SUBJECT: Altering the complaints process of the Texas Medical Board

COMMITTEE: Public Health — committee substitute recommended

VOTE: 7 ayes — Kolkhorst, Alvarado, S. Davis, Gonzales, Laubenberg, Schwertner, Zerwas

2 nays — Naishtat, Coleman

2 absent — S. King, Truitt

WITNESSES: For — Radhia Gleis, International and American Association of Clinical Nutritionists; Steven Hotze, Texans for Patients' and Physicians' Rights; Beverly Kotsanis, Kotsanis Institute Employees; Constantine Kotsanis, Kotsanis Institute; Peter McCarthy, Texas Health Freedom Coalition; Andrew Schlafly, Association of American Physicians & Surgeons; Larry Likover; Judith McGeary; Linda Messier; (*Registered, but did not testify:* Jordan Berry, Texans for Health Freedom; Brent Connett, Texas Conservative Coalition Research Institute; David Doscher; Haley Mack; Claudia Smith)

Against — Bruce Malone, David Teuscher, Texas Medical Association; Matthew Wall, Texas Hospital Association; Kim Johnston

On — Mari Robinson, Irvin Zeitler, Texas Medical Board; Jared Wolfe, Texas Association of Health Plans

DIGEST: CSHB 1013 would make a number of changes to the composition of the Texas Medical Board and the physicians that participate in the peer review process. The bill also would alter the complaints procedure for physicians and make changes to the proceedings related to the investigation.

Membership of TMB. CSHB 1013 would amend Occupations Code, ch. 152 to require a member of the Texas Medical Board (TMB) to be a licensed physician for at least five years before being eligible to serve. To be a member, a physician would have to be in full compliance with state ethics policy. A member would not be in full compliance if a spouse or anyone related to the member had engaged in conduct that would affect or

influence the member's official conduct, position, powers, or duties as a member of the TMB.

A member of the board could not participate in any matter that related to a physician called before the TMB if the member received compensation from an entity other than a medical practice or had a common financial interest with, or was a competitor with the physician who was under investigation.

Complaints before the TMB. The board could not consider or act on a complaint regarding patient care that was provided more than seven years before the complaint was filed, unless it involved the care of a minor. In the case of a minor, the complaint could be pursued until the minor's 21st birthday or the seventh anniversary of the date of care, whichever was later. The TMB could not accept an anonymous complaint, and each complaint filed would have to include the name and address of the person submitting the grievance.

The TMB would be required to provide a physician with a copy of the complaint that included a statement of the alleged violation written in plain language. It would have to be delivered by certified mail or personal delivery within 15 days of receiving the complaint. The TMB could send an additional complaint by first class mail with a confirmation of receipt if the physician rejected the original notice. The copy issued to the physician could not be delayed or redacted, unless the complaint:

- was filed by a patient or a legal guardian or agent under a power of attorney;
- posed a risk of harm to the public; or
- would jeopardize the investigation.

A physician would have at least 30 days after receiving a complaint to prepare and submit a response. The schedule for conducting each phase of the complaints process would be established within 30 days of the expiration of the physician's time to respond. The TMB would have to complete a preliminary investigation of the complaint within 45 days of the board's receiving the complaint. The board also would be required to deliver a copy of the preliminary and final reports, including any dissenting or minority report, to the physician.

Peer review panel. A member of an expert physician panel reviewing the initial complaint would have to be actively practicing medicine in the same specialty as the physician who was the subject of the complaint.

Informal hearing. A physician in the same medical area as the accused physician could serve as a panelist for a randomly assigned informal hearing to determine whether an informal disposition was appropriate.

Recording of an informal settlement conference. On request of the physician under review, the board would be required to make an audio recording of the informal settlement conference proceeding and provide a copy of the audio recording to the physician. The costs of producing and copying the recording would be paid by the physician. The recording would be a part of the investigative file and could not be released to a third party unless authorized.

Administrative hearings. The bill would require the TMB to resolve a contested case with a final order based on the administrative law judge's findings and conclusions. The board could not change a finding of fact or conclusion of law issued by the administrative law judge, but could obtain judicial review. For each case, the TMB would have the sole authority and discretion to determine the appropriate action or sanction, and the administrative law judge could not make any recommendation on the appropriate action or sanction.

Judicial review. A physician whose license had been revoked would be entitled to a jury trial in a district court in Travis County.

Effective date. The bill would take effect September 1, 2011, and would apply only to a person appointed to the TMB, a complaint filed, conduct subject to disciplinary authority, or a contested case hearing for which an administrative law judge issued findings and conclusions on or after the effective date.

