

**Between Two Fires:
Defending the Medical Board Complaint in Austin and in the Courtroom**

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and

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INTRODUCTION

- *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.*
- *Dr. D is a defendant in a medical malpractice action. 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.

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.

DISCIPLINARY PROCESS

Complaint and Preliminary Investigation

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.¹ 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.² 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.³

From 2000 to 2010, the Board received 63,774 complaints, ranging from a low of 4,427 complaints in 2000 to a high of 6,968 complaints in 2009.⁴ In 2010, the Board

¹ TEX. OCC. CODE § 154.051(c); TMB RULE § 178.4.

² TEX. OCC. CODE § 160.002-004.

³ TEX. OCC. CODE § 164.201.

⁴ Mari Elizabeth Robinson, Director of the Texas Medical Board, "Upholding Professional

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%) and insurance companies (<1%).⁵ Of those, 49% related to quality of care, 18% related to unprofessional conduct, 6% related to physician improvement and 27% related to other issues.⁶

The Board is required to conduct a preliminary investigation of the complaint within forty-five days.⁷ As a part of the preliminary investigation, the Board must determine if the complaint falls within its jurisdiction.⁸ Jurisdiction under the Board Rules involves “a matter over which the Board has authority.”⁹ The Board’s broad authority is defined in the Texas Occupations Code in three parts.

The Board can impose discipline for the following reasons:

(a) The board may refuse to admit a person to its examination or refuse to issue a license to practice medicine and may take disciplinary action against a person if the person:

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.

⁵ *Id.*

⁶ *Id.*

⁷ TEX. OCC. CODE § 154.057(b); TMB RULE § 178.5(a).

⁸ TEX. OCC. CODE § 164.051 (listing the grounds for disciplinary action); TEX. OCC. CODE § 164.052 (listing prohibited practices by physicians); TEX. OCC. CODE § 164.053 (listing examples of unprofessional or dishonorable conduct); TMB RULE § 178.5(e).

⁹ TMB RULE § 178.2(8).

(1) commits an act prohibited under Section 164.052;

(2) is convicted of, or is placed on deferred adjudication community supervision or deferred disposition for:

(A) a felony; or

(B) a misdemeanor involving moral turpitude;

(3) commits or attempts to commit a direct or indirect violation of a rule adopted under this subtitle, either as a principal, accessory, or accomplice;

(4) is unable to practice medicine with reasonable skill and safety to patients because of:

(A) illness;

(B) drunkenness;

(C) excessive use of drugs, narcotics, chemicals, or another substance; or

(D) a mental or physical condition;

(5) is found by a court judgment to be of unsound mind;

(6) fails to practice medicine in an acceptable professional manner consistent with public health and welfare;

(7) is removed, suspended, or is subject to disciplinary action taken by the person's peers in a local, regional, state, or national professional medical association or society, or is disciplined by a licensed hospital or medical staff of a hospital, including removal, suspension, limitation of hospital privileges, or other disciplinary action, if the board finds that the action:

(A) was based on unprofessional conduct or professional incompetence that was likely to harm the public; and

(B) was appropriate and reasonably supported by evidence submitted to the board;

(8) is subject to repeated or recurring meritorious health care liability claims that

*in the board's opinion evidence professional incompetence likely to injure the public; or (9) except as provided by Subsection (d), holds a license to practice medicine subject to disciplinary action by another state, or subject to disciplinary action by the uniformed services of the United States, based on acts by the person that are prohibited under Section 164.052 or are similar to acts described by this subsection.*¹⁰

Section 164.052 also lists the following prohibited practices:

(a) A physician or an applicant for a license to practice medicine commits a prohibited practice if that person:

(1) submits to the board a false or misleading statement, document, or certificate in an application for a license;

(2) presents to the board a license, certificate, or diploma that was illegally or fraudulently obtained;

(3) commits fraud or deception in taking or passing an examination;

(4) uses alcohol or drugs in an intemperate manner that, in the board's opinion, could endanger a patient's life;

(5) commits unprofessional or dishonorable conduct that is likely to deceive or defraud the public, as provided by Section 164.053, or injure the public;

(6) uses an advertising statement that is false, misleading, or deceptive;

(7) advertises professional superiority or the performance of professional service in a superior manner if that advertising is not readily subject to verification;

(8) purchases, sells, barter, or uses, or offers to purchase, sell, barter, or use, a medical degree, license, certificate, or diploma, or a transcript of a license, certificate, or diploma in or incident to an

application to the board for a license to practice medicine;

(9) alters, with fraudulent intent, a medical license, certificate, or diploma, or a transcript of a medical license, certificate, or diploma;

(10) uses a medical license, certificate, or diploma, or a transcript of a medical license, certificate, or diploma that has been:

(A) fraudulently purchased or issued;

(B) counterfeited; or

(C) materially altered;

(11) impersonates or acts as proxy for another person in an examination required by this subtitle for a medical license;

(12) engages in conduct that subverts or attempts to subvert an examination process required by this subtitle for a medical license;

(13) impersonates a physician or permits another to use the person's license or certificate to practice medicine in this state;

(14) directly or indirectly employs a person whose license to practice medicine has been suspended, canceled, or revoked;

(15) associates in the practice of medicine with a person:

(A) whose license to practice medicine has been suspended, canceled, or revoked; or

(B) who has been convicted of the unlawful practice of medicine in this state or elsewhere;

(16) performs or procures a criminal abortion, aids or abets in the procuring of a criminal abortion, attempts to perform or procure a criminal abortion, or attempts to aid or abet the performance or procurement of a criminal abortion;

(17) directly or indirectly aids or abets the practice of medicine by a person, partnership, association, or corporation that is not licensed to practice medicine by the board;

¹⁰ TEX. OCC. CODE § 164.051(a).

