

STATE OF TEXAS

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COUNTY OF TRAVIS

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Expert Witness Agreement
Between
The Texas Board of Nursing
And

The Texas Board of Nursing, hereinafter referred to as the “Board”, and _____, hereinafter referred to as the “Expert”, hereby make and enter into this contract for the mutual consideration set forth below as provided for in the Tex. Gov’t. Code §2151.005.

I.

The Expert agrees to provide to the Board expert consulting services and testimony in various disciplinary proceedings brought pursuant to Tex. Occ. Code §301.452. The Expert will provide such services to the extent specifically requested by the Board on an as needed basis. No provision of this agreement shall be construed as mandating performance under this contract by the Expert, if the Expert is unavailable, unable, or unwilling to perform the service requested.

II.

All information prepared by Expert is the work product of the Board and is subject to disclosure or non-disclosure pursuant to the Texas Rules of Civil Procedure and Texas Rules of Evidence. The Expert agrees to keep all information to which it is privy under this contract confidential, privileged and protected from disclosure without the prior consent of the agency. Further, any software, research, reports studies, data, photographs, negatives or other documents, drawings or materials prepared by the Expert in the performance of its obligations under this contract shall be the exclusive property of the State of Texas and all such materials shall be delivered to the State by the Expert upon completion, termination, or cancellation of this contract. The Expert may, at his or her own expense, keep copies of all its writings for its personal files. The Expert shall not use, willingly allow, or cause to have such materials used for any purpose other than the performance of Expert’s obligations under this contract without the prior written consent of the Board.

Notwithstanding any provisions of this contract to the contrary, the Expert understands that the Board will comply with the Texas Public Information Act, Tex. Gov’t. Code, Chapter 552 as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. The Board agrees to notify the Expert in writing within a reasonable time from receipt of a request for information related to the Expert’s work under this contract. The Expert will cooperate with the Board in the production of documents responsive to the request. The Board will make a determination whether to submit a Public Information Act request to the Attorney General. The Expert will notify the Board’s General Counsel

within twenty-four (24) hours of receipt of any third party requests for information. The Expert is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in an electronic format, if practicable, that is accessible by the public, at no additional charge to the state. If this is not practicable, the Expert is required to make any information created or exchanged with the state pursuant to this contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a paper format that is accessible by the public at no additional charge to the state.

III.

The Expert's payment structure shall be as follows:

Records Review and Expert Report Hourly Rate. The hourly rate for the Expert's services shall be three hundred dollars (\$300.00) per hour for records review and preparation of an expert report **per case**.*

Fixed Fee for Deposition Preparation shall be one thousand dollars (\$1,000.00) **per case**. This will include review of the file in preparation for the deposition and any conference/s in person or by phone with Board Staff in preparation of giving deposition testimony. This fee shall also include the Expert's review of his own deposition transcript following a deposition.

Hourly Rate for Deposition Testimony. The hourly rate for the Expert's services shall be three hundred dollars (\$300.00) per hour for deposition testimony in Expert's local area **per case**.

Fixed Fee for Trial Preparation shall be one thousand dollars (\$1,000.00) **per case**. This will include review of the file in preparation for testifying and any conference/s in person or by phone with Board Staff in preparation for trial testimony at the State Office of Administrative Hearings.

Fixed Fee for Review of Depositions and Expert Reports. Expert shall be paid a fixed fee of five hundred dollars (\$500.00) per expert report and/or deposition reviewed (up to 20 pages) and one thousand dollars (\$1,000.00) per expert report and/or deposition reviewed (21 pages or longer) **per case**. This excludes the Expert's review of his own deposition transcript following a deposition.

Fixed Fee for Trial Testimony. Expert shall be paid a fixed fee of one thousand dollars (\$1,000.00) per day for live hearing trial testimony (either in person or by phone) at the State Office of Administrative Hearings **per case**. Expert shall be paid a fixed fee of **two hundred fifty dollars (\$250.00)** per day for any day the Expert is scheduled to be available, either in person or telephonically, but is not physically present at the hearing/trial, and is not called to provide hearing/trial testimony.

Fixed Formal Hearing/Trial Cancellation Fee.

- A. Should a scheduled Formal Hearing/Trial before the State Office of Administrative Hearings be cancelled or continued, less than seven (7) calendar days prior to the date of the hearing/trial, Expert shall be paid a fixed fee of seven hundred dollars (\$700.00) for each scheduled day of in-

person testimony and/or in-person availability at the State Office of Administrative Hearings, not to exceed three (3) days or two thousand one hundred dollars (\$2,100.00).

