

**First Amended**  
**Consideration of Proposed Amendments to Section 213.28,**  
**Licensure of Persons with Criminal Offenses**

House Bill 2426 amended the Nursing Practice Act to include sections 301.1545 and 301.452(d) related to Criminal History Information in Licensing and Disciplinary Decision. Section 301.1545 requires the Board to “list the offenses for which a conviction would constitute grounds for the board to take action... or for which placement on deferred adjudication community supervision would constitute grounds for the board to take action under this chapter.” Section 301.452(d) requires the board to “establish guidelines to ensure that any arrest information, in particular information on arrests in which criminal action was not proven or charges were not filed or adjudicated, that is received by the board under this section is used consistently, fairly, and only to the extent the underlying conduct relates to the practice of nursing.”

The amendments proposed in Rule 213.28 implement these requirements. They were presented to the Enforcement and Discipline Task Force on July 13, 2007, which recommended their approval by the Board.

Staff requests that the Board move to propose amendments to section 213.28 and publish them in the *Texas Register* for a 30-day comment period, and if negative comments are not received in the 30 day comment period, adopt and publish the amendments in the *Texas Register*.

## RULE §213.28      **Licensure of Persons with Criminal Offenses**

(a) This section sets out the considerations and criteria ~~on the eligibility of persons with~~ in determining the effect of criminal offenses on the eligibility of a person to obtain a license ~~as a registered or vocational nurse or those already licensed who renew their license~~ and the consequences that criminal offenses may have on a person's ability to retain or renew a license as a registered nurse or licensed vocational nurse. 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) These offenses include, but are not limited to, the following crimes, as well as any crime that contains substantially similar or equivalent elements under another state or federal law:**

- i. Abandonment / Endangerment of a Child [TPC §22.041]
- ii. Agree to Abduct Child for Remuneration: Younger than Eighteen [TPC §25.031]
- iii. Aiding Suicide: Serious Bodily Injury/Death [TPC §22.08]
- iv. Assault, Aggravated [TPC §22.02]
- v. Capital Murder [TPC §19.03]
- vi. Child Pornography, Possession or Promotion [TPC §43.26(a),(e)(Texas Rules of Criminal Procedure Ch. 62)]
- vii. Indecency w/Child [TPC §21.11(TRCP Ch. 62)]
- viii. Indecent exposure (2 or more counts and/or required to register as sex offender) [TPC §21.08 (TRCP Ch. 62)]
- ix. Injury to Child, Elderly, Disabled [TPC §22.04]
- x. Kidnapping [TPC §20.03, 20.04 (TRCP Ch. 62)]
- xi. Manslaughter [TPC §19.04]
- xii. Murder [TPC §19.02]
- xiii. Online Solicitation of a Minor [TPC §33.021(b),(c),(f); (TRCP Ch. 62)]
- xiv. Prostitution, Compelling [TPC §43.05 (TRCP Ch. 62)]
- xv. Protective Order, Violation [TPC §25.07, 25.071]
- xvi. Sale or Purchase of a Child [TPC §25.08]
- xvii. Sexual Assault [TPC §22.011 (TRCP Ch. 62)]
- xviii. Sexual Conduct, Prohibited [TPC §25.02 (TRCP Ch. 62)]
- xix. Sexual Assault, Aggravated [TPC §22.021 (TRCP Ch. 62)]
- xx. Sexual Performance by Child [TPC §43.25(b), .24(d)( TRCP Ch. 62)]

- xxi. Unlawful Restraint [TPC §20.02]
- xxii. Assault [TPC §22.01(a)(1),(b),(c)]
- xxiii. Criminally negligent homicide [TPC §19.05]
- xxiv. Improper Relationship between Educator and Student [TPC §21.12]
- xxv. Improper photography [TPC §21.15]
- xxvi. Obscenity, Wholesale promotion [TPC §43.23(a),(h)]
- xxvii. Prostitution (3 or more counts) or Aggravated Promotion [TPC §43.02, 43.04]
- xxviii. Resisting Arrest, Use of Deadly Weapon [TPC §38.03(d)]
- xxix. Stalking [TPC §42.072(b)]
- xxx. Harassment [TPC §42.07]
- xxxi. Prostitution or Promotion of [TPC §43.02]
- xxxii. Protective Order, Violation [TPC §25.07, 38.112]
- xxxiii. Resisting Arrest [TPC §38.03(a)]
- xxxiv. Deadly conduct [TPC §22.05(a)]
- xxxv. Obscenity, Participates [TPC §43.23(c),(h)]
- xxxvi. Terroristic Threat [TPC §22.07]
- xxxvii. Criminal Attempt or Conspiracy [TPC §15.01, 15.02]