(18) performs an abortion on a woman who is pregnant with a viable unborn child during the third trimester of the pregnancy unless:

(A) the abortion is necessary to prevent the death of the woman;

(B) the viable unborn child has a severe, irreversible brain impairment; or

(C) the woman is diagnosed with a significant likelihood of suffering imminent severe, irreversible brain damage or imminent severe, irreversible paralysis; or

(19) performs an abortion on an unemancipated minor without the written consent of the child's parent, managing conservator, or legal guardian or without a court order, as provided by Section 33.003 or 33.004, Family Code, authorizing the minor to consent to the abortion, unless the physician concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function and that there is insufficient time to obtain the consent of the child's parent, managing conservator, or legal guardian.¹¹

Section 164.052(a) (5) refers to unprofessional or dishonorable conduct:

(a) For purposes of Section 164.052(a) (5), unprofessional or dishonorable conduct likely to deceive or defraud the public includes conduct in which a physician:

(1) commits an act that violates any state or federal law if the act is connected with the physician's practice of medicine;

(2) fails to keep complete and accurate records of purchases and disposals of:

(A) drugs listed in Chapter 481, Health and Safety Code; or

(B) controlled substances scheduled in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(3) writes prescriptions for or dispenses to a person who:

(A) is known to be an abuser of narcotic drugs, controlled substances, or dangerous drugs; or

(B) the physician should have known was an abuser of narcotic drugs, controlled substances, or dangerous drugs;

(4) writes false or fictitious prescriptions for:

(A) dangerous drugs as defined by Chapter 483, Health and Safety Code; or

(B) controlled substances scheduled in Chapter 481, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(5) prescribes or administers a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is administered or prescribed;

(6) prescribes, administers, or dispenses in a manner inconsistent with public health and welfare:

(A) dangerous drugs as defined by Chapter 483, Health and Safety Code; or

(B) controlled substances scheduled in Chapter 481, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

¹¹ TEX. OCC. CODE § 164.052(a).

(7) violates Section 311.0025, Health and Safety Code;

(8) fails to supervise adequately the activities of those acting under the supervision of the physician; or

(9) delegates professional medical responsibility or acts to a person if the delegating physician knows or has reason to know that the person is not qualified by training, experience, or licensure to perform the responsibility or acts.¹²

If a complaint is outside the Board's jurisdiction, the complaint must be dismissed. Additionally, the Board may also determine that while the complaint falls within its jurisdiction, there has been no violation of the Board rules.¹³

Interestingly, the Board Rules prohibit attempts to avoid Board supervision, *i.e.*, by (a) contracting away the right to report a physician or (b) restricting cooperation with the Board by another licensee, peer review committee, hospital, medical staff, or medical society. Thus, a plaintiff cannot waive his or her right to file a complaint with the Board as a part of a legal settlement agreement.¹⁴

The Board's preliminary investigation provides an opportunity for the physician to respond to the complaint.¹⁵ The physician is generally only afforded a short amount of time in which to respond.¹⁶ The Board will also request medical records from the physician. The physician has a "reasonable

time," which is defined as fourteen days, to provide the records.¹⁷ Ignoring a request from the Board is never a good idea and can actually trigger additional administrative penalties.

Statute of Limitations

The Board adopted Rule 178.9 in December 2011, which implemented a statute of limitations for complaints. The Rule states:

(1) The board may not consider or act on a complaint involving care provided more than seven years before the date on which the complaint is received by the board unless the care was provided to a minor. If the care was provided to a minor, the board may not consider or act on a complaint involving the care after the later of:

(A) the date the minor is 21 years of age; or

(B) the seventh anniversary of the date of care.¹⁸

This statute of limitation only applies to complaints involving medical care. There is no statute of limitations for complaints related to any other violation, including action by another state licensing entity or for criminal conduct.¹⁹

Formal Complaints and Investigations

If the complaint is within the Board's jurisdiction and the investigator believes there is sufficient evidence to move forward, the Board will commence a formal complaint and investigation.²⁰ The investigator will determine whether the complaint involves standard of care issues or administrative issues. The investigation

¹² TEX. OCC. CODE § 164.053(a).

¹³ *Id.* The Board must find both jurisdiction and probable cause to justify further investigation.

¹⁴ TMB RULE § 190.8(2).

¹⁵ TEX. OCC. CODE § 154.003; TMB RULE § 178.5(d).

¹⁶ *Id.* This Rule does not set a time period, but see TMB RULE § 179.5(e) which states that physicians have only ten days to respond to requests for information from the Board.

¹⁷ TMB RULE § 179.4(a).

¹⁸ TMB RULE § 178.9(a)(1).

¹⁹ TMB RULE § 178.9 (b).

²⁰ TMB RULE § 178.6(a).

must be completed within 180 days of opening the investigation of the complaint unless good cause is shown by the Board.²¹

Administrative Violations

If the complaint contains only “administrative violations,” the complaint may go to the “fast-track” program.²² Administrative violations typically do not involve patient care. Examples of administrative violations include:

- Failure to timely provide copies of medical or billing records or overcharging for medical records²³
- Failure to timely comply with a board subpoena or request for information²⁴
- Failure to maintain adequate medical records²⁵
- Discipline by peers that does not involve patient care²⁶
- Discipline by another state or military that does not involve patient care²⁷
- Failure to obtain/document continuing medical education²⁸
- Failure to report liability claims to the board²⁹
- Failure to change address with the board³⁰
- Failure to keep drug logs³¹
- Failure to display sign required by Board Rule 178.3³²
- Misleading advertising³³

- Failure to report accurate information on an application or renewal³⁴
- Minor violation of a board order³⁵

To resolve the complaint more quickly, the Board may impose an administrative penalty. The physician will receive notice of the Board’s intent to impose an administrative penalty, which takes the following form:

NOTICE OF INTENTION TO IMPOSE ADMINISTRATIVE PENALTY

The Texas Medical Board (“TMB”) has received information that you may have committed an administrative violation of the Medical Practice Act, specifically <<ALLEGED FACTS>>, in violation of <<STATUTORY VIOLATION>>.

