

BILL ANALYSIS

Senate Research Center

S.B. 2336
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

This legislation promotes transparency of the actions of the Texas Medical Board (TMB), establishes legal due process for any physician subject to a complaint, and increases the protection of the rights of patients.

This legislation will improve the process for when TMB takes actions without disrupting the ability of patients to obtain quality care. These reforms will reduce the time spent by TMB on frivolous, malicious, and/or anti-competitive complaints. These reforms will strengthen TMB with respect to serving and protecting public health.

As proposed, S.B. 2336 amends current law relating to the powers and duties of TMB and provides for the creation of a commission to advise TMB.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Medical Board is modified in SECTION 8 (Section 154.056, Occupations Code) of this bill.

Rulemaking authority is expressly granted to the advisory commission in SECTION 3 (Section 152.011, Occupations Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 152.002(a), Occupations Code, as follows:

(a) Provides that the Texas Medical Board (TMB) consists of 19 members appointed by the governor with the advice and consent of the senate as follows: twelve members who are learned and eminent physicians licensed in this state for at least five, rather than three, years before the appointment, nine of whom are required to be graduates of a reputable medical school or college with a degree of doctor of medicine (M.D.) and three of whom must be graduates of a reputable medical school or college with a degree of doctor of osteopathic medicine (D.O.); and seven members who represent the public.

SECTION 2. Amends Section 152.003, Occupations Code, by amending Subsection (b) and adding Subsections (e) and (f), as follows:

(b) Prohibits a person from being a public member of TMB if the person or person's spouse meets certain requirements, including that the person or person's spouse would not be in full compliance with Section 572.051 (Standards of Conduct; State Agency Ethics Policy), Government Code, if the person or the person's spouse were an employee of the state. Makes a nonsubstantive change.

(e) Prohibits a person from being a member of TMB if the person or someone related to the person within the second degree by consanguinity would not be in full compliance with Section 572.051, Government Code, if the person were an employee of the state.

(f) Prohibits a person from being a member of TMB if the person or someone related to the person within the second degree by consanguinity receives compensation from an entity, other than a medical practice, that has a financial interest in common with or

adverse to a license holder, including an insurance company, health care regulatory agency, pharmaceutical company, or medical malpractice attorney.

SECTION 3. Amends Subchapter A, Chapter 152, Occupations Code, by adding Section 152.011, as follows:

Sec. 152.011. ADVISORY COMMISSION. (a) Provides that the advisory commission consists of six members: three members appointed by the governor from a list of nominees submitted by the speaker of the house of representatives and three members appointed by the lieutenant governor.

(b) Requires that, of the appointed members, one member to be a graduate of a reputable medical school or college with a degree of doctor of medicine or doctor of osteopathic medicine; one member to be a graduate of a reputable law school or college with a degree in law; and four members represent the public.

(c) Requires that appointments to the advisory commission be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointee.

(d) Provides that members of the advisory commission serve two-year terms.

(e) Requires the advisory commission to receive and investigate complaints by patients and license holders concerning the operations of and disciplinary actions taken by TMB. Requires the advisory commission to hold public hearings at least four times each year. Requires TMB to comply with requests for information by and for testimony before the advisory commission for the purpose of oversight.

(f) Requires the advisory commission, not later than December 31 of each year, to provide a report to the members of the legislature and the governor regarding the operation of TMB.

(g) Authorizes the advisory commission to adopt rules as necessary to govern its proceedings, perform its duties, and enforce its authority under this section.

SECTION 4. Amends Section 152.051(a), Occupations Code, to require TMB to appoint an executive director, who may serve only while the person is a physician licensed in good standing in this state. Provides that the executive director serves as the chief executive and administrative officer of TMB.

SECTION 5. Amends Section 154.002(a), Occupations Code, to require TMB to prepare 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, and other information considered appropriate by TMB. Makes nonsubstantive changes.

SECTION 6. Amends Section 154.051, Occupations Code, by amending Subsection (c) and adding Subsections (d), (e), and (f), as follows:

(c) Authorizes a person, including a person acting on behalf of a partnership, association, corporation, or other entity, to file a complaint against a license holder with TMB by swearing under oath to the truth of the statements in the complaint. Requires the person, if the person filing the complaint is not a patient, to report the person's employment status and the business for whom the person works. Authorizes TMB to file a complaint on its own initiative based only on good cause.

(d) Requires TMB, when appropriate, to encourage each person with a complaint to attempt to resolve the complaint with the license holder directly before filing a formal complaint with TMB. Provides that preprinted complaint forms provided by TMB include a prominent statement encouraging persons with complaints to attempt to resolve their complaints directly with the physician, when appropriate, before filing a formal complaint with TMB.

(e) Prohibits TMB from considering or acting on a complaint involving care provided more than four years before the date the complaint is filed.

