

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 and the creation of a commission to advise the board.

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

SECTION 1. Subsection (a), Section 152.002, 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 Subsections (e) and (f) to read as follows:

(b) A person may not be a public member of the board if the person or the person's spouse:

(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 receiving money from the board;

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

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

(5) is a provider of health care; or

(6) would not be in full compliance with Section 572.051, Government Code, if the person or the person's spouse were an employee of the state.

(e) A person may not be a member of the board 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) A person may not be a member of the board 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. Subchapter A, Chapter 152, Occupations Code, is amended by adding Section 152.011 to read as follows:

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

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

(2) three members appointed by the lieutenant governor.

(b) Of the appointed members:

(1) one member must be a graduate of a reputable medical school or college with a degree of doctor of medicine or doctor of osteopathic medicine;

(2) one member must be a graduate of a reputable law school or college with a degree in law; and

(3) four members must represent the public.

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

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

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

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

(g) The advisory commission may adopt rules as necessary to:

(1) govern its proceedings;

(2) perform its duties; and

(3) enforce its authority under this section.

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

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

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

(a) The board shall prepare:

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

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

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

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

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

(6) a statistical report each fiscal year to the

H.B. No. _____
legislature and the public that provides aggregate information about all complaints received by the board categorized by type of complaint, including administrative, quality of care, medical error, substance abuse, other criminal behavior, and the disposition of those complaints by category; [~~and~~]

(7) 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

(8) other information considered appropriate by the board.

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

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

(d) The board shall, when appropriate, encourage each person with a complaint to attempt to resolve the complaint with the license holder directly before filing a formal complaint with the board. Preprinted complaint forms provided by the board must

H.B. No. _____

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 the board.

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

(f) Notwithstanding any other law, a person may not receive 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. Subsection (a), Section 154.053, Occupations Code, is amended to read as follows:

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

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

(a) The board shall adopt rules concerning the investigation and review of a complaint filed with the board. The rules adopted under this section must:

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

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

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

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

(5) 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;

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

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

(8) [~~+7~~] require the review of reports filed with the

H.B. No. _____

National Practitioner Data Bank for any report of the termination, limitation, suspension, limitation in scope of practice, or probation of clinical or hospital staff privileges of a physician by:

- (A) a hospital;
- (B) a health maintenance organization;
- (C) an independent practice association;
- (D) an approved nonprofit health corporation certified under Section 162.001; or

(E) a physician network.

(b) The board shall:

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

(e) The board by rule shall provide for an expert physician panel appointed by the board to assist with complaints and investigations relating to medical competency by acting as expert physician reviewers. Each member of the expert physician panel must be actively practicing [~~licensed to practice~~] medicine in this state. The rules adopted under this subsection must include provisions governing the composition of the panel, qualifications for membership on the panel, length of time a member may serve on the panel, grounds for removal from the panel, the avoidance of conflicts of interest, including situations in which the affected

H.B. No. _____

physician and the panel member live or work in the same geographical area or are competitors, and the duties to be performed by the panel. The board's rules governing grounds for removal from the panel must include providing for the removal of a panel member who is repeatedly delinquent in reviewing complaints and in submitting reports to the board. The board's rules governing appointment of expert physician panel members to act as expert physician reviewers must include a requirement that the board randomly select, to the extent permitted by Section 154.058(b) and the conflict of interest provisions adopted under this subsection, panel members to review a complaint.

(e-1) The board shall 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. Section 154.0561, Occupations Code, is amended by amending Subsections (b) and (c) and adding Subsection (e) to read as follows:

(b) A second expert physician reviewer shall independently review ~~[the first physician's preliminary report and other]~~ information associated with the complaint. The review by the second expert shall 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.

If the second expert physician reviewer agrees with the first expert physician reviewer, the first reviewer ~~[physician]~~ shall

H.B. No. _____

issue a final written report on the matter.