The proposed amount of an administrative penalty for this violation is \$<<AMOUNT>>. You may respond to this Notice as follows:

•NO CONTEST. If you do not contest the allegations and agree to the proposed administrative penalty, sign your name below and mail the copy of this notice to TMB. This must be received by TMB before <<30 days from today>> to assure that it may be reviewed for approval in a timely manner by the board. Your payment of an administrative penalty will be a public record but your name will not be published in the TMB Newsletter or any press release, nor will it be reported to the National Practitioner’s Databank. This matter will be placed on a fast track for resolution, and TMB will make every effort

²¹ TEX. OCC. CODE § 164.003(b)(1); TMB RULE § 179.6(a).

²² TEX. OCC. CODE § 164.0025.

²³ TMB RULE § 190.14(7)(A).

²⁴ TMB RULE § 190.14(7)(B).

²⁵ TMB RULE § 190.14(7)(I).

²⁶ TMB RULE § 190.14(7)(K).

²⁷ TMB RULE § 190.14(7)(L).

²⁸ TMB RULE § 190.14(7)(G).

²⁹ TMB RULE § 190.14(7)(R).

³⁰ TMB RULE § 190.14(7)(S).

³¹ TMB RULE § 190.14(7)(T).

³² TMB RULE § 190.14(7)(U).

³³ TMB RULE § 190.14(7)(V).

³⁴ TMB RULE § 190.14(7)(W).

³⁵ TMB RULE § 190.14(7)(Q).

to resolve this matter within 60 days of receipt of your payment.
 Sign here if you do not contest the allegations:

•**WRITTEN RESPONSE.** You may provide a written response and information showing that you have not violated the Medical Practice Act. Your response, along with a copy of this notice, must be received by TMB before <<30 days from today>> to assure that it is received before the Board enters an order imposing an administrative penalty. (NOTE: If your response is received before <<27 days from the received date>>, TMB staff has authority to recommend dismissal of the allegations so that your record will not show that a complaint has been filed against you. After that date, this matter will be considered a filed complaint.) Your response will be presented to the Disciplinary Process Review Committee of the Board at the next regular meeting. The Committee will consider your response and recommend to the Board whether an administrative penalty should be imposed or the matter should be dismissed. This matter will be placed on a fast track for resolution, and TMB will make every effort to resolve this matter within 60 days of receipt of your response.

Sign here if you are providing a written response:

•**PERSONAL APPEARANCE.** Before <<30 days from today>>, you may request a personal appearance at an informal meeting before one or more Board representatives at the TMB offices in Austin, Texas. Please send the copy of this Notice to TMB at the address below. You will then be notified of the date and time of

this meeting. If you choose this option, this matter will not be placed on the fast track for resolution.

Sign here if you request a personal appearance:

IF YOU FAIL TO RESPOND TO THIS NOTICE BY ONE OF THE ALTERNATIVES SET FORTH ABOVE, TMB MAY ENTER AN ORDER IMPOSING THE PROPOSED ADMINISTRATIVE PENALTY, AS AUTHORIZED BY SECTION 165.001, TEXAS OCCUPATIONS CODE.

Examples of the administrative penalties include:

\$2,000 per violation	<ul style="list-style-type: none"> • Failure to timely comply with a board subpoena or request for information • Failure to obtain/document continuing medical education, lacking more than 10 hours • Failure to keep drug logs • Failure to report accurate information on an application or renewal
\$1,000 per violation	<ul style="list-style-type: none"> • Failure to timely provide copies of medical or billing records or overcharging for medical records • Discipline by peers that does not involve patient care • Discipline by another state or military that does not involve patient care • Failure to obtain/document continuing medical education, lacking 6-10 hours • Failure to display sign

	<p>required by Board Rule 178.3</p> <ul style="list-style-type: none"> • Misleading advertising • Minor violation of a board order
\$500 per violation	<ul style="list-style-type: none"> • Failure to obtain/document continuing medical education, lacking 5 hours or less • Failure to report liability claims to the board • Failure to change address with the board

An Order imposing an administrative penalty might take the following form:

ORDER IMPOSING ADMINISTRATIVE PENALTY

The Texas Medical Board (TMB) has determined that <<Full Name>> (“the Respondent”) is in violation of <<STATUTORY VIOLATION>>. TMB hereby imposes an administrative penalty for this violation, as authorized by Section 165.001, Texas Occupations Code and Board Rule 187.75-82.

The amount of the imposed penalty is <<AMOUNT>>. Payment of this penalty is due no later than 60 days after the Respondent receives notice of this Order. The administrative penalty shall be paid in a single payment by cashier's check or money order payable to the Texas Medical Board and shall be submitted to the Director of Enforcement for the Board for routing so as to be remitted to the Comptroller of Texas for deposit in the general revenue fund. Respondent's failure to pay the administrative penalty as ordered shall constitute grounds for further disciplinary action by the Board, and may result in a referral by the Executive Director of the

Board for collection by the Office of the Attorney General.

The Respondent may appeal the imposition of this penalty as provided by Section 165.005, Texas Occupations Code, not later than 30 days after the date this Order imposing the administrative penalty is final.

THIS IS A PUBLIC RECORD.

Standard of Care Violations

If the complaint involves standard of care concerns, the complaint is reviewed by two outside physician reviewers.³⁶ Both reviewers must agree that a violation has occurred. If they do not agree, a third review is conducted.³⁷ 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.”³⁸ However a complaint can still be pursued by the Board, even if the experts retract the standard of care opinion.

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.³⁹

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.⁴⁰

³⁶ TEX. OCC. CODE § 154.0561(a)-(b).