(f) Prohibits a person, notwithstanding any other law, from receiving civil, criminal, or regulatory immunity as a result of filing a complaint if the complaint is filed with malice or with an anticompetitive purpose.

SECTION 7. Amends Section 154.053(a), Occupations Code, as follows:

(a) Requires TMB to notify by personal delivery or certified mail a physician who is the subject of a complaint filed with TMB that a complaint has been filed and to provide the physician with a copy of the complaint, rather than notify the physician of the nature of the complaint, without redaction unless there is a risk of harm to the public or unless it would jeopardize a criminal investigation, rather than unless the notice would jeopardize an investigation. Requires the physician, in all cases, to be given a statement of the alleged violation in plain language. Authorizes the physician, in the case of redaction of identifying information from the complaint, to initiate a proceeding with the State Office of Administrative Hearings (SOAH) for a determination of the validity of the redaction.

SECTION 8. Amends Section 154.056, Occupations Code, by amending Subsections (a), (b), and (e) and adding Subsection (e-1), as follows:

(a) Requires TMB to adopt rules concerning the investigation and review of a complaint filed with TMB. Requires that the rules adopted under this section ensure that a physician who is the subject of a complaint has at least 30 days after receiving a copy of the complaint as provided by Section 154.053(a) to prepare and submit a response. Makes nonsubstantive changes.

(b) Requires TMB to establish a schedule for conducting each phase of a complaint that is under the control of TMB not later than the 30th day after the date the physician's time for preparing and submitting a response expires, rather than the date TMB receives the complaint.

(e) Requires TMB by rule to provide for an expert physician panel appointed by TMB to assist with complaints and investigations relating to medical competency by acting as expert physician reviewers. Requires each member of the expert physician panel to be actively practicing, rather than licensed to practice, medicine in this state.

(e-1) Requires TMB to review a report concerning a physician's medical competency prepared by an expert physician reviewer at the request of the physician who is the subject of the complaint.

SECTION 9. Amends Section 154.0561, Occupations Code, by amending Subsections (b) and (c) and adding Subsection (e), as follows:

(b) Requires a second expert physician reviewer to independently review, information associated with the complaint, rather than review the first physician's preliminary report and other information associated with the complaint. Requires that the review by the second expert be independent of the first review, without knowledge by the second reviewer of the identity of the first reviewer, and without any communication between the two reviewers. Requires the first reviewer, rather than physician, if the second expert physician reviewer agrees with the first expert physician reviewer, to issue a final written report on the matter.

(c) Requires the physician who is the subject of the complaint, if the second expert physician reviewer does not agree with the conclusions of the first expert physician reviewer, to be notified of the conflict and provided with copies of the conflicting reports. Requires a third expert physician reviewer to review the reports of both expert witnesses and all information related to the complaint, rather than the preliminary report and information, and decide between the conclusions reached by the first two expert

physicians. Requires that the final written report be issued by the third physician or the physician with whom the third physician concurs and include a copy of the dissenting report. Makes a nonsubstantive change.

(e) Requires TMB, before using a report under this section, to provide to the physician who is the subject of the complaint the identity and qualifications of each expert physician reviewer who reviewed the complaint.

SECTION 10. Amends Section 154.058, Occupations Code, as follows:

Sec. 154.058. DETERMINATION OF MEDICAL COMPETENCY. (a) Requires that each complaint against a physician that requires a determination of medical competency be reviewed initially by a board member, consultant, or employee with a medical background and engaged in an active practice in the same or similar specialty as the physician in the year preceding the review, rather than a review considered sufficient by TMB.

(b) Requires that the complaint, if the initial review under Subsection (a) indicates that an act by a physician falls below an acceptable standard of care, be reviewed by an expert physician panel authorized under Section 154.056(e) consisting of physicians who have an active practice in the same specialty as the physician who is the subject of the complaint. Requires that the identity of the members of the expert panel be promptly disclosed to the physician who is the subject of the complaint, rather than be promptly disclosed to the physician who is the subject of the complaint or in another specialty that is similar to the physician's specialty.

(c) Requires the expert physician panel to report in writing the panel's determinations based on the review of the complaint under Subsection (b). Requires that the report specify the standard of care that applies to the facts that are the basis of the complaint and the clinical basis for the panel's determinations, including any reliance on peer-reviewed journals, studies, or reports. Requires that the report, to be considered by TMB, be in the form of an affidavit sworn under oath.

SECTION 11. Amends Section 160.005(b), Occupations Code, to prohibit evidence, in a proceeding brought under this chapter or Chapter 158 (Authority of Physician to Provide Certain Drugs and Supplies), 159 (Physician-Patient Communication), or 162 (Regulation of Practice of Medicine), from being excluded on the ground that it consists of a privileged communication unless it concerns patient records and the patient objects to this disclosure of the records for reasons of patient privacy, in which case the physician is not required to disclose the records to TMB in the absence of a court order. Makes nonsubstantive changes.