(B) These types of crimes relate to the practice of nursing because:

- (A)(i) nurses have access to persons who are vulnerable by virtue of illness or injury and are frequently in a position to be exploited;
- (B)(ii) 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)(iii) 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)(iv) nurses are in the position to have access to privileged information and opportunity to exploit patient vulnerability; and
- (E)(v) nurses who commit these crimes outside the workplace ~~may raise questions as to whether that same misconduct will be repeated~~ raise concern about the nurse's propensity to repeat that same misconduct in the workplace and ~~raises serious questions~~ concerns 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) These offenses include, but are not limited to, the following crimes, as well as any crime that contains substantially similar or equivalent elements under another state or federal law:

- i. Burglary (if punishable under Penal Code §30.02(d)) [TRCP Ch. 62 (§ 62.001(5)(D))]
- ii. Robbery [TPC §29.02]
- iii. Robbery, Aggravated [TPC §29.03]
- iv. Arson [TPC §28.02(d)]
- v. Burglary [TPC §30.02]
- vi. Criminal Mischief [TPC §28.03]

- vii. Money Laundering >= \$1500 [TPC §34.02(e)(1)-(4)]
- viii. Theft >= \$1500 [TPC §31.03(e)(4)-(7)]
- ix. Theft <= \$1499 [TPC §31.03(e)(1) - (3)]
- x. Vehicle, Unauthorized Use [TPC §31.07]
- xi. Criminal Trespass [TPC §30.05(a),(d)]
- xii. Cruelty to Animals [TPC §42.091]
- xiii. Criminal Attempt or Conspiracy [TPC §15.01, 15.02]

(B) These types of crime relate to the practice of nursing because:

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

(B)(ii) 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 by acts involving similar criminal behavior;

(C)(iii) 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)(iv) 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)(v) nurses frequently provide care autonomously without direct supervision and may have access to and opportunity to misappropriate property; and

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

(vii) certain crimes involving property, such as cruelty to animals and criminal trespass, may also concern the safety of persons and, as such, raise concerns about the propensity of the nurse to repeat similar conduct in the workplace, placing patients at risk.

(3) offenses involving fraud or deception ~~because:~~ .

(A) These offenses include, but are not limited to, the following crimes, as well as any crime that contains substantially similar or equivalent elements under another state or federal law:

- i. Attempt, Conspiracy, or Solicitation of Ch. 62 offense [TRCP Ch. 62]
- ii. Tampering w/ Government Record [TPC §37.10]
- iii. Insurance Fraud: Intent to Defraud [TPC §35.02(a-1), (d)]
- iv. Insurance Fraud: Claim > \$500 [TPC §35.02(c)]
- v. Insurance Fraud: Claim <= \$500 [TPC §35.02 (c)(1)-(3)]
- vi. Medicaid Fraud > \$1500 [TPC §35A.02(b)(4)-(7)]
- vii. Medicaid Fraud < \$1500 [TPC §35A.02(b)(2)-(3)]
- viii. Criminal Attempt or Conspiracy [TPC §15.01, 15.02]

(B) These types of crime relate to the practice of nursing because:

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

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

(D)(iv) 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)(v) the nurse-patient relationship is of a dependent nature; and

(F)(vi) nurses who commit these crimes outside the workplace ~~may raise questions as to whether that same misconduct will be repeated~~ **raise concern about the nurse's propensity to repeat that same misconduct** in the workplace and, therefore, place patients at risk.

(4) offenses involving lying and falsification ~~because:~~ .