³⁷ TEX. OCC. CODE § 154.0561(c).

³⁸ TEX. OCC. CODE § 164.0035.

³⁹ TMB RULE § 187.14(7).

⁴⁰ TEX. OCC. CODE § 164.0015.

These plans do not restrict the physician's license and are not reported to the National Practitioner Data Bank.

If the physician rejects the QA Committee's remedial plan or if the QA Committee recommends further proceedings, an Informal Settlement Conference (ISC) is held. The ISC panel consists of two members of the Board or its district review committees.⁴¹ The physician and his/her attorney are invited to participate in the conference. The physician is given notice of the date of the ISC hearing forty-five days in advance.⁴² If there is a need to change the date, a written request must be made within five days of receiving notice of the scheduled date of the ISC.

The Board must give the physician an ISC packet containing their evidence at least forty-five days before the ISC. The physician may then respond or supplement earlier, but the response must be received at least fifteen days before the ISC.

Responding to the Formal Complaint

If a formal complaint goes forward, the physician will have an opportunity to make a full response. You should consider this your chance to present your side of the case. Do not hold back part of the response, hoping to make a bigger impact at the ISC. Your response might include:

- A written response to the allegations;
 - This response should be comprehensive. This is your chance to include mitigating factors that should be considered by the panel including:

- The physician's background, education and training
- The physician's value to the community;
- The relationship between the physician and the complaining patient;
- Any changes the physician has already implemented in his practice
- Whether this is the first time a violation has been reported;
- A complete copy of the medical records;
 - The Board can subpoena medical records from other providers, but physicians' attorneys cannot issue subpoenas in these proceedings.
- Expert reports;
 - It may be cost prohibitive to get expert support prior to being notified that the matter has been referred to an ISC.
 - It may also be better to wait until you have the reports from the Board's experts before asking your experts to prepare reports.
 - Consider taking videotaped statements from your experts which can be played at the ISC.
- Witness statements;
 - Consider taking videotaped statements from important witnesses which can be played at the ISC.
- Medical literature; and/or
- Documentary evidence, such as photographs, letters, internet posts.

Because your response may be voluminous, organization is important. We prepare ours as a searchable, linked .pdf document. Including hyperlinks allows the reviewer to quickly go to the referenced document without having to search through pages of materials. It also allows you to highlight and annotate the records to draw attention to your points.

⁴¹ TEX. OCC. CODE § 164.003(b)(4); TEX. OCC. CODE § 164.0031.

⁴² TEX. OCC. CODE § 164.003(b)(2)

Dismissal of Complaints

If the information obtained during the investigation is insufficient to show that there has been an administrative or standard of care violation, the matter is referred to a committee for evaluation.⁴³ If the committee agrees, their finding will be forwarded to the Board with a recommendation that the complaint be dismissed. The Board will send a letter to the physician informing him of the dismissal.⁴⁴ This letter may still contain recommendations for improvements to the physician's practice.

Informal Settlement Conference

The ISC is an opportunity for the Board and the physician to discuss the complaint with the panel.⁴⁵ A Board attorney will serve as the "moderator." He advises the panel on the law and previous board actions.⁴⁶ Another Board attorney will present the evidence that a violation has occurred.⁴⁷ This is typically a summary of the information in the ISC packet, which the panel has already reviewed.

The physician is then allowed to make a presentation to the panel.⁴⁸ This typically consists of a statement by the attorney and a statement from the physician. It is important for the physician to address the panel directly so that they can hear explanations, rationale and discussion of mitigating factors. The panel may also question the physician, so he or she should be prepared to

address all aspects of the ISC packet and his or her response.

At the conclusion of the conference, the panel will meet privately and make their recommendations.⁴⁹ They can either recommend dismissal or an agreed order.⁵⁰

Agreed Orders

The agreed order recommended by the panel is reduced to writing by the Board attorney.⁵¹ It generally takes the following form:

AGREED ORDER

On the __ day of _____, 20__, came on to be heard before the Texas Medical Board (the "Board"), duly in session, the matter of the license of _____, ("Respondent.)

On _____, 20__, the Respondent appeared in person, with counsel at an Informal Show Compliance Proceeding and Settlement Conference in response to a letter of invitation from the staff of the Board. The Board's representatives were _____ represented Board staff.

Upon recommendation of the Board's representatives and with the consent of the Respondent, the Board makes the following Findings of Fact and Conclusions of Law and enters this Agreed Order.

BOARD CHARGES

<<The allegations are detailed here.>>

⁴³ TMB RULE § 178.7(c).

⁴⁴ TMB RULE § 178.7(e).

⁴⁵ TEX. OCC. CODE § 164.003(b)(3).

⁴⁶ TEX. OCC. CODE § 164.003(b)(5); TEX. OCC. CODE § 164.0032(c).

⁴⁷ TEX. OCC. CODE § 164.003(b)(6).

⁴⁸ TEX. OCC. CODE § 164.003(b)(2); TEX. OCC. CODE § 164.003(c); TEX. OCC. CODE § 164.0032(d).

⁴⁹ TEX. OCC. CODE § 164.003(d); TEX. OCC. CODE § 164.0032(e).

⁵⁰ TEX. OCC. CODE § 164.0032(f).

⁵¹ TEX. OCC. CODE § 164.0032(g).

BOARD HISTORY

<<This section includes a statement of whether the Respondent has been the subject of disciplinary action in the past.>>

FINDINGS

The Board finds the following:

1. General Findings:

a. Respondent received all notice required by law. All jurisdictional requirements have been satisfied. Respondent waives any defect in notice and any further right to notice or hearing under the Medical Practice Act, Title 3, Subtitle B, Texas Occupations Code (the "Act") or the Rules of the Board.

b. Respondent currently holds Texas Telemedicine License _____. Respondent was originally issued this license to practice medicine in Texas on _____. Respondent is not licensed in any other state.

c. Respondent is primarily engaged in _____. Respondent is certified in _____.

d. Respondent is ___ years of age.

