

## **BILL ANALYSIS**

C.S.S.B. 419  
By: Nelson  
Public Health  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Texas began regulating physicians in 1837, and created the current Texas State Board of Medical Examiners in 1907 to ensure that only qualified physicians practice medicine and provide health care to Texans. In 1993, the State established both the Texas State Board of Physician Assistant Examiners and the Texas State Board of Acupuncture Examiners as advisory boards to the Medical Board to assist in regulating physician assistants, who provide medical services under the supervision of licensed physicians, and acupuncturists. The boards' main functions include issuing licenses to qualified individuals; investigating and resolving complaints, including taking disciplinary action when necessary; and monitoring compliance with disciplinary orders.

All three boards are subject to the Sunset Act and will be abolished on September 1, 2005, unless continued by the Legislature. The Sunset Commission found that the State has a continuing need for all three boards, but identified areas that could be improved to provide fair, objective processes for licensees while continuing to meet high standards in protecting the safety, health, and welfare of Texans.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Medical Board in SECTION 1.12, SECTION 1.22, SECTION 1.23, SECTION 1.24, SECTION 1.26, SECTION 1.28, SECTION 1.37, SECTION 1.50, and SECTION 4.06 of this bill.

It is the committee's opinion that rulemaking authority is expressly granted to the Texas State Board of Physician Assistant Examiners, subject to the approval of the Texas Medical Board in SECTION 2.08, SECTION 2.15, SECTION 2.16, SECTION 2.17, SECTION 2.18, SECTION 2.25, SECTION 2.28 and SECTION 2.35 of this bill.

It is the committee's opinion that rulemaking authority is expressly granted to the Texas State Board of Acupuncture Examiners, subject to the approval of the Texas Medical Board, in SECTION 3.06, SECTION 3.08, SECTION 3.14, SECTION 3.19, SECTION 3.21, SECTION 3.34 and SECTION 3.36 of this bill.

### **ANALYSIS**

#### ***Renames the Texas State Board of Medical Examiners***

The substitute changes the name of the agency from the Texas State Board of Medical Examiners to the Texas Medical Board ("Medical Board") and makes conforming changes throughout the substitute.

#### ***Provides stakeholders with an opportunity for a stronger role in the rulemaking process***

The substitute requires the Medical Board, the Physician Assistant Board and the Acupuncture Board to seek input from stakeholders early in the process when developing rules; clarifies how the Medical Board receives input from the Physician Assistant and Acupuncture boards; and clarifies how stakeholders provide input to the Physician Assistant and Acupuncture boards, which do not have independent rulemaking authority. The substitute specifies that a rule adopted by the boards may not be challenged on the grounds that the boards did not solicit a significant amount of input and requires the boards to state in writing the reasons the boards were unable to do so.

### ***Adds structure to the boards' licensing processes***

The substitute requires the boards to develop guidelines to evaluate applicants' mental and physical health conditions, alcohol and substance abuse, and professional behavior problems; requires the boards to use the most appropriate medical specialist for the evaluation; sets parameters for selecting the medical specialist to perform the evaluation; and clarifies that the guidelines for the evaluation do not impair the boards licensing decisions. The substitute eliminates the medical licensing exam attempt exceptions from the Medical Practice Act and requires the Medical Board to clarify, in rule, the number of exam attempts for applicants who attempt more than one type of exam. The substitute authorizes the Medical Board to award a limited license for the practice of administrative medicine if the applicant meets the requirements for issuance of a license; requires the Medical Board to adopt rules for the issuance of a license to practice administrative medicine; and sets forth the requirements for obtaining an unrestricted license. The substitute authorizes the Medical Board to issue a license limited in scope to an applicant by virtue of the applicant's conceded eminence and authority in the applicant's specialty; sets out eligibility requirements and restrictions; requires the Board to adopt rules for the issuance of this type of license; and sets forth the requirements for obtaining a full license. The substitute authorizes the Medical Board to issue a faculty temporary license to a physician appointed by a medical school in the state; sets out eligibility requirements and restrictions; sets forth the requirements for obtaining a full license; and sets forth activities in which the holder of this type of license may participate.

### ***Strengthens the boards' enforcement efforts***

The substitute establishes additional qualifications and service restrictions, including grounds-for-removal and conflict-of-interest provisions, for physicians to serve on the Medical Board's expert physician panel to review complaints relating to medical competency; requires random selection of expert physician reviewers, to the extent permitted; establishes a process for review of complaints by at least two expert physician reviewers on the panel to determine if the standard of care has been violated and to report that determination; and clarifies that expert physician reviewers may consult and communicate with each other about a complaint. The substitute establishes a process for the boards to conduct a preliminary investigation of complaints within 30 days of receiving the complaint. The substitute also clarifies the legal protections of members of the expert physician panel and consultants who assist the boards.

