

Consideration of Proposed Amendments to the Board's adopted Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or Other Substance Use Disorder

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 the Board's current disciplinary policy regarding Nurses with Substance Abuse, Misuse, Substance Dependency, or Other Substance Use Disorder, as recommended by the Committee after review and discussion at meetings in August 2014 and January, May, and June 2015².

The proposed new policy:

- is re-organized for clarity;
- amends the term "the mentally ill" to "persons with mental disorders" throughout the policy;
- provides consistency with recent changes to the Diagnostic and Statistical Manual of Mental Disorders (DSM-V); and
- includes additional information regarding disciplinary action, consistent with the Board's rules, including the Board's Disciplinary Matrix.

Staff recommends adopting the amended disciplinary policy regarding *Substance Use Disorders and Other Alcohol and Drug Related Conduct*, as set out in Attachment "A".

Board Action: Move to approve the amended disciplinary policy regarding *Substance Use Disorders and Other Alcohol and Drug Related Conduct*, as set out in Attachment "A".

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.

Attachment “A”

Substance Use Disorders and Other Alcohol and Drug Related Conduct

Purpose

The Texas Board of Nursing (Board) is committed to its mission to protect the public health, safety, and welfare. In keeping with this mission, the Board is concerned about conduct that may prevent an individual from practicing nursing with reasonable skill and safety due to a substance use disorder or other alcohol and drug related conduct, such as the possession, intemperate use, misuse, or abuse of alcohol or drugs, prescribed or otherwise.

This policy is intended to explain the Board’s position regarding substance use disorders³ and alcohol and drug related conduct and inform licensees, petitioners, applicants and the public about the Board’s process for reviewing such conduct.

Effect on Practice

Nurses, by virtue of the license issued to them by the Board, have a duty to their patients to provide safe, effective nursing care and to be fit to practice at all times. The nurse-patient relationship is a dependent one, and patients under the care of a nurse are, by their very nature, vulnerable. This is particularly true of the elderly, children, persons with mental disorders, sedated or anesthetized patients, patients whose mental or cognitive ability is compromised, and patients who are disabled or immobilized. It is incumbent upon the nurse to ensure that he/she is able to provide safe and effective nursing care to these vulnerable populations at all times.

Nurses who have a substance use disorder may exhibit impairment in both cognitive and motor functioning. A nurse affected by a substance use disorder may be unable to accurately assess patients, make appropriate judgments, or intervene in a timely and appropriate manner. This danger may be heightened when a nurse works in an autonomous setting, like home health, where other healthcare providers are not present to provide interventions for the patient.

However, a nurse need not have a diagnosed substance use disorder in order for patient care to be affected. Other alcohol and drug related conduct, such as the intemperate use, misuse, or abuse of alcohol or drugs, prescribed or otherwise, may affect a nurse’s ability to provide safe and effective nursing care. This may include behavior that occurs while a

³ The Diagnostic and Statistical Manual of Mental Disorders (DSM) was amended May 2013. The amended version, the DSM-V, utilizes the term *substance use disorder*. The use of the term *substance use disorder* in this policy reflects the terminology utilized in the amended version of the manual. Under the DSM-V, a *substance use disorder* may be mild, moderate, or severe. Further, the term may include matters that were formerly categorized as drug or alcohol abuse or misuse or chemical dependency.

nurse is not on duty or subject to call. For example, a nurse's criminal history may raise questions about his/her ability to practice nursing safely. Arrests or convictions for drug or alcohol related crimes, such as *Driving While Intoxicated* or *Possession of a Controlled Substance*, are relevant when determining if a nurse possess current fitness to practice. Theft of drugs or other substances by a nurse may also cause concerns about the potential for impaired nursing care.

A nurse may also exhibit impaired behavior while on duty, with or without a confirming employer drug screen. In some instances, a nurse may produce a pre-employment drug screen that results positive for a prohibited substance. A nurse may also demonstrate a pattern of mishandling controlled substances, such as excessive withdrawals of drugs from a computerized dispensing machine (such as a pyxis), failing to properly waste drugs, or failing to properly document the administration of drugs in medical records. A nurse may also have a physical condition that requires the use of prescription drugs. Although the use of prescription drugs is authorized by law and may be necessary, the nurse's ability to function safely while under the effects of the drugs will be carefully considered by the Board if it affects the practice of nursing. This is particularly true in situations where a nurse may be abusing his/her prescription drugs or has been unable to stabilize the synergistic effect of his/her medications. In any of these situations, the Board's primary goal is to ensure the delivery of safe and effective nursing care.

