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AUTHORITY AND DUTIES, TEXAS MEDICAL BOARD

The Texas Medical Board (formerly the Texas State Board of Medical Examiners), has been in existence since the late 1800’s and is charged with the protection of the public through the regulation of physicians, physician assistants, acupuncturists, and surgical assistants. The statute establishing the Texas Medical Board (“TMB” or “Board”) and defining its powers, duties and responsibilities for physicians is Title 3, Subtitle B, Chapters 151 – 165, Texas Occupation Code. The Statute and Rules of the TMB can be accessed through the TMB website at www.tmb.state.tx.us.

GENERAL COMPLAINT AND DISPOSITION PROCEDURES:

The TMB is currently required to investigate every complaint, even if the complainant is anonymous. On receipt of a complaint, the Board will issue a preliminary notice of complaint letter (“pre-investigation”) to the physician and offer to consider the physician’s response before proceeding to a formal investigation. On quality of care cases, most proceed to investigation whether or not the physician responds because at this level there usually is no internal physician review. Many, but not all cases follow the process described below.

If the matter indicates no violation on its face, or if the physician’s response appears to conclusively dispose of the complaint issues, the matter is dismissed. Some matters, deemed non-jurisdictional, such as insurance matters may be referred to other entities.

If the staff determines a formal investigation should be opened, the Board gathers the materials obtained from the physician, the patient charts, and any additional pertinent information.

Quality of care issues are sent to a pre-approved and pre-appointed physician reviewer for an anonymous review for a standard of care analysis. Up to three reviews are obtained until two agree- i.e. a panel review process, also described below. Generally, if the consultants agree that there was a breach of the standard of care, a consolidated written review is provided by one of the consultant reviewers and forwarded to the Legal Division where the case is then docketed for an informal conference. If two reviewers state there is no deviation from the standard of care, the matter is submitted to the next meeting of the Board review Committee, the Disciplinary Process Review Committee (“DPRC”).

For cases finding a violation of the standard of care, or for other alleged substantiated violations, the physician is notified of the scheduling of an informal settlement conference (“ISC”) and provided with a copy of the unfavorable anonymous consultant review and invited to respond with a rebuttal for the stated purpose of having the rebuttal considered by the consultant reviewers before the ISC.

Written materials from the responding physician are to be submitted in advance for the ISC panel to consider along with the adverse Board Consultant’s review. The responding physician is provided with a more extensive packet of evidence and data prior to the ISC. Notably, this information is not provided without the scheduling of an ISC and is usually not provided until at least 30 days prior to the ISC. This distinction is important as physicians who choose a “fast track” option, described below, do not receive this documentation.

At the ISC the physician meets with a two member panel, consisting of a physician and a public member. The panel is advised by a Board attorney, usually the General Counsel, the Litigation Director or one of the Board’s Assistant General Counsels, and the case is presented by another Board staff attorney, the Staff Attorney assigned to the case. The meeting is labeled as “informal” but it is rarely informal or comfortable for the responding physician. The case is briefly presented by the staff attorney, statements from complainants are heard (then they are excused), then the physician and his/her counsel respond. Questions are asked, the physician is excused, and the panel deliberates, recalls the physician, and then verbally announces their decision as to whether they will recommend a settlement or dismissal (which still needs ratification at the next DPRC meeting). On rare occasions the case may be referred for further investigation or the performance of a psychiatric or physical evaluation.

If a settlement is recommended at an ISC, an Agreed Order is later drafted, possibly negotiated, and if signed by the physician, ratified by Board at its next meeting. The Agreed Order then becomes final and becomes a matter of public record. Exceptions to the public nature of Agreed Orders are discretionary

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1 Self-reports of substance abuse and psychiatric or other physical conditions are subject to private dispositions and with recent statutory changes, possible referral to the newly created Physicians Health Program.

2 The Legal staff is separated into ISC attorneys and SOAH (litigating) attorneys. The staff is supervised by an attorney Litigation Director.
agreed rehabilitation orders for psychiatric conditions, physical impairments, or self-reported substance abuse issues.

Failing to reach an agreement, the Board will file a formal complaint with the State Office of Administrative Hearings (SOAH) for formal hearing. This complaint is public and is listed on the TMB website under the physician’s profile. It remains public despite any later disposition of the case, regardless of the nature of that disposition (including eventual dismissals).

Following the public contested case hearing at SOAH, which has virtually similar discovery mechanisms and evidence requirements as in civil court; the Administrative Law Judge (ALJ) prepares a written recommendation as to the findings and recommended disposition of the case. This is provided to the respondent physician and staff attorney for rebuttal (“exceptions”), then forwarded to the Board for eventual action. After notice, the case is scheduled for a Board bimonthly meeting and the parties make final argument and the case is decided by majority Board vote.

