

**From:** [Sunset Advisory Commission](#)  
**To:** [Trisha Linebarger](#)  
**Subject:** FW: Public Input Form for Agencies Under Review (Public/After Publication)  
**Date:** Friday, October 21, 2016 4:44:09 PM

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-----Original Message-----

From: sundrupal@capitol.local [<mailto:sundrupal@capitol.local>]  
Sent: Friday, October 21, 2016 4:43 PM  
To: Sunset Advisory Commission  
Subject: Public Input Form for Agencies Under Review (Public/After Publication)

Agency: TEXAS BOARD NURSING TBN

First Name: Taralynn

Last Name: Mackay

Title:

Organization you are affiliated with: The American Association of Nurse Attorneys- Texas Chapter

Email:

City: Austin

State: Texas

Your Comments About the Staff Report, Including Recommendations Supported or Opposed: Please see next section.

Any Alternative or New Recommendations on This Agency:

TAANA-Texas Responses to the Sunset Commission's Report on the Board of Nursing 1. Minor Criminal Offenses  
We applaud the Commission's acknowledgment of the broad and subjective language the Board of Nursing (BON) uses in its rules regarding "unprofessional conduct" and "good professional character." However, we are concerned that the BON will misinterpret the recommendation to "limit their application to the practice of nursing."

The BON lists 96 crimes in the "Disciplinary Guidelines for Criminal Conduct" but also states the list is "not exhaustive." The reality is the BON is not following Occupations Code Chapter 53.025. Chapter 53.025 requires the BON to list "particular" crimes, not a laundry list of crimes that can be expanded as deemed necessary by the BON.

The BON's "Disciplinary Guidelines for Criminal Conduct" currently includes such crimes as criminal mischief, criminal trespass, driving while intoxicated, failure to identify, false report or statement, forgery, harassment, hindering secured creditors, obscenity, perjury, violation of a protective order, public lewdness, unlawful possession of firearm, and unauthorized use of vehicle. These crimes are punishable regardless of whether they arose out of the nurse's practice or involved a patient.

Instead, each crime includes a statement beside it stating how it relates to practice of nursing and the statements are repetitive throughout the guidelines.

For instance, the BON posits that criminal trespass relates to nursing because "[n]urses frequently provide care in private homes and home-like settings where all of the patient's property and valuables are accessible to the nurse. Nurses frequently provide care in settings without direct supervision. Patients under the care of a nurse are

vulnerable by virtue of illness or injury, and the dependent nature of the nurse - patient relationship. Trespass crimes raise serious concerns whether a nurse/nurse applicant can be trusted to respect a patient's property/possessions in the future."

The BON's reach for discipline is very broad when a nurse receives stipulations affecting the nurse's practice if the criminal trespass conviction occurred 0-3 years ago. For example a nurse is at risk for losing employment, faces the stigma of public disclosure and has to spend time and hundreds of dollars satisfying the restrictions all because the nurse used an apartment complex's pool afterhours when the nurse was not a resident of the complex and was subsequently convicted of criminal trespass.

Likewise, in Rule 213.28, Licensure of Individuals with Criminal History, the BON explains why they think various offenses relate to the practice of nursing. For instance offenses against property relate to the practice of nursing because, among other things "nurses who commit these crimes outside the workplace raise concern about the nurse's propensity to repeat similar misconduct in the workplace and, therefore, place patient/clients' property at risk." We want to be sure that Sunset understands the BON is willing to stretch the definition of "relating to the practice of nursing" as far as it can go to rationalize their disciplinary process.

We believe a fair application would be to statutorily require the BON to adopt a rule that limits authority, similar to the rule adopted by the Texas Medical Board. Rule 190.8(6)(B)(iv) states "the conviction will be considered to directly relate to the practice of medicine if the act: (I) arose out of the practice of medicine, as defined by the Act; (II) arose out of the practice location of the physician; (III) involves a patient or former patient; (IV) involves any other health professional with whom the physician has or has had a professional relationship; (V) involves the prescribing, sale, distribution, or use of any dangerous drug or controlled substance; or (VI) involves the billing for or any financial arrangement regarding any medical service." This is a reasonable interpretation of "relating to" their practice.

