Recommendations to the Sunset Commission

REPORT:

A COMPREHENSIVE ANALYSIS OF THE BARRIERS TO ADEQUATE PAIN RELIEF FOR TEXANS CONTAINED IN PERTINENT PORTIONS OF THE MEDICAL PRACTICE ACT AND RULES OF THE TEXAS STATE BOARD OF MEDICAL EXAMINERS

(TEXAS OCCUPATIONS CODE
&
Title 22 TEX ADMINISTRATIVE)

Respectfully Submitted

The Texas Pain Society
&
The Texas Cancer Pain Initiative

November 16, 2004

TABLE OF CONTENTS

STATEMENT OF THE PROBLEM

The Texas State Board of Medical Examiners (TSBME) restricts and constrains the optimum practice of medicine in Texas, resulting in a diminished quality of life for a significant number of Texas citizens. Uncertain interpretations and implementation of the provisions of the Medical Practice Act (MPA) (Now §§ 151 – 165 Texas Occupation Code) and the vague and confusing Rules adopted pursuant to the Act leave practitioners insecure about the board's criteria for the standard of care. The absence of clear standards of care for any illness is detrimental to all patients, but it is especially damaging and hurtful for patients suffering from pain.

Physicians accused of violating the MPA in this climate of uncertain standards of care are then faced with a cumbersome, inefficient, costly, and repetitive procedural process. The consequences of this uncertainty and these burdensome procedural processes prompt Texas physicians to tailor their practices to provide incomplete and sub-optimum care for the citizens of Texas to avoid sanctions by the TSBME - a *de facto* negative public policy. The public welfare suffers because of patient's decreased access to vitally important types of care.

A new approach to clarifying standards and providing appropriate and timely complaint resolution can remedy the problem. Permanent solutions require correcting the structural deficiencies in the Board and law. The board must define how it discerns the profession's minimum standards, assure that complaints are processed in a fair, expedient, and efficient manner, and restore confidence in its operation.

This report identifies Board operations and parts of the Code identified as most detrimental. The report is organized into two parts, 1) an Executive Summary highlighting deficiencies, and 2) a supporting discussion detailing statutes and rules, suggested solutions, and the anticipated benefits of changes.

EXECUTIVE SUMMARY

I. Absence of Clear Standards of Practice

- Board fails to implement requirements that Expert Physician Panels make medical competency determination with respect to all complaints alleging violations of the standard of care
- Board fails to implement requirements that only qualified medical specialists determine standard of care according to a specific set of legislative criteria including written report with evidence cited.
- Board fails to ensure that its rules provide for medical standards of care to be the sole criteria in determining violations of standard of care

II. Undue Influence, Cost, and Delay in the Complaint Resolution Process

- No assurance Expert Physician Panels members function as required by statute, i.e. as a face-to-face deliberative body to make transparent decisions as to standard of care with disclosure of medical sources used.
- No requirement that the Expert Physician Panels promulgate a specific standard of care which apply the relevant medical principles and law to the factual situation
- Rules that allow the Disciplinary Committee or the Full Board to routinely review and overrule Expert Physician Panels - or hear appeals – violate spirit and intent of statute.
- Staff lacks authority to dismiss baseless or unfounded complaints.
- Potential for politically motivated & conflict of interest driven investigations to influence staff decisions and (*to the extent used*) Expert Physician Panels
- No deadline to file complaint; investigations can be indefinite.

III. Inefficient Informal Settlement & Resolution Conference Procedure

- Unlimited review and remand by Disciplinary Review Committees followed by the need for approval by the full Board defeats the purpose of "informal adjudication" and subjects a licensee to multiple, repetitive, costly investigation.
- Presence of various members of Board on different committees at different times will lead to non-uniform dispositions based on personal standards of care, leniency, and conflicts of interest.
- No procedures exist to govern fairness or public access to these hearings. Despite definition as "informal," the requirement that licensees personally attend along with detailed evidentiary, procedural, and appeals guidelines as well as the involvement by the Board and members make the very nature of the process formal.
- Board should not use ISCs to circumvent Expert Physician Panels or findings with which it disagrees. No licensee shall submit to discipline based on a violation of the standard of care if the licensee was previously exonerated.
- High probability that professional animosities result in material conflicts of interest; no written records are allowed and no appeals so the true extent cannot be measured.
- The title, "Informal Settlement Conference creates a false air of collegiality but in reality are mandatory and failure to attend subjects licensee to default judgment.
- Board may restrict licensee's right to present evidence.

IV. Formal Hearings at State Office of Administrative Hearings

- Board rules impermissibly allow Board to modify or change an ALJ's Proposed Findings of Fact and Conclusions of Law.
- Board refusal to accept Proposals for Decision frequently results in costly re-litigation that harms the professional reputation and independence of the Board.

- Board rules governing procedure for contested hearings conflict with SOAH procedures.
- Board consistently passes rules with no basis in law and for no purpose other than to intimidate licensees into settling.
- Board promulgates unlawful rules because it has yet to be challenged and consequently can intimidate a licensee or even an ALJ; rules not consistent standards fairness and due process.
- Board's frequent disregard of ALJ indicates Board is imposing bad faith punishments for licensee's failure to settle in violation of its rules.

V. Inappropriate Use of Evidence or Assertion of Confidentiality

- Board rule impermissibly makes all peer review records admissible in disciplinary hearings and admissible as exception to hearsay.
    - Statute prohibits use of such records as admissible evidence unless the Board obtains a waiver from the peer review committee.
- Board rules that change the Rules of Evidence conflict with requirement that formal hearings be adjudicated according to the rules in the APA.
- Rule that forbids keeping a written record of informal settlements allow for abuse.
- Board reliance on General Counsel as to scope of confidentiality privilege is inappropriate conflict of interest.
- Board lacks adequate safeguards to ensure inappropriate investigatory information is not shared or obtained by Board members who will be voting on the merits.
- Agency attorneys do not screen themselves from Board or report ex parte contacts.

DISCUSSION

Absence of Clear Standards of Practice:

- **Expert Physician Panels, §154.056e), §154.058(b)-(c)**

Senate Bill 104 passed the 78th Legislature and was signed into law in 2003. It changed the TEXAS OCCUPATIONS CODE to require a three-tiered process of screening complaint to ensure innocent licensees are given presumption of competence unless a complaint provides grounds to begin an investigation.[1]

Three levels of review are mandated: (1) jurisdictional review (no qualification requirement specified); (2) initial medical competency review by medically qualified person.§154.058(a); (3) secondary medical competency review and decision by Expert Physician Panel §154.058(b). §154.056(e) requires the agency to enact rules providing for the creation of an expert physician panel to assist in the more advanced stage of an investigation and/or complaint screening. §154.056(c) requires that the standard of care determination be made in writing by the Expert Physician Panel, be specified with particularity, and the evidence used must be disclosed including the medical journals relied upon. The peer review members must be Texas licensed physicians of the same or similar specialty as the subject of the investigation.

Only after a complaint clears all three levels of review, may disciplinary action occur. Notably, the legislature had indicated its intention that the standard of care determination be made in writing by the Expert Physician Panel, be specified with particularity, and the evidence used must be disclosed including the medical journals relied upon. The peer review members must be Texas licensed physicians of the same or similar specialty as the subject of the investigation.

Requires each complaint against a physician that requires a determination of medical competency to be reviewed initially by certain persons with a medical background considered sufficient by TSBME. Section 154.058(a)

[1] S.B. 104 (78th Regular Session) "Requires the complaint, if the initial review under Subsection (a) indicates that an act by a physician falls below an acceptable standard of care, to be reviewed by an expert physician panel authorized under Section 154.056(e) consisting of physicians who practice in the same specialty." Bill Analysis for S.B. 104, Senate Research Center, Bill Analysis, *available at* http://www.capitol.state.tx.us/cgiin/tlo/textframe.cmd?LEG=78&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00104&VERSION=5&TYPE=A

Problem with Board Chapter 182 Rules:

- Rules 182.(1)-(6) adopted by the agency in light of **§154.056(e)** do not comply with the express language requiring the creation of an expert physician panel. **§154.056; See Appendix B.**

- Public comment submitted both in writing and through oral testimony was not adequately answered by the agency in the Texas Register in violation of the Texas Administrative Procedure Act. **See Appendices B-C.**

- Unclear how agency has interpreted statute as rules give no guidance.
  - Requirement to use Expert Panels became effective on September 1, 2003. **S.B. 104, Section 39. 78-R. 2003**.
  - Unclear if agency is spending funds provided in S.B. 104 for this purpose.
  - Unclear how agency is hiring these experts; who is eligible; what payment; how agency ensures experts are not conflicted. (Website contains no information beyond Rules in Chapter 182).

- Board rules impermissibly permit Board members (including public members) and members sitting on the Disciplinary Committee to overrule medical experts in making medical competency decisions. (**178.7, 187.8, 161.6(b)(1))**

- Rule permits Board not Expert Physician Panel members - physicians of same specialty - the discretion to influence the standard of care **(Rule 191.4)**

- Chapter 182 of the Board Rules does not mandate deliberative panels but rather the use of consultant experts and witnesses, a continuation of the status quo. **Rules 182.1-182.6 & Appendix C.**

Proposed Solutions:

- Board should replace current Chapter 182 Rules with Alternative Rules proposed by Texas Pain Society and Texas Cancer Pain Initiative at public hearing before the board on October 10, 2003. **See Appendix C.**

- Agency should require establishment of attorney to serve as Inspector General

- General Counsel or whomever authorized non-disclosure of information and certified lawfulness of rule should be required to give an accounting of these failures.

- Monitoring of legal compliance by outside agency to ensure statutes are followed.
  - Licensees are not in a position to sue for injunctive relief given procedural posture in which these cases arise.

- Agency failure to publish accurate notice & comments does not allow initial public debate to begin or public accountability of the agency.

- Importantly, statute may need to be amended to ensure that the agency cannot refuse to make public the findings of Expert Physician Panels based on an assertion of privilege or confidentiality

- At a minimum, reports as to the applicable standard of care with confidential information relating to patient and licensee redacted should be made publicly available.

Foreseen Benefits:

- Expert Physician Panels function as an effective and cost-efficient filter in preventing the prosecution of questionable or unfounded actions at SOAH. Anecdotal evidence indicates the agency has a high rate of loss at SOAH indicating that some cases that are pursued by the agency have not been properly vetted.

- Agency decisions that are based on patently biased considerations would be inhibited. **See Appendix D.**

- Public availability of Expert Physician Panel Reports would provide notice of what the state considers applicable standards of care. While the standard of care may be fact specific, the release of expert physician panel reports would allow licensees to follow the actions of their regulating agency.

- Public availability of expert physician reports increases the accountability of the agency by exposing it to public scrutiny.

- Public availability of expert physician reports deters future substandard practice putting other licensees on notices as to the standard of care enforced by the Board.

- **Vague & Uncertain Violations**

§§107.102; 164.053(a); Rules170; 170.2; 190.8

These sections of the Code which allow the Board to discipline licensees for unprofessional or dishonorable conduct are vague and provide little guidance to the agency, members of the public, or licensees as to what would constitutes a violation. **§164.053(a)(3) states, "**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: (a) writes prescriptions for or dispenses to a person who:

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

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

- Violations of the criminal law should cross-reference the penal code.

- Violations of the standard of care should be defined with reference to the standard of care.

- "Abuser" is no longer a meaningful term in the practice of medicine as it does not distinguish between addiction or dependence, licit or illicit use.

Problem: (Rules)

- No rule explains how physician "should know". **Rule Chapter 170.**

- No meaningful definition of actions that violate statute has been provided to licensees despite mandate of the statute. **Rule Chapter 170.**

- Rules fail to clarify the statute's intent.
    - "Inconsistent with public health and welfare" – Definition does not reference the law and list of conduct that applies does not reference the Code. Statute must be changed as administrative rule does not have force of law to overturn a statute. **Rule 190.8 (1)**
    - "Unprofessional or dishonorable" – Definition does not reference the law and list of conduct that applies does not reference the Code. Statute must be changed as administrative rule does not have force of law to overturn a statute. **Rule 190.8(2)**
    - "Abuser" is defined so broadly in the rules it has no more meaning than given in the statute. **Rule 170.2(1)**
        - Rule expands the scope to include any drug, i.e. nicotine gum..

Problem: (Statute)

- Failure to further specify "prescriptions" makes it a violation for a licensee to write any prescription even an antibiotic for a person is known to abuse drugs. **§164.053(a)**
    - As written, this would make any prescription of any drug a violation and this would be inconsistent with professional conduct, humaneness, and federal law – namely the American with Disabilities Act (ADA).