If the physician is aggrieved by the final action of the Board, the physician can take steps to appeal to the Travis County District Court. The appeal is under the very difficult “substantial evidence rule” and no new evidence is taken. This is basically an appellate review whereby, failing to demonstrate some fatal procedural flaw, the Respondent/Appellant physician must show that there was not a scintilla of evidence to support the Board’s ruling. If the appeal is successful, the District Court will likely still remand the case to the Board for corrective action, rather than reverse and render. The parties can of course appeal that decision to the Court of Appeals and potentially to the Texas Supreme Court.

**ADMINISTRATIVE "FAST TRACK" COMPLAINT RESOLUTION PROCESS**

Certain investigations/complaints are processed through the Board’s self-described “fast track” resolution process. Generally, eligible violations include minor violations such as advertising complaints, failure to provide medical records in a timely manner, failure to obtain required continuing medical education, and minor violations of reporting or other Board rule requirements not involving quality of care issues. The Board refers to this mechanism as “fast track” resolution as the expected turnaround time is a matter of a few months versus significantly longer time frames for more substantive allegations or violations.

Generally, the Board’s enforcement managers in consultation with its Executive Director and Medical Director or other staff, reviews possible eligible matters for “fast track” resolution. (See 22 T.A.C. 187.14). The internal staff is referred to as the “Quality Assurance Committee” of Board employees. In many cases, the matter may be viewed by Board staff as one with simplified and limited disputed factual or legal issues.

Physicians may choose a fast track resolution by agreeing to the charges set forth in a later submitted “Order” and by paying a fine rather than going through a full investigation and possible ISC or contested case proceedings. If the staff committee believes that the allegations and information available indicates a violation of the Medical Practice Act and/or Rules, Board staff will send the physician a form letter indicating the physician “may” have violated the Act/Rules, stating a certain proposed penalty amount, and offering one of three options to the physician:

1. A submission of “No Contest” - The form indicates that the physician does not contest the allegations and agrees to the penalty. The agreement, if chosen, is not a reportable event to the National Practitioner Data Bank, is not in the newsletter or press release, but remains a public record. The letter also states every effort will be made to resolve it within 60 days by submission to the Board for final approval (which is designed to allow the Board staff time to submit the proposal to the next meeting of the Board). If approved by the Board, an “Order Imposing Administrative Penalty” is issued and signed by the presiding officer of the Board. The matter is then concluded.

2. Written response- This option allows the physician to submit a written response showing no violation. The file, including the written responses submitted by the respondent physician, is submitted to the next meeting of the Board to decide whether to impose the staff recommended penalty or to

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3 Notably, the use of the term “Committee” may be one of convenience since Board members do not currently serve and the meetings are not posted as Open Meetings.

4 The Board does notify the physician after entry of the penalty that the Order is also reported to the Federation of State Medical Boards, which maintains its own database. Actions are available to the public and other state Boards. See www.fsmb.state.tx.us

5 Ostensibly, this response will have already been provided, which should lead most physicians to assume any further similar response will not be persuasive in dismissing the matter.
recommend that the matter be dismissed. However, if the Board decides a penalty is warranted, an “Order Imposing Administrative Penalty” is then unilaterally imposed, signed and entered by the presiding officer of the Board. These Orders make findings as to an administrative violation, including recitation of the statutory and/or Rule violation, recite that Order is a public record, and names the physician, his address and license number. The physician is then notified of the imposition of the penalty. If a penalty is imposed, the physician is notified of his appeal right to district court (see below discussion as to issues).

3. Personal Appearance- a physician may opt out of the fast track process and seek a personal appearance (ISC) before the Board.

All three options require a deadline for response and state that failure to respond will result in a default and imposition of the penalty. A physician may opt for fast-track no more than three times, and only once for a given violation.

"FAST TRACK" PROPOSED/ADOPTED PROCESS:

At the February 4-5, 2010 Board meeting, the Board adopted further informal resolution processes, basically allowing Board staff, in consultation with designated Board members, to propose agreed resolutions for violations beyond administrative matters. Previously, the staff was limited to administrative matters which did not involve patient care, sexual misconduct, or harm to patients from substance abuse. The new rule and process allows the Board staff, in consultation with “designated” Board members, to offer a proposed “Corrective Order”, and propose additional terms and conditions beyond an administrative penalty.