- B. Should a scheduled Formal Hearing/Trial before the State Office of Administrative Hearings be cancelled or continued, less than fourteen (14) calendar days prior to the date of the hearing/trial, Expert shall be paid a fixed fee of four hundred dollars (\$400.00) for each scheduled day of in-person testimony and/or in-person availability at the State Office of Administrative Hearings, not to exceed three (3) days or one thousand five hundred dollars (\$1,200.00). Each day Expert receives the Fixed Formal Hearing/Trial Cancellation Fee, for cancelled or continued hearings/trials less than fourteen (14) calendar days prior to the date of the hearing/trial, Expert will remain available for any Board of Nursing litigation service, including, but not limited to: rescheduled formal hearings/trials, depositions, and hearing/trial preparation. Any and all substitute litigation services under this subparagraph must be scheduled no later than fourteen (14) calendar days prior to the date of the substitute litigation service. Further, Expert will be paid, per day of service, for any and all substitute litigation services in accordance with the terms of this expert witness agreement, only if the amount of payment exceeds the applicable Fixed Formal Hearing/Trial Cancellation Fee. If the amount of payment for the substitute legal service, per this expert witness agreement, does not equal or exceed the Fixed Formal Hearing/Trial Cancellation Fee, Expert will receive the Fixed Formal Hearing/Trial Cancellation Fee.
- C. Should a scheduled Formal Hearing/Trial before the State Office of Administrative Hearings be cancelled or continued, less than twenty-one (21) calendar days prior to the date of the hearing/trial, Expert shall be paid a fixed fee of two hundred dollars (\$200.00) for each scheduled day of in-person testimony and/or in-person availability at the State Office of Administrative Hearings, not to exceed three (3) days or six hundred dollars (\$600.00). Each day Expert receives the Fixed Formal Hearing/Trial Cancellation Fee, for cancelled or continued hearings/trials less than twenty-one (21) calendar days prior to the date of the hearing/trial, Expert will remain available for any Board of Nursing litigation service, including, but not limited to: rescheduled formal hearings/trials, depositions, and hearing/trial preparation. Any and all substitute litigation services under this subparagraph must be scheduled no later than fourteen (14) calendars prior to the date of the substitute litigation service. Further, Expert will be paid, per day of service, for any and all substitute litigation services in accordance with the terms of this expert witness agreement, only if the amount of payment exceeds the applicable Fixed Formal Hearing/Trial Cancellation Fee. If the amount of payment for the substitute legal service, per this expert witness agreement, does not equal or exceed the Fixed Formal Hearing/Trial Cancellation Fee, Expert will receive the Fixed Formal Hearing/Trial Cancellation Fee.

* "Per case" refers to each disciplinary proceeding or contested case proceeding brought against an individual for alleged violations of the Nursing Practice Act. Most cases are distinguished by individual Respondent or State Office of Administrative Hearings (SOAH) docketing number.

Expenses. Travel and per diem expenses, if any, shall be reimbursed according to State of Texas Comptroller Guidelines.

Compensation Limits. The total price for the term of this contract is capped at fifty thousand dollars (\$50,000.00), unless specifically approved by the Executive Director of the Board of Nursing.

The Expert agrees to keep documentation and receipts related to his performance under this contract. The parties stipulate and agree that the total amount due to Expert for all services performed under this contract shall be the amount set forth in this contract. The parties further acknowledge and agree that nothing in this contract will be interpreted to create an obligation or liability in excess of the funds currently appropriated to the Board during this biennium.

IV.

Payment will be made within thirty (30) days of services rendered and after the Expert has submitted to the Board a signed invoice attesting to the days and hours worked, the subject matter of the work, and expenses incurred. Expenses are to be itemized and copies of all available receipts provided prior to payment.

V.

The offer of this contract is an official act of the Board, or its designee, the Executive Director, who has been empowered and authorized to act on behalf of the Board in respect to this contract.

VI.

The term of this contract shall become effective upon the signature of the Executive Director of the Board and continue until August 31, 2018. This contract may be canceled at any time by mutual consent. In addition, either party to this contract may cancel it by the giving of at least thirty (30) days' notice in writing to the other party whereupon this contract will be canceled upon the expiration of the thirty (30) day (or longer) period after receipt of the notice of cancellation. Upon mutual contract of the parties, this contract may be extended for up to one year on August 31, 2018.