- Use of the passive "known to be an abuser" is problematic because it could penalize a physician for treating a person who abuses narcotic drugs despite the fact that physician had no knowledge of this fact and no reason to know. **§164.053(a)(3)(A)**

- Allows the Board to discipline a licensee who "should have known" a person was an abuser of narcotic drugs. **§164.053(a)(3)(B)**
- The term "abuse" is not synonymous with "addiction" and the two terms lack a uniform definition among the medical profession.

- In general, abuse refers to the inappropriate use of any drug or substance; hence a person who takes a prescription contrary to the instructions may be an "abuser" but not suffer from a recognized addiction. **§164.053(a)(3)**

- Use of the past tense "was" makes it unclear whether a single incidence of past abuse will forever disqualify a licensee from writing prescriptions to a patient. **164.053(a)(3)(B)**

- No criteria establishes how a physician "should have known" a person "was an abuser" **164.053(a)(3)(B)**

Proposed Solution:

1. Include language specifying that legitimately prescribed medications are appropriate, including pain analgesics.
   - Example "unprofessional or dishonorable conduct likely to deceive or defraud the public is conduct in which a physician's prescription or administration of a controlled substance violates a standard of care or is not provided for the purpose of alleviating pain within the context of a physician-patient relation.
2. The subsections (A) & (B) should be eliminated as redundant and confusing
3. Alternatively, (B) should be changed from "the physician should have known" to a "reasonably prudent physician in the community and providing care under the circumstances should have known"

Foreseen Benefits:

- The law as currently written is harmful to the public health because it provides physicians with little guidance as to what treatment would entail a violation of the Code and gives the Board wide discretion to penalize objectively reasonable medical care.
  - Clarification will alleviate the chilling effect this poorly drafted statute has on physicians providing otherwise adequate care for his/her patients.

- Denying medical services to a person as broadly as this law does likely is inconsistent with the ADA.
  - The Board should provide guidance to ensure licensees know that they may not discriminate against persons with an addiction.

- Appropriate treatment will alleviate the burden of unaddressed addictions and bring otherwise dangerous and at risk individuals into the medical system for appropriate care.
- **TEX OCC. CODE §107.101** – Texas Intractable Pain Treatment Act authorizes the treatment of pain for any person including a person with a current addiction disorder or a history of substance abuse.

➢ By taking into account the specific situation in which the licensee practiced, licensees will not be unfairly held to standards that may not be possible for licensees to meet.
- While all licenses should be trained to recognize certain indicators of addiction disorders, it would be unreasonable and illogical to hold a family practitioner in a busy practice to the same standards as a psychiatrist specializing in addiction medicine
- Failure to acknowledge such realities result in primary care physicians refusing to provide needed medication to patients who may be suffering from legitimate pain because of a well-founded fear that such prescribing may later be found to be inappropriate, despite the physician's actual belief that the patient is truly suffering severe pain and the prescription is medically appropriate.

- **Information Vital to Standard of Care not Disclosed to Licensees**

§153.014 (SB 144 78th Legislature) requires TSBME, as well as other state health care licensing boards, to provide licensees with specific information on prescribing and dispensing pain medications with particular emphasis on Schedule II and Schedule III drugs, abusive and addictive behavior and common diversion strategies of certain persons using pain medications, appropriate use of pain medications and the difference between addiction, pseudo-addiction, tolerance, and physical dependence.

Problem:

➢ Agency's compliance with statute is diffuse and fails to address its specific requirements.

➢ Agency has not updated its Pain Guideline or Rules (Chapter 170) to reflect change in scientific or medical understandings.

➢ The Code is primarily worded on an understanding of drug addiction based on a model that lost validity in the last decade (enacted as part of 1989 Intractable Pain Act).

➢ Agency has no proactive policy in sharing information with licensees either as to appropriate use or as warning licensees as to how they can gain useful information in differentiating among patients seeking treatment for pain versus addiction or fraud.

Proposed Solution:

(a) The Agency should enact rules that update its pain treatment policy to reflect the substantive commands of the law:
(1) appropriate and balanced discussion of the clinically appropriate use of Schedule II and Schedule II controlled substances indicated for the treatment of pain. **§153.014(a)(1)**

- Agency should make statements supported which a clear preponderance of the evidence represents a medical consensus;
- Agency should be guided by modern definitions of adequate and inadequate pain treatment and substance abuse as defined by recognized pain specialty organizations
- Model Statements such as those of the Federation of State Medical Boards and research compiled by the Pain & Policy Studies Group (University of Wisconsin should be regularly consulted to maintain high quality standards)

(2) abusive and addictive behavior of certain persons who use prescription pain medications; **§153.014(a)(2)**

- Agency should provide information that clearly distinguishes these behaviors from those of legitimate pain patients.

(3) common diversion strategies employed by certain persons who use prescription pain medications, including fraudulent prescription patterns; and **§153.014(a)(3)**

- Texas State Board of Pharmacy, and other agencies are given authority to cooperate with the board under the scope of this Act.

(4) the appropriate use of pain medications and the differences between addiction, pseudo-addiction, tolerance, and physical dependence.**§153.014(a)(4)**

- Agency should adopt rules that propose medically accurate definitions of addiction, pseudo-addiction, tolerance, and physical dependence.
- "abuser of narcotic drugs" and other archaic language should be replaced.
- Agency should establish standing Committee to review the rules annually.

Proposed Benefits:

- These definitional matters are not trivial – distinguishing among these issues is the key to compassionate care of pain patients.
  - Board Staff and investigators should also be trained to understand these distinctions.

- Appropriately educating its licensees will increase their understanding of how people suffering from serious pain can often be unfairly and mistakenly categorized as "drug seekers" or narcotic drug abusers.

- In fact, the Board's current policy of not recognizing these terms in its Pain Guidelines and Policy is at variance with recommendations from the Federation of State Medical Boards and specialty societies dedicated to the study and treatment of addiction disorders.

- Appropriately educating pain doctors will allow physicians to identify and treat these patients earlier

- A cooperative approach between law enforcement, medical doctors, and the Board is recommended as the best possible approach to protecting public health and enforcing the law as well as ensuring a high standard of care.

- The Board should make it a priority to evaluate the current standard of care that exists for patients in Texas in the areas of acute, chronic, and cancer pain treatment.

- The agency should recognize that inadequate (or under treatment of pain) falls below the standard of care and adopt appropriate rules and enforce violations of inadequate treatment of pain.

- **<u>General Incongruities and Arbitrariness in Agency Practice & Procedure</u>**

  - Comments by licensees, professional organizations, and the public seeking greater disclosure and clarity in EPP creation ignored by the Board. **See Appendix C.**
    - Unfortunately the Board did not include nor adequately respond to oral testimony by members of the public and licensees given during its October 2003 hearing despite a statutory requirements that it do so. **APA 2001.029(b)-(c)**

  - Rule violations are not defined in terms of the standard of care but instead use confusing legal terminology. All violations of medical practice should be defined with reference to the standard of care. **§164.053(a)(3)**

  - Rules should track and incorporate the evolving medical understanding with respect to distinguishing opioid addiction, dependence, tolerance, pseudo-addiction & withdrawal. §**154.014(a)**

  - Board should establish mechanisms for cooperation with professional societies and concerning regulatory standards relevant to practice areas. **§153.014(b)**

- **Inadequate Rulemaking under the Administrative Procedure Act**

Violations of the APA:

The Board as an administrative agency is subject to the procedures covering the governance of such agencies in the TEX. GOV'T. CODE. §2000.01 et seq. Under the Texas Administrative Procedure Act, agencies must promulgate rules with opportunity for notice and comment by the public. Rules enacted without following the procedure required in the Administrative Procedure Act can be invalidated as procedurally invalid and a constitutionally defective exercises of power

The agency's proposed rules to enact Expert Physician Panel's pursuant to S.B. 104 provided the public with a unique opportunity to comment on the need for the Board to recognize its regulation and enforcement of standards of care was inadequate which the Texas Pain Society and Texas Cancer Pain Initiative both exercised by submitting written comments.

Problem: The APA requires the following notice and response be published in the Texas Register

TEX.GOV'T CODE (APA) §2001.021; 2001.024; 2001.29; 2001.30
TEX OCC. CODE. 101.007(2); 161.11(b);

- The Texas Pain Society and the Texas Cancer Pain Initiative, submitted via certified mail written comments opposing the proposed rules as inadequate and petitioning for adoption of an alternate version. **TEX.GOV'T CODE §2001.021 § 2001.029; §2001.30**

- Oral testimony was given during a public hearing for comment on the rule yet the agency did not consider these comments or include notice of them in the Texas Register. **2001.024(b)-(c)**
  - "A state agency shall consider fully all written and oral submissions about a proposed rule. §2001.029(c)

- The board's summary of comments in the November 21, 2003 TEXAS REGISTER misstated the identity of parties, neglected to state the fact that the parties opposed the proposed rules as adopted; and mischaracterized the nature of the comments.
  - **Violating TEX.GOV'T CODE §2001.021 § 2001.029; §2001.30**

- The Board listed only two persons as having commented which is materially false; two submitted written comments and several members of the public and several licensees made oral comments at the hearing. APA §2001.033(a))(1)(A)
  - The Board's "summary" of the comments is not accurate and does not reflect comments made by the Texas Cancer Pain Initiative (not named) and the Texas Pain Society. APA§2001.033(a))(1)(A)

- The Board did not indicate that Tex. Cancer Pain Initiative and Tex. Pain Society opposed the rules as adopted. APA§2001.033(a))(1)(A)
- Board failed to summarize a factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted; and APA §2001.033(a)(1)(B)
- The publication does not give the reasons why the agency disagrees with party submissions and proposals; APA §2001.033(a)(1)(C)

➢ Public commentary is not a meaningless formality but a chance for informed members of the profession and public to offer meaningful improvements to proposed rules. TEX.GOV'T CODE § 2001.001(2); 2001.029(c)

➢ The Board did not receive comments in good faith or respond to the suggestions made. The Administrative Procedure Act requires that the Board keep an open mind with respect to proposed rules and also publish notice of comments received in TEXAS REGISTER. APA § 2001.033(a).

➢ The Board despite acknowledging receipt of a written copy of the comments, failed to accurately summarize the comments, it must do so accurately and at least provide the public with following information:
  - The Board adopted the minor amendments made without seeking new comments or giving prior notice violating the APA again. See Appendix B. APA 2001.029;2001.024

- **Risks of Defective Rulemaking:**

➢ The only way the standards of care can be incorporated into the Board's operations and enforcement is if the public is given meaningful notice and opportunity to comment and participate in shaping policy.

➢ An agency with police powers should not flaunt the obligations imposed by law.

➢ The current rules do not accurately reflect the intent of the legislature and are also procedurally invalid.

➢ The intent of notice is to give interested parties the opportunity to comment and allow the Rules of the agency to be as well constructed as possible.
  - Agency unwillingness and hostility to professional associations and the public is unlawful and harmful to the public interest and quality of the rules.

➢ The current rules are subject to judicial challenge and voidable making agency decisions tenuous.

Proposed Solution:

- The current rules should be rescinded and the rules proposed by the Texas Cancer Pain Initiative and Texas Pain Society should be adopted. **Appendix C.**

- Publication should occur as required by law. APA 2001.024

- Appointment of Inspector General or monitoring by independent agency should be authorized for immediate future until the cause of agency's non-compliance determined.

- Rulemaking authority transferred completely to the Health Professions Council. **TEX OCC. CODE. 101.007(2)**

Proposed Benefit:

- Procedural posture of licensees does not make it easy for licensee to take judicial action on their own behalf
  - Requirement for exhaustion of administrative remedies
  - Desire for decision on merits

- Increased participation from public and professions will lead to better crafted rules

- Procedural validity will protect the agency from expensive constitutional litigation challenging the authority of its enactments.

- Health Professions Council. TEX OCC. CODE. §101.007(2) already is invested with power to engage in rulemaking.
  - General Counsel lacks either competence or independence to pass appropriate rules.
  - Uniform rulemaking body concentrates expertise and efficiency.

II. Ponderous and Burdensome Complaint and Disciplinary Process

- **Complaint Processing & Disposition**

The agency has enacted a regulatory schema that does not allow the prompt or efficient investigation and disposition of baseless complaints.

The agency allows for an initial 30 day review of all complaints followed by a six month investigation period. Rules allow for baseless complaints to remain without resolution

until approximately 210 days (or 7 months) have passed from receipt of a baseless complaint until dismissal. Even with dismissal, allowance for a complainant to appeal dismissal of a baseless complaint could cause the process to begin anew.

