

## **BILL ANALYSIS**

C.S.H.B. 3816  
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Public Health  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

C.S.H.B. 3816 will improve the accountability and transparency of the Texas Medical Board and will reduce the amount of time the board spends pursuing frivolous or malicious complaints against physicians. The reforms of C.S.H.B. 3816 are intended to eliminate potential conflicts of interest and to restore public faith in the independence of the board.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Medical Board in SECTIONS 6, 7, and 13 of this bill.

It is the committee's opinion that rulemaking authority is expressly granted to the commissioner of insurance in SECTION 6 of this bill.

### **ANALYSIS**

C.S.H.B. 3816 amends the Occupations Code to increase from three to five the number of years a physician must be licensed in Texas to qualify for appointment as a physician member to the Texas Medical Board. The bill prohibits a person from being a member of the board if the member is not in full compliance with provisions regarding standards of conduct and state agency ethics policy, and clarifies that a person is considered to be not in full compliance if the person's spouse or anyone related to the person within the second degree by consanguinity engages in conduct prohibited of a state officer or employee that would affect or influence the member's official conduct, position, powers, or duties on the board in a manner prohibited by those provisions. The bill prohibits a member of the board from participating in any matter regarding a license holder if the person or anyone related to the person within the second degree of consanguinity receives compensation from an entity, other than a medical practice, that has a financial interest in common with or adverse to the license holder, including an insurance company, a health care regulatory agency, a pharmaceutical company, or a medical malpractice attorney.

C.S.H.B. 3816 adds to the information required to be prepared by the board for public dissemination a list of the names of all persons who served on an informal settlement conference panel during the preceding year and the number of informal settlement conference panels on which each person served. The bill prohibits the board from considering or acting on a complaint against a license holder involving care provided more than seven years before the date the complaint is filed, unless the care was provided to a minor in which case board consideration or action is limited to the later of the date the minor is 21 years of age or the seventh anniversary of the date of care.

C.S.H.B. 3816 specifies that the board is required to notify a physician who is the subject of a complaint that has been filed with the board by personal delivery or certified mail. The bill clarifies that the copy of the complaint required to be provided to a physician by the board is to be a copy without redaction and adds an exception to the requirement to provide a copy of the

complaint if there is a risk of harm to the public. The bill requires the complaint to include a statement of the alleged violation in plain language. The bill authorizes the board, if a physician rejects a notice by personal delivery or certified mail, to send a physician an additional notice that the physician is subject of a complaint by first class mail that includes notice of the attempted delivery by personal delivery or certified mail.

C.S.H.B. 3816 requires a complaint filed with the board by an insurance agent or insurer against a physician to include the name and address of the insurance agent or insurer filing the complaint, notwithstanding any confidentiality requirements of provisions regarding public information or physicians, or of rules adopted under provisions regarding physicians. The bill requires the board to notify the physician who is the subject of the complaint of the name and address of the insurance agent or insurer who filed the complaint not later than the 15th day after the date the complaint is filed with the board, unless the notice would jeopardize an investigation. The bill prohibits the board from accepting anonymous complaints and requires the board to adopt rules as necessary to implement the requirements and procedures for complaints filed by an insurance agent or insurer. The bill establishes that failure by an insurance agent or insurer to comply with the requirements for certain complaints or the rules adopted by the board constitutes grounds for the imposition of sanctions by the commissioner of the Texas Department of Insurance. The bill authorizes the commissioner of insurance to adopt rules to implement provisions relating to the imposition of such sanctions against an insurance agent or insurer. The bill defines "anonymous complaint," "insurance agent," and "insurer."

C.S.H.B. 3816 requires the rules the board is required to adopt concerning the investigation and review of a complaint filed with the board to ensure that a physician who is the subject of a complaint has at least 45 days after receiving a copy of that complaint to prepare and submit a response. The bill clarifies that the board is required to establish a schedule for conducting each phase of a complaint under the board's control not later than the 30th day after the date the physician's time for preparing and submitting a response expires, rather than not later than the 30th day after the date the board receives the complaint. The bill requires each member of the expert physician panel appointed by the board to assist with complaints and investigations relating to medical competency to be actively practicing medicine in the state, rather than licensed to practice medicine in the state, and makes conforming changes. The bill requires the board, before a complaint is reviewed, to redact all information that identifies the physician who is the subject of the complaint, the patient, and the person filing the complaint. The bill requires the board to deliver a copy of the preliminary and final reports on a complaint to the physician who is the subject of a review and to redact information identifying the expert physicians from the reports before delivery.