SUPPORTERS SAY:

CSHB 1013 would end anonymous complaints at the TMB. There have been cases where insurance providers or competitive doctors have issued complaints to the board for reasons beyond the standard of care. Under the bill, physicians would be provided with a copy of the complaint written in clear language so that physicians could understand what they were being accused of and could respond appropriately. This already is the protocol for the Texas Dental Board. Arming all parties with the same information

also should make the process more efficient because the complaint would be easier to understand and resolve.

The bill would lengthen the time a physician had to respond to a complaint. This is important because physicians are trying to care for patients, manage their practices, and still deal with a complaint. They should have sufficient time to respond.

CSHB 1013 would provide clear statutory language about who could serve on the TMB to prevent any potential conflicts of interest that could allow for a miscarriage of justice for a wrongfully accused physician. It is important that the body that ensures that Texas doctors are ethical be comprised of people who can uphold the ethics code. The bill also would make sure that an individual could not use a position on the board to further the person's own interest.

CSHB 1013 would not allow the TMB to change a finding of fact or conclusion of law by an administrative law judge. A physician can spend thousands of dollars and months of time litigating a case before it comes to an administrative court. The State Office of Administrative Hearings (SOAH) can issue a comprehensive ruling in favor of the physician, and then have the TMB reject the findings, which is arbitrary and unfair.

The bill would help to ensure that physicians under review got a fair shake. The physicians who were selected for the peer review process and the board panelists would be required to be in active practice and have expertise in the same field as the accused physician. It is important to be judged by one's peers, but it is equally important that they have the latest knowledge in the field of the accused physician.

OPPONENTS SAY:

CSHB 1013 would prohibit anonymous complaints to the TMB, which could silence credible complaints because an individual feared the consequences from an accused physician. While roughly 70 percent of complaints made to the TMB come directly from patients or their families, a number of legitimate concerns about a doctor's practice come from a physician's colleagues, such as a nurse or physician assistant who works side-by-side rather than in competition with the physician. These health care professionals are in a unique position to raise the alarm about a bad actor because they have the medical expertise to understand the medical consequences of a physician's treatment.

Prohibiting the TMB from accepting anonymous complaints could cause harm to a patient. Physicians' expertise and close relationship with patients put doctors in a unique position of power over those patients. Other state regulatory agencies, such as Child Protective Services, permit anonymous complaints for vulnerable populations because it is important to protect the health and well being of Texans. This is an important safety issue and the current law on this point should remain intact.

The bill could put patients at risk by allowing an administrative law judge to have the final word on a case, even if there was overwhelming evidence that suggested action needed to be taken against an accused physician.

CSHB 1013 would jeopardize the peer review process by limiting the pool of licensed physicians who could participate. The bill would permit only a physician who was actively practicing medicine to serve as a panelist. This would reduce the number of available physicians and could have a dramatic affect on the process and ultimately impact health outcomes. We should continue to tap into the available talent pool to ensure that there is diversity in the peer review process and to give accused physicians and their patients the fairest outcome.

CSHB 1013 contains a provision that could not be achieved in real time. It would require the TMB to issue a preliminary investigation report to an accused physician about the complaint within 45 days, but also would provide an accused physician with at least 30 days to respond to the complaint. This could leave the TMB with only 15 days to assess the case, assign it to at least two peer reviewers, write up the report, and send it off, which would be completely unrealistic.

The bill would create an unfunded mandate on the TMB or a hidden tax on physicians. The additional administrative burden that would be placed on the TMB could not be achieved with only two additional staff. To make up the difference, the TMB likely would have to raise the licensing fee for physicians. Given the budget shortfall and the tough economy, it does not make sense to burden this agency or increase these fees.

NOTES:

The committee substitute removed a provision in the original bill that would have allowed a physician to practice medicine in a manner taught in an accredited continuing medical education course; removed a provision that would have limited TMB's ability to direct a physician in the practice of medicine unless the physician was engaged in a practice that caused

harm to a patient; and omitted a provision that would have altered the classification of dishonorable conduct for a physician who prescribed or administered a drug or treatment for non-therapeutic use, unless it was likely to cause harm to the patient.

The fiscal note suggests that the TMB would have to hire two full-time equivalent staff to handle the administrative duties required under CSHB 1013. It is believed that the TMB could adjust the licensing fees to cover the costs associated with the bill.

The companion bill, SB 906 by Patrick, has been referred to the Senate Health and Human Services Committee.