- **Non-Compliance with §164.035 Dismissal of Baseless Complaint**

Other than adopting a generic definition, "baseless," in its rules, the board has not established criteria as required by law to notify the public or licensees of how the agency determines whether a complaint is baseless, when such a determination is made, and how either a licensee or complainant may appeal such a decision.

Problem: No rules provide for evaluation of complaints to determine whether complaint is baseless or unfounded.

Proposed Solution:

The agency rules should establish clear guidelines to inform both the public and licensees as to how the initial review of complaints occur. Specifically, the agency should specify**:**

- A specific and short time period by which to make an initial determination as to whether a complaint shall be summarily dismissed as baseless or unfounded.

- Publish guidelines to provide notice to the public and to licensees clarifying how agency determinations of baseless or unfounded claims will be made.

- Clarify that baseless or unfounded claims are not subject to appeal.

- Allow Staff to Dismiss baseless or unfounded claims.

- Require the agency to allow input from subject licensees concerning any complaints received unless an ongoing investigation would be clearly jeopardized.

Foreseen Benefits:

- Increases speed & efficiency while allowing agency to review written summary

- Failure to adopt the rules required by the Act limits the agency's accountability to the public and its elected public officials.

- By notifying the public as to what claims are inappropriate or cannot be proven, the agency can reduce its investigative burden and save both time and money.

- Appeals of baseless claims defeat the intent of this provision of the MPA that allows for the quick and efficient resolution of baseless or unfounded complaints.

- Allowing immediate input from licensees - who often have the most relevant information regarding a complainant - permits faster and more effective complaint resolution and avoids the potential problem of a full investigation falling apart once a licensee has the opportunity to provide relevant facts to the agency.

- **Complaint Screening and Medical Competency of Reviewers –**

§§154.058(a); 182.4

Problem

- Confusion as to qualification required for "licensed healthcare provider" as it is not defined in Code or Rules.

Solution:

- Rule must define "licensed healthcare provider"
- Change statute to exclude Board from reviewing complaints
- No action should be taken on claim which basis is the finding of a violation of the standard of care unless it has first been reviewed by a person with sufficient medical competence as required by §154.058(a) and 182.4.

Benefit:

- Prevents unfounded investigations from wasting time and funds.
- Only Staff should make investigatory decisions (improper influence / motive)
- Appearance of impropriety corrected

Narrative Explanation:

§§154.058(a)-(b) specify that for complaints alleging a licensee's conduct has violated the standard of care, an initial review must occur by a board member, consultant, or "*employee with a medical background considered sufficient by the board"*. Both §154.058 and Rule §178.5(a) should be revised to require the board to define what "*a medical background considered sufficient by the board"* is and require the agency to hire only qualified medical personnel to review complaints related to the standard of care.

Problem:

- §154.058(a) requires that agency employees that screen complaints alleging a violation of the standard of care, must have a "*medical background considered*

sufficient by the board"; however no board rules have specified what qualifications the board considers sufficient to meet the requirement imposed by §154.058.
- Rule 178.5 only requires that a "licensed health care provider" initially screen complaints alleging a violation of the standard of care.
- The terms *"licensed health care provider"* and "*employee with medical background considered sufficient by the board"* are not defined in either the MPA or Rules.

Proposed Solution:

- The agency should define both "licensed health care provider" and "employee with medical background considered sufficient by the board" to include specific qualifications (including education and experience minimums) for these positions.

Foreseen Benefit:

- Standard of care violations are already amenable to civil remedies. The board should ensure before initiating expensive litigation by staff attorneys that a true violation exists and can be proven with competent evidence.
- Reduction in erroneous investigations – The process of an investigation is financially and emotionally exhausting for a physician, and the state should make every effort to ensure it is certain that a violation exists before moving forward. An investigation that moves beyond even the most inchoate phase can adversely impact a licensee's career.

- **Ambiguities in Procedural Rights of Licenses to Notice**

§154.053(a)
§164.004(a)(1)
§154.053
22 TEX ADMIN. CODE. 178.5(d)

Problem
- Rules do not specify scope of broad investigatory exception to notice
- No right of licensee to respond during determination of jurisdiction or baseless

Proposed Solution:

- Exception to required notice to licensee of complaint.

Proposed Benefit:

- Limitation of this statute to emergency suspension orders or temporary suspension hearings that will limit a potentially abusive exception of due process rights.
- Change rule to allow licensee to provide any relevant information to the Board in writing as long as notice has been provided to the licensee.
    - No cost associated
    - Often licensees have key information

Narrative Explanation:

The TEX. OCC. CODE requires the agency to comply with the requirements of due process and states that except pursuant to an emergency suspension order, board proceedings may not be instituted unless "the board gives notices, in a manner consistent with the notice requirements under Section 154.053, to the affected license holder of the facts or conduct alleged..." Unfortunately, the drafters of the amended Code did not include a legislative provision recognizing that notice must still be provided even if initially withheld – a possibility under §154.053(a) if notice would "jeopardize an investigation." Because the legislature surely did not intend to allow an agency to institute proceedings against a licensee without giving notice, this oversight should be legislatively and administratively corrected.

- **Unduly Prolonged Investigations**

TEX OCC. CODE §154.056
179.6; 179.7; 178.8

Problem

- Rules allow indefinite investigation and endless review and appeal of complaint.
    - §154.056(b)(1) requires that each complaint be disposed of in a timely manner. §154.056(b)(2) establish a schedule for conducting each phase of a complaint within 30 days of receiving complaint

Proposed Solution:

- Allow Staff to dismiss unfounded, baseless & non-jurisdictional complaints
- Abolish rule allowing for appeal of dismissed complaint.
- Require dismissal of claims for insufficient evidence by Staff Attorney if after 180 days of filing there is not sufficient evidence to bring formal charges unless the full Board grants an extension until its next regularly scheduled meeting.
- Rewrite following rules accordingly to reflect only upon special invocation
    - Special exception for good cause only by the Board will invoke these rules: otherwise they are presumptively invalid.

- No deadline for a complainant to file a complaint based on broad showing of "other causes"179.6(a)
- Investigations may last indefinitely. 179.6(b)
- Past complaints may be reexamined. Rule 179.7
- Appeal by complainant may restart process. 178.8

Proposed Benefit:

- Allows Staff to concentrate on important complaints
- Board duties can be spent on policy matters and disciplinary review
- Indefinite investigations are a waste of resources and should be exceptions, not general rules
    - Backlogs in the past indicate this is likely to occur

- **Ancillary Issues: Related Length & Fairness of Complaint Disposition**

Problem:

- A number of unnecessary and prejudicial devices have been introduced into the Code. While the Board understandably needs discretion, these measures are so time-consuming, cumbersome, and prejudicial and provide so little benefit that they should be eliminated.

Proposed Solutions:

- Abolition of Appeals by Complainants 178.8
    - Members of the public do not have the competence to determine the standard of care or conclusions of law
- Abolition of Remands by Disciplinary Review Committee & Full Board (187.21)
    - This causes a per se conflict of interest because it requires the Board to rehear a complaint of a lower body that it already has disagreed with but wishes to impose harsher sanctions.
    - The only reason the Board would even need to exercise such an option is if material information was unavailable.
    - Informal decisions should be binding or they shouldn't be entered into to begin with. This is an unnecessary power.

- Mandatory Consolidation of Prosecutions
    - The Board should not be allowed to file multiple complaints based on the same operative set of facts in order to harass, delay, or prejudice a licensee.
- Statutory Bar to Filing of Late Complaints, 179. 6;.179.7
    - Rules contradict intent of Code to resolve complaints in timely manner.

- Statute of Limitation to File Formal SOAH Charges, 179. 6;.179.7
    - Rules contradict intent of code allowing indefinite investigation and uncertainty.

As currently written, all of the above procedures are both inequitable to licensees, costly to the agency, unnecessary, and wasteful of scarce resources. For this reason, all of the above rules should be abolished. Licensees should not have to rely on the discretion and good faith of Staff or the Board in order to ensure he or she is not threatened with prolonged, repeated, or costly litigation. The mere existence of these provisions can cause innocent licensees to give up valuable rights and may be used to demand inequitable concessions.

There is a need for the equivalent in administrative prosecutions for many of the equivalent protections afforded in civil and criminal courts. As presently written, agency rules allow for a complainant to file a complaint or for the board to investigate/take action on a complaint without any time bar pursuant to Rules 179.6(b) & §178.8 despite the requirement of §154.056(b)(1) stating the agency shall "*dispose of each complaint in a timely manner."*

Problem:

- To allow an indefinite investigation is contrary to established legal norms.
- The accused physician should have the right to restore his good name and lift the cloud of investigation.
- A complainant should not be allowed to wait indefinitely to file a complaint. This encourages frivolity in complaint filing and complaints filed for improper motives.
- Without a statute of limitations, investigations and proceedings may occur after the degradation of evidence and the death or unavailability of witnesses.

Proposed Solution:

- Complainants must be required to file complaints within a specified period of time.
- Staff investigations must also be limited to a specified period of time.
- However, if deemed necessary, in extraordinary circumstances, the full board upon a vote by a majority may waive the statute of limitations upon a finding of imminent threat to the public welfare.

Foreseen Benefits:

- Requiring complainants to file complaints within a specified period of time after the occurrence giving rise to the complaint serves a number of beneficial purposes.
    - Reduces frivolous complaints and dilatory tactics

- Reminds the public of the importance of reporting violations promptly so that effective and cost-efficient investigations may occur.
- Ensures the due process rights of licensees who may not be able to effectively preserve evidence or call witnesses in their defense to deny claims made years in the past.

- Limiting the time for investigations serves similar goals
  - It forecloses the possibility of "fishing expeditions," for example, if the original charge in a complaint is not proven, a licensee is subjected to prolonged and enduring scrutiny until any violation shows up.
  - It allows the licensee who is in fact or at law innocent of the complaint allegations to be exonerated in a timely manner thereby restoring an almost inevitably tarnished reputation more quickly
- A narrow exception to a statute of limitations will permit truly egregious instances of misconduct to be addressed by the board; however the agency's proper focus should be on present complaints of recent misconduct.
  - A narrow exception balances the overarching goal of limiting unduly prolonged investigation or stale complaints while ensuring the agency can act when appropriate. The current rules allow the agency to determine in secret when it will withhold notice from a licensee. This fosters a lack of public accountability and opens the door to potential abuse of what should be a narrowly construed conception.
  - Specifying a vote of the full board be required to authorize an investigation without notice to the physician being investigated will keep this authorization from being abused or lightly used. As presently written, the investigators may be making these determinations and it is inconsistent with legal norms to allow investigators or state employees to make decisions affecting the substantive legal rights of citizens.
  - As presently written, the agency's rules provide that no notice be given when the investigation exception of §154.053(a) is invoked. Not only is this prejudicial to the licensee's rights, but would likely not withstand legal challenge

- Elimination of Appeals reduces unnecessary time & expense spent reexamining already addressed complaints.

- Eliminating remands forces the Board to reject outright a decision instead of simply delaying

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III. Inefficient Settlement and Informal Resolution Conference Procedure

Narration: Serious deficiencies exist with respect to board's rules establishing an informal complaint settlement resolution process. In principle, good faith negotiations between a subject licensee and the agency can remove the time and expense associated

with full and formal hearings at SOAH. However, for an informal process of negotiation to be effective, there must be minimum standards of justice and fair play by which the agency must is bound.

Problem:

- Disciplinary Committee must approve informal resolutions or settlement agreements between a licensee and an authorized representative of the board.

- No rule requires the Board to use the findings of Expert Physician Panel.

- Licensees may be caught in a costly and time-consuming trap in which good faith negotiations lead nowhere.

Proposed Solution:

- Informal resolutions or settlement agreements between a licensee and an authorized representative of the board should be binding.
    - Staff alone should conduct the informal hearings.

- The applicable standard of care determination may not be reopened and Expert Physician Panel findings as to standards of care are binding.

- The informal resolution and settlement process should be minimal.

- The informal resolution and settlement process hearings should not include Board members

- Standards for competent evidence should be eliminated. Right to present evidence should not be restricted.

- There should be a defined limit to informal proceedings after which the proceedings will shift to the SOAH.

Proposed Benefits:

- By making the informal hearing agreements binding, the process becomes efficient; Board approval is unnecessary, and the need for formal procedures is unnecessary.
- Requiring the previous findings of Expert Physician Panels to be used unless good cause is shown prevents costly re-litigation of previously settled issues by the most qualified adjudicators.