SECTION 12. Amends Section 164.001, Occupations Code, by amending Subsections (b) and (c) and adding Subsections (k), (l), (m), and (n), as follows:

(b) Requires TMB, except as otherwise provided by Sections 164.057 and 164.058, on determining by clear and convincing evidence that a person committed an act described by Sections 164.051 through 164.054, to enter certain orders.

(c) Requires TMB, notwithstanding Subsection (b), to revoke, suspend, or deny a physician's license if TMB determines based on clear and convincing evidence that, through the practice of medicine, the physician poses a continuing threat to the public welfare.

(k) Authorizes a license holder to practice medicine in a manner taught in a course accredited by the Accreditation Council for Graduate Medical Education, the American Medical Association, or the American Osteopathic Association.

(l) Prohibits TMB from ordering or requiring a physician to practice medicine in a particular manner, exercising the authority to practice medicine, or directing anyone 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.

(m) Prohibits TMB from imposing a penalty, sanction, or other disciplinary action that is different from the action recommended by the panel in an informal proceeding under Section 164.0032(f) and agreed upon by the license holder.

(n) Prohibits TMB, notwithstanding any other law, from involving itself in fee disputes or taking disciplinary action against a license holder for using the "fee for service" method of billing or taking disciplinary action against a license holder based upon the manner in which the license holder maintains the license holder's office or records, unless the conduct has a likelihood of causing an actual harm or an imminent risk of harm to a patient.

SECTION 13. Amends Section 164.003(c), Occupations Code, to entitle an affected physician to receive notice at least 48 hours before a proceeding of the identity of the panel members presiding over the informal settlement conference proceedings and audio or video record or arrange for transcription of the informal settlement conference proceedings. Makes nonsubstantive changes.

SECTION 14. Amends Section 164.0031(a), Occupations Code, to require at least two panelists, in an informal meeting under Section 164.003 or an informal hearing under Section 164.103 (Rescission of Probation), to be randomly appointed to determine whether an informal disposition is appropriate.

SECTION 15. Amends Sections 164.007(a-1) and (c), Occupations Code, as follows:

(a-1) Requires that the decision of the SOAH judge be binding on TMB, rather than authorizes TMB to change a finding of fact or conclusion of law or vacate or modify an order of the administrative law judge only if TMB makes a determination required by Section 2001.058(e) (relating to the authorization for a state agency to change a finding of factor or conclusion of law, or vacate or modify an order issued by the administrative law judge regarding), Government Code.

(c) Provides that each investigation file, investigation report, rather than complaint, adverse report, other investigation report, and other investigative information in the possession of or received or gathered by TMB 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 TMB or its employees or agents involved in discipline of a license holder. Authorizes a license holder, notwithstanding any other provision of this subsection, to access and obtain a copy of any information relating to the license holder.

SECTION 16. Amends Section 164.009, Occupations Code, as follows:

Sec. 164.009. JUDICIAL REVIEW. (a) Creates this subsection from existing text. Authorizes a person whose license to practice medicine has been revoked or who is subject to other disciplinary action by TMB to appeal to a Travis County district court not later than the 30th day after the date TMB decision is final. Authorizes the district court to sustain a TMB disciplinary action only on a finding by clear and convincing evidence that the action was supported by facts and law.

(b) Entitles a person whose license to practice medicine has been revoked to a jury trial.

SECTION 17. Amends Section 164.053(a), Occupations Code, as follows:

(a) Provides that for purposes of Section 164.052(a)(5) (relating to a physician or an applicant for a license to practice medicine commits unprofessional or dishonorable conduct that is likely to deceive or defraud or injure the public), unprofessional or

dishonorable conduct likely to deceive or defraud the public includes conduct in which a physician prescribes or administers a drug or treatment that is proven to be nontherapeutic in nature or proven to be nontherapeutic in the manner the drug or treatment is administered or prescribed and has a likelihood of harm to a patient.

SECTION 18. Makes application of Section 152.002(a) and Section 152.003, Occupations Code, as amended by this Act, prospective.

SECTION 19. Provides that the changes in law made by this Act relating to TMB's complaint procedures apply only to a complaint filed on or after the effective date of this Act. Provides that a complaint filed before the effective date of this Act is governed by the law in effect on the date the complaint was filed, and the former law is continued in effect for that purpose.

SECTION 20. Provides that the changes in law made by this Act relating to TMB's disciplinary authority apply only to conduct that occurs on or after the effective date of this Act. Provides that conduct that occurs before the effective date of this Act is governed by the law in effect on the date the conduct occurred, and the former law is continued in effect for that purpose.

SECTION 21. Requires the governor and lieutenant governor, not later than January 1, 2010, to appoint the members of the advisory commission under Section 152.011, Occupations Code, as added by this Act.

SECTION 22. Makes application of Section 152.051(a), Occupations Code, as amended by this Act, prospective.

SECTION 23. Effective date: September 1, 2009.