

**Consideration of Proposed New 22 Tex. Admin. Code §213.29,
Pertaining to *Fitness to Practice***

Background: The Eligibility & Disciplinary Advisory Committee (Committee) is one of the Board's standing advisory committees and was created to advise the Board on regulatory matters, either as specifically charged by the Board or on a continuous basis¹. Attachment "A" contains a rewrite of current Rule 213.29, as recommended by the Committee after review and discussion at meetings in August 2014 and January, May, and June 2015². The proposed new rule also provides examples of verifiable and reliable evidence of sobriety and abstinence from drugs and alcohol and probationary terms, which Staff recommends be included in the rule.

The proposed new rule:

- is re-organized for clarity;
- includes language that is consistent with the recent changes to the Diagnostic and Statistical Manual of Mental Disorders (DSM-V); and
- clarifies Board expectations regarding an individual's fitness to practice, including specific references to physical and psychological evaluations; substance use disorders and abuse/misuse of alcohol and drugs; mental health conditions; and other medical conditions that may impact an individual's ability to practice nursing safely.

Staff recommends repealing current Rule 213.29 and proposing new Rule 213.29, as set out in Attachment "A", in its place.

Board Action: Move to approve the proposed repeal of 22 Tex. Admin. Code §213.29, pertaining to *Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters*, with authority for the General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. If no negative comments and no request for a public hearing are received, move to adopt the repeal of 22 Tex. Admin. Code §213.29, pertaining to *Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters*, as proposed.

Further, move to approve proposed new 22 Tex. Admin. Code §213.29, pertaining to *Fitness to Practice*, as set out in Attachment "A", with authority for the General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. If no negative comments and no request for a public hearing are received, move to adopt new 22 Tex. Admin. Code §213.29, pertaining to *Fitness to Practice*, as proposed.

¹ See 22 Tex. Admin. Code §211.6.

² The Board issued a charge to the Committee at its April 2012 meeting to review its Criminal Guidelines and Sanction policies. The Committee also reviewed related rules.

§213.29. Fitness to Practice.

(a) Each individual who seeks to practice nursing in Texas must possess current fitness to practice. This requirement includes all individuals seeking to obtain or retain a license or privilege to practice nursing in Texas and applies in all eligibility and disciplinary matters. Each individual has a duty to self evaluate to ensure that he/she is fit to practice before providing nursing care.

(b) An individual's fitness to practice will be determined by evaluating the individual's ability to consistently comply with the requirements of the Nursing Practice Act, the Board's rules and regulations, and generally accepted standards of nursing practice. An individual's fitness to practice may be subject to Board review due to an individual's substance use disorder; possession, abuse, or misuse of alcohol or drugs, prescribed or otherwise; or physical or mental health condition. This is not an exhaustive list. If an individual exhibits any conduct that may prevent him/her from practicing nursing with reasonable skill and safety, the Board will review the individual's conduct to determine if he/she possesses current fitness to practice.

(c) Evaluations. If an individual exhibits conduct that raises questions about his/her fitness to practice, the Board may require the individual to undergo a physical and/or psychological evaluation that meets the criteria of the Occupations Code §301.4521 and §213.33 of this chapter (relating to Factors Considered for Imposition of Penalties/Sanctions). Pursuant to §301.4521, an individual subject to this rule is responsible for paying the costs of the evaluation. Utilizing the results of the evaluation and the individualized facts of the case, the Board may deny licensure (including renewal, reinstatement/reactivation, or the return to direct patient care from a limited license); suspend or revoke the individual's license or privilege to practice nursing in this state; or impose probationary conditions or restrictions on the individual's ability to practice nursing

in this state.

(d) Substance Use Disorders and Abuse/Misuse of Alcohol or Drugs.

(1) Individuals who have been diagnosed, treated, or hospitalized for a substance use disorder that may impair their ability to practice nursing safely, will, at a minimum, be required to demonstrate sobriety and abstinence from drugs and alcohol for a minimum of twelve consecutive months, through verifiable and reliable evidence, in order to obtain or retain licensure. Verifiable and reliable evidence of sobriety and abstinence from drugs and alcohol may include evidence of the completion of inpatient, outpatient, or aftercare treatment, random drug screens, individual or group therapy, and/or support group attendance. Depending upon the individualized facts of each case, an individual may be required to establish this period of sobriety and abstinence prior to being permitted to practice nursing in this state. If appropriate, based upon the individualized facts of the case, an individual may also be eligible to obtain or retain licensure and practice nursing under an encumbered license with conditions/restrictions determined by the Board or through participation in a Board-approved peer assistance program created pursuant to the Texas Health and Safety Code Chapter 467 or other lawfully authorized peer assistance program. Licensure conditions/restrictions may include the completion of inpatient, outpatient, or aftercare treatment, random drug screens, individual or group therapy, and/or support group attendance. The outcome of any particular case will be based upon an evaluation of the individualized factors of the case and the potential risk of harm the individual's practice may pose to patients/clients and/or the public.

(2) Individuals who have not been diagnosed, treated, or hospitalized for a substance use disorder, but have nonetheless exhibited behaviors raising concerns about the individual's ability to practice nursing with reasonable skill and safety due to the possession, misuse, or abuse of alcohol or drugs, prescribed or otherwise, including related criminal conduct, may be required to demonstrate sobriety and abstinence from

drugs and alcohol for a minimum of twelve consecutive months, through verifiable and reliable evidence, in order to obtain or retain licensure. Verifiable and reliable evidence of sobriety and abstinence from drugs and alcohol may include evidence of the completion of inpatient, outpatient, or aftercare treatment, random drug screens, individual or group therapy, and/or support group attendance. If appropriate, and depending upon the individualized facts of each case, an individual may be eligible to obtain or retain licensure and practice nursing under an encumbered license with conditions/restrictions determined by the Board, which may include the completion of inpatient, outpatient, or aftercare treatment, random drug screens, individual or group therapy, and/or support group attendance. The outcome of any particular case will be based upon an evaluation of the individualized factors of the case and the potential risk of harm the individual's practice may pose to patients/clients and/or the public.