In essence, this process allows Board staff to make broader recommendations prior to or in lieu of an ISC and to seek earlier agreed resolution of matters. The proposed Rule 187.14(7), provides (with shown mark-up changes):

(7) Informal Resolution of Violations.

(A) The [Pursuant to §164.0025 of the Act, the] Quality Assurance ("QA") Committee [of board employees] may recommend dismissal or an agreed settlement of any complaint[. except a complaint that relates directly to patient care. For purposes of this section, the term "relates directly to patient care" means that there is an allegation regarding the standard of care, sexual misconduct affecting patients, or any harm to patients resulting from intemperate use of drugs or alcohol].

(B) The QA Committee shall include designated board members, district review committee members, and board staff members [the Executive Director or the Deputy Executive Director, the manager of the investigation division, and the manager of the legal division].

(C) The QA Committee shall review all complaints [that are] referred by the investigation division to determine whether

[(4)] the complaint should be accepted for legal action[; and]

[(i)] the complaint relates directly to patient care.]

(D) If the QA Committee determines that an offer of settlement should be made regarding a complaint [that does not relate directly to patient care,] the offer of settlement shall be presented to the licensee.

(i) If the licensee accepts the offer of settlement, the signed proposed [agreed ] order 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 scheduled.

(E) Agreed settlements reached under these provisions shall be called "Corrective Orders."

(F) Corrective Orders can only be offered by the QA Committee, and shall not be available after an ISC is convened.

ISSUES CONCERNING FAST TRACK COMPLAINT RESOLUTION:

The Board has increased the use of fast track Orders due to the ever increasing volume of Board complaints. Since tort reform in 2003, Medical Board investigations have increased from 1,775 in 2003 to 2,873 in 2009, a 61% increase. Medical Board disciplinary actions have increased in the same time frame from
277 per year to 411 per year, a 48% increase\textsuperscript{6}. It appears this trend will remain steady if not increase as license applications and the number of licensed Texas physicians has increased 30% since 2003\textsuperscript{7}. For this reason, and the fact that staff and Board personnel and financial resource are limited, the Board staff sought and implemented expedited resolution procedures.

However, certain issues arise concerning “fast track” procedures, namely:

1. Many times physicians are faced with the uncertainties of Board investigations. Given that access to the underlying complaint and the contents of the investigative file is still restricted by statute and not provided to the physician, physicians are relying upon the Board staff’s initial and perhaps incomplete assessment as to whether a violation has occurred, without knowing the specific basis for, rationale or documentation supporting such assessments. While some physicians may view the agreement to a penalty as expedient, many who agree to such penalties may do so without advice of counsel.

2. As noted above, physicians without counsel may be unaware that managed care entities, hospitals, malpractice carriers, other states in which the physician holds a license, and other third party entities may nevertheless view the Order as a basis for action. Arguably, the physician may try and characterize the penalty as a “slap on the wrist” and while some entities may agree with that assessment, it still is a “disciplinary” action and can have negative collateral effects.

3. For physicians who select the “written response” option, their statutory rights to an ISC and later contested case hearing are waived. For some physicians who readily agree with findings of violations, the concern may be minimal (e.g. failure to complete CME, failure to report change of address, etc.). However, some physicians may not be aware that an admission of a violation and entry of an Order by the Board is nevertheless a reportable event in nearly all application or credentialing questions. Physicians who choose the written response option may also not be fully aware that they are waiving their right to an ISC and any later contested case hearing if the Board committee disagrees with their written response.

4. Imposed Orders (i.e. physicians who seek the written option) do not make specific Findings of Fact or Conclusions of Law as would normally be found in a Proposal for Decision or Order adopted by the Board after a contested case hearing process. Instead, the Board notifies adversely affected physicians who have imposed Orders that they may seek district court review according to the administrative penalty procedures stated in Chapter 165.001 of the Act. Despite this Chapter’s reference to the Board’s statutory requirements to follow the requirements of the Administrative Procedure Act, for imposed Orders there is no evidentiary record, no specific Findings of Fact or Conclusions of Law or other record for “judicial review”\textsuperscript{8} as specified in this Chapter. It is unclear at this time as to whether the written option will remain in place for administrative violations and also be an option for non-administrative options. However, it is less likely so for non-administrative violations as the Medical Practice Act is abundantly clear that absent imposition of an administrative penalty only, an ISC is a statutory right.