Although any of these situations may affect the ability of a nurse to safely perform his/her duties, these examples are not exhaustive. The Board is authorized to, and does, investigate any situation that may affect a nurse's ability to provide safe and effective nursing care.

Disciplinary Action

Not all complaints involving a nurse's ability to practice safely will require the same amount of Board intervention or will result in a disciplinary action. The particular facts of each case must be carefully considered. The Board believes that substance use disorders are treatable conditions, and nurses who achieve stable recovery may be able to safely provide care to patients under certain conditions. Likewise, the Board also believes that nurses who have engaged in behaviors involving the intemperate use, misuse, or abuse of alcohol or drugs may also be able to safely provide care to patients under certain conditions.

In all situations involving an individual's fitness to practice, the Board's primary objective is to ensure the protection of the public. However, the Board will consider the unique facts and circumstances of each situation and may utilize various options in resolving the matter, including returning nurses to practice under structured requirements.

A nurse whose fitness to practice is in question due to a substance use disorder or drug or alcohol related behavior may be required to undergo an evaluation that meets the requirements of [Tex. Occ. Code §301.4521](#) and [Board Rule 213.33](#). Under the authority of [Tex. Occ. Code §301.4521](#), the Board may require an individual to submit to a physical and/or psychological evaluation to determine if the individual is able to safely provide nursing care. [Board Rule 213.33 and the Board's adopted Guidelines for Physical and](#)

[Psychological Evaluations](#) contain additional information regarding the types of evaluations that may be required in a particular situation and the applicable requirements that evaluators must meet. The Board will consider the individualized results of the evaluation, along with the facts of the case in determining the most appropriate resolution for the particular situation.

In more serious cases, it may be necessary for the Board to deny licensure or remove a nurse from nursing practice until the nurse is deemed safe to return to those duties. In these situations, the nurse will be given the opportunity to seek treatment and may return to nursing care when he/she is able to provide evidence of sustained sobriety and stable recovery. Verifiable evidence of sobriety may include random drug screens, letters of recommendation, evaluations from present and past employers, and signed logs of support group attendance. If an individual meets these requirements and returns to nursing practice, the individual may be subject to Board monitoring and random drug screening for a period of time.

In other cases, it may be determined that an individual's participation in a Board-approved peer assistance program⁴ will sufficiently minimize the risk to patients/clients and the public. Under certain conditions, this may even be accomplished through a confidential, non-public Board order. [See Tex. Occ. Code §301.466\(d\)](#)⁵. There may also be situations where an individual's behavior warrants an eligibility or disciplinary order that includes random drug screening and monitored practice for a minimal period of time. These types of orders may be appropriate when an individual does not have a substance use disorder diagnosis, but has engaged in behaviors involving alcohol or drugs that raises questions about the individuals' ability to safely practice nursing. If an individual's conduct involves a criminal offense, the Board will utilize its adopted [Disciplinary Guidelines for Criminal Conduct](#) and [Tex. Occ. Code Chapter 53](#), in addition to the principles outlined in this policy, when evaluating the individual's behavior.

Matters involving an individual's fitness to practice are varied, and each case must be evaluated on its own merits and in light of the risk the individual's practice may pose to patients/clients and the public. For additional information, please review the Nursing Practice Act (NPA), [Tex. Occ. Code Chapter 301](#), the Board's rules, located at [22 Texas Administrative Code Chapters 211 - 227](#), including §§213.27 - 213.33, and the Board's [adopted policies](#) located on the Board's web site, at www.bon.texas.gov. The Board's adopted [Disciplinary Matrix](#) may also contain additional information that may be applicable in certain situations involving a nurse's substance use disorder or alcohol or drug related

⁴ An individual must meet eligibility criteria for participation in a peer assistance program. For example, an individual may not be eligible to participate if he/she is on criminal probation or community supervision; has prior Board discipline; or has previously participated in the program. Further, an individual must be willing to participate in a peer assistance program and such participation is available through an agreed order only.

⁵ In September 2013, the Board was granted the authority to issue confidential, non-public orders for participation in a Board-approved peer assistance program. Such orders may remain confidential so long as the individual complies with, and successfully completes, the terms of the order.

conduct.



Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder

The Texas Board of Nursing (Board), in keeping with its mission to protect public health, safety, and welfare, believes it is important to have a clear position on how it will deal with nurses who are reported to the Board because they have:

- 1) been diagnosed with substance dependency or abuse, but do not have evidence of current sobriety that dates back a minimum of twelve (12) consecutive months;
- 2) exhibited impaired behavior that may be related to substance abuse, misuse, or intemperate use;
- 3) demonstrated a pattern of use of addictive substances, or pattern of substance mishandling or abuse;
- 4) shown evidence of criminal behavior or acts involving substances of addiction/abuse; or
- 5) any combination or single factor listed above, whether or not the events reported to the Board occurred while a nurse was on duty.

Any of the above substance-related conditions may affect the ability of a nurse to safely perform nursing duties, thus creating a threat to public safety.

This policy applies to all nurses or those individuals seeking to obtain or regain licensure as a nurse in Texas.

The Board adopts the following assumptions as the basis for its position:

- 1) Patients¹ under the care of a nurse are vulnerable by virtue of illness or injury and the dependent nature of the nurse-patient relationship.
- 2) Persons who are especially vulnerable include 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.
- 3) Critical care, geriatric, and pediatric patients are particularly vulnerable given the level of vigilance demanded under the circumstances of their health condition.
- 4) Nurses are able to provide care in private homes and home-like setting without direct supervision.

- 5) Nurses who have active substance dependence, or who abuse, misuse, or engage in intemperate use of drugs or alcohol or other substance use disorder may exhibit impairment in both cognitive and motor functioning while caring for patients. Such impairment places patients at risk for harm due to the nurse's inability to accurately assess, make appropriate judgments, and intervene in a timely manner to stabilize the patient(s) and prevent complications.
- 6) The disease of substance dependence or other substance use disorders as noted above may range in severity; however, the board believes all are potentially treatable conditions. Nurses who are in active recovery may be able to safely provide care to vulnerable patients, provided the nurse's practice can be adequately monitored for a defined period of recovery.
- 7) Recovery is a process of learning new behaviors, attitudes and life style that takes time after initial treatment to assure that the person is in a stable and sustainable state of recovery.

The Board believes it has a responsibility to both the public and the nurse when information about a nurse's substance use disorder comes to the Board's attention. The responsibility to the public is for swift action to remove a nurse from performing duties involving direct patient care until the nurse is deemed safe to return to those duties. The Board's responsibility towards the nurse is to recognize that person's past service in the provision of patient care and give that person an opportunity to seek treatment at an approved treatment facility² for the substance use disorder and then return to providing patient care when able to submit verifiable, documented proof that he/she has a year of sobriety and is in stable recovery.

If the Board finds disciplinary action is warranted, under no circumstance will a nurse be eligible for an unencumbered license until the nurse has successfully completed an approved treatment program, plus a year of verifiable, documented sobriety and subsequent probationary monitoring by the Board for a minimum of three (3) years. If a nurse fails to maintain compliance with the Board order, the Board will accept the voluntary surrender of the nurse's license or the Board will seek revocation subject to the Administrative Procedure Act, Nursing Practice Act, and Board rules.

Impairment in the Workplace

A nurse may demonstrate impaired behavior in the workplace due to consumption of drugs and/or alcohol either before coming to work or during work hours. The Board encourages both employers and co-workers of nurses to be familiar with the myriad of signs and symptoms associated with impairment and to report suspicion of impairment so the nurse can be removed from a patient care assignment and the risk of harming patients.

The Board would encourage facilities, agencies, and others who employ or utilize nurses to implement policies requiring "for cause" drug screens to eliminate the often unverifiable claims by the facility regarding suspected workplace impairment of the nurse. Impairment or suspected impairment of a nurse's practice by drugs or alcohol

should be reported to the state peer assistance program for nurses or the Board for investigation (Tex. Occ. Code Ann. §301.401). The Nursing Practice Act requires that a person report to the Board a nurse suspected of being impaired by chemical dependency or diminished mental capacity if the person believes that an impaired nurse committed a practice violation. A nurse need not be “diagnosed” with an addictive/abusable or dependence problem to be reported to the board for impaired behavior and/or practice.