- By making the process minimal, the intent of statute is followed and SOAH hearings occur more quickly allowing licensee to clear his or hear name or be disciplined faster; either way the public interest is served

- The current process - if it remains unchanged - is essentially a formal hearing under the guise of an informal proceeding. Because the agency disposes of most complaints and pending cases through this method of adjudication, the public should scrutinize it and confidentiality should be limited along with restrictions against the keeping of a formal record.

Board Procedures Violate Procedural Rights Granted by Statute

- **Statutory Rights:**

- At least 30 day written notice provided licensee. **§164.003(b)(2)**
- Licensee has right to be heard. **§164.003(b)(3)**
- Board's General Counsel represents the Staff or Board Rep. during ISC (both probably and this is a conflict. **§164.003(b)(4)**
- Staff must present facts the staff reasonably believes it could prove by competent evidence or qualified witnesses at a hearing. **§164.003(b)(5)**
- Licensee has right to reply to board's presentation. **§164.003(b)(5)**
- Licensee may reply present the facts he reasonably believes competent evidence or qualified witnesses can prove. **§164.003(c)**
- After ample time, (non-binding), Board representative can make recommendation as to disposition. **§164.003(d)**
- Ex Parte Contacts. **APA §2001.061(a)** between Board members and staff attorneys must comply with APA requirements
    - Board member and attorney may not directly or indirectly discuss facts or law subject to finding of fact, conclusion of law (without notice to other party and opportunity to appear).
    - This makes the entire informal adjudication scheme impossible unless strict formalities implemented. **APA §2001.061(a)**
- Unless required for the disposition of an ex parte matter authorized by law,
    - "*member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities,*
        - *except on notice and opportunity for each party to participate. ."***APA§2001.061(a)**

- **Impermissibly Restrictive Rules Promulgated By Board:**

- Failure to attend ISC punishable by default.**187.12 / 187.16**
    - 164.004(b) implies attendance at ISC is optional – "opportunity"

- inconsistent to base punishment on informal hearing without a record

- Board rules impermissibly make personal attendance mandatory at Board's request. **187.16(d)**
  - 164.004(b) implies attendance at ISC is optional – "opportunity"
  - inconsistent to base punishment on informal hearing without a record
- ISCs must be scheduled within 180 days. **187.16(e)**
  - Rule should require ISC to occur not simply be scheduled.
  - 187.19 allows for multiple ISCs.
- Evidence may be restricted at discretion of the Board's representative.**187.18 (e)**
  - **§164.004(b) requires licensee be given opportunity to be heard**
  - **§164.003(d) requires be given ample time to present evidence**
- Licensee must submit evidence in advance or lose right and/or pay fine. **187.18(h)**
  - Board need not disclose its evidence in advance.
    - Evidence that is not disclosed is not competent.
    - Rule should state this axiom.
- Counsel for Panel is Board attorney and therefore has conflict of interest. **187.18(i)**
  - Any counsel who participates in this process cannot continue to have ex parte contacts and cannot function as "independent" counsel
- Board staff is not impartial. **187.18(j)**
  - Violates due process under 164.004
- Limiting access to information should be prohibited because of potential to intimidate licensee with undisclosed evidence. **187.18(k)**
  - Presence of undisclosed should require a formal hearing; OR
  - Closed hearing / mediation at SOAH with respect to discovery

- No written record permitted of an ISC is permitted. **187.18(l)**
  - This rule should be changed to allow for accountability to the public.
  - Allow for licensee to bind agency to promises made
- ISCs are defined to be informal despite fact the procedure are formal and penalties attach. **187.18(m)**
  - Defining a hearing as informal does not change its fundamental nature.
- Staff does not have authority to make binding negotiation. **187.19**
  - Board or Disciplinary Process Review Committee can remand ISC deal and cause process to start over again.**161.6 (b)(1)(C)**
  - Board Members serve on District Review Committees which has oversight functions over all complaints and informal settlements as well as ???????? disposition of specific cases. **187.2**
  - **178.8** can delay or reverse ISC. **178.8**
  - This is wasteful, inefficient, and costly.

Rules Impermissibly Permit Conflicts of Interest: Two Areas

- ❖ Communications Board & Staff
- ❖ Board Functions in Both Investigation & Adjudication

- Recusal policy is unclear, left to discretion of each member, optional. **187.42**.
- Disciplinary Process Review Committee
- District Review Committees Oversee Complaint & Investigations. **191.4(c)**
- Board Members serve on Disciplinary Process Review Committee which has oversight functions over all complaints and informal settlements as well as disposition of specific cases. **187.2**
    - Disciplinary Process Review Committee overseas the disciplinary process. **161.6(b)(1)(A)**
    - Disciplinary Process Review Committee monitors the effectiveness, appropriateness and timeliness of the disciplinary process and enforcement of the Medical Practice Act and board rules. **161.6(b)(1)(B)**
    - Disciplinary Process Review Committee makes recommendations regarding resolution and disposition of specific cases and approve, adopt, modify, or reject recommendations from board staff or board representatives. **161.6(b)(1)(C)**
    - Disciplinary Review Committee approves dismissals of complaints and closure of investigations. **161.6(b)(1)(D)**

- **Alternate Proposed Solutions**

- An alternative to informal hearing process that currently exists is one without any rules and that simply requires no Board intervention, and involves either good faith negotiation between the licensee and Staff or a formal hearing.
    - This would essentially be a binding negotiation between an attorney for the Board and a licensee or licensee's counsel enforceable by the full Board.
    - The full Board could empower the Staff Attorney to authorize a negotiated agreed border order that it would agree to honor.
        - This would allow settlements to be binding without a massive rewriting of the code.

IV. Formal Hearings at State Office of Administrative Hearings

SOAH plays a vital role in ensuring fair hearings are accorded licensees. Current agencies roles create confusion concerning the relation between ALJs and the Board.

- **Contested Cases Must Be Resolved at SOAH pursuant to the Administrative Procedure Act. Final decision on merits takes place by Agency.**
  TEX OCC. CODE § 164.007

Problem:

- Stature requires board to adopt procedures compliant with APA Chapter 2001 for disposition of contested case through formal hearings at SOAH.

- *"A formal hearing shall be conducted by an administrative law judge employed by the State Office of Administrative Hearings. After receiving the administrative law judge's findings of fact and conclusions of law, the board shall determine the charges on the merits."* **§ 164.007**

- Agency rules purports to allow Board to modify or change any part of a Proposal for Decision including findings of facts and conclusions of law. **187.37(d)**
    - Rule states the Board may "[c]hange a finding of fact or conclusion of law or vacate or modify any proposed order of an ALJ when the proposed order is"
        1. erroneous;
        2. against the weight of the evidence;
        3. based on unsound medical principles;
        4. based on an insufficient review of the evidence;
        5. not sufficient to protect the public interest; or
        6. not sufficient to adequately allow rehabilitation of the physician

- No authorizing statute allows board to change ALJ proposed order in this manner.
    - This violates the entire purpose of having an ALJ and a separate hearing.
    - The only exception that applies to the Board's ability to change part of a SOAH decision is found in a written statement of policy provided to the ALJ.
        - Agency May Only Overrule Conclusion of Law Based on Written Statement of Rule or Policy. **APA § 2001.058(c)**; **2001.058(e)**
        - A state agency shall provide the administrative law judge with a written statement of applicable rules or policies

Foreseen Benefit:

- This rule creates confusion as to the relationship between the agency and SOAH, and infuses unnecessary cost and uncertainty into the litigation process for licensees. Its abolition will make clear that SOAH proceedings are the appropriate forum for determinations of facts and law to be made.
- The abolition of this rule will take away the ability of the agency to imply that the assertion of a licensee's right to an impartial adjudication at SOAH could be overruled under an arbitrary and unclear standard.

- The repeal of this rule brings the Rules of the Board into compliance with law of the State of Texas.

V. Inappropriate Use of Confidentiality

- **Board Rules violate the Administrative Procedure Act:**

Problem:

- Rule allows the board to disclose confidential information "to other persons." **Rule §179.3(5)**

- Such a broadly word exception is so vague that the conditions under which disclosure is permitted is impossible to discern.

- This language could eviscerate the law requiring confidential information be kept from the public.

Proposed Solution:

- Language of rule should be changed to "other persons as required by law or court order"

Proposed Benefit:

- Restricting the scope of the rule will limit potential misuse of any otherwise broad exception to the requirement that records be kept confidential.

- **Peer Review**

Problem:

A recent board rule purports to make all peer review records admissible as evidence for all purposes when introduced by the Board in a disciplinary hearing. **187.31(e).**

- This rule, despite being an interpretive administrative rule, claims the authority to create a statutory exception to the hearsay rule, as stated in Article VIII, Texas Rules of Evidence 187.31(e)

- The rule also claims the authority to waive an evidentiary privilege provided by statute.**160.007(a)**
- Contradicts the Administrative Procedure Act's Rules of Evidence. **APA §2001.081; 187.31(a); 2001.083.**

- Misleadingly cites §160.006(a) which allows the board to disclose information in a peer review without waiving the peer review record privilege as authority to make such evidence admissible despite a statute expressly stating such evidence is not admissible without a waiver from the peer review committee. **160.007(e)**

Proposed Solution:

- This rule should be repealed.

- The attorney who certified this rule as being within the Board's authority's to adopt should be called to account for misleading the Board and the public as the Board has both actual knowledge that the Board could not use such evidence and no reason to believe its authority to regulate medicine could give it the authority to change the rules of evidence.

Proposed Benefit:

- Repeal of this rule will protect the integrity of the peer review process at private hospitals

- Encourage hospitals to conduct peer reviews without fear such information will be subject to public disclosure

VI. Concluding Proposal

Optional Proposal: Appointment of Agency Inspector General

- The Texas State Board of Medical Examiners is unique in the extent to which it has violated basic principles of administrative law and government accountability.

- The Board's General Counsel and Staff Attorneys and other legal compliance officers have failed the Board and the State.
    - Board rules are substantively defective to the extent they have been shown to alter or change the legal rights and duties of the agency.
    - Board rules are procedurally defective in failure to respond to comments and provide adequate notice
    - Board rules exceed the scope of interpretive authority.

- The Board has selectively ignored legislation with which it seems to disagree.
- Board members' active involvement in complaint screening, investigation, and informal and formal disciplinary adjudication. Rules seldom effectively implement the statutes under which they are enacted.

- Duty to comply with ex parte contacts reporting ignored

- Board has no guidance concerning when Board members should recuse themselves.

Proposed Benefit:

- Creation of Inspector General or independent agency may be necessary to ensure that rules actually enact or interpret and do not alter or change statutes procedural requirements of notice & comment rulemaking followed; informal adjudications are subject to Open Record Acts when applicable; Ex parte communications between Board and its representative bodies do not take place with any Staff Attorney without meeting requirements of APA.

- Board structure and conflicts must be changed to ensure appropriate professionals set standards of medical care; role of public members must be restricted.

- Participation of public Board members of on Disciplinary Committee is an unsound practice as they lack competence to make decisions on professional conduct and ISC must be rethought unless they have independent expert advice.

- Complaint screening and investigation should be Staff function separate from duties of Board or Committees; there will be ongoing need to monitor compliance.

Appendix A – Proposed Chapter 182

Proposed Board Rules, Chapter 182, Use of Experts
Texas Register, September 5, 2003, 28 TEX REG 7582-7583

Chapter 182. USE OF EXPERTS

22 TAC §§182.1 - 182.6

The Texas State Board of Medical Examiners proposes new §§182.1-182.6, concerning the use of experts consistent with the requirements of Senate Bill 104. The new sections will establish procedures, qualifications and duties of these professionals serving as expert panel members, consultants and expert witnesses to the board.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the rules are in effect there will be fiscal implications to state or local government as a result of enforcing the rules as proposed. The cost of the program, which was appropriated by the 78th legislature is estimated as follows:

(Note: Estimates are unable to be determined for FY06-FY08 at this time.)

FY04 - $1,591,836

FY05 - $1,392,594

Ms. Shackelford also has determined that for each year of the first five years the rules as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be compliance with Senate Bill 104. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The new rules are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rules: Texas Occupations Code Annotated, §154.056.

§182.1.Purpose.

This chapter is promulgated to establish procedures, qualifications and duties of those professionals serving as expert panel members, consultants and expert witnesses to the board.

§182.2.Board's Role.

This chapter shall be construed and applied so as to preserve board member discretion in the imposition of sanctions pursuant to provisions of the Medical Practice Act Tex. Occ. Code, Annotated, Title 3, Subtitle B (the Act) related to methods of discipline and administrative penalties. This chapter shall be further construed and applied so as to be consistent with the Act.