If the Expert fails to provide the goods or services contracted for according to the provisions of the contract, or fails to comply with any terms or conditions of the contract, the Board may, upon written notice of default to the Expert immediately terminate all or any part of the contract. Termination is not an exclusive remedy, but will be in addition to any other rights and remedies as provided in equity, by law or under the contract. The Board may exercise any other right, remedy, or privilege which may be available to it under applicable law of the state and any other applicable law or may proceed by appropriate court action to enforce the provisions of the contract. The exercise of any of the foregoing remedies will not constitute a termination of the contract unless the Board notifies the Expert in writing prior to the exercise of such remedy. The Expert shall be liable for all costs and expenses, including court costs, incurred by the Board with respect to the enforcement of any of the remedies listed herein.

In the event that the contract is terminated for any reason, or upon its expiration, the Board shall retain ownership of all associated work products and documentation obtained from the Expert under the contract.

VII.

The Expert is not an employee of the Board, and as such is responsible for payment of any federal taxes to be paid to the federal government attributable to the payments made under this contract, and is, furthermore, not eligible for any fringe benefits due state employees. All obligations of the Board are subject to the availability of legislative appropriations. The Expert acknowledges that the ability of the Board to make payments under the contract is contingent upon the continued availability of funds. The Expert further acknowledges that funds may not be specifically appropriated for the contract and the Board's continual ability to make payments under the contract is contingent upon the funding levels appropriated to the Board. The Board will use all reasonable efforts to ensure that such funds are available. The Expert agrees that if future levels of funding for the Board are not sufficient to continue operations without any operational reductions, the Board, in its discretion, may terminate the contract or a pending order under the contract, either in whole or in part. In the event of such termination, the Board will not be considered to be in default or breach under the contract, nor shall it be liable for any further payments ordinarily due under the contract, nor shall it be liable for any damages or any other amounts which are caused by or associated with such termination. The Board shall make best efforts to provide reasonable written advance notice to the Expert of any such contract or order termination. In the event of such a termination, the Expert shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination, either on the particular order if an order is being terminated, or the contract, if the contract is being terminated. The Board shall be liable for payments limited only to the portion of work the Board authorized in writing and which the Expert has completed, delivered to the Board, and which has been accepted by the Board. All such work shall have been completed, per the contract requirements, prior to the effective date of termination.

VIII.

The Expert warrants that, to the best of his/her knowledge, there are no state or federal laws which would prevent him/her from entering into this contract. The Expert represents and warrants that neither Expert nor any firm, corporation, partnership, or institution represented by Expert, or anyone acting for such firm, corporation or institution has violated the antitrust laws of the State of Texas under Tex. Bus. & Com. Code, Chapter 15, or the federal antitrust laws.

IX.

The Expert shall indemnify and hold harmless the State of Texas and customers, and/or their officers, agents, employees, representatives, Experts, assignees, and/or designees from any and all liability, actions, claims, demands, or suits, and all related costs, attorney fees, and expenses arising out of, or resulting from any acts or omissions of the Expert or its agents, employees, subExperts, order fulfillers, or suppliers of subExperts in the execution or performance of the contract. The defense shall be coordinated by the Expert with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and the Expert may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. The Expert and the Board agree to furnish timely written notice to each other of any such claim.

The Expert shall indemnify and hold harmless the State of Texas and customers, and/or their employees, agents, representatives, Experts, assignees, and/or designees from any and all third party claims involving infringement of United States patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the performances or actions of the Expert pursuant to this contract. The Expert and the Board agree to furnish timely written notice to each other of any such claim. The Expert shall be liable to pay all costs of defense, including attorneys' fees. The defense shall be coordinated by the Expert with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and the Expert may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General.

The Expert shall have no liability under this section if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without the Expert's written approval, (iii) any modifications made to the product by the Expert pursuant to the Board's specific instructions, (iv) any intellectual property right owned by or licensed to the Board, or (v) any use of the product or service by customer that is not in conformity with the terms of any applicable license contract.

If the Expert becomes aware of an actual or potential claim, or the Board provides the Expert with notice of an actual or potential claim, the Expert may (or in the case of an injunction against the Board, shall), at the Expert's sole option and expense; (i) procure for the Board the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that the Board's use is non-infringing.