### ***Clarifies the boards' informal proceedings process***

The substitute applies language regarding informal proceedings that currently exists for the Medical Board to the Physician Assistant and Acupuncture boards and to complaints regarding surgical assistants handled by the Medical Board, including establishing that an informal meeting must be set for a complaint within 180 days after the boards commence an investigation of the complaint. The substitute clarifies the consequences of not scheduling an informal meeting within 180 days of receiving the complaint for the Medical Board and requires the Medical Board to notify all parties to a complaint if an informal meeting is not scheduled within 180 days, unless the notice would jeopardize the investigation; and requires the Medical Board to further define good cause for not scheduling an informal meeting within 180 days. The substitute defines in statute the roles and responsibilities of participants in informal proceedings for the boards; requires that at least two panelists – including at least one physician for the Medical Board – serve on the boards' informal panels, unless the respondent waives this requirement, and except in cases where the respondent is showing compliance with a board order; and requires the boards to include at least one public member on the boards' informal panels. The substitute authorizes the boards to delegate to staff the authority to handle complaints that do not relate directly to patient care or that involve only administrative violations, subject to board approval, and requires referral to informal proceedings in certain cases. The substitute outlines requirements and time frames for the Medical Board and the license holder to provide and receive certain information prior to informal proceedings, including requiring the license holder to provide their rebuttal to the Medical Board at least five business days before the informal meeting. The substitute clarifies that investigation files used by the boards in informal meetings are confidential. The substitute adds two public members to each District Review Committee (DRC); clarifies the DRC's role in statute; clarifies eligibility requirements for DRC members; and establishes conflict-of-interest, grounds-for-removal and training requirements for DRC members. The substitute sets forth certain requirements for the Medical Board when it rejects a recommendation resulting from an informal proceeding. The substitute requires the Medical Board, when determining the appropriate disciplinary action, to

consider whether the violation relates directly to patient care or involves only an administrative violation.

***Addresses the medical peer review process***

The substitute clarifies the Medical Board's ability to disclose peer review documents in disciplinary hearings, subject to confidentiality provisions already in statute, at the Medical Board and at the State Office of Administrative Hearings (SOAH); clarifies that peer review documents remain confidential at the Medical Board and at SOAH; specifies that if medical peer review documents are admitted into evidence at SOAH, the documents must be admitted under seal; and clarifies that medical records, such as a patient's medical records, that are otherwise available outside of the peer review process are not confidential. The substitute establishes that in formal hearings at SOAH in which peer review action is the sole ground alleged for disciplinary action, the Medical Board must provide evidence from its own investigation; clarifies that the appropriate use of peer review information in formal hearings at SOAH is the basis for the opinion of an expert witness called by the Medical Board; and clarifies that a member of a peer review committee is not subject to subpoena and cannot be compelled to provide evidence in a formal hearing. The substitute clarifies the definition of medical peer review to include the professional conduct of professional health care practitioners. The substitute establishes a joint interim committee, consisting of members appointed by the presiding officer of each house of the Legislature, to study the medical peer review process in hospitals and other health care entities in the state, and requires the joint interim committee to report its findings to the Governor, Lieutenant Governor, and Speaker of the House of Representatives by January 1, 2007.

***Modifies provisions of existing law to better protect the public***

The substitute restricts nondisciplinary rehabilitation orders to individuals who have not violated the standard of care as a result of the intemperate use of drugs or alcohol, provided that the boards have not received a valid complaint regarding the individual's intemperate use of drugs or alcohol that affected the standard of care before the individual signs the proposed order. The substitute requires the boards to inform private associations of a license holder's responsibilities under a rehabilitation order only if the order requires a license holder to participate in activities or programs provided by the association; requires the boards to provide specific guidance to the associations; and maintains the confidentiality of the rehabilitation order. The substitute also removes the statutory exemption from Medical Board regulation for physicians who use moderate sedation in outpatient settings.