§182.3.Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Consultant--An individual with specialized knowledge or training selected by the agency to review complaints and investigations filed by the agency.

(2) Expert Panel Member--A physician appointed by the board to assist in investigations filed by the agency involving alleged violations of the standard of care as set out in section 154.058 of the Act.

(3) Expert Witness--An individual with specialized knowledge or training who contracts with the board to provide expert opinions in the investigation and resolution of disciplinary matters.

§182.4.Use of Consultants.

The initial screening of each complaint that involves the alleged violation of the standard of care shall include review by a consultant or employee with a degree in a health care field.

§182.5.Use of Expert Panel.

If the initial review of a complaint indicates that an act by a licensee may fall below an acceptable standard of care, the complaint shall be referred to an expert physician panel for review.

(1) Composition and qualifications. Selection criteria for appointment to the panel shall include:

(A) licensed to practice medicine in Texas

(B) certification by the American Board of Medical Specialties or the Bureau of Osteopathic Specialists;

(C) no history of licensure restriction;

(D) no history of peer discipline; and

(E) acceptable malpractice complaint history.

(2) Duties of the expert panel. Expert panel members will assist the board with complaints and investigations relating to medical competency. Cases concerning possible violation of the standard of care will be referred to the expert panel. Panel members who practice in the same specialty or similar area of practice as the licensee will be assigned to participate in the review of cases as deemed appropriate. Panel members assigned to a case will review all the medical information and records collected by the board and shall report findings in the prescribed format. A report shall be prepared by the expert panel to include the following:

(A) findings involving medical competency;

(B) applicable standard of care; and

(C) the clinical basis for the determinations, including any reliance on peer-reviewed journals, studies, or reports.

§182.6.Use of expert witnesses.

Expert witnesses shall be utilized as needed by the agency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 25, 2003.

TRD-200305475

Donald W. Patrick, MD, JD

Executive Director

Texas State Board of Medical Examiners

Earliest possible date of adoption: October 5, 2003

For further information, please call: (512) 305-7016

Appendix B – Adopted Chapter 182
Adopted Board Rules, Chapter 182, Use of Experts
Texas Register, November 21, 2003, 28 TEX REG 10492-10493

Chapter 182. USE OF EXPERTS

22 TAC §§182.1 - 182.6

The Texas State Board of Medical Examiners adopts new §§182.1-182.6, concerning the use of experts consistent with the requirements of Senate Bill 104. Sections 182.1, 182.2, 182.4 and 182.6 are adopted without changes to the proposed text as published in the September 5, 2003, issue of the Texas Register (28 TexReg 7582) and will not be republished. Sections 182.3 and 182.5 are adopted with changes to the proposed text as published in the September 5, 2003, issue of the *Texas Register* (28 TexReg 7582). The text of the rules will be republished. The new sections establish procedures, qualifications and duties of these professionals serving as expert panel members, consultants and expert witnesses to the board.

Comments were received regarding adoption of the rules.

Section 182.3 - Representative Capelo and the Texas Medical Association commented about the lack of definition of the term "expert panel." The Board concurred and added a definition to the section for clarification.

Section 182.5 - The Texas Pain Society commented that the selection criteria for board certification was unfairly limiting. The Board reviewed the comments and determined that the rule as proposed will allow for an expert panel that will include physicians trained in equivalent fields of practice to review complaints. *(Emphasis Added)*

The new rules are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

§182.3.Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Consultant--An individual with specialized knowledge or training selected by the agency to review complaints and investigations filed by the agency.

(2) Expert Panel--Physicians appointed by the board to consider particular complaints related to alleged violations of standard of care.

(3) Expert Panel Member--A physician appointed by the board to assist in investigations filed by the agency involving alleged violations of the standard of care as set out in §154.058 of the Act.

(4) Expert Witness--An individual with specialized knowledge or training who contracts with the board to provide expert opinions in the investigation and resolution of disciplinary matters.

§182.5.Use of Expert Panel.

If the initial review of the complaint indicates that an act by a licensee may fall below an acceptable standard of care, the complaint shall be referred to the expert physician panel for review.

(1) Composition and qualifications. Selection criteria for appointment to the panel shall include:

(A) licensed to practice medicine in Texas

(B) certification by the American Board of Medical Specialties or the Bureau of Osteopathic Specialists;

(C) no history of licensure restriction;

(D) no history of peer discipline; and

(E) acceptable malpractice complaint history.

(2) Duties of the expert panel. Expert panel members will assist the board with complaints and investigations relating to medical competency. Cases concerning possible violation of the standard of care will be referred to the expert panel. Panel members who practice in the same specialty or similar area of practice as the licensee will be assigned to participate in the review of cases as deemed appropriate. Panel members assigned to a case will review all the medical information and records collected by the board and shall report findings in the prescribed format. A report shall be prepared by the expert panel to include the following:

(A) findings involving medical competency;

(B) applicable standard of care; and

(C) the clinical basis for the determinations, including any reliance on peer-reviewed journals, studies, or reports.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 10, 2003.

TRD-200307664

Donald W. Patrick, MD, JD

Executive Director

Texas State Board of Medical Examiners

Effective date: November 30, 2003

Proposal publication date: September 5, 2003

For further information, please call: (512) 305-7016

Appendix C
Comments Opposing the Board's Proposed Rules, Chapter 182, Use of Experts and Petition for Adoption of Alternative Rules

Public Hearing before the Board October 10, 2003, Austin, Texas

MEMO

TO: TEXAS STATE BOARD OF MEDICAL EXAMINERS

From: Texas Pain Society (Membership Society with greater than 25 members)
Samuel Hassenbusch, M.D., Ph.D., President

Texas Cancer Pain Initiative (Non-Membership Society)
C. Stratton Hill, Jr., M.D., President
Past President, Texas Pain Society

Subject: Adoption of Proposed Rule, Chapter 182. Use of Experts

The Texas Pain Society requests a public hearing on Proposed Rule, Chapter 182. Use of Experts as authorized under SUBCHAPTER C. TEXAS ADMINISTRATIVE CODE, § 2001.029. (b)(3) and § 2001.029 (c) Public Comment.

The Texas Pain Society and The Texas Cancer Pain Initiative provide the following comments concerning Chapter 182. Use of Experts.

§ 2001.029 (b)(3)

(b) A state agency shall grant an opportunity for a public hearing before it adopts a substantive rule if a public hearing is requested by:

(3) an association having at least 25 members

Comment 1.

The Title of the Proposed Rule "Use of Experts" [hereinafter Proposed Rule] and other pertinent sections of the proposed rules in Chapters 178 and 179 do not fully reflect the requirements of Tex. SB 104, 78th Leg. R.S. 2003 SECTION 9. Section 154.056, Occupations Code, (6) (e) which authorizes, "The board by rule shall provide for an expert physician panel." The title makes no mention of an "expert physician panel."

Comment 2.

The Proposed Rule is deficient in appropriate definitions necessary for a fair, just, and efficient application of the Proposed Rule.

Comment 3.

The Proposed Rule fails to adopt rules that establish the criteria for determining that a complaint is baseless or unfounded as required by Texas Occupations Code Section 163.0035.

Comment 4.

The Proposed Rule is vague, arbitrary, and capricious in that it fails to provide for the composition and number of expert physician panels, qualification for membership on the expert physician panel(s), the professional procedures the expert physician panel(s) is to follow, and the duties of the expert physician panel members.

Comment 5.

The Proposed Rule is vague, arbitrary and capricious in failing to specify the Standard of Care for medical conditions to be determined by the expert physician panel.

Comment 6.

The Proposed Rule is vague, arbitrary, and capricious in failing to provide for the expert physician panel(s)' written reports to specify the standard of care and the clinical basis as to how it was reached including what sources were accepted and what sources were rejected in preparing the report, reliance on peer-reviewed journals, studies, or reports as required by S.B. 104, Section 10's amendment of Texas Occupational Code Section 154.058 c Occupations Code.

Comment 7.

The Proposed Rule is vague, arbitrary and capricious in failing to define or make clear the procedures for the administration of the functions of the panel(s).

Comment 8.

The Proposed Rule is vague, arbitrary, and capricious in failing to provide any grievance procedures for subject licensees who dispute the findings of the panel(s).

Comment 9.

The Proposed Rule is vague, arbitrary, and capricious in failing to define "another specialty that is similar to the physician's specialty."

Comment 10.

A.

For the reasons cited in 1-9, the Texas State Board of Medical Examiners has exceeded its statutory authority in that its arbitrary, vague, and capricious Proposed Rule leaves the agency with discretion to determine the acceptable standard of care without utilizing the Expert Physician Panel required by Tex. SB 104, 78th Leg., R.S. 2003. In so far as the general objective of the statute was to require the agency to provide for an expert physician panel to assist the board with complaints and investigations relating to medical competency, the agency's failure to provide for the prescribed composition, qualifications, membership requirements, and duties of the expert physician panel eviscerate the panel's legislative envisioned functions, in effect, enabling the agency to function without the guidance of the expert physician panel.

B.

The Proposed Rule is constitutionally defective in that it creates a disciplinary review procedure that is arbitrary, vague, and capricious and lacks a rational basis in that it fails to provide proper notice to licensees as to how they will be investigated, adjudicated, and disciplined. Further the Proposed Rule lacks a rational basis in that its enabling statute was meant to provide for the public welfare in establishing procedures, qualifications and duties of those professionals serving as expert panel members, consultants and expert witnesses to the board. The Proposed Rule does none of these things.

C.

The Proposed Rule violates constitutional rights to due process and open courts because licensees will be subject to arbitrary, vague, and capricious procedures that violate due process and deny recourse to impartial proceedings.

D.

The Proposed Rule violates equal protection because those physicians who are reviewed according to the procedures in the Proposed Rule will be improperly discriminated against because no provision is made for the expert physician panels to be composed of qualified members who have the knowledge and skill to define and apply an acceptable standard of care. The Proposed Rule would harm advanced and specialized licensees engaged in sub-disciplines of medicine or treating obscure and rare diseases. The Proposed Rule's expert physician panel does not ensure that panel members will have qualifications other than a license to practice medicine in Texas and certification by the American Board of Medical Specialties or the Bureau of Osteopathic Specialists. Since medical disciplines evolve and sub-disciplines are not provided for, those physicians practicing in areas where particular expertise and training are required to judge an

acceptable standard of care will not be guaranteed a fair and just review by the proposed expert physician panel

Comment 11.

The Texas Pain Society and The Texas Cancer Pain Initiative submit an attached substitute rule, Chapter 182. Panel of Physician Experts, each section of which is a comment, for which we request "a concise statement of the principal reasons for or against its adoption" from the board as outlined in TEX GOV'T Code, Title 10, Subchapter A. § 2001.030. Statement for or Against Adoption, TEXAS REGISTER AND ADMINISTRATIVE CODE.

Proposed Alternate Rule: ***(Offered by the Texas Pain Society and the Texas Cancer Pain Initiative at the Public Hearing October 10, 2003)***

Chapter 182. PANEL OF EXPERT PHYSICIANS

§ 182.1 Purpose

This chapter is promulgated to establish an expert panel of physicians to assist the board with complaints and investigations related to medical competency of licensees, and establish the composition, qualifications, procedures, and duties of the Expert Physician Panel.

§ 182.2 Board's Role

This chapter shall be construed and applied so as to preserve the board's discretion in the imposition of sanctions within the provisions of the Medical Practice Act Tex.Occ.Code, Annotated, Title 3, Subtitle B (the Act) related to methods of discipline and administrative penalties. This chapter shall be further construed and applied so as to implement the Expert Physician Panel provisions of the Act.

§ 182.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agency–The divisions, departments, and employees of the Texas State Board of Medical Examiners, The Texas Board of Physician Assistant Examiners, and the Texas State Board of Acupuncture Examiners.

(2) Board–The appointed members of the Texas State Board of Medical Examiners for physicians and surgical assistants, The Texas State Board of Physician Assistants for physician assistants, and the Texas State Board of Acupuncture for acupuncturists.

(3) Expert Physician Panel – The group of physician experts appointed by the board to meet as a body to consider particular complaints relating to violations of standard of care, and composed of physicians as required by Section 154.058 (b) and authorized under Section 154.056 (e) of the Act.

