

# Between a Rock and a Hard Place: Defending Professional Board Complaints in Austin and in the Courtroom

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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., 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.

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- *Fact Pattern 1: 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.*

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### 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.

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### Recent Changes

- No more anonymous complaints. See 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. See Board Rule 190.8(5) may lead to a presumption "that the case is meritorious."

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### Board Complaints in 2010

**2010:** the Board received 6,849 complaints. These included complaints initiated by;

- (a) the Board (17%),
- (b) patients (30%);
- (c) friends and family members (21%);
- (d) health professionals(9%);
- (e) consumers (13%);

- (f) anonymous (4%);
- (g) government agencies (2%);
- (h) law enforcement (4%); and
- (i) insurance companies (<1%).

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

Source: Mari Elizabeth Robinson, Director of the Texas Medical Board, "Upholding Professional Accountability: What You Need to Know About Physician Licensure, Discipline, & Regulation in Texas," presented at the 18th Annual Advanced Medical Malpractice Course 2011, and available from TexasBar CLE.

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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.

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The Preliminary Complaint

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

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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
- Texas Board Rule 190.8 (Practices Inconsistent with Public Health and Welfare).

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

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### Responding to the Initial Complaint

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

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### Fast Track

(Missy, put in brief description)

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### 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.*

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### **Quality Assurance Committee**

- The complaint is also 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).<sup>1</sup>

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### **Remedial Plan. (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.

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

- Process
- Preparation
- Pitfalls

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### SOAH

- trial de novo
- 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).

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- Irrelevant evidence?
- Go through the Texas Rules of Evidence Labyrinth
  - TRE401 Relevant?
  - TRE 404(b) Not similar acts.
  - TRE 406 Not a habit or routine.
  - TRE 403 Unfair prejudice.

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Fact Pattern 2:

*Dr. D is a defendant in a medical malpractice act. He has two Board Orders pertaining to patient care. Neither of these Orders involve the same type of care at issue in the lawsuit. One of the Orders required Dr. D to give a notice to his patients about the restrictions on his license. During the lawsuit, plaintiff sought discovery pertaining to the Orders, the investigations and Dr. D's compliance with the notice requirement. Dr. D. initially failed to respond or object to the discovery. When he later objected, Plaintiff moved to compel the discovery. The Texas Medical Board intervened and moved for a protective order. The Court ruled that the Board had standing to intervene and move for protection. The Court ordered that the investigative files were protected, but that the physician did have to produce documentation showing he complied with the Board Orders*

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Questions?