Nurses may obtain medications or other substances through theft from the facility or from a patient in a home or home-like setting. Theft of drugs or other substances by a nurse must be investigated as it raises the question of inappropriate use of drugs or other substances that have the potential and are likely to impair a nurse’s practice, thus raising the risk of harm to patients.

A nurse who fails to participate in or complete the state peer assistance program for nurses and is reported to the Board for impairment in the workplace or diversion of drugs will be requested to obtain a chemical dependency evaluation³ from an evaluator who possesses credentials approved by the Board.⁴ Under no circumstance will an evaluation by a Licensed Chemical Dependency Counselor (LCDC) be deemed as acceptable proof that a nurse does not have a substance abuse or dependency diagnosis. If the person is diagnosed as chemically dependent, the nurse may be given the opportunity to enter an approved treatment facility, provide proof of verifiable, documented sobriety for the preceding twelve (12) month period, and participate in Board monitoring for at least three (3) years.

If the state peer assistance program for nurses determines that a nurse is ineligible for its program, a nurse may be eligible to return to work under monitoring conditions determined through a suspend/probate agreement with the Board if he/she has verifiable, documented proof of sobriety for the previous twelve (12) consecutive months and successful completion of a treatment program within the past six (6) months and subsequent to the last relapse. At a minimum those conditions will include an enforced suspension until a year of verifiable recovery and sobriety with supporting documentation and successful completion of an approved treatment program with a recommendation from the treatment program regarding fitness to return to work.

The nurse will be required to provide proof of working an active program of recovery, employer monitoring by another nurse, employer evaluations of performance, abstinence from drugs and alcohol unless prescribed by a licensed provider for a legitimate purpose with notification to the Board, random drug testing, proof of support group attendance for a period of at least three (3) years, and may be limited in practice settings and in his/her access to controlled substances in the workplace. A nurse who is not willing or able to attend and complete treatment will be offered the opportunity to voluntarily surrender his/her license or will be served with Formal Charges and be given the opportunity for a hearing as provided in the Administrative Procedure Act, Nursing Practice Act, and/or Board rules.

If the person does not receive a diagnosis of chemical dependence, the Board will take any recommendations of the evaluator into account, i.e., pain or disease management, and/or mental health issues, and determine whether or not a period of monitoring by the Board is in the best interest of public health and safety. In addition, if the evaluator determines that the nurse has a pain management, disease management, or mental health issue, the nurse will be sent to an appropriate specialist or clinic approved by the Board for evaluation and additional recommendations. If the evaluator determines that the individual has a low probability for substance abuse, but the evidence supports practice violations that relate to the drugs at issue, the Board will determine whether or not a period of monitoring is necessary to ensure public safety and welfare.

Crimes Related to Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder

The Board may rely solely on the conviction for a crime or probation for a crime, with or without an adjudication of guilt to impose a disciplinary sanction on a nurse. In addition, evidence of the conduct that is the basis for the court document may be of concern to the Board in that it implicates a nurse's professional character pursuant to rule 213.27 (Good Professional Character). The Board will also consider a pattern of arrests for crimes related to substance abuse in regards to a pattern of behavior that may be of concern to the Board. 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.

Crimes related to substance abuse, misuse, substance dependency or other substance use disorder range from those that are primarily harmful to the nurse to those that are harmful to others. Nurses who have committed crimes such as Minor in Possession of Drugs/Alcohol, Possession of a Controlled Substance, Driving Under the Influence of Intoxicants, or Driving While Intoxicated will be required to obtain an evaluation by an evaluator with credentials approved by the Board⁴ to determine if the person has a diagnosis of chemical dependence. Under no circumstance will an evaluation by a Licensed Chemical Dependency Counselor (LCDC) be deemed as acceptable proof that a nurse does not have a substance abuse or dependency diagnosis. The Board may additionally use the results of that evaluation to determine fitness to function as a nurse and whether monitoring by the Board is necessary for protection of the public.