## 2. Arrests and Dismissals

In the Nursing Practice Act, the legislature authorized the Board of Nursing (BON) to punish nurses who violate criminal law. Sec. 301.452, Occupations Code, says "(b) A person is subject to denial of a license or to disciplinary action under this subchapter for:... (3) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude;..."

The BON has extended that authority to include nurses who have merely been arrested, received pre-trial diversion or received a military non-judicial punishment. These nurses are subjected to long investigations and many times disciplinary restrictions for actions that are not convictions or placement on deferred adjudication or deferred disposition. The BON has justified taking disciplinary action when there has only been an arrest by stating they cannot wait on the criminal court system to determine whether the nurse is innocent. Pre-trial diversion is an agreement between the District Attorney and the nurse's attorney and is not set before a Judge. Military non-judicial punishment, according to an attorney with the armed services, is not a criminal conviction rather it is a way for commanding officers to maintain good order and discipline and there are no records of the action maintained once the individual is discharged from the military or re-enlist.

The inclusion of deferred adjudication and deferred disposition in Sec. 301.452, Occupations Code has led to much confusion and unjust disciplinary actions. Frequently a nurse is advised to accept deferred adjudication of a conviction because it is a cheaper and quicker way to resolve an arrest. The nurse is told once the probation is completed the matter is dismissed and does not show up on the nurse's criminal history record. The case is dismissed when considering everything but the nursing license. Too often a nurse accepts a deferred adjudication when the nurse is innocent because the nurse cannot afford to fight in court. Frequently the reason deferred adjudication is offered is because the prosecutor does not have strong evidence against the nurse. In addition, many nurses fail to disclose the deferred adjudications because they believe the actions to be dismissed.

We ask the Sunset Commission recommend the BON limit its jurisdiction to that which was authorized by the

legislature and remove “or placement on deferred adjudication community supervision or deferred disposition” from Sec. 301.452, Occupations Code.

3. State Office of Administrative Hearings (SOAH) The BON should not be allowed to overturn Proposals For Decisions (PFD) from the State Office of Administrative Hearings (SOAH). Nurses spend a great deal of money to fight the BON at SOAH, only to have their successful hearing overturned. For instance, In the Matter of Charles Stephen Phillips, the Administrative Law Judge found the BON’s determination was “conclusory.” Further, the ALJ found the BON’s expert witness, Dr.

Fallis, “offered three opinions ranging from a view that the Respondent posed no threat, to an opinion that he could pose a threat, and finally to the view that he is likely to pose a future threat. It seemed that Dr.

Fallis’ opinion was directly related to the amount of pressure that was brought on her by Staff.” Even with that damning PFD, the BON amended and modified the PFD, reprimanded Mr. Phillips, and required quarterly probation reports. If the BON cannot be trusted to provide a fair hearing, then at the very least they should not be allowed to overturn a decision from SOAH.

Likewise, in Debra Ross v. BON, Ms. Ross had voluntarily surrendered her RN license as a sanction for a felony DWI in 2002. She then took and successfully completed intensive outpatient counseling and had continued her sobriety until she reapplied for licensure in 2005. As part of her application, she “underwent, and provided the BON with, a psychological evaluation by a BON-approved psychologist....” According to the ALJ, “[the] evaluation supports a determination that Applicant is currently fit to hold an RN’s license. Despite the positive evaluation, Staff denied the reinstatement request....” The ALJ recommended the BON grant the request for reinstatement. Nevertheless, once again, the BON overturned the PFD because “the [ALJ’s] findings of fact and conclusions of law are in conflict with prior agency decision.” The BON has complete control over agency decisions, and then uses those decisions to overturn the ALJ.

This is not uncommon. According to the BON’s own documents, since January 2014, the BON has considered 68 PFDs. Of those PFDs, the BON overturned 63.

Worse, 9 of those PFDs were to “clarify the BON’s position...” For example, clarifying the BON’s position that the misdemeanor offense of Assault is related to the practice of nursing; clarifying the effect of a criminal offense under §301.4535 and §301.453(c); clarifying the BON’s interpretation of “substantive,” as that term is used in the BON’s Disciplinary Matrix. This is an egregious violation of the notice requirement of the due process clause. In *Madden v. TX Bd. Of Chiro. Examiners*, the Texas Court of Criminal Appeals in Austin held that “The BON’s action in assigning the new meaning to the term ‘bona fide chiropractic’ school nevertheless raised the question of fundamental fairness for that new meaning was applied for the first time to Madden in the decision in his contested case and as the sole basis for denying him entrance to the examination.”