Specific Panel Findings:

<<includes facts and findings from the investigation and ISC>>

Mitigating Factors:

In determining the appropriate sanctions in this matter, the Panel considered the following mitigating factors:

<<includes mitigating factors such as remedial measures, changes in the physicians' practice, facts regarding the complainant, Respondent's cooperation, etc.>>

CONCLUSIONS OF LAW

Based on the above Findings, the Board concludes that:

1. The Board has jurisdiction over the subject matter and the Respondent pursuant to the Act.
2. <<lists the authority of the Board to impose discipline for the specific violations.
3. Section 164.001 of the Act authorizes the Board to impose a range of disciplinary actions against a person for violation of the Act or a Board rule.
4. Section 164.002(a) of the Act authorizes the Board to resolve and make a disposition of this matter through an Agreed Order.
5. Section 164.002(d) of the Act provides that this Agreed Order is a settlement agreement under the Texas Rules of Evidence for the purposes of civil litigation.

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Board ORDERS that the Respondent be subject to the following terms and conditions:

<<lists the restrictions and penalties>>

RESPONDENT WAIVES ANY FURTHER HEARINGS OR APPEALS TO THE BOARD OR TO ANY COURT IN REGARD TO ALL TERMS AND CONDITIONS OF THIS AGREED ORDER. RESPONDENT AGREES THAT THIS IS A FINAL ORDER.

THIS ORDER IS A PUBLIC RECORD.

I, (Respondent), HAVE READ AND UNDERSTAND THE FOREGOING AGREED ORDER. I UNDERSTAND THAT BY SIGNING, I WAIVE CERTAIN RIGHTS. I SIGN IT VOLUNTARILY. I

UNDERSTAND THAT THIS AGREED ORDER CONTAINS THE ENTIRE AGREEMENT AND THERE IS NO OTHER AGREEMENT OF ANY KIND, VERBAL, WRITTEN OR OTHERWISE.

The physician will receive a copy of the order before it is sent to the Board. The physician has a chance to review the order and can either accept it, ask for changes, or reject the order.⁵² Once the order is agreed upon by the physician and the Board attorney, it is sent to the Board for approval.⁵³

SOAH Hearings

If an agreed order cannot be reached, the complaint will be referred for prosecution by a Board attorney before the State Office of Administrative Hearings (SOAH).⁵⁴ An administrative law judge conducts a hearing and recommends an outcome.⁵⁵ The ALJ will then issue a Proposal for Decision. Both sides have fifteen days to file exceptions to the proposal.⁵⁶ The Board must accept or reject the recommendations from the administrative law judge.⁵⁷ Once the physician receives notice of the decision, he has twenty days to file a motion for rehearing.⁵⁸ In most cases, except when there is imminent peril or the parties have agreed, a motion for rehearing is a prerequisite to appeal.⁵⁹ Appeals are taken to the district court in Travis County and must be filed within thirty days.⁶⁰

⁵² *Id.*

⁵³ TEX. OCC. CODE § 164.0032(h).

⁵⁴ TEX. OCC. CODE § 164.0032(g).

⁵⁵ TMB RULE § 187.23.

⁵⁶ 7 TEX. ADMIN CODE. § 155.507.

⁵⁷ TMB RULE § 187.23.

⁵⁸ TEX. GOV'T CODE § 2001.146(a).

⁵⁹ TEX. GOV'T CODE § 2001.145(a).

⁶⁰ TEX. GOV'T CODE § 2001.176.

The SOAH has a very informative website with tips and links for anyone involved in a proceeding there. www.soah.state.tx.us.

WHAT BECOMES PUBLIC RECORD?

Reports of disciplinary action imposed by the Board, including an administrative penalty or fine, a corrective order, an agreed order, or suspension are available to the public on the Board's website and within the individual physician profiles. The Occupations Code specifically states that an agreed disposition or a remedial plan is public information.⁶¹

WHAT ABOUT LITIGATION?

Medical Board Privilege

The general rule is that Board complaints and investigations are confidential. The Occupations Code states:

(a) A record, report, or other information received and maintained by the board under this subchapter or Subchapter B, including any material received or developed by the board during an investigation or hearing and the identity of, and reports made by, a physician performing or supervising compliance monitoring for the board, is confidential. The board may disclose this information only:

(1) in a disciplinary hearing before the board or State Office of Administrative Hearings or in a subsequent trial or appeal of a board action or order;

(2) to the physician licensing or disciplinary authority of another jurisdiction, to a local, state, or national professional medical society or association, or to a medical peer review committee located inside or outside this state that is

⁶¹ TEX. OCC. CODE § 164.002(c).

concerned with granting, limiting, or denying a physician hospital privileges;

(3) under a court order;

(4) to qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any physician or other individual is first deleted; or

(5) to the division of workers' compensation of the Texas Department of Insurance as provided by Section 413.0514, Labor Code.⁶²

Subsection (3), which allows disclosure under a court order, is sometimes cited as a means to gain disclosure during medical malpractice cases. For example, the requesting party files a motion to compel seeking a “court order” which would require disclosure. However, subsection (c) of 160.006 prevents this tactic:

(c) A record or report disclosed by the board under this subchapter, a record or report received, maintained, or developed by the board, a medical peer review committee, a member of the committee, or a health care entity, and a record or report received or maintained by the State Office of Administrative Hearings under this subchapter are not available for discovery or court subpoena and may not be introduced into evidence in any action for damages, including a medical professional liability action that arises out of the provision of or failure to provide a medical or health care service.⁶³

Likewise, the Board Rules prevent disclosure of the investigative materials and state:

All complaints, adverse reports, investigation files, other investigation

reports, and other investigative information in the possession of, received or gathered by the board shall be confidential as provided by the Medical Practice Act ("the Act"), Title 3 Subtitle B Tex. Occ. Code Ann. and no employee, agent, or member of the board may disclose information contained in such files except in the following circumstances:

(1) to the appropriate licensing authorities in other states, the District of Columbia, or a territory or country in which the physician is licensed or is applying for licensure;

(2) to a peer review committee considering a physician's application to obtain or retain privileges;

(3) to appropriate law enforcement agencies if the information is relevant to an active criminal investigation or if the investigative information indicates a crime may have been committed;

(4) to a health care entity upon receipt of written request, if there is a current complaint under active investigation that has been assigned by the executive director to a person authorized by the board to pursue legal action.

