

By: Brown of Brazos

H.B. No. 3816

A BILL TO BE ENTITLED

AN ACT

relating to the powers and duties of the Texas Medical Board.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 152.002(a), Occupations Code, is amended to read as follows:

(a) The board consists of 19 members appointed by the governor with the advice and consent of the senate as follows:

(1) twelve members who are learned and eminent physicians licensed in this state for at least five [~~three~~] years before the appointment, nine of whom must 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

(2) seven members who represent the public.

SECTION 2. Section 152.003, Occupations Code, is amended by amending Subsection (b) and adding Subsection (e) to read as follows:

(b) A person may not be a public member of the board if he or someone within the second degree by consanguinity:

(1) is registered, certified, or licensed by a regulatory agency in the field of health care;

(2) is employed by or participates in the management of a business entity or other organization regulated by or

1 receiving money from the board;

2 (3) owns or controls, directly or indirectly, more
3 than a 10 percent interest in a business entity or other
4 organization regulated by or receiving money from the board;

5 (4) uses or receives a substantial amount of tangible
6 goods, services, or money from the board other than compensation or
7 reimbursement authorized by law for board membership, attendance,
8 or expenses; ~~or~~

9 (5) is a provider of health care; or

10 (6) is not in full compliance with Subchapter 572.051,
11 Government Code, Texas Ethics Commission ("Conflict of Interest"),
12 as though the person were an employee of the state.

13 (e) A person may not be a member of the board if he or
14 someone within the second degree by consanguinity is not in full
15 compliance with Subchapter 572.051, Government Code, Texas Ethics
16 Commission ("Conflict of Interest"), as though the person were an
17 employee of the state.

18 (f) A person may not be a member of the board if he or
19 someone within the second degree by consanguinity receives
20 compensation from an entity, other than a medical practice, which
21 has a financial interest in common with or adverse to a license
22 holder, including an insurance company, health care regulatory
23 agency, pharmaceutical company, or medical malpractice attorney.

24 SECTION 3. Subchapter A, Chapter 152, Occupations Code, is
25 amended by adding Section 152.011 to read as follows:

26 Sec. 152.011. ADVISORY COMMISSION. (a) The advisory
27 commission consists of six members as follows:

1 (1) three members appointed by the governor from a
2 list of nominees submitted by the speaker of the house of
3 representatives; and

4 (2) three members appointed by the lieutenant
5 governor.

6 (b) Of the appointed members:

7 (1) one member must be a graduate of a reputable
8 medical school or college with a degree of doctor of medicine (M.D.)
9 or doctor of osteopathic medicine (D.O.);

10 (2) one member must be a graduate of a reputable law
11 school or college with a degree in law (J.D. or its equivalent); and

12 (3) four members must represent the public.

13 (c) Appointments to the advisory commission shall be made
14 without regard to the race, color, disability, sex, religion, age,
15 or national origin of the appointee.

16 (d) Members of the advisory commission serve two-year
17 terms.

18 (e) The advisory commission shall receive and investigate
19 complaints by patients and license holders concerning the
20 operations of and disciplinary actions by the board. The advisory
21 commission shall hold public hearings at least four times each
22 year. The board shall comply with requests for information by and
23 testimony before the advisory commission for the purpose of
24 oversight.

25 (f) Not later than December 31 of each year, the advisory
26 commission shall provide a report to the members of the legislature
27 and the governor regarding the operation of the board.

1 (g) The advisory commission may adopt bylaws as necessary
2 to:

3 (1) govern its proceedings;

4 (2) perform its duties; and

5 (3) enforce its authority under this subtitle.

6 SECTION 4. Section 152.051(a), Occupations Code, is amended
7 to read as follows:

8 (a) The board shall appoint an executive director, who may
9 serve only when he is a physician licensed in good standing in this
10 state. The executive director serves as the chief executive and
11 administrative officer of the board.