Rightfully, the court held that this was an unconstitutional violation of due process.

A review of the PFDs overturned reveal the BON regularly uses this ability unfairly. If they want to punish someone, the BON will find a way to do it, even if they have to overcome their own rules, enabling statute, or expert’s opinions. At the very least, the state should offer nurses a fair and just process. Currently, when a nurse believes the BON to be wrong either in their allegations or in their proposed sanctions, the nurse must spend an incredible amount of time and money fighting the BON at SOAH. When the nurse obtains a favorable PFD the BON is allowed to negate that success and the nurse’s only recourse is to spend even more money and time appealing the matter at District Court. In essence, the BON is allowed two opportunities to impose their will even when a nurse has won the case in front of an unbiased judge. This is an extreme example of an agency breaching the public’s trust.

We believe the Sunset Commission should recommend a statutory fix to require SOAH to have final decision making power. In this way, if either the nurse or the BON were unhappy with the SOAH Judge’s decision, that aggrieved party could appeal.

#### 4. Formal Charges Before Disciplinary Action

The BON has a history of placing Formal Charges on a Nurse’s record while the informal resolution process is ongoing. These Formal Charges are filed internally “Before the Board of Nursing,” but not with SOAH. To our knowledge, the BON is the only licensure agency that does this. The BON regularly files these Formal Charges when a licensee requests ISC, makes a

counterproposal to a proposed agreed order, and/or declines a BON request such as completing a chemical dependency or mental health evaluation. This practice raises Due Process concerns because BON complaints and investigations are statutorily confidential, but when the BON files the Formal Charges they list “Formal Charges filed” along with the date of the filing on their public verification page online. This practice puts the nurse in a very difficult spot with their employer by revealing a BON investigation is pending and “Formal Charges filed” sounds ominous and criminal to employers. Nurses with jobs are often fired, and nurses without jobs are unable to find employment..

In a recent example reported by an Austin attorney, a nurse without a complaint or disciplinary history was charged with theft from a resident at an assisted living facility. While the criminal charges were pending, the BON requested that the nurse complete a forensic evaluation and polygraph to determine “the likelihood that [she] will engage in such behavior again.”

The nurse declined the BON’s request noting since the criminal charges remained pending, there was no determination she engaged in the alleged behavior in the first place. The BON responded by filing Formal Charges “Before the Board of Nursing” and attaching that fact to the nurse’s online profile. The nurse’s employer knew about the pending criminal charges and continued to employ her in spite of the pending criminal issue, but the filing of Formal Charges prompted the employer to terminate the nurse.

Given the current act of filing Formal Charges is purely an internal process by the BON, we feel there should be a statutory fix. Formal Charges should not be filed internally “Before the Board of Nursing.” The BON should not be permitted to file Formal Charges until a case is docketed at SOAH.

## 5. Licensure Reinstatement

The BON has revoked the licenses of at least 434 nurses in the last 12-month period. Another 235 have voluntarily surrendered their nursing license while under investigation by the BON. As an initial note before discussing what these nurses must go through to reinstate their licenses, the first order question is whether those who are voluntarily surrendering their licenses should have surrendered their license. It is standard practice of the BON in certain types of cases, often cases with active criminal indictments and/or dealing with alleged misappropriation of narcotics, to send a letter which starts “The Texas Board of Nursing recommends that you surrender your license to practice nursing”. This letter is often sent long before the criminal case is adjudicated or without evidence of misappropriation of narcotics.

For example, a nurse in Fort Bend County was arrested and charged with insurance fraud related to automobile insurance. Because of limited means, the nurse was unable to fight the criminal charges, but was offered a pre-trial diversion contract because of weak evidence. Despite a lack of authority to discipline nurse (see supra, arrests and dismissals) based on the pre-trial diversion, the BON sent the nurse a voluntary surrender order, which she signed because she didn’t seek legal advice and believed that she must surrender her license in this situation.

