misconduct will be repeated in the same workplace, and therefore, place patient's property at risk.

Comment: The Board needs to provide data to support this statement.

- (3) Offenses involving fraud and deception ...

Comment: This language is overly broad in that it includes matters (offenses) outside of the Board of Nurse Examiners' statutory authority in Texas Occupations Code 301.452 and 301.4535. The Board should be required to specifically delineate precisely which crimes involving fraud and deception relate to and affect the practice of nursing and give a reason for each.

(4) Offenses involving lying and falsification because ...

Comment: This language is overly broad in that it includes matters (offenses) outside of the Board of Nurse Examiners' statutory authority in Texas Occupations Code 301.452 and 301.4535. The Board should be required to specifically delineate precisely which crimes involving lying and falsification relate to and affect the practice of nursing and give a reason for each.

(5) offenses regarding delivery, possession, manufacture or use of or dispensing or prescribing a controlled substance, dangerous drug or mood altering drug may raise questions as to whether the same misconduct will be repeated in the workplace ...

Comment: The Board needs to provide data to support this statement. In addition, the term "offenses" is overly broad and includes matters outside of the Board of Nurse Examiners' statutory authority in Texas Occupations Code 301.452 and 301.4535.

(c) considering whether a criminal offense ...

Comment: The Board's statutory authority with regard to eligibility for licensure or renewal of licensure is located at Texas Occupations Code 301.4535. This language "offense" is entirely too broad and on its face subsumes conduct beyond the Board's statutory authority.

(d) In addition to the factors that may be considered under Subsection (c), at this section the Board, determining the present fitness of a person who has been convicted of or received a deferred Order for a crime, shall consider:

Comment: The Board places no time limit on the date of convictions or deferred Orders. Prior to the merger of the Board of Nurse Examiners and the Board of Vocational Nurse Examiners, LVNs were not even asked about deferred adjudication. For the Board to now consider criteria previously not applicable to vocational nurses is over-reaching. The Board of Nurse Examiners did not have statutory authority to discipline any nurse for deferred adjudication until September 1, 2005. The date of the offense should confer jurisdiction and a limitations period is necessary.

Rule § 213.33 – Factors Considered For Imposition of Penalties/Sanctions and/or Fines

(e) When determining evidence of present fitness to practice, the Board or Executive Director may request an evaluation by a psychologist or psychiatrist,

who is licensed by the Texas State Board of Examiners of Psychologists or the Texas Medical Board, respectively. The evaluator must be familiar with the duties appropriate to the nursing profession. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the psychological stability and veracity of the applicant or licensee. The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board.

(f) When determining evidence of present fitness to practice by a licensee or applicant for licensure:

Comment: The proposed amendment to § 213.33 (e) would give the Board broad authority to impose a psychological/psychiatric evaluation requirement on any nurse who is under investigation by the Board for any reason. It likewise implies that the refusal of a nurse to submit to an evaluation whether justified or not, would affect the recommended sanction. This is beyond the scope of the Board's authority. § 213.33 is utilized in every disciplinary case to determine the penalty/fine or sanction; a requirement for evaluation has no place in this section. If an evaluation is required to determine fitness, the requirement and rationale for the same belongs in the Rule related to the issue under scrutiny (chemical dependency, mental illness, sex crimes). This section 213.33 could then contain a provision for the **results** of the evaluation required for the specific issue to be considered in determining the appropriate remedy.

In addition, the Board fails to define what objective, reliable and valid test would or could be used to test a nurse's "veracity". This appears to be a thinly veiled attempt at requiring nurses to submit to polygraph testing.

The Board has drawn a distinction between a psychological/psychiatric evaluation and a more "specialized" evaluation which addresses the "criminal element of unprofessional conduct." There is no explanation of what the "specialized" examination entails. This writer objects to this distinction or requirement to the extent that it requires a polygraph examination as a component of a forensic psychiatrist's or a psychologist's opinion. Polygraphy is not reliable, valid or admissible in Texas (and most other) courts. Moreover, neither the APA, SOAH's rules nor the Texas Rules for Civil Procedure Rule 204 recognize polygraphy as part of any type of "physical or mental examination." This writer does not believe that polygraphy could withstand a Daubert challenge.

With regard to the use of polygraphy, it is recognized as a component of testing for sex offenders. In fact, the Commission on Sex Offender Treatment has published standards which require persons who treat sex offenders to be licensed. Serial Polygraphy by a JPCOT Certified Polygrapher is a required component of a sex offender evaluation. The Board of Nurse Examiners failed to make this distinction and would actually benefit from a separate rule related to persons who have been convicted of, or received deferred adjudication for sexual crimes or are accused of sexually assaulting a patient. The "specialized evaluation" needs to be clearly delineated based on IDENTIFIED reliable and valid scientific/professional standards.

(1) the Board or Executive Director may request an individual risk assessment conducted by a Board-approved forensic psychologist or psychiatrist who:

Comment: The Board has a history of removing physicians from their "approved list" who give too many favorable evaluations to nurses/applicants to include those who have not required nurses to submit to polygraph examination. In addition, the Board has refused to accept evaluations from providers who had information only from the person being evaluated (without the Investigator's "case review"). Instead of forcing a nurse to utilize an evaluator on an approved "list", the Board should publish the minimum acceptable criteria with regard to education, specific credentials and experience for a psychologist or psychiatrist to possess in order to conduct an evaluation that is acceptable to the Board

(A) evaluates the criminal history of a person; and

(B) seeks to predict:

(i) the likelihood that the person will engage in criminal activity that may result in the person receiving a second or subsequent reportable adjudication or conviction; and

(ii) the continuing danger, if any, that the person poses to the community.

Comment: The Board must substantiate the usefulness of an evaluation that predicts the recidivism of a nurse or applicant.

(C) is familiar with the duties appropriate to the nursing profession.

(D) conducts the evaluation pursuant to professionally recognized standards and methods; and

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(E) utilizes objective tests and instruments that, at a minimum, are designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the nurse applicant or licensee.

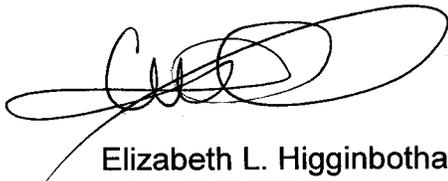
Comment: The Board fails to define what objective, reliable and valid test would or could be used to test a nurse's "veracity". This appears to be a thinly veiled attempt at requiring nurses to submit to polygraph testing. See above comments related to polygraph testing, which are referenced and incorporated herein as if set forth verbatim.

(2) The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board.

(3) The applicant or licensee should be provided a copy of the evaluation upon completion by the evaluator, if not, the Board will provide the individual a copy.

Comment: The Board routinely "poisons the well" by not providing an evaluator with a COMPLETE copy of all of the file materials relevant to the issues to be evaluated and instead provides a "case review" which contains sometimes limited information that is based on a Board investigator's interpretation of the evidence. The respondent should have the opportunity to review the information submitted to the evaluator and provide additional information to ensure the evaluation is done fairly and is based on the evidence. In addition, the applicant or licensee must have the opportunity to obtain all information the BNE gets from the evaluator at the same time that the BNE obtains it; the applicant/licensee is paying for the examination and is entitled to the results.

Yours truly,



Elizabeth L. Higginbotham, RN, J.D.  
FOR THE FIRM

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