12 SECTION 5. Section 154.002(a), Occupations Code, is amended
13 to read as follows:

14 (a) The board shall prepare:

15 (1) an alphabetical list of the names of the license
16 holders;

17 (2) an alphabetical list of the names of the license
18 holders by the county in which the license holder's principal place
19 of practice is located;

20 (3) a summary of the board's functions;

21 (4) a copy of this subtitle and a list of other laws
22 relating to the practice of medicine;

23 (5) a copy of the board's rules;

24 (6) a statistical report each fiscal year to the
25 legislature and the public that provides aggregate information
26 about all complaints received by the board categorized by type of
27 complaint, including administrative, quality of care, medical

1 error, substance abuse, other criminal behavior, and the
2 disposition of those complaints by category; ~~and~~

3 (7) a list of the names of all persons who served on an
4 informal settlement conference panel during the preceding year and
5 the number of informal settlement conference panels on which each
6 person served; and

7 (8) other information considered appropriate by the
8 board.

9 SECTION 6. Section 154.051, Occupations Code, is amended by
10 amending Subsection (c) and adding Subsections (e), (f), and (g) to
11 read as follows:

12 (c) A person, including a person acting on behalf of a
13 partnership, association, corporation, or other entity, [A person,
14 including a partnership, association, corporation, or other
15 entity,] may file a complaint against a license holder with the
16 board by swearing under oath to the truth of the statements in the
17 complaint. If the person filing the complaint is other than a
18 patient, then that person must report his employment status and the
19 business for whom he works. The board may file a complaint on its
20 own initiative based only on good cause.

21 (e) The board shall encourage each person with a complaint
22 to attempt to resolve the complaint with the license holder
23 directly before filing a formal complaint with the board, in
24 situations where that would be appropriate. Preprinted complaint
25 forms provided by the board must include a prominent statement
26 encouraging persons with complaints to attempt to resolve their
27 complaints directly with the physician, when appropriate, before

1 filing a formal complaint with the board.

2 (f) The board may not consider or act on a complaint
3 involving care provided more than four (4) years before the date the
4 complaint is filed.

5 (g) Notwithstanding any other law, a person may not receive
6 civil, criminal, or regulatory immunity as a result of filing a
7 complaint if the complaint is filed with malice or with an
8 anticompetitive purpose.

9 SECTION 7. Section 154.053(a), Occupations Code, is amended
10 to read as follows:

11 (a) The board shall notify by personal delivery or certified
12 mail a physician who is the subject of a complaint filed with the
13 board that a complaint has been filed and shall provide [~~notify~~] the
14 physician with a copy of the complaint without redaction unless
15 there is a risk of harm to the public or unless it would jeopardize a
16 criminal investigation. In all cases the physician will also be
17 given a statement of the alleged violation in plain language. In
18 the case of redaction of identifying information from the
19 complaint, the physician can initiate a proceeding in the State
20 Office of Administrative Hearings (SOAH) for a determination of the
21 validity of the redaction [~~of the nature of the complaint unless the~~
22 ~~notice would jeopardize an investigation~~].

23 SECTION 8. Section 154.056, Occupations Code, is amended by
24 amending Subsections (a), (b), and (e) and adding Subsection (e-1)
25 to read as follows:

26 (a) The board shall adopt rules concerning the
27 investigation and review of a complaint filed with the board. The

1 rules adopted under this section must:

2 (1) distinguish among categories of complaints and
3 give priority to complaints that involve sexual misconduct, quality
4 of care, and impaired physician issues;

5 (2) ensure that a complaint is not dismissed without
6 appropriate consideration;

7 (3) require that the board be advised of the dismissal
8 of a complaint and that a letter be sent to the person who filed the
9 complaint and to the physician who was the subject of the complaint
10 explaining the action taken on the complaint;

11 (4) ensure that a person who files a complaint has an
12 opportunity to explain the allegations made in the complaint;

13 (5) ensure that a physician who is the subject of a
14 complaint has at least 30 days after receiving a copy of the
15 complaint as provided by Section 154.053(a) to prepare and submit a
16 response;

17 (6) prescribe guidelines concerning the categories of
18 complaints that require the use of a private investigator and the
19 procedures for the board to obtain the services of a private
20 investigator;

21 (7) [~~(6)~~] provide for an expert physician panel
22 authorized under Subsection (e) to assist with complaints and
23 investigations relating to medical competency; and

24 (8) [~~(7)~~] require the review of reports filed with the
25 National Practitioner Data Bank for any report of the termination,
26 limitation, suspension, limitation in scope of practice, or
27 probation of clinical or hospital staff privileges of a physician

1 by:

- 2 (A) a hospital;
- 3 (B) a health maintenance organization;
- 4 (C) an independent practice association;
- 5 (D) an approved nonprofit health corporation
- 6 certified under Section 162.001; or
- 7 (E) a physician network.

