

1 By: Senator Dan Patrick

S.B. No. 2336

2 Companion Bill by: Rep. Fred Brown

H.B. No. 3816

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A BILL TO BE ENTITLED

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AN ACT

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

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

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

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

14 (1) twelve members who are learned and eminent
15 physicians licensed in this state for at least five [~~three~~]
16 years before the appointment, nine of whom must be graduates of
17 a reputable medical school or college with a degree of doctor of
18 medicine (M.D.) and three of whom must be graduates of a
19 reputable medical school or college with a degree of doctor of
20 osteopathic medicine (D.O.); and

21 (2) seven members who represent the public.

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

25 (b) A person may not be a public member of the board if he

1 or someone within the second degree by consanguinity:

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

4 (2) is employed by or participates in the management
5 of a business entity or other organization regulated by or
6 receiving money from the board;

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

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

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

15 (6) is not in full compliance with Subchapter
16 572.051, Government Code, Texas Ethics Commission ("Conflict of
17 Interest"), as though the person were an employee of the state.

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

23 (f) A person may not be a member of the board if he or

1 someone within the second degree by consanguinity receives
2 compensation from an entity, other than a medical practice,
3 which has a financial interest in common with or adverse to a
4 license holder, including an insurance company, health care
5 regulatory agency, pharmaceutical company, or medical
6 malpractice attorney.

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

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

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

14 (2) three members appointed by the lieutenant
15 governor.

16 (b) Of the appointed members:

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

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

23 (2) four members must represent the public.

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

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

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

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

17 (g) The advisory commission may adopt bylaws as necessary
18 to:

19 (1) govern its proceedings;

20 (2) perform its duties; and

21 (3) enforce its authority under this subtitle.

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

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

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

7 (a) The board shall prepare:

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

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

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

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

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

17 (6) a statistical report each fiscal year to the
18 legislature and the public that provides aggregate information
19 about all complaints received by the board categorized by type
20 of complaint, including administrative, quality of care, medical
21 error, substance abuse, other criminal behavior, and the
22 disposition of those complaints by category; ~~and~~

23 (7) a list of the names of all persons who served on

1 an informal settlement conference panel during the preceding
2 year and the number of informal settlement conference panels on
3 which each person served; and

4 (8) other information considered appropriate by the
5 board.

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

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

19 (e) The board shall encourage each person with a complaint
20 to attempt to resolve the complaint with the license holder
21 directly before filing a formal complaint with the board, in
22 situations where that would be appropriate. Preprinted
23 complaint forms provided by the board must include a prominent

1 statement encouraging persons with complaints to attempt to
2 resolve their complaints directly with the physician, when
3 appropriate, before filing a formal complaint with the board.

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

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

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

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

1 redaction. [~~of the nature of the complaint unless the notice~~
2 ~~would jeopardize an investigation~~].

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

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

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

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

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

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

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

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

5 (7) [~~(6)~~] provide for an expert physician panel
6 authorized under Subsection (e) to assist with complaints and
7 investigations relating to medical competency; and

8 (8) [~~(7)~~] require the review of reports filed with
9 the National Practitioner Data Bank for any report of the
10 termination, limitation, suspension, limitation in scope of
11 practice, or probation of clinical or hospital staff privileges
12 of a physician by:

13 (A) a hospital;

14 (B) a health maintenance organization;

15 (C) an independent practice association;

16 (D) an approved nonprofit health corporation
17 certified under Section 162.001; or

18 (E) a physician network.

19 (b) The board shall:

20 (1) dispose of each complaint in a timely manner; and

21 (2) establish a schedule for conducting each phase of a
22 complaint that is under the control of the board not later than
23 the 30th day after the date the physician's time for preparing

1 and submitting a response expires.

2 (e) The board by rule shall provide for an expert
3 physician panel appointed by the board to assist with complaints
4 and investigations relating to medical competency by acting as
5 expert physician reviewers. Each member of the expert physician
6 panel must be actively practicing medicine in this state. The
7 rules adopted under this subsection must include provisions
8 governing the composition of the panel, qualifications for
9 membership on the panel, length of time a member may serve on
10 the panel, grounds for removal from the panel, the avoidance of
11 conflicts of interest, including situations in which the
12 affected physician and the panel member live or work in the same
13 geographical area or are competitors, and the duties to be
14 performed by the panel. The board's rules governing grounds for
15 removal from the panel must include providing for the removal of
16 a panel member who is repeatedly delinquent in reviewing
17 complaints and in submitting reports to the board. The board's
18 rules governing appointment of expert physician panel members to
19 act as expert physician reviewers must include a requirement
20 that the board randomly select, to the extent permitted by
21 Section 154.058(b) and the conflict of interest provisions
22 adopted under this subsection, panel members to review a
23 complaint.

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

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

7 (b) A second expert physician reviewer shall independently
8 review information associated with the complaint. The review by
9 the second expert shall be independent of the first review,
10 without knowledge by the second reviewer of the identity of the
11 first reviewer, and without any communication between the two
12 reviewers. If the second expert physician agrees with the first
13 expert physician, the first physician shall issue a final
14 written report on the matter.