The Expert agrees and acknowledges that during the existence of this contract, the Expert shall be entirely responsible for the liability and payment of the Expert's and the Expert's employees' taxes of whatever kind, arising out of the performances in this contract. The Expert agrees to comply with all state and federal laws applicable to any such persons, including laws regarding wages, taxes, insurance, and workers' compensation. The Board and/or the state shall not be liable to the Expert, its employees, agents, or others for the payment of taxes or the provision of unemployment insurance and/or workers' compensation or any benefit available to a state employee or employee of another governmental entity customer.

The Expert agrees to indemnify and hold harmless the Board, the State of Texas and/or their employees, agents, representatives, Experts, and/or assignees from any and all liability, actions, claims, demands, or suits, and all related costs, attorneys' fees, and expenses, relating to tax liability, unemployment insurance and/or workers' compensation in its performance under this contract. The Expert shall be liable to pay all costs of defense, including attorneys' fees. The defense shall be coordinated by the Expert with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and the Expert may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. The Expert and the Board agree to furnish timely written notice to each other of any such claim.

The Expert acts in the capacity of an independent Expert under this contract. The Expert will indemnify and hold the Board harmless from and against all claims arising out of the Expert's performance

including, but not limited to, the use of automobiles and/or other means of transportation. The Expert will indemnify and hold harmless the state of Texas, its officers and employees, and the Board, its officers and employees for any claims or damages that arise from the disclosure by the Expert of information held by the Board.

X.

The dispute resolution process provided for in Texas Government Code, Chapter 2260 shall be used by the Board and the Expert to resolve any dispute arising under the contract. The dispute resolution process provided for in Chapter 2260 shall be used, as further described herein, to attempt to resolve a claim for breach of contract asserted by the Expert under the Contract. If the Expert's claim for breach of contract cannot be resolved by the parties in the ordinary course of business, it shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, the Expert shall submit written notice, as required by Chapter 2260, to the Deputy Comptroller or his or her designee and to the Board's General Counsel. Compliance by the Expert with Chapter 2260 is a condition precedent to the filing of a contested case proceeding under Chapter 2260.

The contested case process provided in Chapter 2260 is the Expert's sole and exclusive process for seeking a remedy for an alleged breach of contract by the Board if the parties are unable to resolve their disputes as described above. Compliance with the contested case process provided in Chapter 2260 is a condition precedent to seeking consent to sue from the Legislature under Chapter 107, Civil Practices and Remedies Code. Neither the execution of the contract by the Board nor any other conduct of any representative of the Board relating to the contract shall be considered a waiver of sovereign immunity to suit. For all other specific breach of contract claims or disputes under the contract, the Board and the Expert shall first attempt to resolve them through direct discussions in a spirit of mutual cooperation. If the parties' attempts to resolve their disagreements through negotiations fail, the dispute will be mediated by a mutually acceptable third party to be chosen by the Board and the Expert within fifteen (15) days after written notice by one them demanding mediation under this section. The Expert shall pay all costs of the mediation unless the Board in its sole good faith discretion, approves its payment of all or part of such costs. By mutual contract, the Board and the Expert may use a non-binding form of dispute resolution other than mediation. The purpose of this section is to reasonably ensure that the Board and the Expert shall, in good faith, utilize mediation or another non-binding dispute resolution process before pursuing litigation. The Board's participation in, or the results of, any mediation or other non-binding dispute resolution process under this section or the provisions of this section shall not be construed as a waiver by the Board of (1) any rights, privileges, defenses, remedies or immunities available to the Board as an agency of the State of Texas or otherwise available to the Board; (2) the Board termination rights; or (3) other termination provisions or expiration dates of the contract.

Notwithstanding any other provision of the contract to the contrary, unless otherwise requested or approved in writing by the Board, the Expert shall continue performance and shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes; however, the Expert may suspend performance during the pendency of such claim or dispute if the Expert has complied with all provisions of Section 2251.051, Texas Government Code, and such suspension of performance is expressly applicable and authorized under that law.

The venue of any suit brought for any breach of the contract is fixed in any court of competent jurisdiction in Travis County, Texas, and all payments shall be due and payable in Travis County, Texas.

XI.

In accordance with Section 403.055(h) of the Texas Government Code, the Expert agrees that any payments due to the Expert under this contract will be first applied toward any debt and/or back taxes the Expert owes the State of Texas. Payments will be so applied until such debts and taxes are paid in full. The Expert agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas. This clause does not apply if federal law requires payment to be made to the Expert for the services, and may not apply if federal law conditions the receipt of the money for this service to the State on the basis of payment being made to the Expert.

XII.

It is agreed and understood that the contract may be amended only upon written contract between the Board and the Expert, but in no case will the contract be amended so as to make it conflict with the laws of the State of Texas.