(5) to other persons if required during the course of the investigation;

(6) to other regulatory agencies as required by law; and

(7) a person who has provided a statement may receive a copy of the statement.⁶⁴

Few Texas courts have considered the admissibility of Board complaints and orders. In the few cases where the issue has been addressed, courts have excluded the evidence. In *Gustafson v. Chambers*, the First Court of Appeals upheld the exclusion of “every document that relates or refers to every complaint filed with the Texas State

⁶² TEX. OCC. CODE § 160.006(a).

⁶³ TEX. OCC. CODE § 160.006(c).

⁶⁴ TMB RULE § 179.3.

Board of Medical Examiners.”⁶⁵ The Court held that answering such an interrogatory was prohibited by Tex. R. Civ. Stat. Ann. art 4495b, which has been codified as Tex. Occ. Code § 160.006.⁶⁶ The Court noted that the records of the Board are privileged and not subject to discovery. “This statute, which makes all complaints received by the Board confidential, includes any complaints” against the defendant.⁶⁷ The Court afforded broad protection to the records of the Board pertaining to this physician.

The Dallas Court of Appeals also considered this issue in *Kavanaugh v. Perkins*.⁶⁸ The trial court had ordered the physician to produce “for *in camera* inspection documents within his possession prepared by medical review committees or the State Board of Medical Examiners that he claims are privileged.”⁶⁹ The physician filed a writ of mandamus. The appellate court acknowledged the Board privilege, saying, “All complaints, adverse reports, investigation files, other investigation reports, and other investigative information possessed, received or gathered by the Texas State Board of Medical Examiners, its employees or its agents relating to a licensee are privileged and confidential and are not subject to discovery.”⁷⁰ However, the Court tempered this ruling by pointing out that this exception does not apply to documents that are kept in the regular course of business.⁷¹ That is, documents that can be offered or proved by separate means do not become privileged simply because they are

submitted or referred to by the Board. An obvious example of this is the medical records of the complaining patient. These can still be used in the health care case, even though they are a part of the Board’s file.

Agreed Orders are public records and are listed on the physician’s profile on the TMB website. The SOAH complaint is also a public record. It remains public despite a later disposition of the case, regardless of the nature of that disposition. Even if an agreed order is eventually reached, the underlying complaint initiated with the SOAH by the Board remains public record.

However, the Occupations Code specifically protects the information gathered by the Board and states:

*Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.*⁷²

Thus, while the outcome of the case is public record, the complaint and file remain privileged and protected from discovery. Confidential investigative material which arose out of peer review activities disclosed by the Board at a formal, public hearing at

⁶⁵ *Gustafson v. Chambers*, 871 S.W.2d 938, 949 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).

⁶⁶ *Id.*

⁶⁷ *Id.* at 946.

⁶⁸ *Kavanaugh v. Perkins*, 838 S.W.2d 616 (Tex. App.—Dallas 1992, orig. proceeding).

⁶⁹ *Id.* at 622.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² TEX. OCC. CODE § 164.007(c).

SOAH is likewise not admissible in a medical malpractice case.⁷³

Settlement Agreements

The Occupations Code makes the Agreed Order inadmissible by designating it as a settlement agreement.⁷⁴ The settlement would be inadmissible under Texas Rule of Evidence 408. The settlement agreement exclusion might not apply if the physician has multiple Board orders or if his license was revoked by the Board.⁷⁵

In *Allen v. Scott*, the Amarillo Court of Appeals considered the admissibility of an Agreed Order to prove the physician's negligence.⁷⁶ On appeal, the plaintiff argued that she was entitled to a new trial so that she could offer a document wherein the defendant physician purportedly admitted his negligence.⁷⁷ The document was entitled "Agreed Order" and concerned an administrative or disciplinary proceeding initiated against the defendant before the Texas Medical Board.⁷⁸ The document stated that the "Agreed Order is a settlement agreement under the Texas Rules of Evidence for purposes of civil litigation."⁷⁹ The Amarillo Court noted that the Texas Supreme Court had previously held that "settlement agreements are discoverable . . . to the extent relevant . . . but not admissible

at trial to prove liability."⁸⁰ Plaintiff sought a new trial so that she could tender the "Agreed Order" as evidence establishing defendant's negligence.⁸¹ Because that would have violated the Supreme Court's directive in *Ford Motor Co. v. Leggat*, the trial court did not abuse its discretion in refusing to grant plaintiff a new trial to effectuate her intent.⁸²

Irrelevant Evidence

Other objections would include Texas Rule of Evidence 402 (irrelevant evidence inadmissible); 403 (exclusion of relevant evidence on special grounds); or 404 (character evidence not admissible to prove conduct). In *Hutton v. Payne*, the Amarillo Court of Appeals held that evidence that the defendant doctor's practice privileges had been suspended and that his license had been restricted two years before rendering services to the plaintiff was not admissible.⁸³ The plaintiff attempted to use the records to impeach the physician's credibility when he testified that he did not violate the standard of care.⁸⁴ The trial court found that there was a lack of the requisite nexus between the events of the Board complaint and the events of the lawsuit.⁸⁵ Unless the Board case is identical to the lawsuit, this objection is generally applicable and could be used in most instances to exclude this evidence.