Nurses who have committed crimes that are clearly a danger to others, such as Manufacture and Distribution of a Controlled Substance or Conspiracy to Distribute Illegal Drugs will be considered on an individual basis and may be required to complete a drug and alcohol or forensic psychological evaluation. The Board views crimes related to substance abuse that are harmful to others as more serious than those where harm is directed mainly at the nurse. If the individual facts of a case show harm to others, the Board will serve Formal Charges against the nurse and the nurse will have the

opportunity to a formal hearing as provided in the Administrative Procedure Act, Nursing Practice Act, and/or Board rules. It should be noted that if a nurse is imprisoned following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision for a crime involving drugs, alcohol, or substance abuse, the Board shall revoke the nurse's license, regardless of the conduct associated with or the circumstances surrounding the crime. Chapter 53 of the Texas Occupations Code and 22 Texas Administrative Code § 213.28 governs the consequences of criminal convictions and chapter 53 requires revocation of a nurse's license if there is imprisonment as stated above. Section 213.27 of 22 Texas Administrative Code is also applicable to criminal conduct.

Petition for Reinstatement of License

A nurse whose license has been revoked or suspended or who has voluntarily surrendered his/her license due to chemical dependence or crimes related to substance abuse has the right to petition the Board for reinstatement of the license after one (1) year has elapsed from the effective date of the Board action, unless agreed otherwise. The burden of proof will be on the license holder that he/she is in recovery from chemical dependence, no longer abuses drugs or alcohol and has been rehabilitated to the extent that he/she no longer poses a threat to the public health, safety, and welfare.

Evidence of Verifiable Sobriety

It is highly recommended that evidence of sobriety include random drug screens, letters, and evaluations from present and past employers, and signed logs of support group attendance. Should the Board reinstate licensure, the nurse may be required to take a refresher course before a license is issued to him/her.

¹ The terms "resident" or "client" are often used interchangeably with the term "patient" in health care facilities. For the purpose of this policy, the term "patient" includes all of these terms.

² An approved treatment facility means a public or private hospital, a detoxification facility, a primary care facility, an intensive care facility, a long-term care facility, an outpatient care facility, a community mental health center, a health maintenance organization, a recovery center, a halfway house, an ambulatory care facility, another facility that is required to be licensed and approved by the Department of State Health Services, or a facility licensed or operated by the Department of State Health Services. The term does not include an educational program for intoxicated drivers or the individual office of a private, licensed health care practitioner who personally renders private individual or group services within the scope of the practitioner's license and in the practitioner's office. Tex. Health & Safety Code § 461.002(9).

³ A chemical dependency evaluation requires:

- a) a release signed by the nurse that allows the Board to send the investigatory file to the evaluator for review prior to the evaluation;

- b) a release that allows the evaluator to send the evaluation directly to the Board;
- c) review of the Board's investigatory file by the evaluator prior to the evaluation;
- d) administration of a SASSI-III and/or MAST test by the evaluator; and
- e) a face-to-face interview between the evaluator and nurse.

⁴ An evaluator must demonstrate that they hold a current professional license and also possess the credentials for the provision of treatment for chemically dependent individuals. A physician, a medical doctor (M.D.) or osteopathic (D.O.), who is certified by the American Society of Addiction Medicine (ASAM) should be considered when the nurse/applicant does not believe/acknowledge that he/she abuses chemicals, and has current indicators that suggest they may abuse chemicals and concurrent medical issues put them at risk for abuse/dependency. Examples of medical issues that may put one at risk for abuse and/or dependence include: a history of chronic pain; a history of migraines; fibromyalgia; and/or any other ongoing medical or dental event which has required frequent or long-term narcotic analgesics. An addictionist who is doctorally prepared and who specializes in diagnosing and treating chemical dependency should be considered when the nurse/applicant does not believe/acknowledge the abuse of chemicals, but has current non medical related indicators that suggest that he/she may abuse chemicals. Other licensed treatment evaluators may be approved for evaluation and recommendations for treatment when the nurse/applicant acknowledges being active or recently having been active in the disease of chemical dependency (the individual acknowledges being chemically dependent and, therefore, the evaluation is related to treatment, not diagnosis).

In cases where a judicial order or a criminal conviction is at issue, the Board reserves the right in these situations and others involving criminal activity to request a forensic psychological evaluation with a chemical dependency component. In all cases, whether criminal or not, if additional diagnosis or therapy information is needed, the Board may request additional evaluations.

See Policy on Board-Approved Treatment Providers, (approved October 21-22, 2004-Agenda Item 7.9).

Original policy adopted on July 26, 2002, amended on April 25, 2003, and revised on April 23, 2004 and January 18, 2008 (based on recommendations adopted by the Eligibility and Disciplinary Task Force on November 30, 2007).