5. If a physician selects the written response option, Board Rules do not define the nature of the review/appeal standard in district court- e.g. is it substantial evidence? If so, what constitutes “the record”? The Board would likely claim its investigative file, including its internal review by the Committee, remains privileged and confidential by statute. Although the administrative penalties statute does address bond requirements for the penalty, the

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\textsuperscript{6} Source- Medical Board website- www.tmb.state.tx.us

\textsuperscript{7} The use of staff proposed Orders may also increase with other state health care agencies facing budget cuts and freezes at the current time. The Dental Board has also recently implemented a staff driven procedure.

\textsuperscript{8} Read in pari materia with the Medical Practice Act’s specific rights to an ISC and to a contested hearing as well as the chapter’s specific reference to the requirements to follow the Administrative Procedure Act, rights to a contested hearing are mandatory and cannot be superseded or obviated by Board rule to the contrary.
standard of review is not defined\(^9\) and is likely that this chapter was never intended to supplant a contested case process.

Since the broadening of the fast track rules to allow for staff recommendations is newly created, it is too early to predict whether the non-administrative allegations will follow the same forms/disclosures as administrative violations. Similarly, it is unknown how the Board’s re-characterization of these Orders as “Corrective Orders” may provide any additional benefit to physicians who agree to this process. While attempts to classify such Orders as less serious may be appreciated by the physician community, as a practical matter such Orders nonetheless remain “disciplinary” Orders by statute, remain public records, and usually require disclosure in even the simplest of credentialing forms.

TEXAS MEDICAL BOARD REVIEW PANELS:

Despite the Board’s increasing use of staff recommended “fast track” Orders for administrative and non-administrative violations, many investigations do not lend themselves to expedited resolution, especially cases involving patient care. By statute, the Board is required to submit quality of care determinations to physicians who practice in the same or similar specialty. Generally, quality of care cases will proceed through the “review panel” process, which is set forth primarily in Section 154.056(e) of the Act. This section provides:

(a) A physician on the expert physician panel authorized by Section 154.056(e) who is selected to review a complaint shall:

1. determine whether the physician who is the subject of the complaint has violated the standard of care applicable to the circumstances; and
2. issue a preliminary written report of that determination.

(b) A second expert physician reviewer shall review the first physician's preliminary report and other information associated with the complaint. If the second expert physician agrees with the first expert physician, the first physician shall issue a final written report on the matter.

(c) If the second expert physician does not agree with the conclusions of the first expert physician, a third expert physician reviewer shall review the preliminary report and information and decide between the conclusions reached by the first two expert physicians. The final written report shall be issued by the third physician or the physician with whom the third physician concurs.

(d) In reviewing a complaint, the expert physician reviewers assigned to examine the complaint may consult and communicate with each other about the complaint in formulating their opinions and reports.

It is possible that quality of care cases will not proceed with a panel review process and will be placed on a “fast track” process if a medical determination can be easily discerned from the preliminary investigation file (e.g. wrong site surgery, medication errors). Since the Board’s filling of a Medical Director position within the Board, additional physician expertise has been gained in assessing quality of care issues and assessing the seriousness of the allegations or deviations. It is also possible, perhaps probable, that Board staff will also attempt to offer fast track Orders to physicians in cases where the review panel has found deviations from the standard of care and prior to an ISC.

Of course the Board staff’s and full Board’s intent is to provide faster resolution of cases. According to the Board 5% 2010-2011 Reduction Report to the Legislature, approximately 70-75% of current investigations involve standard of care issues. Furthermore, approximately 500 cases are awaiting panel consultant review. The report indicates that without adequate funding, the number of quality of care cases awaiting review will increase.

ISSUES WITH THE PANEL REVIEW PROCESS:

When the panel review process was created in 2005, its legislative intent and rationale was such that physicians would have objective reviews by their own practicing peers and theoretically, a more level playing field as to quality of care complaints. It was also assumed that if a “panel” of experts agreed as to a deviation from the standard of care, the more likely a substantiated violation of the Medical Practice Act.

Generally, Board panel reviewers are paid for their review time and are approved by the Board based upon training and experience, lack of disciplinary history or significant medical malpractice history, and of course, a willingness to serve. Panel reviewers are provided instructions as to elements sought in a review. As many readers are aware, the standard of care can vary significantly from reviewer to reviewer. Also, reviewers may have different training or education as to the appropriate standard.

\(^9\) Evidence again that a physician is entitled to a contested case.
In many cases, the panel review may meet its intended function. However, certain problematic issues have arisen since creation of review panels, specifically:

1. Reviewers are anonymous throughout the investigation process, even after completion of the investigation. While reports of the reviewers are compiled and summarized by Board staff, cases which proceed to ISC or even SOAH contested case litigation, nevertheless maintain the anonymity of the reviewers’ identities.