(4) Consultant – A physician selected by the board, as prescribed herein, to review complaints received by the agency. A consultant must qualify by:

(A) demonstrating evidence of specialized training in a discipline or sub-discipline of medicine and having practiced said discipline exclusively for three (3) years in the State of Texas, or

(B) having a practice in Texas limited to a discipline or sub-discipline of medicine for a period of five (5) years and recognized by peers to possess expert knowledge and is successful in the treatment of diseases in the said discipline or sub-discipline of medicine.

(5) Expert Physician Panel Member – A physician with expertise in a recognized discipline of medicine, as outlined in §182.6(1)(B), appointed by the board to evaluate alleged violations of the standard of practice as set out in section 154.058 of the Act.

(6) Expert Witness–An individual with specialized knowledge or training who contracts with the board to provide expert opinions in the investigation and resolution of disciplinary matters.

(7) Baseless or unfounded—Not based on any evidence or fact.

(8) Complaint—Information provided to the board that alleges a licensee has committed a violation of the Act.

(9) Complainant—A person, including a partnership, association, corporation, or other entity, who initiates a complaint with the board against a licensee.

(10) Jurisdictional—A matter over which the board has the authority to investigate and act upon.

(11) Licensee—A person to whom the board has issued a license, permit, certificate, approved registration, or similar form of permission authorized by law.

(12) Subject licensee—The licensee against whom a complaint is filed.

(13) Subject medical condition—The medical condition which the subject licensee treated or attempted to treat that is the subject of the complaint.

(14) Discipline of medicine—A field of medical study that includes exclusively diseases of a specific organ or organ system, or a pathological state affecting a single organ, an organ system, or multiple organs having systemic consequences if left untreated.

(15) Sub-discipline of medicine—A field of study that emphasizes a single or sub-set of diseases in a discipline of medicine.

§182.4 Initial Screening of Allegation(s)

The initial screening of each complaint that involves the alleged violation(s) of the standard of care (practice) shall be reviewed by a consultant, as defined by 182.3(4), whose practice encompasses the same or substantially similar field of medicine that is the subject of the complaint, or an employee of the agency with a degree in a clinical health care field the same or substantially similar to that of the subject of the complaint with a minimum of 3 years of clinical practice.

(1) If after an initial screening, a consultant or agency employee determines that a complaint alleging a violation of the Act is non-jurisdictional or for any other good cause does not warrant further review or investigation, the written determination will be forwarded to the board with a recommendation the complaint be dismissed.

(2) If after an initial screening, a consultant or qualified agency employee determines that a complaint alleging a violation of the Act is jurisdictional and warrants further review, the written determination must be communicated to the Expert Physician Panel citing in detail the Section(s) of the Medical Practice Act or Rule(s) of the Board alleged to have been violated.

§182.5 Creation and Composition of Expert Physician Panels

(1) An Expert Physician Panel will be appointed for each recognized discipline and/or sub-discipline of medicine as recognized by the American Board of Medical Specialties, Bureau of Osteopathic Specialties, or organizations recognized as equivalent to these certifying boards. The American Board of Facial Plastic & Reconstructive Surgery, The American Board of Pain Medicine, The American Board of Sleep Medicine, and the American Board of Spine Surgery are also recognized. Additional disciplines or sub-discipline's specialty certification bodies, or specialty or sub-specialty organizations may be recognized for Expert Physician Panel creation at the board's discretion.

(2) Each Expert Physician Panel will be composed of three (3) or more physicians whose specialized training and/or experience, as outlined herein, qualify them to function as experts in a given discipline of medicine.

(3) Expert Physician Panels will be created for recognized disciplines and sub-disciplines of medicine and may be created for symptoms or medical conditions that cross medical interdisciplinary boundaries. These panels will be composed of Expert Physician Panel Members from the various disciplines and sub-disciplines of medicine treating the symptom or medical condition.

(4) Members of the Expert Physician Panels will serve terms of three years. The initial panels will be appointed in staggering terms of 1,2, & 3 years, and panels with more than three members, appropriate staggering terms. Determination of the initial panel individual member's terms will be by chance.

(A) Members Of Expert Physician Panels unable to serve for whatever reason will be replaced by action of the board. Replacement Expert Physician Panel Members must meet the qualification requirements in §182.6. The replacement will serve to the expiration of the replaced member of the Expert Physician Panel's term.

§182.6 Qualifications of Members of Expert Physician Panels

(1) Selection criteria for physician appointment to the Expert Physician Panel shall include:

(A) a current, unencumbered license to practice medicine in Texas

(B) recognition as a specialist or expert by meeting either of the following criteria:

(1) certification by the American Board of Medical Specialties, Bureau of Osteopathic Specialties, or by Boards or organizations recognized as equivalent to these two certifying boards. The American Board of Facial Plastic & Reconstructive Surgery, The American Board of Pain Medicine, The American Board of Sleep Medicine, and the American Board of Spine Surgery are also recognized, or,

(2) having a practice in Texas limited to a discipline or sub-discipline of medicine for a period of five (5) years and recognized by peers to possess expert knowledge and is successful in the treatment of diseases in the said discipline or sub-discipline of medicine.

(C) no history of licensure restrictions

(D) no history of peer discipline

(E) acceptable malpractice complaint history

§182.7 Duties of Expert Physician Panel

The Expert Physician Panel:

(1) Shall evaluate complaints and assist in investigations relating to possible or alleged violations of the standard of practice.

(2) All cases deemed to be a possible violation of the standard of practice will be referred to the appropriate Expert Physician Panel.

(3) The Expert Physician Panel will review all the medical information and records collected by the agency, or any board members, and any additional records or other

information deemed relevant by the panel, or any one of its members. In the course of its review, the Expert Physician Panel may at any time request that additional information be gathered by the agency and provided to the Expert Physician Panel if the Expert Physician Panel for reaching an opinion deems such information necessary.

(4) The Expert Physician Panel will report its findings to the board in a prescribed written format in which it shall do the following:

(A) define and state the applicable Standard of Practice

(B) state the scientific and/or clinical basis for determining the Standard of Practice, including all authorities consulted and state with specificity those ultimately relied upon and those rejected, if any, by the Panel to reach its determination.

(C) state whether the Standard of Practice enunciated in each case is recognized as a "community" or "national" standard.

(D) state the Panel's determination of the subject licensee's conduct as to practicing within or below the defined Standard of Practice, and

(E) the written report of the panel will be made available to the subject licensee in a timely manner, not to exceed 60 days after the Agreed Order or final disposition of the case.

§182.8 The Board's Utilization of the Expert Physician Panel's Written Report

(1) The board must reference the Expert Physician Panel in its final order as to whether the board's order reflects agreement or disagreement with the Expert Physician Panel's finding of the subject licensee's conduct as practicing within or below the Panel's determined Standard of Practice.

(2) The board will keep and maintain all written reports produced by the Expert Physician Panel and make them available to the public upon written request.

(3) Unless the board disagrees with the Expert Physician Panel and takes action inconsistent with its recommendations, the Expert Physician Panel reports shall be deemed to reflect what the board considers the Standard of Practice for the subject medical condition under the circumstances of the episode involved.

§182.9 Use of Expert Witnesses

(1) Expert witnesses shall be utilized as needed by the agency.

(A) an Expert Witness may offer evaluative and information testimony only.

(B) an Expert Witness' testimony may not be used by the board in lieu of or as a substitute for the recommendations of the Expert Physician Panel.

Appendix D

Texas State Bd. of Medical Examiners v. Dunn

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

EDITORIAL NOTE: *This case illustrates two points made in the above analysis of the operation of the Board: 1) The vulnerability of physicians to repetitive and capricious Informal Settlement Conferences, and 2) The frustrations of repetitive ISCs causing a physician to sign an Agreed Order, no matter what the requirements of it are, to stop the onerous, ponderous, and endless disciplinary process.*

NO. 03-03-00180-CV

Texas State Board of Medical Examiners and Donald W. Patrick, M.D., J.D., Executive Director of the Texas State Board of Medical Examiners, Appellants

v.

Jack Dunn, III, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT

NO. GN104061, HONORABLE SUZANNE COVINGTON, JUDGE PRESIDING

Citation: Texas *State Bd. of Medical Examiners v. Dunn*, Tex. App. – Austin, 2003 WL 22721659 (2003) (unpublished decision, memorandum opinion)

Jan P. Patterson, Justice

Before Chief Justice Law, Justices B. A. Smith and Patterson

Affirmed

November 20, 2003

Memorandum Opinion:

In this case, we address the circumstances under which the Texas State Board of Medical Examiners may reject an Administrative Law Judge's findings of fact and substitute its own. We hold that the Board, which does not have unlimited discretion to change an ALJ's findings of fact and conclusions of law, did not establish a reasonable evidentiary basis for rejecting the ALJ's findings and conclusions. For the following reasons, we affirm the judgment of the district court.

Appellee Jack Dunn, III, was a practicing anesthesiologist in July 1995, when he administered an epidural to M.J., a woman who went into cardiac arrest and died during childbirth. In September 1997, the Board and Dunn entered into an agreed order under which his license was suspended until he showed that he was able to safely practice medicine (the "Agreed Order"). According to the Agreed Order, at the time of M.J.'s death, Dunn was abusing prescription drugs. The Agreed Order also contained findings of fact that during 1995 and 1996, other doctors and nurses raised concerns about Dunn's job performance and competency; he was removed as a member of a physician group; his privileges at a Lubbock hospital were suspended; he improperly prescribed prescription drugs to a female patient with whom he had a romantic relationship; and he settled for one million dollars a malpractice suit brought as a result of M.J.'s death.

About one year after his suspension, Dunn began to seek to have his suspension lifted. In January 1999, an informal settlement conference ("ISC") was held before a panel including one or more Board members. The ISC panel recommended that Dunn's suspension be lifted subject to conditions that included practice restrictions and monitoring requirements. When the recommendation was presented to the full Board, it was rejected. Another ISC was held in October 1999, the panel again recommended that Dunn's suspension be lifted subject to restrictions, and the full Board again rejected the recommendation. In early 2000, after the full Board rejected a third ISC panel recommendation that Dunn should be reinstated, Dunn appealed the Board's decision.

The matter was sent to the State Office of Administrative Hearings ("SOAH"). While the cause was pending with SOAH, Dunn and the Board participated in a mediated settlement conference. During that mediation, an agreement was reached under which Dunn's suspension would be lifted subject to various requirements and conditions. When the agreement was presented to the full Board, the Board rejected the agreement. The SOAH proceeding was then reopened.

Following a lengthy hearing, the ALJ issued a proposal for decision, stating that the evidence established that Dunn was competent to again practice medicine and recommending that the Board reinstate Dunn's medical license subject to certain restrictions. The ALJ made extensive findings, most of which were not challenged or changed by the Board and which provide the underpinnings for the legal issues at hand. The Board rejected several of the ALJ's findings of fact and conclusions of law and refused to reinstate Dunn. Dunn appealed to the district court, which found that the Board's decision lacked evidentiary support; it reversed the Board's order and remanded it for further proceedings, restricting the Board to consideration of the record previously developed. The district court also ordered the Board not to bar Dunn from taking the Special Purpose Exam ("SPEX") and Jurisprudence Exam ("JE") to show his medical competence. It is from the district court's order that the Board and its Executive Director, Donald W. Patrick, M.D., J.D. (collectively, the "Board"), appeal.

The Board raises two issues on appeal: (1) whether the Board had a reasonable basis to reject several of the ALJ's findings of fact and conclusions of law, and (2) whether the district court erred in limiting the scope of the Board's review of the cause on remand and in ordering the Board not to "prevent or hinder" Dunn's applications to take the SPEX and JE.

Standard of Review

The Board is the "primary means of licensing, regulating, and disciplining physicians," and is statutorily authorized to adopt rules to perform its duties and regulate the practice of medicine. Tex. Occ. Code Ann. §§ 151.003(2), 153.001 (West Supp. 2004). Once a license has been suspended, a doctor may seek reinstatement by showing that reinstatement is in the best interests of both the doctor and the public. *Id*. § 164.151(c) (West Supp. 2004). The Board's decision to deny reinstatement is subject to judicial review under the Administrative Procedure Act (the "APA"). *Id*. §§ 164.007(a), .009, .151(d) (West Supp. 2004); *see* Tex. Gov't Code Ann. §§ 2001.001-.902 (West 2000 & Supp. 2004). We review the Board's actions under the substantial evidence rule and will not substitute our judgment for that of the Board; we will reverse only if the decision is not reasonably supported by substantial evidence, is arbitrary or capricious, or is an abuse of discretion. Tex. Gov't Code Ann. § 2001.174(2)(E), (F) (West 2000). The Board must show it properly changed or disregarded the ALJ's findings and conclusions.