CONCLUSION

Texas Medical Board complaints provide practitioners with serious challenges. Once

⁷³ TEX. OCC. CODE § 160.006(c)-(d).

⁷⁴ TEX. OCC. CODE § 164.002(d).

⁷⁵ TEX. OCC. CODE § 164.002(d), which states in part, "This subsection does not apply to a license holder who has previously entered into an agreed disposition with the board of a different disciplinary matter or whose license the board is trying to revoke."

⁷⁶ *Allen v. Scott*, No. 07-06-0075-CV, 2008 Tex. App. LEXIS 572, *5-7 (Tex. App.—Amarillo January 25, 2008, pet. denied)(mem. op.).

⁷⁷ *Id.* at *5.

⁷⁸ *Id.* at *6.

⁷⁹ *Id.*

⁸⁰ *Id.* (citing *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 649 (Tex. 1995), citing TEX. R. EVID. 408).

⁸¹ *Id.* at *7.

⁸² *Id.*

⁸³ *Hutton v. Payne*, 2002 WL 971943 (Tex. App.—Amarillo 2002, no pet.) (not designated for publication).

⁸⁴ *Id.* at *3.

⁸⁵ *Id.* at *3.

a complaint is made, the practitioner and his counsel must take the complaint seriously. Providing timely, accurate and complete information to the Board is the only option.

ACKNOWLEDGMENTS

Thanks to:

- Paul Starr and Missy Atwood, “TMB Board Complaints,” presented at the 19th Annual Advanced Medical Malpractice Course 2012, and available at from TexasBar CLE.
- 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.
- Michael R. Sharp, “The Texas Medical Board: Selected Issues Relevant to Medical Malpractice Plaintiff and Defense Counsel,” presented at the 16th Annual Advanced Medical Malpractice Course 2009, and available from TexasBar CLE.

QUESTIONS AND ANSWERS

Q: Does the 180 day deadline start from the initial letter from the Board or from the time they announce formal investigation is taking place? What happens if this 180-day time period passes?

TMB Rule 179.6 governs the time limits for investigations and states:

- (a) Each investigation shall be completed before the passage of the 180th day after the complaint has been filed and an official investigation opened, unless there is good cause as to why the investigation could not be completed within that time. Good cause shall include, but shall not be limited to:
 - (1) the unavailability of pertinent documents that the agency has made all reasonable efforts to obtain;
 - (2) the refusal of the subject licensee to cooperate during the course of the investigation;
 - (3) extended illness of a board investigator or other board employee integral to the completion of the investigation;
 - (4) delinquency in reviewing the case and submitting a report by an Expert Physician Reviewer;
 - (5) the necessity of additional investigation as determined by the Board's internal Quality Assurance Committee or DPRC;
 - (6) additional complaints pending investigation regarding the licensee; and
 - (7) other events beyond the control of the agency.
- (b) The board may not dismiss a complaint solely on the grounds that an investigation has not been completed and/or the case has not been scheduled for hearing within 180 days.
- (c) If an investigation has not been completed and/or the case has not been scheduled for hearing within 180 days, the board must notify the parties to the complaint as to why these deadlines were not met. This notice is not required if it would jeopardize an investigation.
- (d) There is no time limit from the time at which a violation of the Act occurred by which the board must investigate a complaint.

Q: In what format can mitigating circumstances be presented before an ISC has been set?

These can be addressed in the initial response to the complaint. TMB Rule 178.5(d) states:

During this preliminary investigation, the subject licensee may be given the opportunity to respond to the allegations. If the subject licensee is given this opportunity, the response must be received within the time prescribed by agency staff. Any additional information received from the subject licensee will be added to the information maintained on the complaint.

Q: Do you know the requirements for the new specialty recognized by the Board in telemedicine?

The Board has frequently asked questions and a link to the Rule changes at <http://www.tmb.state.tx.us/professionals/physicians/licensed/telemedicineFAQs.php>

Q: After jurisdiction is confirmed and it is determined that the complaint is a standard of care issue, there are 2 reviewers to evaluate. Are the 2 reviewers physicians? Are they of the same expertise as the physician against whom the complaint was asserted?

Expert physician reviews are governed by TMB Rule 182.8, which states, in part:

(a) Selection of Reviewers. Any complaint alleging a possible violation of the standard of care will be referred to Expert Physician Reviewers who will review all the medical information and records collected by the board and shall report findings in the prescribed format.

(1) Reviewers shall be randomly selected from among those Expert Panel members who practice in the same specialty as the physician who is the subject of the complaint. The practice area or specialty declared by the subject physician as his area of practice may be the specialty of the expert reviewers.

(2) If there are no Expert Panel Members in the same specialty or if the randomly selected Reviewer has a potential or apparent conflict of interest that would prevent the Reviewer from providing a fair and unbiased opinion, that Reviewer shall not review the case and another Reviewer shall be randomly selected from among those Expert Panel members who practice in the same or similar specialty as the physician who is the subject of the complaint, after excluding the previously selected Reviewer.

(A) A potential conflict of interest exists if the selected Reviewer practices medicine in the same geographical medical market as the physician who is the subject of the complaint and (i) is in direct competition with the physician or (ii) knows the physician.

(B) An apparent conflict of interest exists if the Reviewer: (i) has a direct financial interest or relationship with any matter, party, or witness that would give the appearance of a conflict of interest; (ii) has a familial relationship within the third degree of affinity with any party or witness; or (iii) determines that the

Reviewer has knowledge of information that has not been provided by the Board and that the Reviewer cannot set aside that knowledge and fairly and impartially consider the matter based solely on the information provided by the Board.