(c) If the second expert physician reviewer does not agree with the conclusions of the first expert physician reviewer, then the physician who is the subject of the complaint shall be notified of the conflict and provided with copies of the conflicting reports. A [a] third expert physician reviewer shall review the reports of both expert witnesses and all information related to the complaint [~~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 and must include a copy of the dissenting report.

(e) Before using a report under this section, the board shall 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. Section 154.058, Occupations Code, is amended to read as follows:

Sec. 154.058. DETERMINATION OF MEDICAL COMPETENCY. (a) Each complaint against a physician that requires a determination of medical competency shall 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 [~~considered sufficient by the board~~].

(b) If the initial review under Subsection (a) indicates that

H.B. No. _____
an act by a physician falls below an acceptable standard of care,
the complaint shall 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. The identity of the members of
the expert panel shall 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) The expert physician panel shall report in writing the
panel's determinations based on the review of the complaint under
Subsection (b). The report must 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. To be
considered by the board, the report must be in the form of an
affidavit sworn under oath.

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

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

- (1) is a communication between attorney and client; or
- (2) 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
the board in the absence of a court order.

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

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

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

(2) administer a public reprimand;

(3) suspend, limit, or restrict the person's license or other authorization to practice medicine, including:

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

(B) stipulating periodic board review;

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

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

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

(B) continued practice under a license;

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

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

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

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

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

(k) A license holder may 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) The board may not order or require a physician to practice medicine in a particular manner, exercise the authority to practice medicine, or direct 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) The board may not impose 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) Notwithstanding any other law, the board may not:

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

(2) take 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. Subsection (c), Section 164.003, Occupations Code, is amended to read as follows:

(c) An affected physician is entitled to:

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

(2) present the facts the physician reasonably believes the physician could prove by competent evidence or qualified witnesses at a hearing;

(3) receive notice at least 48 hours before a proceeding of the identity of the panel members presiding over the informal settlement conference proceedings; and

(4) audio or video record or arrange for transcription of the informal settlement conference proceedings.

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

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

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

(a-1) The decision of the State Office of Administrative Hearings judge shall be binding on the board [~~The board may change a finding of fact or conclusion of law or vacate or modify an order of the administrative law judge only if the board makes a determination required by Section 2001.058(e), Government Code~~].

(c) Each [~~complaint, adverse report,~~] investigation file, [~~other~~] investigation report, and other investigative information in the possession of or received or gathered by the board 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 the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board. Notwithstanding any other provision of this subsection, a license holder may access and obtain a copy of any information relating to the license holder.

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

Sec. 164.009. JUDICIAL REVIEW. (a) A person whose license to practice medicine has been revoked or who is subject to other disciplinary action by the board may appeal to a Travis County district court not later than the 30th day after the date the board

H.B. No. _____
decision is final. The district court may sustain a board disciplinary action only on a finding by clear and convincing evidence that the action was supported by facts and law.

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

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

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

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

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

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

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

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

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

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

(4) writes false or fictitious prescriptions for:

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

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

(5) 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;

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

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

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

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

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

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

SECTION 18. The changes in law made by this Act to Subsection (a), Section 152.002, and Section 152.003, Occupations Code, apply

H.B. No. _____

only to a person appointed to the Texas Medical Board on or after the effective date of this Act. A person appointed before the effective date of this Act is governed by the law in effect on the date the appointment was made, and the former law is continued in effect for that purpose.

SECTION 19. The changes in law made by this Act relating to the Texas Medical Board's complaint procedures apply only to a complaint filed on or after the effective date of this Act. 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. The changes in law made by this Act relating to the Texas Medical Board's disciplinary authority apply only to conduct that occurs on or after the effective date of this Act. 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. Not later than January 1, 2010, the governor and lieutenant governor shall appoint the members of the advisory commission under Section 152.011, Occupations Code, as added by this Act.

SECTION 22. The change in law made by this Act to Subsection (a), Section 152.051, Occupations Code, applies only to a person appointed as executive director of the Texas Medical Board on or after the effective date of this Act. A person appointed before the effective date of this Act is governed by the law in effect

H.B. No. _____
when the person was appointed, and the former law is continued in
effect for that purpose.

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