8 (b) The board shall:

- 9 (1) dispose of each complaint in a timely manner; and
- 10 (2) establish a schedule for conducting each phase of
- 11 a complaint that is under the control of the board not later than
- 12 the 30th day after the date the physician's time for preparing and
- 13 submitting a response expires.

14 (e) The board by rule shall provide for an expert physician

15 panel appointed by the board to assist with complaints and

16 investigations relating to medical competency by acting as expert

17 physician reviewers. Each member of the expert physician panel

18 must be actively practicing medicine in this state. The rules

19 adopted under this subsection must include provisions governing the

20 composition of the panel, qualifications for membership on the

21 panel, length of time a member may serve on the panel, grounds for

22 removal from the panel, the avoidance of conflicts of interest,

23 including situations in which the affected physician and the panel

24 member live or work in the same geographical area or are

25 competitors, and the duties to be performed by the panel. The

26 board's rules governing grounds for removal from the panel must

27 include providing for the removal of a panel member who is

1 repeatedly delinquent in reviewing complaints and in submitting
2 reports to the board. The board's rules governing appointment of
3 expert physician panel members to act as expert physician reviewers
4 must include a requirement that the board randomly select, to the
5 extent permitted by Section 154.058(b) and the conflict of interest
6 provisions adopted under this subsection, panel members to review a
7 complaint.

8 (e-1) The board shall review a report concerning a
9 physician's medical competency prepared by an expert at the request
10 of the physician who is the subject of the complaint.

11 SECTION 9. Section 154.0561, Occupations Code, is amended
12 by amending Subsections (b) and (c) and adding Subsection (e) to
13 read as follows:

14 (b) A second expert physician reviewer shall independently
15 review information associated with the complaint. The review by
16 the second expert shall be independent of the first review, without
17 knowledge by the second reviewer of the identity of the first
18 reviewer, and without any communication between the two reviewers.

19 If the second expert physician agrees with the first expert
20 physician, the first physician shall issue a final written report
21 on the matter.

22 (c) If the second expert physician does not agree with the
23 conclusions of the first expert physician, then the physician who
24 is the subject of the complaint shall be notified of the conflict
25 and provided with copies of the conflicting reports. A [a] third
26 expert physician reviewer shall review the reports of both expert
27 witnesses and all information related to the complaint, and decide

1 between the conclusions reached by the first two expert physicians.
2 The final written report shall be issued by the third physician or
3 the physician with whom the third physician concurs and must
4 include a copy of the dissenting report.

5 (e) Before using a report under this section, the board
6 shall provide to the physician who is the subject of the complaint
7 the identity and qualifications of each expert physician who
8 reviewed the complaint.

9 SECTION 10. Section 154.058, Occupations Code, is amended
10 to read as follows:

11 Sec. 154.058. DETERMINATION OF MEDICAL COMPETENCY. (a)
12 Each complaint against a physician that requires a determination of
13 medical competency shall be reviewed initially by a board member,
14 consultant, or employee with a medical background and engaged in an
15 active practice in the same or similar specialty as the physician in
16 the year preceding the review [~~considered sufficient by the board~~].

17 (b) If the initial review under Subsection (a) indicates
18 that an act by a physician falls below an acceptable standard of
19 care, the complaint shall be reviewed by an expert physician panel
20 authorized under Section 154.056(e) consisting of physicians who
21 have an active practice in the same specialty as the physician who
22 is the subject of the complaint. The identity of the members of the
23 expert panel shall be promptly disclosed to the physician who is the
24 subject of the complaint [~~or in another specialty that is similar to~~
25 ~~the physician's specialty~~].