(3) An individual's prior substance use disorder diagnosis or history of prior criminal conduct involving drugs or alcohol, prescribed or otherwise; or misuse or abuse of alcohol or drugs, prescribed or otherwise; will be considered by the Board only to the extent that it may be indicative of the individual's current lack of fitness to practice nursing.

(e) Mental Health Conditions and Diminished Capacity.

(1) Individuals who have been diagnosed, treated, or hospitalized for a mental health condition that may impair their ability to practice nursing safely, will, at a minimum, be required to demonstrate controlled behavior and consistent compliance with recommended treatment, including compliance with a prescribed medication regime, for a reasonable amount of time, through verifiable and reliable evidence, in order to obtain or retain licensure. Depending upon the individualized facts of each case, an individual may be required to establish controlled behavior and compliance with recommended treatment, including compliance with a prescribed medication regime, prior to being permitted to practice nursing in this state. If appropriate, and depending upon the

individualized facts of the case, an individual may also be eligible to obtain or retain licensure and practice nursing under an encumbered license with conditions/restrictions determined by the Board or through participation in a Board-approved peer assistance program created pursuant to the Texas Health and Safety Code Chapter 467. The outcome of any particular case will be based upon an evaluation of the individualized factors of the case and the potential risk of harm the individual's practice may pose to patients/clients and/or the public.

(2) Individuals who have not been diagnosed, treated, or hospitalized for a mental health condition, but have nonetheless exhibited behaviors raising concerns about the individual's fitness to practice due to a mental health condition or diminished capacity may be required to demonstrate controlled behavior and compliance with recommended treatment, including compliance with a prescribed medication regime, for a reasonable amount of time, through verifiable and reliable evidence, in order to obtain or retain licensure. If appropriate, and depending upon the individualized facts of each case, an individual may also be eligible to obtain or retain licensure and practice nursing under an encumbered license with conditions/restrictions determined by the Board. The outcome of any particular case will be based upon an evaluation of the individualized factors of the case and the potential risk of harm the individual's practice may pose to patients/clients and/or the public.

(3) An individual's prior mental health diagnosis or behavioral history will be considered by the Board only to the extent that it may be indicative of the individual's current lack of fitness to practice nursing.

(f) Other Medical Conditions.

(1) The Board recognizes that individuals may have a variety of medical conditions that require medical treatment and/or a medication regime that includes

prescription drugs. Although authorized by law and medically necessary, prescription drugs may affect an individual's fitness to practice. An individual must be able to function safely while under the effects of prescription drugs. An individual who abuses his/her prescription drugs or who has been unable to stabilize the synergistic effect of his/her medications may not possess current fitness to practice. Further, some prescription medications may cause side effects that affect an individual's fitness to practice, even when taken properly. In some cases, an individual's physical condition may prevent the individual from practicing nursing safely. In addition to an individual's medication regime, the Board will review an individual's behavior, diagnosis/condition, and treatment plan to determine if he/she possesses current fitness to practice. Based upon the individualized facts of the case, including the results of a required evaluation, if any, the Board may deny licensure (including renewal, reinstatement/reactivation, or the return to direct patient care from a limited license); suspend or revoke the individual's license or privilege to practice nursing in this state; or impose probationary conditions or restrictions on the individual's ability to practice nursing in this state, including limiting the practice setting to one in which the individual is safe to practice nursing.

(2) An individual's prior medical condition and/or diagnosis will be considered by the Board only to the extent that it may be indicative of the individual's current lack of fitness to practice nursing.

(g) Authority of Executive Director. In eligibility and disciplinary matters involving an individual's fitness to practice, the Executive Director may:

(1) review information submitted by the individual and materials and information gathered or prepared by Board Staff; including evidence of the individual's safe practice, compliance with the Nursing Practice Act, Board rules and regulations, and generally accepted standards of nursing practice; verification of compliance with treatment; and evidence of sobriety;

(2) identify any deficiencies in the information necessary for a determination regarding the individual's current fitness to practice;

(3) close any eligibility file in which the individual seeking licensure has failed to respond to a request for information from the Board or to a proposal for denial of licensure within 60 days of the request or proposed denial, as applicable;

(4) approve an individual's eligibility for licensure, enter eligibility orders as authorized in §211.7 (relating to Executive Director) of this title, and approve renewals, without Board ratification, when the evidence is clearly insufficient to support denial of licensure; and

(5) propose eligibility and disciplinary orders in eligibility, disciplinary, and renewal matters consistent with the Board's rules and regulations and the interests of public safety and enter disciplinary orders as authorized in §211.7 of this title.

(g) The following eligibility and disciplinary sanction policies, as applicable, shall be used by the Executive Director, SOAH, and the Board in evaluating the impact of criminal conduct on nurse licensure in eligibility and disciplinary matters:

(1) Sanctions for Behavior Involving Fraud, Theft, and Deception, approved by the Board and published on XXXXX in the Texas Register (XX TexReg XXXX) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>;

(2) Sanctions for Behavior Involving Lying and Falsification, approved by the Board and published on XXXXX in the Texas Register (XX TexReg XXXX) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>;

(3) Sanctions for Sexual Misconduct approved by the Board and published on XXXXX in the Texas Register (XX TexReg XXXX) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>; and

(4) Sanctions for Substance Use Disorders and Other Alcohol and Drug Related Conduct, approved by the Board and published on XXXXX in the Texas Register (XX TexReg XXXX) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.