2. In contested cases at SOAH the Board staff’s practice is to seek a different physician reviewer from those used in the investigation panel review process. Therefore, the report which was used as the basis for the ISC and even for the filing of a formal Complaint, usually does not allow for deposition or other discovery as to the panel reviewer’s opinions, underlying assumptions, biases, etc. In many cases, the filing of a formal Complaint at SOAH is filed without an available Board designated expert.

3. For quality of care cases involving disagreements between the first and second reviewers (i.e. one opinion is favorable to the respondent physician), the Board does not provide a copy of the second favorable report. In fact, unless referenced in notice/ISC materials, it likely will not be disclosed to a physician that a second review was performed and favorable.

4. “Same or similar specialty”- Though the Board staff usually attempts to stay within the same specialty as the respondent physician, there can be disagreement as to the “same or similar specialty”. The problem has been most evident in cosmetic/plastic surgery cases, cosmetic procedures performed by family practice, ob/gyn or other practitioners, and in specialties where significant crossover between specialties may exist (e.g. family practice and internal medicine).

5. The Board will rely written panel reports without notifying the physician of the results of the report until there is an invitation to an ISC. It is assumed, but not known, that if a fast track Order is offered, the staff will provide the underlying panel review report.

SHOULD YOU CONDUCT YOUR OWN EXPERT REVIEW?

In any significant quality of care case, questions arise as to whether you should conduct your own expert review. There are of course many variables as to whether such a review should be conducted and the timing of such review. In general, the following factors may be considered:

1. Cost considerations- physicians, with ever increasing costs associated with their practices and decreasing reimbursement rates will inquire as to the necessity of such reviews. In some cases, a panel review will find no violation and the case will be dismissed. However, cases involving patient deaths, unfavorable outcomes, or complaints filed by other physicians or as the result of reported peer review may warrant such review.

2. Many physicians, especially physicians with no medical malpractice experience may be unaware of the protections available to attorneys under attorney work product and attorney–client privilege. A discussion as to these issues may be helpful.

3. A review can reveal the weaknesses or strengths of a case and help prepare further or alternative defenses.

4. A positive expert review may affect panel reviewers and demonstrate a position of strength to any later Board ISC panel. Given the Board’s increasing workload and limited budget, the “battle of the experts” cases will necessitate careful reviews and whether expenditure of resources is warranted by the Board.

ESSENTIAL POINTS TO CONSIDER DURING A MEDICAL BOARD INVESTIGATION:

1. The Board’s investigation, investigative reports and any other information submitted by anyone other than the subject doctor are privileged and confidential:
   - In the Board’s Pre-Investigation stage almost invariably the allegations noted in the notice letter are generic. Many physicians (and attorneys) have complained about this lack of specificity. The Board has recently noted these criticisms and stated it has begun efforts to improve the notice given to physicians;
In some instances, subsequent additional letters from the investigator requesting additional information may give more detail as to the complaint issues. Investigators, however, are reluctant to verbally discuss the specifics of the allegations given the confidentiality of the investigative file.

2. Ensure a complete copy of the record is provided—many times triage notes, or external communications records are not always kept in the file, which may be helpful.

3. Ensure timely and appropriate responses; however, be aware that you may be responding to unknown issues or to contrary or incorrect information from another source.

4. Be wary of the investigation notice letter which usually only gives a summary of the allegations at best. The Board is not limited in its investigation to the matters alleged in the complaint, which is not provided to the physician unless the case later proceeds to an Informal Settlement Conference (“ISC”) and the complainant waives confidentiality. Nevertheless, Board investigators or consultant reviewers are not limited to the allegations presented by the complainant. In fact, more often than not, the consultant reviewer criticizes very different aspects of care from those identified by the complainant. The complaint letter is usually provided to the consultant reviewer.

5. The Board’s Rules also now prohibits contacting a witness or complainant for purposes of “intimidation”. As previously noted, such term is undefined and subjective. In some matters, contacting other witnesses may be helpful to a defense but may present issues of “intimidation” as viewed by the Board in its perspective.

6. Be aware of the pros and cons of the fast track process and whether early settlement is advisable versus later ISC review and/or contested case litigation.

SUMMARY
A review of the Board’s mission statement on its website will reveal that its clear mission is to establish and ensure “standards of excellence”. Such is a laudable goal. However, many excellent physicians who are practicing optimal medicine nevertheless may find themselves the subject of a Board complaint and investigation and possible criticism subject to disciplinary action. It is therefore critical that any responses to the Board be carefully and thoroughly analyzed, that counsel be familiar with the review and appeal mechanisms, and that physicians be counseled appropriately.