The Board, like other agencies, does not have unlimited discretion to change an ALJ's findings of fact. Generally, an agency may not change an ALJ's findings of fact or conclusions of law or modify an ALJ's order unless the agency determines that (1) the

ALJ improperly applied or interpreted the law, agency rules and policies, or prior administrative decisions, (2) a prior administrative decision on which the ALJ's decision was based was incorrect, or (3) a finding of fact contains a technical error requiring correction; the agency must state in writing specific reasons and legal bases for any changes. *Id*. § 2001.058(e) (West 2000); *see Flores v. Employees Retirement Sys.*, 74 S.W.3d 532, 539-40 (Tex. App.--Austin 2002, pet. denied); *see also Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 564-65 (Tex. 2000) (once school board chooses to send dispute to hearing examiner, statutory scheme requires board to defer to fact findings and board may not reweigh evidence and resolve questions of credibility; statute is more restrictive than APA but agency retains authority to ultimately decide whether facts show violation of board policy); *Southwestern Pub. Serv. Co. v. Public Util. Comm'n*, 962 S.W.2d 207, 212-13 (Tex. App.--Austin 1998, pet. denied) (PUC has statutory authority to supplant ALJ's findings and is not bound by "the general, restrictive APA section 2001.058").

The Board, after receiving an ALJ's findings of facts and conclusions of law, is to "determine the charges on the merits." Tex. Occ. Code Ann. § 164.007(a) (West Supp. 2004). The Board argues that it is not bound by section 2001.058 because of this mandate to determine charges on the merits. But the fact that the Board must determine the merits of such cases is not inconsistent with the provisions of section 2001.058. This Court has held that section 2001.058 applies to this agency to delineate the allocation of fact-finding between the ALJ and the Board. *Compare Levy v. Texas State Bd. of Med. Exam'rs*, 966 S.W.2d 813, 815-16 (Tex. App.--Austin 1998, no pet.), *with Southwestern Pub. Serv. Co.*, 962 S.W.2d at 212-13 (section 2003.049 expressly provides broader PUC review than section 2001.058); *see also* F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an ALJ?*, 51 Baylor L. Rev. 63, 76-80 (1999) (discussing section 2001.058 and its application to agency decisions).

Courts give deference to an agency's decision to modify or reject an ALJ's conclusions or findings only when substantiated by the ALJ's findings or when the basis for the change is fully articulated. *Compare Ramirez v. Texas State Bd. of Med. Exam'rs*, 995 S.W.2d 915, 918-19, 925 (Tex. App.--Austin 1999, pet. denied) (order followed ALJ recommendation; held substantial evidence supported board's decision), *with Employees' Retirement Sys. v. McKillip*, 956 S.W.2d 795, 800-01 (Tex. App.--Austin 1997), *overruled in part on other grounds by Texas Natural Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 814 (Tex. 2002) (after ALJ made findings of fact, agency made contrary findings and decision; held, agency did not satisfy section 2001.058 and did not show "rational connection between the stated policy and the change ordered by the agency"), *and Texas State Bd. of Med. Exam'rs v. Scheffey*, 949 S.W.2d 431, 432, 437 (Tex. App.--Austin 1997, writ denied) (board adopted ALJ's findings of fact but rejected recommendation; held, one of board's grounds for suspension was supported by substantial evidence).

An ALJ, as an independent and impartial fact finder, is better suited to decide questions of so-called "adjudicative fact," meaning questions of fact affecting only the parties to a contested case, "the 'who, what, when, where and how' disputes of the case." On the other

hand, agencies are "relatively" free to review and correct an ALJ's "legislative facts," which "provide a foundation for developing law, rules, or policies and, consequently, affect the outcome of many cases." McCown & Leo, *supra*, at 68-69 (citing K.C. Davis, *Treatise on Administrative Law* § 15.03, at 353 (2d ed. 1979)); *see Exxon Corp. v. Railroad Comm'n*, 993 S.W.2d 704, 710 (Tex. App.--Austin 1999, no pet.) ("'adjudicative' facts [are those] for which one expects perfectly explicit support in the body of evidence; . . . 'legislative facts' [are those] that the Commission was authorized to determine based on its judgment and expertise in light of what the evidence showed with respect to the general situation"); Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.5, at 55 (3d ed. 1994) (distinguishing adjudicative facts from legislative facts); *see also Davis*, 34 S.W.3d at 565-66 (comparing more restrictive education code to APA; "the focus is on whether the issue determined is ultimately one of policy, and if so, whether a school board's decision is supported by substantial evidence and free of erroneous legal conclusions"). Thus, the allocation of primary fact-finding to the ALJ, with any changes to be appropriately substantiated by the Board, is a hallmark of the administrative process.

Analysis

To earn reinstatement of a suspended medical license, a petitioning doctor has the burden of showing that reinstatement is in his and the public's best interests. Tex. Occ. Code Ann. § 164.151(c) (West Supp. 2004). Once an ALJ finds that a doctor has made such a showing, the Board, if it disagrees, must explain how the ALJ's findings or conclusions were erroneous, based on the administrative record as presented to the ALJ. *See* Tex. Gov't Code Ann. § 2001.058(e). Here, the ALJ found that Dr. Dunn carried his burden, and the burden then shifted to the Board to controvert or establish why his reinstatement is not in his or the public's best interest. We hold that the Board did not carry this burden.

The Board rejected the ALJ's findings that (1) before Dunn began abusing drugs he was clinically competent and (2) he was physically, mentally, and otherwise competent to safely practice medicine as long as he continued in recovery.[2]The Board refused to adopt the following conclusions of law: (1) Dunn established that it was in his and the public's best interest to have his license reinstated; (2) it would be appropriate to impose practice restrictions and monitoring to assure Dunn's continued recovery and clinical competence while he reentered the practice of medicine; and (3) Dunn should be reinstated with the requirements that he continue to submit to random urine tests, take a drug that blocks the brain's ability to feel a "high" from opiates, pass the SPEX and JE, complete a residency

[2] 1. The Board also rejected several findings by the ALJ related to the SPEX and JE. However, at oral argument, both parties agreed that the issues related to Dunn's desire to take the examinations were moot. Therefore, we will not address the Board's complaints related to the ALJ's findings 44, 45, 46, and 47, and we will not address its complaints related to the district court's order barring it from interfering with Dunn's attempts to take the examinations.

or fellowship, limit his practice to an institutional or group practice, and have his practice monitored by another doctor.

The Board attempts to characterize the rejected findings as legislative facts, arguing that the determination of clinical competence impacts future cases. However, we believe the specific questions here--whether Dunn was competent before his drug abuse began and whether he is currently competent to practice medicine--are instead adjudicative facts, tied to and affecting only the parties to this particular contested case. The overall definition of competence is a matter of policy; whether a particular doctor under particular facts has carried his burden of establishing his competence is not. Therefore, we will review the Board's justifications for changing the ALJ's adjudicative facts under a stricter standard than we would review a determination or alteration of legislative facts. *See Flores*, 74 S.W.3d at 539-40; McCown & Leo, *supra*, at 68-69.

Finding of Fact Number 38

The ALJ's finding of fact number 38 stated, "Before Dr. Dunn began abusing drugs, he was clinically competent." The Board refused to adopt that finding, instead stating that the finding contradicted findings in the 1997 Agreed Order and that Dunn's "failure to recognize or acknowledge that he did anything wrong in administering anesthetic to patient M.J. after more than four years of sobriety is a further indication of a lack of clinical knowledge or skill unrelated to his abuse of drugs."

First, we note that on appeal and during the proceedings below, the parties agreed that Dunn's competence before his drug abuse began in 1995 was not at issue. Therefore, the Board had no justification to change the ALJ's finding related to his competence before his drug abuse began. Furthermore, the Board, which presented no evidence at the hearing, did not rebut the evidence demonstrating that Dunn was in fact competent before his drug abuse began.[3] The Board states that its change was supported by evidence of Dunn's responsibility for M.J.'s death, concerns raised as to his overall competence, his prescribing controlled substances to the woman with whom he was involved, and the physician's group's termination of its affiliation with him. However, M.J. died in July 1995, Dunn's physician's group terminated his affiliation and questions were raised about his competence during 1995, and Dunn prescribed controlled substances to the woman in late 1995 and early 1996. These issues arose during the time Dunn was abusing drugs and are not relevant to Dunn's competency before his drug abuse began. Dunn had practiced medicine since 1989 and was certified by the American Board of Medical Specialties in anesthesiology. Other doctors presented evidence that Dunn was competent until 1995, and Dunn testified that he had administered anesthetic in 4500 cases, including about 500 epidurals, and that only one, M.J.'s case, gave rise to a malpractice claim. We hold that

[3] At the hearing before the ALJ, counsel for the Board stipulated that "at some point prior to 95 Dr. Dunn was competent. As to the exact time period, we couldn't be specific as to what time period he was competent."

the district court properly found that the Board lacked substantial evidence or a reasonable basis to change the ALJ's finding of fact number 38.

Finding of Fact Number 57

Finding of fact number 57 found that based on the ALJ's other findings, Dunn is "physically, mentally, and otherwise competent to safely practice medicine, contingent on his remaining in recovery." The Board rejected this finding, stating that it was not supported by the evidence, based on an insufficient review of the evidence and unsound medical principles, and insufficient to protect the public. The Board quoted statistics related to relapses in doctors recovering from drug abuse and stated that Dunn had not proved his current competence, noting he had not practiced medicine for over four years and had not passed any objective, recognized test or completed an internship. The Board also stated that Dunn's testimony showed a "failure to recognize his error," indicated a lack of clinical ability, and contradicted other statements he had made in which he acknowledged mistakes in M.J.'s treatment, thus casting doubt on his credibility.

Dunn objected to the admission of the Agreed Order into evidence, stating he did not believe that all the facts recited in the Order were true. Dunn testified that he signed the Agreed Order because, "I thought it was time for me to get on with my recovery and as--I signed it as a basis of, you know, coming to an agreement with the--with the Board where I could be on the process to getting my license back. I wasn't so concerned with the actual facts of it and there are several of them that--that are not true." Dunn said his father, who is also a doctor, advised him to sign the Agreed Order because it was the "only chance of getting my license back, and . . . that's why I signed it." The ALJ ruled that she would allow it as evidence of the allegations leveled against Dunn, not as Dunn's absolute admission of the truth of the allegations. The ALJ's proposed decision makes a similar recitation.[4]

The Agreed Order recites that M.J. had an uncomplicated pregnancy, that Dunn, "in gross error, placed the epidural's catheter in her abdomen" and administered "inappropriate dosages" of anesthetic, and that M.J. and her unborn child died as a result of Dunn's

[4] Because the Board and Dunn, who was not represented by an attorney and who signed the order without advice of counsel, opted to enter into the Agreed Order in 1997 and Dunn settled the malpractice suit, the actual facts of M.J.'s tragic death were never fully litigated. The Board wishes to use Dunn's signature to the Agreed Order as an absolute admission of all statements of fact in the order. However, the Board, by its decision to enter into the Agreed Order, chose not to fully explore the facts of the case. Dunn testified that he did not believe every factual recitation was true, but that he signed the document in order to get on with his recovery and his life.

Having voluntarily entered into the Agreed Order, neither party may collaterally attack the Order. However, we recognize that the Order is in the nature of a compromise. We believe the ALJ properly admitted the Agreed Order, not as "admissions by Dr. Dunn or . . . equivalent[s] to adjudicated facts," but as an indication of the findings and events surrounding M.J.'s death and Dunn's drug abuse. It is probative but not utterly binding evidence. The ALJ took his testimony into account when evaluating his credibility and competence. The record reflects that the ALJ carefully considered Dunn's credibility, even reopening the SOAH hearings to address inconsistencies in testimony that raised credibility concerns.

actions and omissions. The Order further recites that Dunn failed to recognize M.J.'s deteriorating condition or to start lifesaving measures in a timely fashion.

The autopsy report listed M.J.'s cause of death as complications of epidural anesthesia, specifically finding that (1) the catheter was within the retroperitoneum and (2) the circumstances suggested anesthetic toxicity. The level of anesthetic in M.J.'s blood was not increased, but time had passed from the anesthetic's administration and her time of death. The report stated that the temporal relationship of the administration of the anesthetic, the sequence of events preceding the cardiac arrest, and the absence of other findings that might explain the seizures and cardiac arrest, as well as the "epidural catheter's position within the abdomen," all "compellingly indicate" that M.J. died as a result of complications from the epidural.