C.S.H.B. 3816 authorizes a license holder to practice medicine in a manner taught in a course currently accredited by the Accreditation Council for Continuing Medical Education, the American Medical Association, or the American Osteopathic Association. The bill prohibits the board from directing a physician in the practice of medicine, except by ordering that a physician not engage in a practice that causes actual harm or an imminent risk of harm to a patient.

C.S.H.B. 3816 requires the board, on request by a physician under review, to make a recording of an informal settlement conference proceeding, establishes that the recording is a part of the investigative file, and prohibits the recording from being released to a third party unless otherwise authorized. The bill requires the appointment of at least two of the panelists in an informal meeting or informal hearing under state law to be random. The bill clarifies that after receiving the administrative law judge's findings of fact and conclusions of law, the board is required to dispose of the contested case by issuing a final order based on the judge's findings and conclusions, rather than to determine the charges on the merits. The bill prohibits the board from changing a finding of fact or conclusion of law or vacating or modifying an order of the administrative law judge, rather than authorizing the board to make such a change or to vacate or modify such an order only if the board makes a determination on the merits of a charge. The bill authorizes the board to obtain judicial review of any finding or conclusion issued by the

administrative law judge as provided by law. The bill establishes that for each case the board has the sole authority and discretion to determine the appropriate action or sanction, and prohibits the administrative law judge from making any recommendation regarding the appropriate action or sanction.

C.S.H.B. 3816 establishes that a person whose license to practice medicine has been revoked is entitled to a jury trial in a district court in Travis County. The bill specifies that conduct in which a physician prescribes or administers a drug or treatment that is either nontherapeutic in nature or nontherapeutic in the manner of prescription or administration is considered unprofessional or dishonorable conduct likely to deceive or defraud the public for purposes of license denial and disciplinary action if the prescription or administration has the likelihood of harm to a patient.

#### **EFFECTIVE DATE**

September 1, 2009.

#### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 3816 differs from the original in nonsubstantive ways by conforming conflict of interest provisions relating to a prohibition against a person serving as a member of the Texas Medical Board to standard conflict of interest language requiring full compliance with standards of conduct and state agency ethics policy provisions for a person, a person's spouse, and anyone related to the person within the second degree by consanguinity and makes related technical and clarifying corrections.

C.S.H.B. 3816 omits provisions in the original establishing an advisory commission to receive and investigate complaints by patients and license holders concerning the operations of and disciplinary actions by the board and providing for the operation of the advisory commission. The substitute omits provisions in the original limiting the executive director appointed by the board to service only when the director is a physician licensed in good standing in the state. The substitute omits provisions in the original clarifying that a person authorized to file a complaint against a license holder includes a person acting on behalf of a partnership, association, corporation, or other entity; specifying that a person files a complaint with the board by swearing under oath to the truth of the statements in the complaint; requiring a person, other than a patient, filing a complaint to report the person's employment status and the business for which the person works; and clarifying that the board is authorized to file a complaint on its own initiative based only on good cause. The substitute omits provisions in the original requiring the board, or forms provided by the board, to encourage persons with a complaint to attempt direct resolution with the appropriate party before filing a formal complaint with the board.

C.S.H.B. 3816 differs from the original by prohibiting board consideration or action on a complaint involving care provided more than seven years, rather than more than four years as in the original, before the date the complaint is filed, and by adding an exception to the time limit not included in the original for care provided to a minor. The substitute omits a provision included in the original prohibiting a person from receiving legal immunity as a result of filing a complaint with malice or an anticompetitive purpose. The substitute omits a provision included in the original requiring a copy of a complaint without redaction to be provided to the physician who is the subject of the complaint unless it would jeopardize a criminal investigation. The substitute omits a provision in the original authorizing a physician to initiate a proceeding in the State Office of Administrative Hearings for a determination of the validity of any redaction of identifying information in a complaint. The substitute adds a provision not included in the original authorizing the board to send an additional notice of complaint by first class mail if an initial notice is rejected by the physician who is the subject of the complaint.