15 (c) If the second expert physician does not agree with the
16 conclusions of the first expert physician, then the physician
17 who is the subject of the complaint shall be notified of the
18 conflict and provided with copies of the conflicting reports. A
19 [a] third expert physician reviewer shall review the reports of
20 both expert witnesses and all information related to the
21 complaint, and decide between the conclusions reached by the
22 first two expert physicians. The final written report shall be
23 issued by the third physician or the physician with whom the

1 third physician concurs and must include a copy of the
2 dissenting report.

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

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

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

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

1 ~~another specialty that is similar to the physician's specialty].~~

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

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

12 (b) In a proceeding brought under this chapter or Chapter
13 158, 159, or 162, evidence may not be excluded on the ground
14 that it consists of a privileged communication unless it:

15 (1) is a communication between attorney and client;
16 or

17 (2) concerns patient records and the patient objects
18 to this disclosure of the records for reasons of patient
19 privacy, in which case the physician is not required to disclose
20 the records to the board in the absence of a court order.

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

1 (b) Except as otherwise provided by Sections 164.057 and
2 164.058, the board, on determining by clear and convincing
3 evidence that a person committed an act described by Sections
4 164.051 through 164.054, shall enter an order to:

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

7 (2) administer a public reprimand;

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

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

12 (B) stipulating periodic board review;

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

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

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

20 (B) continued practice under a license;

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

23 (7) require the person to practice under the

1 direction of a physician designated by the board for a specified
2 period;

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

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

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

12 (k) A license holder may practice medicine in manner taught
13 in a course accredited by the Accreditation Council for Graduate
14 Medical Education (ACGME), the American Medical Association
15 (AMA), or the American Osteopathic Association (AOA).

16 (l) The board may not order or require a physician to
17 practice medicine in a particular manner, nor may the board
18 exercise the authority to practice medicine, nor direct anyone
19 in the practice of medicine, except by ordering that a physician
20 not engage in a practice that causes actual harm or an imminent
21 risk of harm to a patient.

22 (m) The board may not impose a penalty, sanction, or other
23 disciplinary action that is different from the action

1 recommended by the panel in an informal proceeding under Section
2 164.0032(f) and agreed upon by the license holder.

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

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

7 (2) take disciplinary action against a license holder
8 based upon the manner in which the license holder maintains the
9 license holder's office or records, unless the conduct has a
10 likelihood of causing an actual harm or an imminent risk of harm
11 to a patient.

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

14 (c) An affected physician is entitled to:

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

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

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

22 (3) audio or video record or arrange for
23 transcription of the Informal Settlement Conference proceedings.

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

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

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

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

12 (c) Each [~~complaint, adverse report,~~] investigation file,
13 [~~other~~] investigation report, and other investigative
14 information in the possession of or received or gathered by the
15 board or its employees or agents relating to a license holder,
16 an application for license, or a criminal investigation or
17 proceeding is privileged and confidential and is not subject to
18 discovery, subpoena, or other means of legal compulsion for
19 release to anyone other than the board or its employees or
20 agents involved in discipline of a license holder. For purposes
21 of this subsection, investigative information includes
22 information relating to the identity of, and a report made by, a
23 physician performing or supervising compliance monitoring for

1 the board. Notwithstanding any other provision of this
2 subsection, a license holder may access and obtain a copy of any
3 information relating to the license holder.

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

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

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

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

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

23 (2) fails to keep complete and accurate records of

1 purchases and disposals of:

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

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

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

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

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

14 (4) writes false or fictitious prescriptions for:

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

17 (B) controlled substances scheduled in Chapter
18 481, Health and Safety Code, or the Comprehensive Drug Abuse
19 Prevention and Control Act of 1970 (21 U.S.C. Section 801 et
20 seq.);

21 (5) prescribes or administers a drug or treatment
22 that is proven to be nontherapeutic in nature or proven to be
23 nontherapeutic in the manner the drug or treatment is

1 administered or prescribed and has a likelihood of harm to a
2 patient;

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

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

7 (B) controlled substances scheduled in Chapter
8 481, Health and Safety Code, or the Comprehensive Drug Abuse
9 Prevention and Control Act of 1970 (21 U.S.C. Section 801 et
10 seq.);

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

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

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

19 SECTION 18. The changes in law made by this Act by the
20 amendment of Sections 152.002(a) and 152.003, Occupations Code,
21 apply only to a person appointed to the Texas Medical Board on
22 or after the effective date of this Act. A person appointed
23 before the effective date of this Act is governed by the law in

1 effect on the date the appointment is made, and the former law
2 is continued in effect for that purpose.

3 SECTION 19. The changes in law made by this Act relating
4 to the Texas Medical Board's complaint procedures apply only to
5 a complaint filed on or after the effective date of this Act. A
6 complaint filed before the effective date of this Act is
7 governed by the law in effect on the date the complaint is
8 filed, and the former law is continued in effect for that
9 purpose.

10 SECTION 20. The changes in law made by this Act relating
11 to the Texas Medical Board's disciplinary authority apply only
12 to conduct that occurs on or after the effective date of this
13 Act. Conduct that occurs before the effective date of this Act
14 is governed by the law in effect on the date the conduct occurs,
15 and the former law is continued in effect for that purpose.

16 SECTION 21. Not later than January 1, 2010, the governor
17 and lieutenant governor shall appoint the members of the
18 advisory commission under Section 152.011, Occupations Code, as
19 added by this Act.

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

1 appointed before the effective date of this Act is governed by
2 the law in effect when the person is appointed, and the former
3 law is continued in effect for that purpose.

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