

New provisions regarding Texas Medical Board proceedings

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On May 31, 2011, Governor Rick Perry signed into law a new bill relating to Texas Medical Board (TMB) complaints and their resolution. These new provisions became effective September 1, 2011. This article outlines the key provisions in this new legislation, which include three changes regarding the complaint and investigation process and two changes regarding the hearing/disciplinary process.

First, the TMB will no longer accept anonymous complaints (1). An anonymous complaint is defined as a complaint that “lacks sufficient information to identify the source or the name of the person who filed the complaint” (2). With one exception, however, the physician will still not be informed of the complainant’s identity, unless the complainant consents to disclosure of his identity. The new exception requiring disclosure of the complainant’s identity exists if the complaint is filed by an insurance agent, insurer, pharmaceutical company, or third-party administrator. If the complaint is filed by one of these individuals or entities, within 15 days after the complaint is filed, the TMB must notify the physician who is the subject of the complaint the name and address of the insurance agent, insurer, pharmaceutical company, or third-party administrator, “unless the notice would jeopardize an investigation” (3).

Second, there is now a 7-year statute of limitations on patient care complaints, unless the care provided involved a minor (4). If the care at issue was provided to a minor patient, the statute of limitations is the later of (a) the date the minor becomes 21 years of age, or (b) the seventh anniversary of the date of care (4).

The third change to the complaint process involves the time within which the TMB must complete its “preliminary investigation.” The preliminary investigation is the process through which the TMB decides whether to “officially proceed on the complaint” (5). Under the old law, the TMB had 30 days after receipt of a complaint to complete its preliminary investigation. Starting September 1, 2011, the TMB has 45 days to complete its preliminary investigation (5). This law change does not have much practical effect, since both in the new law and the prior one, “if the board fails to complete the preliminary investigation in the time required by this subsection, the board’s official investigation of the complaint is considered to commence on that date” (5).

The changes relating to disciplinary actions and procedures involve slight alteration of two of the Informal Show Compli-

ance and Settlement Conference (ISC) deadlines and the addition of a “remedial plan” as a manner in which to resolve a TMB complaint.

Under the old rules, the TMB had to give a physician no less than 30 days’ notice of an ISC. This provision has been changed to require that the physician be given no less than 45 days’ notice of an ISC, and that the TMB has to provide the physician its ISC materials by that time (6). Under the old rules, the physician had until 5 business days prior to the ISC to submit materials for the ISC panel to consider. This provision has been changed to require any such materials to be submitted at least 15 business days before the ISC (7).

The remedial plan provided for in this new legislation allows the TMB another disciplinary option to consider along with the past options of license revocation or suspension, probation, reprimand, health care, counseling or treatment, education, practice supervision, and administrative penalty to resolve a complaint it determines has merit (8). The nature and role of the remedial plan option is not clear from this new legislation. By the terms of this legislation, the TMB has until January 1, 2012, to adopt TMB rules that relate to remedial plans. At this time, there are only a few “is” and “is not’s” regarding remedial plans.

The statute provides that a remedial plan is of public record (9). The statute also provides that a remedial plan is a settlement agreement under Rule 408 of the Texas Rules of Evidence (10). This means that a remedial plan is not admissible in subsequent litigation to prove liability or damages (11). The statute provides that a remedial plan is not an option for disposition of meritorious complaints involving patient death, commission of a felony, inappropriate sexual behavior, and inappropriate financial or personal involvement with a patient (12).

These new provisions apply to complaints filed on or after September 1, 2011. It remains to be seen what practical effect, if any, the new complaint process provisions will have on the number of complaints filed with the TMB. In my experience, a complaint filed by an insurance agent, insurer, pharmaceutical

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company, or third-party administrator is rare indeed. In fact, I have only been involved in one such complaint. Similarly, I cannot recall a matter that involved care more than 7 years prior to the complaint being filed. Finally, it is rare that the TMB completes its “preliminary investigation” within 30 days (or 45 days for that matter). As such, many complaints will still likely become an “official investigation” because the preliminary investigation is not completed within the preliminary investigation time frame allowed by statute.

The change that relates to the timing of ISC notification and the deadline for the physician to provide materials for the ISC panel to consider at the time of the ISC gives physicians a little more notice than previously allowed. The physician is provided more notice of the ISC hearing (45 days rather than 30 days) and is given more time to prepare and provide materials for the ISC panel to consider. Under the old provision, the deadline for the physician to provide ISC materials was 5 business days prior to the ISC. This meant that the physician had no more than 25 days to respond to the TMB’s ISC materials. Under the new provision, the physician gets the TMB’s ISC materials 45 days before the ISC and is required to submit any materials for consideration by the ISC panel at least 15 business days before the ISC. This means that the physician now has no more than 30 days to prepare and submit these materials.

The likely practical effect of this new provision is that the TMB will be able to respond to the physician’s ISC materials

prior to the ISC. Under the 5-day deadline, it was difficult for the TMB’s expert to analyze, review, and comment on the physician’s ISC materials. Now, with 15 days, physicians should expect a “rebuttal” from the TMB’s expert to the materials submitted. While in theory this might provide the TMB an opportunity to “reconsider” its prior criticism of a physician, it is more likely that the TMB’s expert will provide a response stating that he or she has reviewed the physician’s materials and that the prior opinions offered against the physician remain unchanged.

There is a practical matter unrelated to these new provisions that physicians need to appreciate if they are the subject of a TMB investigation. This practical matter is the fact that if an investigation has been pending against you for more than about 3 months, you need to accept, expect, and prepare for the likelihood that this matter will be referred to an ISC.

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1. Texas Occupations Code, §154.0535(b).
 2. Texas Occupations Code, §154.0535(a)(1).
 3. Texas Occupations Code, §154.0535(c).
 4. Texas Occupations Code, §154.051(d).
 5. Texas Occupations Code, §154.057(b).
 6. Texas Occupations Code, §164.003(b)(2).
 7. Texas Occupations Code, §164.003(f).
 8. Texas Occupations Code, §164.001(b).
 9. Texas Occupations Code, §164.002(c).
 10. Texas Occupations Code, §164.002(d).
 11. Texas Rules of Evidence, Rule 408.
 12. Texas Occupations Code, §164.0015(c)(1).