When the nurse’s license is revoked or the nurse surrenders a license, the nurse must wait at least one year under the Nursing Practice Act in order to file a Petition for Reinstatement. Tex. Occ. Code §301.467. There are some exceptions to this rule which mandate longer times away from practice, but under the BON’s current practice, the nurse may not even request a copy of the form Petition for Reinstatement from the BON’s monitoring investigator until they have passed that one-year mark. Once the Petition is filed by the nurse, there is often a delay of two months before an informal conference is set with BON staff. This informal conference, scheduled with only BON Staff (no members of the BON are present at these meetings unless they are observing the process), are often set four to six months in the future. This means it can take a nurse as long as a year after they are eligible for reinstatement for the nurse to return to the workforce.

There are several ancillary issues related to the reinstatement process which often leads to inordinate delays in reinstatement, increased costs for both the BON and for nurses who have to hire attorneys to handle the situations. These issues are 1) BON Staff’s unwillingness to reinstate licenses when the nurse owes restitution over \$5000 and 2) BON Staff’s overly harsh requirements for relicensure for certain Petitioners.

First, the BON has adopted a disciplinary matrix (22 Tex. Admin. Code §213.33(b)) which treats any alleged financial loss to the public of more than \$5,000 as essentially a revocable event for a nurse's license. One nurse in Tarrant County was convicted of a fraud charge and was given restitution of around \$9,000. Despite making a herculean effort to get her restitution below the \$5,000 level before a hearing at SOAH, the nurse's license was revoked and she was not allowed to even obtain a petition for reinstatement until she made full restitution. Another nurse with an exceptional nursing practice history and an employer who wanted to hire him tried to reinstate his nursing license only to be told since his remaining restitution was above \$4999, the BON would not reinstate him.

There are situations where a nurse might never be able to make full restitution, yet the BON fights efforts to reinstate the nursing license even when the reinstatement would allow the nurse to pay off their restitution quicker. In one case, a Dallas County nurse was convicted of the federal offense of "misprision of a felony" (which essentially a failure to report a felony committed by another when the person has knowledge of the felony) in 2003 and assessed restitution of \$3.3 MILLION. The nurse was given a credit for money seized, but still owed \$2.4 million. The nurse surrendered her license in 2006. In 2014, over 10 years AFTER the conviction and five years after the former nurse was released from probation, the nurse petitioned for reinstatement and was denied because of the large amount of restitution. After a hearing at SOAH, where the nurse was able to show that she had a wealth of good professional character, the SOAH judge proposed reinstatement, citing her wealth of good professional character and the fact that the nurse would be able to increase her payments of restitution because of her increased earnings as a nurse.

Second, in many cases BON staff simply refuses to recognize situations where a nurse has shown current good professional character and uses any trivial reason to deny a reinstatement. A Dallas-Fort Worth area nurse failed to disclose a series of criminal charges and convictions, the last occurring in 2009. When the case went to a hearing at SOAH, the ALJ issued a decision which indicated that while the BON had reason enough to revoke the nurses license, the nurse's recent practice history and education was also enough for the BON to consider probating a suspension, too. The BON revoked the license and on petition for reinstatement, required a forensic psychological exam and polygraph, which found the nurse could conform his actions to the requirements of the nursing practice act, but could benefit from a term of counseling related to the reasons why he acted out in a criminal matter earlier in his life. Seizing on that singular reason, BON Staff denied the reinstatement until the nurse got the counseling, which required the nurse to wait another year to file a new petition for reinstatement.

Nurses work very hard to educate themselves, and the state often subsidizes their education through the state educational institutions that train nurses and through loan subsidy programs for students. As noted above, nurses are not able to fully leverage their education and suffer significant losses of income due to these delays of reinstatement. For all that time and money to be wasted, there should be a better reason than a bottleneck and unwarranted delays in the reinstatement procedure.

We recommend that a rule must be in place that "once the Nurse has submitted all required documents for reinstatement, the hearing must occur within 120 days.

6. Informal Settlement Conferences (ISCs) ISCs are completely underutilized, which is both costly and time consuming.

In 2015, the BON conducted 9,617 investigations of Registered Nurses. Of those, only 193—or 2%—went to informal settlement. There are multiple reasons for having such few ISCs. First, the ISC process is unnecessarily burdensome for the BON and the nurse. They have to have in-person attendance from BON staff as well as the nurse. So, it's very rarely in anyone's best interest to pursue this option. Second, nurses are often retaliated against when they request an ISC. The BON regularly files internal Formal Charges when an ISC is requested. They often include an Agreed Order with the Formal Charges to try to coerce the nurse into signing the Order. Those Formal Charges remain on the licensee's profile on the BON website until the case is resolved—sometimes over a year and there have been cases where Formal Charges have remained on the nurse's license for over three years.