26 (c) The expert physician panel shall report in writing the
27 panel's determinations based on the review of the complaint under

1 Subsection (b). The report must specify the standard of care that
2 applies to the facts that are the basis of the complaint and the
3 clinical basis for the panel's determinations, including any
4 reliance on peer-reviewed journals, studies, or reports. To be
5 considered by the board, the report must be in the form of an
6 affidavit sworn under oath.

7 SECTION 11. Section 160.005(b), Occupations Code, is
8 amended to read as follows:

9 (b) In a proceeding brought under this chapter or Chapter
10 158, 159, or 162, evidence may not be excluded on the ground that it
11 consists of a privileged communication unless it:

- 12 (1) is a communication between attorney and client; or
13 (2) concerns patient records and the patient objects
14 to this disclosure of the records for reasons of patient privacy, in
15 which case the physician is not required to disclose the records to
16 the board in the absence of a court order.

17 SECTION 12. Section 164.001, Occupations Code, is amended
18 by amending Subsections (b) and (c) and adding Subsections (k),
19 (l), and (m) to read as follows:

20 (b) Except as otherwise provided by Sections 164.057 and
21 164.058, the board, on determining by clear and convincing evidence
22 that a person committed an act described by Sections 164.051
23 through 164.054, shall enter an order to:

24 (1) deny the person's application for a license or
25 other authorization to practice medicine;

26 (2) administer a public reprimand;

27 (3) suspend, limit, or restrict the person's license

1 or other authorization to practice medicine, including:

2 (A) limiting the practice of the person to or
3 excluding one or more specified activities of medicine; or

4 (B) stipulating periodic board review;

5 (4) revoke the person's license or other authorization
6 to practice medicine;

7 (5) require the person to submit to care, counseling,
8 or treatment of physicians designated by the board as a condition
9 for:

10 (A) the issuance or renewal of a license or other
11 authorization to practice medicine; or

12 (B) continued practice under a license;

13 (6) require the person to participate in an
14 educational or counseling program prescribed by the board;

15 (7) require the person to practice under the direction
16 of a physician designated by the board for a specified period;

17 (8) require the person to perform public service
18 considered appropriate by the board; or

19 (9) assess an administrative penalty against the
20 person as provided by Section 165.001.

21 (c) Notwithstanding Subsection (b), the board shall revoke,
22 suspend, or deny a physician's license if the board determines
23 based on clear and convincing evidence that, through the practice
24 of medicine, the physician poses a continuing threat to the public
25 welfare.

26 (k) A license holder may practice medicine in manner taught
27 in a course accredited by the Accreditation Council for Graduate

1 Medical Education (ACGME), the American Medical Association (AMA),
2 or the American Osteopathic Association (AOA).

3 (1) The board may not order or require a physician to
4 practice medicine in a particular manner, nor may the board
5 exercise the authority to practice medicine, not direct anyone in
6 the practice of medicine, except by ordering that a physician not
7 engage in a practice that causes actual harm or an imminent risk of
8 harm to a patient.

9 (m) The board may not impose a penalty, sanction, or other
10 disciplinary action that is different from the action recommended
11 by the panel in an informal proceeding under Section 164.0032(f)
12 and agreed upon by the license holder.

13 (n) Notwithstanding any other law, the board may not:

14 (1) involve itself in fee disputes or take
15 disciplinary action against a license holder for using the "fee for
16 service" method of billing; or

17 (2) take disciplinary action against a license holder
18 based upon the manner in which the license holder maintains the
19 license holder's office or records, unless the conduct has a
20 likelihood of causing an actual harm or an imminent risk of harm to
21 a patient.

22 SECTION 13. Section 164.003(c), Occupations Code, is
23 amended to read as follows:

24 (c) An affected physician is entitled to:

25 (1) reply to the staff's presentation; ~~and~~

26 (2) present the facts the physician reasonably
27 believes the physician could prove by competent evidence or

1 qualified witnesses at a hearing;

2 (3) receive notice at least 48 hours prior to a
3 proceeding of the identity of the panel members presiding over the
4 Informal Settlement Conference proceedings; and

5 (4) audio or video record or arrange for transcription
6 of the Informal Settlement Conference proceedings.