C.S.H.B. 3816 adds provisions not included in the original establishing requirements and procedures for complaints filed by an insurance agent or insurer. The substitute differs from the original by requiring certain rules adopted by the board to ensure that a physician who is the subject of a complaint has at least 45 days, rather than 30 days as in the original, after receiving a copy of the complaint to prepare and submit a response. The substitute omits a provision in the original requiring the board to review a report concerning a physician's medical competency prepared by an expert at the request of the physician who is the subject of the complaint. The substitute omits a provision included in the original requiring the independent second expert review of information associated with a complaint to be conducted without knowledge by the second reviewer of the identity of the first reviewer and without any communication between the two reviewers. The substitute omits the requirement included in the original that the physician who is the subject of the complaint of conflicting conclusions between the two expert reviewers be notified of the conflict and provided copies of the conflicting reports and requiring the final report to include a copy of the dissenting report. The substitute adds provisions not included in the original requiring the board to redact all information identifying the physician who is the subject of a complaint, the patient, and the person filing the complaint before the complaint is reviewed, and to deliver a copy of the preliminary and final reports to the physician. The substitute differs from the original by requiring the board to redact information identifying the expert physicians from the reports before delivery, whereas the original requires the board to provide the identity and qualifications of each expert physician who reviewed the complaint.

C.S.H.B. 3816 omits a provision included in the original clarifying that the initial review required for each complaint against a physician that requires a determination of medical competency be performed by an individual engaged in an active practice in the same or similar specialty as the physician in the year preceding the review. The substitute differs from the original by retaining statutory language removed by the original providing the option for members of an expert panel reviewing a complaint to include physicians that practice in another specialty that is similar to the physician's specialty. The substitute omits a provision included in the original requiring the identity of the members of the expert panel making a determination of a physician's medical competency to be promptly disclosed to the physician who is the subject of the complaint. The substitute omits a requirement included in the original that to be considered by the board a report must be in the form of an affidavit sworn under oath. The substitute omits a provision included in the original prohibiting evidence in certain proceedings from being excluded on the ground that that evidence consists of a privileged communication unless it concerns patient records and the patient objects to the disclosure for privacy reasons.

C.S.H.B. 3816 omits a provision included in the original specifying that a determination of the board that a person committed certain acts in violation of licensing requirements be determined by clear and convincing evidence. The substitute omits provisions included in the original prohibiting the board from imposing a disciplinary action different from the action recommended by a panel in an informal proceeding and agreed upon by the license holder and from involving itself in fee disputes or taking disciplinary action against a license holder for using a fee-for-service method of billing or based on the manner in which the license holder maintains the holder's office records with certain exceptions. The substitute omits provisions included in the original entitling a physician affected by a complaint to be resolved in an informal proceeding to receive prior notice of the identity of the presiding panel members to receive notice at least 48 hours prior to a proceeding of the identity of the panel members presiding over informal settlement proceedings. The substitute differs from the original by requiring the board, on request by a physician under review, to make a recording of the informal settlement conference proceedings, whereas the original entitles a physician affected by a complaint to an audio or video record or transcription of such a proceeding. The substitute adds a provision not included in the original establishing that the recording is part of the investigative file and may not be released to an unauthorized third party.

C.S.H.B. 3816 differs from the original by requiring the board, after receiving an administrative law judge's findings of fact and conclusions of law, to dispose of the contested case by issuing a

final order based on those findings and conclusions, whereas the original provides that the decision of the administrative judge is binding on the board. The substitute adds provisions not included in the original authorizing the board to obtain judicial review of any finding or conclusion issued by the administrative law judge, granting the board sole authority and discretion to determine the appropriate action or sanction, and prohibiting the administrative law judge from making any recommendations regarding such action or sanction. The substitute omits provisions included in the original removing complaints and adverse reports from investigative information considered to be privileged and confidential and not subject to means of legal compulsion for release to anyone other than the board or its employees or agents involved in disciplining a license holder. The substitute omits a provision included in the original authorizing a license holder to access and obtain a copy of any information relating to the license holder.

C.S.H.B. 3816 omits the authorization included in the original for the district court to sustain a board disciplinary action only on a finding by clear and convincing evidence that the action was supported by facts and law. The substitute adds a clarification not included in the original that the jury trial to which a person whose license to practice medicine has been revoked is entitled is to be held in a district court in Travis County. The substitute differs from the original by omitting the condition that a drug or treatment be proven to be nontherapeutic or the manner in which the drug or treatment is administered for the drug or treatment or manner of administration to be considered unprofessional or dishonorable conduct of a physician.

C.S.H.B. 3816 makes conforming changes not included in the original to omit administrative provisions relating to the appointment of members of the advisory commission and relating to the omitted requirement that the executive director of the board serve only when the director is a licensed physician in good standing.

C.S.H.B. 3816 differs from the original in nonsubstantive ways by making technical and clarifying corrections and conforming to certain bill drafting conventions.