XIII.

Pursuant to Section 2262.154 of the Texas Government Code, the state auditor may conduct an audit or investigation of the Expert or any other entity or person receiving funds from the state directly under this contract or indirectly through a subcontract under this contract. The acceptance of funds by the Expert or any other entity or person directly under this contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Expert or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. The Expert will ensure that this clause concerning the authority to audit funds received indirectly by subExperts through the Expert and the requirement to cooperate is included in any subcontract it awards. The Expert further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit or investigation, including providing all records requested. The Expert will ensure that this clause concerning the State Auditor's Office's authority to audit state funds and the requirement to cooperate fully with the State Auditor's Office is included in any subcontracts it awards, should subcontracting be authorized. Additionally, the State Auditor's Office shall at any time have access to and the rights to examine, audit, excerpt, and transcribe any pertinent books, documents, audit documentation, and records of the Expert relating to this contract.

XIV.

Pursuant to Tex. Gov't Code § 2155.441, the Expert represents and warrants that it will buy Texas products and materials for use in providing the services authorized herein when such products and

materials are available at a comparable price and in a comparable period of time when compared to non-Texas products and materials.

XV.

Neither Expert nor the Board shall be liable to the other for any delay in, or failure of performance caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. Force majeure is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three (3) business days of the existence of such force majeure, or otherwise waive this right as a defense.

XVI.

Effective September 1, 2006, state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation. If applicable, the Expert shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (<http://www.buyaccessible.gov>). If applicable, Experts not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at <http://www.section508.gov/>.

XVII.

If the Expert defaults on the contract, the Board reserves the right to cancel the contract without notice. The defaulting Expert will not be considered in future contracts for the same type of work, unless the specification or scope of work significantly changed. The period of suspension will be determined by the agency based on the seriousness of the default.

XVIII.

For the purposes of this contract, the term "Work" is defined as all reports, statistical analyses, work papers, work products, materials, approaches, designs, specifications, systems, documentation, methodologies, concepts, research, materials, intellectual property or other property developed, produced, or generated in connection with this contract. All work performed pursuant to this contract is made the exclusive property of the Board. All right, title and interest in and to said property shall vest

in the Board upon creation and shall be deemed to be a work for hire and made in the course of the services rendered pursuant to this contract. To the extent that title to any such work may not, by operation of law, vest in the Board, or such work may not be considered a work made for hire, all rights, title and interest therein are hereby irrevocably assigned to the Board. The Board shall have the right to obtain and to hold in its name any and all patents, copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. The Expert must give the Board and/or the State of Texas, as well as any person designated by the Board and/or the State of Texas, all assistance required to perfect the rights defined herein without any charge or expense beyond those amounts payable to Expert for the services rendered under this contract.

The Expert shall maintain and retain supporting fiscal and any other documents relevant to showing that any payments under this contract funds were expended in accordance with the laws and regulations of the State of Texas, including but not limited to, requirements of the Comptroller of the State of Texas and the State Auditor. The Expert shall maintain all such documents and other records relating to this contract and the State's property for a period of seven (7) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. The Expert shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all documents and other information related to the "Work" as defined in this section of the contract. The Expert and the subExpert, if any, shall provide the State Auditor with any information that the State Auditor deems relevant to any investigation or audit. The Expert must retain all work and other supporting documents pertaining to this contract, for purposes of inspecting, monitoring, auditing, or evaluating by the Board and any authorized agency of the State of Texas, including an investigation or audit by the State Auditor.

The Expert shall cooperate with any authorized agents of the State of Texas and shall provide them with prompt access to all of such State's work as requested. The Expert's failure to comply with this section shall constitute a material breach of this contract and shall authorize the Board and the State of Texas to immediately assess appropriate damages for such failure.

This contract is full and complete on its face, has been read by all parties, and no terms or conditions exist outside those acknowledged and accepted herein by the parties whose signatures appear below. The Expert may not assign any of its rights or delegate any of its obligations under this contract. Any assignment or delegation attempted by the Expert in violation of this clause will be void and ineffective for all purposes.

[Remainder of page left intentionally blank]

For the faithful performance of the terms of this contract, the parties hereto execute this contract in their respective capabilities on the dates indicated.

TEXAS BOARD OF NURSING

EXPERT

By: *Katherine A. Thomas*
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Executive Director for the
Texas Board of Nursing
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By:

Date: 3/12/18

Date: 3-9-18