7 SECTION 14. Section 164.0031(a), Occupations Code, is
8 amended to read as follows:

9 (a) In an informal meeting under Section 164.003 or an
10 informal hearing under Section 164.103, at least two panelists
11 shall be randomly appointed to determine whether an informal
12 disposition is appropriate. At least one of the panelists must be a
13 physician.

14 SECTION 15. Sections 164.007(a-1) and (c), Occupations
15 Code, are amended to read as follows:

16 (a-1) The decision of the SOAH judge shall be binding on the
17 board.

18 (c) Each [~~complaint, adverse report,~~] investigation file,
19 [~~other~~] investigation report, and other investigative information
20 in the possession of or received or gathered by the board or its
21 employees or agents relating to a license holder, an application
22 for license, or a criminal investigation or proceeding is
23 privileged and confidential and is not subject to discovery,
24 subpoena, or other means of legal compulsion for release to anyone
25 other than the board or its employees or agents involved in
26 discipline of a license holder. For purposes of this subsection,
27 investigative information includes information relating to the

1 identity of, and a report made by, a physician performing or
2 supervising compliance monitoring for the board. Notwithstanding
3 any other provision of this subsection, a license holder may access
4 and obtain a copy of any information relating to the license holder.

5 SECTION 16. Section 164.009, Occupations Code, is amended
6 to read as follows:

7 Sec. 164.009. JUDICIAL REVIEW. (a) A person whose license
8 to practice medicine has been revoked or who is subject to other
9 disciplinary action by the board may appeal to a Travis County
10 district court not later than the 30th day after the date the board
11 decision is final. The district court may sustain a board
12 disciplinary action only on a finding by clear and convincing
13 evidence that the action was supported by facts and law.

14 (b) A person whose license to practice medicine has been
15 revoked is entitled to a jury trial.

16 SECTION 17. Section 164.053(a), Occupations Code, is
17 amended to read as follows:

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

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

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

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

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

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

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

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

10 (4) writes false or fictitious prescriptions for:

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

13 (B) controlled substances scheduled in Chapter
14 481, Health and Safety Code, or the Comprehensive Drug Abuse
15 Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

16 (5) prescribes or administers a drug or treatment that
17 is proven to be nontherapeutic in nature or proven to be
18 nontherapeutic in the manner the drug or treatment is administered
19 or prescribed and has a likelihood of harm to a patient;

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

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

24 (B) controlled substances scheduled in Chapter
25 481, Health and Safety Code, or the Comprehensive Drug Abuse
26 Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

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

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

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

7 SECTION 18. The changes in law made by this Act by the
8 amendment of Sections 152.002(a) and 152.003, Occupations Code,
9 apply only to a person appointed to the Texas Medical Board on or
10 after the effective date of this Act. A person appointed before the
11 effective date of this Act is governed by the law in effect on the
12 date the appointment is made, and the former law is continued in
13 effect for that purpose.

14 SECTION 19. The changes in law made by this Act relating to
15 the Texas Medical Board's complaint procedures apply only to a
16 complaint filed on or after the effective date of this Act. A
17 complaint filed before the effective date of this Act is governed by
18 the law in effect on the date the complaint is filed, and the former
19 law is continued in effect for that purpose.

20 SECTION 20. The changes in law made by this Act relating to
21 the Texas Medical Board's disciplinary authority apply only to
22 conduct that occurs on or after the effective date of this Act.
23 Conduct that occurs before the effective date of this Act is
24 governed by the law in effect on the date the conduct occurs, and
25 the former law is continued in effect for that purpose.

26 SECTION 21. Not later than January 1, 2010, the governor and
27 lieutenant governor shall appoint the members of the advisory

1 commission under Section 152.011, Occupations Code, as added by
2 this Act.

3 SECTION 22. The change in law made by this Act by the
4 amendment of Section 152.051(a), Occupations Code, applies only to
5 a person appointed as executive director of the Texas Medical Board
6 on or after the effective date of this Act. A person appointed
7 before the effective date of this Act is governed by the law in
8 effect when the person is appointed, and the former law is continued
9 in effect for that purpose.

10 SECTION 23. This Act takes effect September 1, 2009.