***Improves the efficiency of the Acupuncture Board's operations***

The substitute authorizes the Acupuncture Board to make licensing and disciplinary decisions without the Medical Board's approval; updates the Acupuncture Board's disciplinary authority to provide the Acupuncture Board with more flexibility, including allowing the Acupuncture Board to order probation, continuing education and regular reporting; and allows the Acupuncture Board to immediately stop activity that could harm the public by granting that board temporary suspension authority. The substitute provides the Acupuncture Board with administrative penalty authority and sets forth how the Acupuncture Board imposes an administrative penalty; provides guidelines for determining the amount of the penalty, which cannot exceed \$5,000 per violation, per day; requires notice to the affected person; provides options for the person to pay or appeal the penalty; specifies how the Acupuncture Board may collect the penalty; and addresses the appeal of a violation, including the assessment of the administrative penalty and remittance of the penalty and interest. The substitute requires the Acupuncture Board to establish written guidelines regarding its continuing education program, and describes the role of Medical Board employees in approving continuing education courses. The substitute clarifies that the Texas Higher Education Coordinating Board has the authority to approve degree programs for acupuncture schools in Texas, and requires the Coordinating Board to seek input from the Acupuncture Board regarding standards used to assess a school or degree program. The substitute requires the presiding officer of the Acupuncture Board be a licensed acupuncturist. The substitute clarifies that a rule adopted by the Acupuncture Board is subject to Medical Board approval.

***Provides the Medical Board with flexibility in how it regulates the delegation of prescription authority by physicians***

The substitute continues the Medical Board's authority to waive prescription delegation requirements. The substitute abolishes the advisory committee, which was set to expire September 1, 2005, that was established to review waivers for the Medical Board, allowing the Medical Board to assume this responsibility through its regular committee structure. The substitute also eliminates the prescriptive delegation registration requirement; authorizes the Medical Board to establish rules that require physicians to record delegation and maintain records related to that delegation; and provides the Medical Board with access to those records during an investigation.

***Conforms key elements of the boards' licensing and regulatory functions to commonly applied licensing practices***

The substitute requires physician assistant and acupuncture applicants to pass a jurisprudence exam as a condition for licensure and requires the Physician Assistant and Acupuncture boards to establish rules regarding the exams. The substitute clarifies that the boards must address felony and misdemeanor convictions in the standard manner defined in the Occupations Code, except when requirements in the boards' enabling statutes are more strict. The substitute authorizes the boards to delegate to staff the authority to issue licenses to qualified applicants. The substitute requires the Physician Assistant Board to adopt rules establishing a system of continuing medical education and sets forth requirements for that system. The substitute establishes late-renewal penalties for the Physician Assistant Board; authorizes the Medical and Physician Assistant boards to adopt a system under which licenses expire on various dates during the year; authorizes the Physician Assistant and Acupuncture boards to accept the voluntary surrender of a license and requires those boards to establish, by rule, guidelines to determine if the former holder of a license is competent to resume practice; and authorizes the Physician Assistant Board to refuse to issue or renew a license and authorizes the Acupuncture Board to refuse to renew a license. The substitute authorizes the boards to require refunds as part of the agreed settlement process, and limits the refund to the amount the consumer paid to the license holder for services regulated by the boards; authorizes the boards to issue cease-and-desist orders, and makes violation of these orders subject to administrative penalty; allows medical faculty members to be eligible to serve on the Medical Board; clarifies that the Senate must confirm appointments to the Physician Assistant and Acupuncture boards; authorizes the Physician Assistant Board to establish a fee for individuals who hold an inactive license and authorizes the Physician Assistant Board to establish, by rule, a length of time a license can remain inactive; and requires the Acupuncture Board to recommend licensing and other fees to the Medical Board.

***Other provisions***

The substitute prohibits physicians from using information acquired solely from Medical Board duties for personal advancement or gain. The substitute requires the Medical Board to publish any corrections or reversals of Medical Board disciplinary decisions, except when the physician who was the subject of the disciplinary action requests that the information not be published, and provides requirements for the publication. The substitute also clarifies that the boards must adhere to the provisions of the Administrative Procedure Act when acting on rulings by the State Office of Administrative Hearings.

***Applies standard Sunset across-the-board recommendations***

The substitute updates standard Sunset across-the-board recommendations to all three boards regarding conflicts of interest for board members; the use of technology; negotiated rulemaking and alternative dispute resolution policies; and training for board members before assuming their duties. The substitute updates standard Sunset across-the-board recommendations for the Medical and Physician Assistant Boards regarding designation by the Governor of the presiding officer of the board; grounds for the removal of board members; separation of the boards' policymaking duties from the agency's management functions; public member eligibility; and complaint records, including updating parties about the status of complaints. The substitute also updates standard Sunset across-the-board recommendations regarding public participation before the Physician Assistant Board and unbiased appointments to the Physician Assistant Board.

### ***Continuation of the boards***

The substitute continues the Texas State Board of Medical Examiners (renamed the Texas Medical Board as described above), the Texas State Board of Physician Assistant Examiners and the Texas State Board of Acupuncture Examiners for 12 years, but eliminates the separate Sunset dates for the Physician Assistant and Acupuncture boards.