(3) Notwithstanding the provisions of subsection (a)(2) of this section, if no Reviewer agrees to review the case who can qualify under the requirements of that subsection, a Reviewer who has a potential conflict may review the case, provided the Expert Reviewers' Report discloses the nature of the potential conflict.

(4) If any selected Reviewer has a potential or apparent conflict of interest, the Reviewer shall notify board staff of the potential or apparent conflict.

Q: If the initial reviewers agree there is a standard of care violation, does it go to the Quality Assurance Committee next? Does Quality Assurance Committee decide whether a remedial plan may be appropriate? Does the Quality Assurance Committee decide if it goes to the ISC? Who comprises the Quality Assurance Committee?

TMB Rule 187.14 governs informal resolution of complaints and states:

(7) Informal Resolution of Violations.

(A) The Quality Assurance ("QA") Committee may recommend referral to an ISC, dismissal, or an agreed settlement of any complaint.

(B) The QA Committee shall include designated board members, district review committee members, and board staff members.

(C) The QA Committee shall review all complaints referred by the investigation division to determine whether the complaint should be accepted for legal action.

(D) If the QA Committee determines that an offer of settlement should be made regarding a complaint the offer of settlement shall be presented to the licensee.

(i) If the licensee accepts the offer of settlement, the signed proposed order or remedial plan shall be presented to the board at a public meeting for approval.

(ii) If the licensee fails to timely accept the offer of settlement, or if the licensee requests that an Informal Settlement Conference (ISC) be held, the offer shall be deemed to be rejected and an ISC shall be held.

Q: What procedural mechanism is used to obtain medical records from other physicians? If it goes to ISC, the Board often provides information from other health care providers that they have obtained. However, how does the doctor obtain records?

The physician generally has to rely on the records obtained by the Board. However, TMB Rule 187.16(b) allows the physician to request complete copies of those records. It states:

(b) If the information that the board intends to use at the ISC includes only excerpts of any medical record, the licensee has a right to obtain the complete medical record within 14 days after a request is mailed.

Q: I represent dentists in front of the dental board and it is common to negotiate the terms of discipline suggested by the panel following an ISC - i.e. length of probated suspension, amount of administrative penalty, CE required, etc. Can this be done after an ISC at the medical board?

The Board Rules are vague as to the modifications that will be considered after an ISC. TMB Rule 187.19 states, in pertinent part:

(d) Additional negotiations may be held between board staff and the licensee or the authorized representative. In consultation with the board representatives, as available, the recommendations of the board representatives may be subsequently modified based on new information, a change of circumstances, or to expedite a resolution in the interest of protecting the public.

(e) At the discretion of board staff, a licensee may be invited to participate in negotiations. One or both of the board representatives from the informal show compliance proceeding, or a board member if no such board representative is available, may participate in the negotiations, either in person or by telephone.

(f) The board representative(s) shall be consulted and must concur with any subsequent substantive modifications before any recommendations are sent to the full board for approval.

Q. How much can physicians charge for medical records?

The fees are set out in the Texas Administrative Code. As of the writing of this paper, the Code states:

(1) The physician responding to a request for such information shall be entitled to receive a reasonable, cost-based fee for providing the requested information. A reasonable fee shall be a charge of no more than \$25 for the first twenty pages and \$.50 per page for every copy thereafter. If an affidavit is requested, certifying that the

information is a true and correct copy of the records, a reasonable fee of up to \$15 may be charged for executing the affidavit. A physician may charge separate fees for medical and billing records requested. The fee may not include costs associated with searching for and retrieving the requested information.

(2) *A reasonable fee, shall include only the cost of:*

(A) copying, including the labor and cost of supplies for copying;

(B) postage, when the individual has requested the copy or summary be mailed; and

(C) preparing a summary of the records when appropriate.

22 TEX. ADMIN. CODE § 165.2(e). If the physician charges for producing a copy, then the records must be turned over within 15 business days after the receipt of reasonable fees for furnishing the records. 22 TEX. ADMIN. CODE § 165.2(b).

Q. Is the statute of limitations retroactive?

The Board rule states that the statute of limitations is effective as of December 4, 2011. Texas laws are “presumed to be prospective in [their] operation unless expressly made retrospective.” See TEX. GOV’T CODE § 311.022. This provision of the Code Construction Act applies to rules enacted pursuant to a code and would encompass the Board’s statute of limitations rule. TEX. GOV’T CODE § 311.002.

Q. What are “boundary violations” and are they subject to a statute of limitations?

Boundary violations range from mild to severe, but they all are potentially harmful to the patient and may affect the quality of care that patient receives. Examples of possible boundary violations include sexual/physical relationships, economic involvement, overtly political requests, or similar conduct that the patient would not otherwise engage in but for the actions, conduct, or directive of the physician. Boundary violations are not specifically addressed in the statute of limitations rule, which states:

§178.9 Statute of Limitations

(a) Standard of Care.

(1) The board may not consider or act on a complaint involving care provided more than seven years before the date on which the complaint is received by the board unless the care was provided to a minor. If the care was provided to a minor, the board may not consider or act on a complaint involving the care after the later of:

(A) the date the minor is 21 years of age; or

(B) the seventh anniversary of the date of care.

(2) Notwithstanding paragraph (1) of this subsection, a complaint previously investigated relating to an alleged standard of care violation that occurred more

than seven years from the date a new complaint is filed with the board, may be considered by the board with a new complaint for the purpose of determining whether there is a pattern of practice violating the Act.

(3) The statute of limitations relating to standard of care violation shall only apply to licensees and not applicants for licensure.

(b) Other Violations. There is no statute of limitations for the filing of complaints in relation to any other violation including action by another state licensing entity or criminal conduct.

Therefore, if the Board believes that the boundary violation was also a standard of care violation, it would fall under the statute of limitations.