**(A) These offenses include, but are not limited to, the following crimes, as well as any crime that contains substantially similar or equivalent elements under another state or federal law:**

i. False Report or Statement [TPC §32.32, 42.06]

ii. Forgery [TPC §32.21(c)(d)(e)]

iii. Tampering with a Governmental Record [TPC §37.10]

**(B) These crimes are related to nursing because:**

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

(B)(ii) 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)(iii) 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)(iv) 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)(v) 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)(vi) 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)(vii) 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)(viii) a crime of lying or falsification raises concerns **about the nurse's propensity to** ~~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) These offenses include, but are not limited to, the following crimes, as well as any crime that contains substantially similar or equivalent elements under another state or federal law:**

.Drug Violations under Health & Safety Code Ch. 481, 482, 483

.Driving While Intoxicated (2 or more counts) [TPC §49.09]

(B) These crimes relate to the practice of nursing because:

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

(B)(ii) 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)(iii) 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)(iv) nurses are able to provide care in private homes and home-like setting without supervision;

(E)(v) 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)(vi) 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~~ raises concern about the nurse's propensity to repeat that same misconduct in the workplace.

(vii) DWI offenses involve the use and/or abuse of mood altering drugs while performing a state licensed activity affecting public safety; repeated violations suggest a willingness to continue in reckless and dangerous conduct, or an unwillingness to take appropriate corrective measures, despite previous disciplinary action by the state.

(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) the knowing or intentional practice of nursing without a license issued under the NPA;

(2) any felony or misdemeanor involving moral turpitude;

(3) the nature and seriousness of the crime;

(4) the relationship of the crime to the purposes for requiring a license to engage in nursing practice;

(5) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(6) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of nursing practice;

(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;

(d) Crimes listed under subsections (b)(1)(A)(i-xxi), (b)(2)(A)(i-iii), and (b)(3)(A)(i) above are offenses identified under §301.4535 of the NPA. As such, these offenses require the board to suspend a nurse's license, revoke a license, or deny issuing a license to an applicant upon proof of initial conviction.

(d) (e) 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) the extent and nature of the person's past criminal activity;
- (2) the age of the person when the crime was committed;
- (3) the amount of time that has elapsed since the person's last criminal activity;
- (4) the conduct and work activity of the person before and after the criminal activity;
- (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

(6) other evidence of the person's present fitness, including letters of recommendation from: prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; the sheriff or chief of police in the community where the person resides; and any other persons in contact with the convicted person.

(e) (f) 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) (g) If requested by staff, it shall be the responsibility of the individual seeking licensure to ensure that staff is provided with legible, certified copies of all court and law enforcement documentation from all jurisdictions where the individual has resided or practiced as a licensed health care professional. Failure to provide complete, legible and accurate documentation will result in delays prior to licensure or renewal of licensure and possible grounds for ineligibility.

**(h) The fact that a person has been arrested will not be used as grounds for disciplinary action. If, however, evidence ascertained through the Board's own investigation from information contained in the arrest record regarding the underlying conduct suggests actions violating the Nursing Practice Act or rules of the Board, the board may consider such evidence as a factor in its deliberations regarding any decision to grant a license, restrict a license, or impose licensure discipline.**

(g) (i) Behavior that would otherwise bar or impede licensure may be deemed a "Youthful Indiscretion" as determined by an analysis of the behavior using the factors set out in §213.27 of this title (relating to Good Professional Character), subsections (a) - (e) of this section and at least the following criteria:

- (1) age of 22 years or less at the time of the behavior;
- (2) absence of criminal plan or premeditation;
- (3) presence of peer pressure or other contributing influences;
- (4) absence of adult supervision or guidance;
- (5) evidence of immature thought process/judgment at the time of the activity;
- (6) evidence of remorse;
- (7) evidence of restitution to both victim and community;
- (8) evidence of current maturity and personal accountability;
- (9) absence of subsequent undesirable conduct;
- (10) evidence of having learned from past mistakes;
- (11) evidence of current support structures that will prevent future criminal activity; and
- (12) evidence of current ability to practice nursing in accordance with the Nursing Practice Act, Board rules and generally accepted standards of nursing.

(h)(j) With respect to a request to obtain a license from a person who has a criminal history, the executive director is authorized to close an eligibility file when the applicant has failed to respond to a request for information or to a proposal for denial of eligibility within 60 days thereof.

(i)(k) 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)(l) 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.