



**BETWEEN A ROCK
AND A HARD PLACE:
DEFENDING PROFESSIONAL
BOARD COMPLAINTS IN AUSTIN
AND IN THE COURTROOM**



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The image features a vertical decorative bar on the left side, composed of several colored segments: a grey bar at the top, a white bar, a small grey bar, a yellow bar, and a long pink bar at the bottom. The main text is centered on a dark blue background.

The Purpose of the Texas Medical Board is to protect the public's safety and welfare through the regulation of the practice of medicine.

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- The Board is comprised of 19 members:
9 M.D.s, 3 D.O.s, and 7 lay members.
 - The Board takes its mission seriously.
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The purpose of this presentation and paper is to outline the Texas Medical Board (TMB) disciplinary process, identify practical tips to assist you during the process, and discuss the discoverability and admissibility of TMB proceedings.

- *Dr. C had a complaint filed against him by a former patient.*
- *The patient complained that Dr. C had inappropriately prescribed pain medications to him over several years. He also complained that Dr. C then took advantage of him and convinced him to sell his house to Dr. C.*
- *The Board's first expert report alleged that the standard of care was not met because Dr. C did not have a pain management contract and did not see the patient for 11 months while prescribing medication.*
- *After considering Dr. C's response to complaint, the expert revised his opinion to say that there was no violation of the standard of care because the patient had no adverse effects, was seeing other specialists, and frequently saw Dr. C in the small community in which they lived.*
- *However, at the ISC hearing, the panel focused on Dr. C's recordkeeping and issued an administrative penalty.*

Complaint and Preliminary Investigation

- **COMPLAINT.** The Texas Medical Board disciplinary process begins with a complaint filed against the physician. This complaint can come from a patient or patient's family member, or from the Board itself. TEX. OCC. CODE § 154.051(c); TMB RULE § 178.4.
- **DUTY TO REPORT.** The Texas Occupations Code also charges medical peer review committees, and physicians with the duty to report information that indicates that the physician poses a continuing threat to public welfare through the practice of medicine. TEX. OCC. CODE § 160.002-004.
- **AUTOMATIC REVIEW.** The Board is also required to review the medical competency of any physician against whom three or more Chapter 74 expert reports have been filed in three separate lawsuits within a five-year period. TEX. OCC. CODE § 164.201.

Recent Changes

- No more anonymous complaints.
 - TEX. OCC. CODE § 154.535(b), eff. 9/1/11.
- Initial Investigation should be completed within 45 days unless good cause shown.
 - TEX. OCC. CODE § 154.057(b).
- Beware 3 Settlements of greater than \$50,000; may lead to a presumption “that the case is meritorious.”
 - TMB RULE § 190.8(5).

Board Complaints in 2010

The Board received 6,849 complaints. These included complaints initiated by;

- the Board (17%)
- patients (30%)
- friends and family members (21%)
- health professionals(9%)
- consumers (13%)
- anonymous (4%)
- government agencies (2%)
- law enforcement (4%)
- insurance companies (<1%).

Of those, 49% related to quality of care, 18% related to unprofessional conduct, 6% related to physician impairment and 27% related to other issues.



Now this is depressing for the advocates....

In 2010, board held 645 ISC's and found some form of discipline in 534 of them.

Basically, that is an 82.7% chance of discipline following an ISC.



The Preliminary Complaint

- The initial investigation should be completed within 45 days.
- The board first determines if it has jurisdiction.

- The Board's broad authority is defined in the Texas Occupations Code in three parts:
 - TEX. OCC. CODE § 164.051 (Reasons to Impose Discipline).
 - TEX. OCC. CODE § 164.052 (List of Prohibited Practices).
 - TEX. OCC. CODE § 164.052 (a) (Unprofessional or Dishonorable Conduct

- TMB RULE § 190.8 (Practices Inconsistent with Public Health and Welfare).



Focus: “likely to” injure; not “has injured”



Responding to the Initial Complaint

- Provide Narrative (Letter will tell you deadline)
 - Provide Records (14 days)
 - Goal: End Investigation Now
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Administrative Violations

- Not “standard of care” violations
- Matter concluded within 60 days; “fast track”
- Physician receives a “Notice of Intent to Impose Penalty”
 - Can respond no contest and pay fine
 - Can respond in writing with explanation
 - Can request a personal appearance before a panel—but then no more fast track

Standard of Care Violations

- **Two Outside Reviewers.** If the complaint involves standard of care concerns, the complaint is reviewed by two outside physician reviewers. TEX. OCC. CODE § 154.0561(a)-(b).
- Both reviewers must agree that a violation has occurred. If they do not agree, a third review is conducted. TEX. OCC. CODE § 154.0561(c).
- If the experts find that the standard of care was not met, they must prepare a written report. If the experts or the Board attorneys find the complaint to be baseless or unfounded, the complaint shall be dismissed with a statement that “the reason for the dismissal is because the complaint was baseless or unfounded.” TEX. OCC. CODE § 164.0035.
- *Caveat: However a complaint can still be pursued by the Board, even if the experts retract the standard of care opinion.*

Quality Assurance Committee

- The complaint is then considered by the Board's Quality Assurance Committee.
- The QA Committee can recommend dismissal of the complaint, a remedial plan, further disciplinary proceedings, or even temporary suspension of the physician's license.
 - TMB RULE § 187.14(7).

Remedial Plans or Corrective Orders

- A remedial plan is used for first-time violations that do not involve:
 - patient death
 - commission of a felony or
 - inappropriate sexual relationships or financial dealings.
 - TEX. OCC. CODE § 164.0015.
- These plans do not restrict the physician's license and are not reported to the National Practitioner Data Bank.



Informal Show Compliance Proceeding and Settlement Conference (“the ISC”)

- Process
 - Preparation
 - Pitfalls
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SOAH

- Trial de novo before ALJ
 - Can propose new or different discipline
 - Very difficult to appeal: substantial evidence rule
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Settlement Agreements

- The general rule is that Board complaints and investigations are confidential.
 - TEX. OCC. CODE § 160.006(a).
- Board Orders are considered settlement agreements under TRE 408.
 - TEX. OCC. CODE § 164.002(d).



Texas Rules of Evidence Labyrinth

- TRE 401 Relevant?
 - TRE 404(b) Not similar acts.
 - TRE 406 Not a habit or routine.
 - TRE 403 Unfair prejudice.
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