### ***Conforming changes***

The substitute makes conforming changes throughout the legislation. It also repeals certain sections of the Occupation Code to conform with standard Sunset across-the-board language regarding training for Medical Board members; abolishes the advisory committee established to review waivers for the Medical Board, which was set to expire as described above, while maintaining the Medical Board's ability to continue to waive prescription delegation requirements; removes the separate Sunset date for the Physician Assistant Board; removes the separate Sunset date for the Acupuncture Board; and conforms to other changes made in the substitute to authorize the Acupuncture Board to make disciplinary decisions without the Medical Board's approval.

### **EFFECTIVE DATE**

September 1, 2005.

### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

The substitute clarifies the definition of medical peer review to include the professional conduct of professional health care practitioners.

The substitute clarifies how the Medical Board receives input when developing rules from the Physician Assistant and Acupuncture boards.

The substitute specifies that a rule adopted by the boards may not be challenged on the grounds that the boards did not solicit a significant amount of input; requires the boards to state in writing the reasons the boards were unable to do so; and removes language giving the boards discretion on which rules need input.

The substitute clarifies that the Medical Board must publish any corrections or reversals of disciplinary decisions except if the physician who was the subject of the disciplinary action requests that the information not be published.

The substitute clarifies that the rules adopted by the Medical Board regarding conflicts of interest for expert physician reviewers must address situations in which the affected physician and the panel member live or work in the same geographical area or are competitors.

The substitute clarifies that the rules adopted by the Medical Board regarding random selection of expert physician reviewers must comply with current law requiring the reviewer to practice in the same or similar specialty as the physician under review.

The substitute clarifies that expert physician reviewers may consult and communicate with each other about a complaint.

The substitute removes language in the original bill that would have allowed the holder of a license, issued by the Medical Board to an applicant by virtue of the applicant's conceded eminence and authority in the applicant's specialty that is limited in scope, to practice at an affiliate of the medical institution or program that recommended the applicant.

The substitute clarifies that to be eligible for a faculty temporary license issued by the Medical Board, an applicant may not hold a medical license in another state or a Canadian province that has any restrictions, disciplinary orders, or probation, and clarifies that if a faculty temporary license holder wishes to receive a permanent, unrestricted license, the license holder must meet the requirements for issuance of a permanent, unrestricted license, including any examination requirements.

The substitute adds language that specifies that if medical peer review documents are admitted into evidence for any purpose at a proceeding before the State Office of Administrative Hearings, the documents must be admitted under seal.

The substitute requires the Medical Board, when determining the appropriate disciplinary action, to consider whether the violation relates directly to patient care or involves only an administrative violation.

The original bill required the Medical Board to provide a license holder with a written statement of the nature of the allegations against the license holder and the information the Medical Board intends to use at the informal meeting, unless the information is confidential. The substitute deletes "unless the information is confidential."

The substitute differs from the original bill by requiring the license holder that is scheduled for an informal meeting to provide the Medical Board with the licensee's rebuttal at least five business days, instead of 10 business days, before the informal meeting.

The substitute clarifies that the boards' attorney may not participate in panel deliberations during informal proceedings, except to provide advice on legal issues and precedents.

The substitute requires the Medical Board to notify the licensee and state in the Medical Board's minutes the reason for rejecting a recommendation from an informal meeting panel and to specify further action to be considered, and requires the Medical Board to consider previous attempts to resolve the matter when determining what further action to take.

The substitute removes language in the original bill that specified that in formal hearings regarding misuse of the peer review process information obtained as a result from peer review could be used as evidence and a member of a peer review committee is subject to subpoena and can be compelled to provide evidence.

The substitute removes language in the original bill that clarified the Medical Board has the authority to investigate complaints regarding misuse of the peer review process.

The substitute adds a provision that requires the presiding officer of each house of the Legislature to appoint a joint interim committee to study the medical peer review process in hospitals and other health care entities in the state, and requires the joint interim committee to report its findings to the Governor, Lieutenant Governor, and Speaker of the House of Representatives by January 1, 2007.

The substitute adds language authorizing the Physician Assistant and Acupuncture boards to use up to 30 days after receiving a complaint to evaluate whether to officially proceed on the complaint.

The substitute adds language specifying that the Physician Assistant and Acupuncture boards, and the Medical Board when issuing a rehabilitation order regarding surgical assistant licenses, may only disclose a rehabilitation order to a local or statewide private medical association if the boards require a license holder under a rehabilitation order to participate in activities or programs provided by the association.

The substitute adds a provision requiring the Texas Higher Education Coordinating Board to seek input from the Acupuncture Board regarding standards used to assess a school or degree program.