This issue has led to the massive bottleneck in the BON's enforcement processes. Over 25% of the cases that the BON had open in FY 2015 were over 12 months old, and another 20% were between 6 months and 12 months old. The ISC process should be streamlined and encouraged. This would reduce wait times and increase efficiency. We are currently dealing with an extreme

nursing shortage. This state does not have the nursing resources to have a board that is actively holding people back from practice. The commission should address this issue by overhauling the ISC process to provide incentives for everyone involved to deal with cases quickly and appropriately.

However, there are numerous more reasons to have an ISC. These include:

- 1) The Nurse and BON learn the strength of their case and if either should settle before going to SOAH;
- 2) It allows the BON to have a nurse-to-nurse type conversation with the Nurse, which allows for better understanding of the issues. Like many other healthcare licensing agencies (TMB, TPAB, TBODE, etc.) the BON is not just focused on the past allegations, but also on the future. This interaction at the ISC allows the BON to:
  - a. Determine the Nurses' competency through asking standard of care questions; and
  - b. Determine if the Nurse's practice skills and knowledge meet nursing standards, thereby allowing either a dismissal at ISC or an offer of a Corrective Action.
- 3) It saves thousands of dollars by both parties by avoiding the SOAH process for an allegation that either results in a Judge recommending dismissal of all charges or finding only minor violations were committed;
- 4) It is the only chance that a Nurse has to explain their nursing process thoughts or their actions and decisions to the BON in an informal setting.  
(An argument can be made the BON is failing to utilize the Government Code §2001, regarding informal processes, etc.).

No sound reasoning has been given for why the BON does not give ISC's for everyone who requests one OR for every action it offers a disciplinary/remedial action on, or that it files at SOAH. One must ask why all the other State healthcare licensing agencies in the Hobby Building all offer/allow their licensees ISC's, yet the BON doesn't?

The BON must change its practice of having ISC's only on Tuesdays, if need be, to accommodate the ISC requests.

The BON should move all cases going to ISC to an attorney, who can then work with the Nurse and his or her attorney. Currently, there is no informal process or forum for a Nurse to engage with a BON attorney before the case gets ready for SOAH referral. An attorney is able to evaluate the evidence in the case and often once a case is reviewed by a BON attorney the case is either settled or dismissed. The BON MUST have its attorneys involved in the settlement process and allow the non-attorney investigators to remain neutral fact-finders.

#### 7. Eligibility Orders

The BON needs to have a comprehensive and uniform approach in how and why it has to initially discipline nurses from other states applying for a Texas license. Currently, any Nurse under an Order from a prior State, when applying for a Texas License, faces a daunting Order from the BON before obtaining their Texas license. The BON initially offers the out of State Nurse an Eligibility Order with numerous restrictions, including direct supervisor or continuing education, etc., when the Nurse has not done anything to violate the NPA or BON Rules.

The BON needs a rule in place that it cannot offer the nurse applicant any type of Order if the Nurse proves they have completed the terms of the other State's Order. Further, for those Nurse applicants currently under another State's Order, if it's a non-standard of care issue, the BON should be severely limited in what types of Eligibility Order it can offer. It defies logic for the BON to offer a Nurse applicant a public and disciplinary Order that "publicly punishes" that Nurse for something he or she already received punishment for in another state.

Finally, as can be ascertained from other section, the BON, while it has the mission to protect the public, ignores the need to have enough nurses to provide care to the people in Texas. The BON should consider if a nurse will be able to obtain jobs after their license is encumbered with a disciplinary order. Currently the BON automatically imposes practice site restrictions without a corresponding need shown in the evidence. For example, if a nurse incorrectly fills out Food Stamp documents and receives a conviction does that nurse really need to be supervised while working or be restricted from working for a nursing agency, home health or hospice?

Thank you for the opportunity to make these comments.

My Comment Will Be Made Public: I agree