On cross-examination, the Board walked Dunn through the Agreed Order's findings related to M.J.; Dunn denied that M.J. had an uncomplicated pregnancy, saying instead that she had documented preeclampsia and was showing signs of it when Dunn started her epidural. Dunn said as he administered the epidural, he used a known technique to decide when the needle was properly placed and "every indication that I had that I've been trained to do to place an epidural indicated that it was in the correct spot." He testified that during the autopsy, "the catheter tip had been sheared off" and was found in M.J.'s abdomen. The medical examiner "asked me where the epidural catheter tip should be and so it's my opinion that he didn't even know where the epidural catheter was." Dunn said he had not seen objective evidence that he had misplaced the catheter, and he disagreed with several statements in the medical examiner's report. He further testified that he had given a test dose of anesthetic and had checked for symptoms that the epidural was incorrectly inserted; when no such symptoms appeared, he injected the anesthetic very slowly and carefully. He said patients with preeclampsia are prone to seizures that can lead to cardiovascular collapse, and stated that when M.J. went into seizures and cardiac arrest, he attempted to revive her to no avail. He said, "I did do everything that I possibly could and in a timely manner, and I am satisfied that I did everything that I possibly could and that I was very careful about the way I did the epidural on this lady. . . . I'm not trying to assess blame, but there were, you know, other circumstances that were not ideal." Dunn also said that the medical examiner's report found that M.J.'s blood level of anesthetic was within normal limits and not elevated, "which is important . . . because elevated levels of anesthetic can cause seizures."

An unidentified consultant wrote a letter to the Board in 1996,[5] following a review of M.J.'s records, stating that the most likely cause of death was Dunn's failure to recognize that the catheter was improperly placed and a "relative" overdose of anesthetic. The consultant said M.J.'s medical records did not support Dunn's assertion that preeclampsia had escalated to eclampsia with seizures. The consultant said Dunn should not have administered more anesthetic after an initial dose gave no result, indicating an improperly

[5] This letter is unsigned and does not indicate by whom it was written, that person's credentials or qualifications, or his or her relationship to the Board or this case. It appears that it was never admitted during the ALJ's hearing, but instead was attached as an exhibit to one of the Board's pleadings.

inserted catheter. The consultant also faulted Dunn for not checking for resuscitation equipment before administering anesthetic.

There was extensive testimony from several doctors involved in Dunn's recovery from drug abuse, testifying that Dunn had been in complete compliance with their recommendations and requirements, was in "full sustained recovery," and was at minimal risk for relapse. One of those doctors testified that, with regard to M.J.'s death, "I think he [Dunn] has accepted full responsibility for that. It's not possible to determine to what extent substance abuse played a role in that with, you know, a great deal of accuracy. . . . He does accept the understanding that we have of chemical dependency, that part of that process is recovering from its affects, being preoccupied with the drug to some extent, et cetera, and he accepts that as something that was potentially interfering with his normal functioning." Asked a second time about Dunn's drug abuse and its involvement in M.J.'s death, the doctor said he did not believe Dunn was using drugs or going through withdrawal symptoms at the time he administered anesthetics to M.J., but, "Dr. Dunn has accepted that the fact that he was abusing drugs at that time could play a role in any untoward event."

Asked about his professional performance in relation to and at about the time of M.J.'s death, Dunn testified, "I feel like I--I did what I was trained to do and I--although I am--I have a deeper understanding of what substance abuse, how it can possibly have an affect on it. I do feel like that I handled the situation as I was trained to do and I handled it in as effective a manner as I could have." He said, "I'm comfortable with . . . how drug addiction can--can possibly affect one's clinical judgment, I--I realize that there--that it may have played a part in the unfortunate outcome of that malpractice case and I'm comfortable with that." On cross-examination, he stated, "I have come to realize that even though I wasn't acutely intoxicated or in active withdrawals, that substance abuse or alcohol abuse around that time can have an affect on someone's judgment. And I--while I'm willing to admit that, you know, there's a possibility that that--you know, that that's a possibility, I still feel like I--I--I handled the--a difficult situation to the best of my ability and training." He also stated that, although he believes he was practicing medicine to the best of his ability, "I've come to realize that, you know, substance abuse can affect one's judgment," and, "I agree that it's possible that I wasn't at my optimal best."

Dunn continued to take medical education courses during his suspension, amassing 381 hours at the time of his ALJ hearing. Dunn testified that he also tried to stay informed about medical issues without practicing by reviewing medical cases for a law firm in Dallas. At the time of the hearing, Dunn had taken more than seventy drug tests, all of which were negative. He continues to take two or three random tests a month. Dunn testified that it was only the last agreed ISC recommendation that would have required him to take the SPEX and JE, for which he understood he had to have Board approval, and that he then began to request permission to take the exams. Dunn said he had not received Board permission to take those two examinations.

The Board argues that Dunn did not show current clinical competence because he had not: (1) practiced medicine since his suspension in 1997, (2) taken or passed any

recognized examinations, or (3) completed an internship or fellowship. However, had Dunn practiced medicine since his suspension, he would have been guilty of the unauthorized practice of medicine. *See* Tex. Occ. Code Ann. § 155.001 (West Supp. 2004). Dunn agreed to all conditions the various ISC recommendations would have imposed, including taking and passing the SPEX and JE, limiting his practice to a group or institutional setting, continuing to take random drug tests, being monitored by another doctor approved by the Board, limiting or abstaining from the practice of anesthesiology, and completing a six-month residency before resuming practice. The completion of a residency program and passage of the examinations would seem to answer the Board's concerns about Dunn's clinical competence and absence from the practice of medicine since 1997.

The Board also points to section 163.11(a) of the administrative code, which requires that "[a]ll applicants for licensure shall provide sufficient documentation to the board that the applicant has, on a full-time basis, actively diagnosed or treated persons or has been on the active teaching faculty of an acceptable approved medical school within each of the last two years preceding receipt of an Application for licensure." 22 Tex. Admin. Code § 163.11(a) (2003). However, section 163.11(c) allows an applicant lacking such recent experience to obtain a license by meeting one or more conditions, such as certification by the American Board of Medical Specialties, passage of the SPEX, completion of continuing medical education hours, or a fellowship, mini-residency, or other structured remedial education. *Id*. § 163.11(c).

The Board also used relapse statistics quoted by the ALJ to support its decision. The ALJ found, and the Board agreed, that a study indicated that 40 percent of anesthesiologists relapsed, versus 44 percent of other kinds of physicians, and that 81 percent of anesthesiologists had sustained recoveries longer than two years. The Board then states that a 40 to 44 percent chance that Dunn will relapse poses too great a risk to the public. Under this rationale, however, no anesthesiologist who abused opiates would ever be considered safe to be relicensed, because the statistics would always indicate at least a 40 percent possibility of relapse.

The Board states that it doubts Dunn's competence because he has not practiced medicine recently, while refusing to reinstate his license, even with restrictions. The Board states that Dunn had not passed any examinations, a point which has now become moot, while failing to give him permission to take the SPEX or JE. The Board states that Dunn had not completed an internship or residency program, while refusing to approve the ISC recommendations that would require such a program's completion before Dunn could return to practice. Finally, the Board states that Dunn's refusal to accept responsibility for M.J.'s death indicates a lack of clinical competence and raises credibility issues because Dunn had previously accepted such responsibility.[6] Issues of credibility are to be decided by the impartial finder of fact, the ALJ, and the Board should not redetermine those issues or reweigh the evidence. *See Flores*, 74 S.W.3d at 539-40 (resolution of

[6] The Board also refers to the allegations from 1995 and 1996. However, any concerns raised during the time Dunn was abusing drugs are irrelevant to his competence now.

adjudicative facts "often requires making credibility determinations" and hearing examiner is better suited to make such determinations than agency because hearing examiner has heard evidence and observed witness demeanor and is disinterested party); *Ford Motor Co. v. Motor Vehicle Bd.*, 21 S.W.3d 744, 757 (Tex. App.--Austin 2000, pet. denied) (quoting *Southern Union Gas Co. v. Railroad Comm'n*, 692 S.W.2d 137, 141-42 (Tex. App.--Austin 1985, writ ref'd n.r.e.)) ("The ALJ was the sole judge of the credibility of the witnesses and was free to accept the testimony of any witness or even accept 'part of the testimony of one witness and disregard the remainder.'"); *Southwestern Pub. Serv. Co.*, 962 S.W.2d at 214 (Because PUC matters "often involve objective evidence that is more conducive to review on the record than evidence such as live witness testimony, which is subject to credibility concerns. . ., section 2003.049(g) allows the Commission to substitute its judgment for the ALJ's on questions of fact."). Further, Dunn, while refuting some of the allegations in the Agreed Order and stating that he believed other factors substantially contributed to M.J.'s death and that he had handled the situation as effectively as he could have, also testified that he understood that his drug abuse could have had an effect on his performance. We further observe that when the Board refused to reinstate Dunn's license after three ISC recommendations, Dunn had not yet testified before the ALJ, thus raising the asserted credibility concerns, and yet the Board denied each recommendation, even when they included requirements that would protect the public and assure Dunn's clinical competence. Based on the reasons put forth by the Board throughout these proceedings, it appears that the Board is not hewing to the statutory standard for reinstatement, but rather is acting consistent with the intent that Dunn shall never practice medicine again.[7] However, the Board entered into the Agreed Order, *suspending* Dunn's license until he could prove his competence, *not revoking* his license, as the Board is authorized to do. The Board should be bound by the Agreed Order to at least the same degree as it seeks to bind Dunn.

The Board's reasons for changing the ALJ's findings of fact do not reference an improper application of law, policy, or rule, nor do they state that the ALJ relied on an incorrect prior decision or made a technical error. Thus, the Board was not authorized by statute to change the ALJ's findings of fact. *See* Tex. Gov't Code Ann. § 2001.058(e). Even if we assume that section 2001.058(e) does not apply, the Board's reasoning states that the ALJ's findings were not supported by the evidence, were based on insufficient review of the evidence and unsound medical principles, and were insufficient to protect the public. The Board opted not to present any evidence other than the Agreed Order, which Dunn disputed in some detail. The Board chose to rely solely on the Agreed Order and its cross-examination of Dunn's witnesses, and is therefore bound by the evidence as presented by those witnesses. That testimony indicates that Dunn has performed exceptionally well in his rehabilitation efforts, has maintained his recovery, and shows no signs of relapse. Dunn presented evidence of his clinical competence prior to his drug abuse, something the Board did not dispute other than to point to allegations of misconduct during the time Dunn was using drugs, and presented evidence of his efforts

[7] This is further indicated by the minutes from the Board meeting at which the last ISC recommendation to reinstate Dunn's license was discussed. At that meeting, a Board member stated "it is his feeling that Dr. Dunn's actions were so egregious that he personally will not vote to approve his request to terminate his suspension."

to maintain his competence by taking substantial numbers of continuing education courses and reviewing medical records for a law firm. Dunn agreed to complete a residency program, pass the SPEX and JE, and limit his practice. Dunn testified that he believed his administration of the anesthetic was not the sole cause of M.J.'s death, while admitting that his drug abuse may have affected his performance. The evidence does not support the Board's changing of the ALJ's finding of fact number 57.

Conclusions of Law 5 through 9

In conclusions 5 through 9, the ALJ concluded that Dunn had shown it would be in his and the public's best interests for his license to be reinstated, that practice restrictions and monitoring requirements should be imposed to ensure Dunn's continued recovery and clinical competence, and that the Board should lift the suspension of Dunn's license subject to reasonable restrictions and requirements. As with the findings of fact discussed above, the Board justified its changes by stating the ALJ's conclusions were not supported by the evidence or based on insufficient review of the evidence and unsound medical principles, and were insufficient to protect the public, and by stating Dunn had "failed to meet his burden of proof that he is currently competent to practice medicine," again noting Dunn had not practiced in over four years, taken recognized tests, or completed a recognized internship or fellowship. We fail to see how a doctor whose license is suspended for a period of years could possibly demonstrate competence under the Board's interpretation of the requirements in this case. Based on the evidence as presented by Dunn and cross-examined by the Board and as discussed above, we hold that the reasons put forth by the Board do not justify the Board's changing of the ALJ's conclusions of law.

Can the District Court Limit the Board's Review on Remand?

We have held that on remand to an agency, a court may use its general equity powers to control the scope of remand or to provide instructions to the agency, as long as it acts within the bounds of the law. *First Sav. & Loan Assoc. v. Lewis*, 512 S.W.2d 62, 64 (Tex. Civ. App.--Austin 1974, writ ref'd n.r.e.). The APA authorizes a court to "reverse or remand the case for further proceedings." Tex. Gov't Code Ann. § 2001.174(2). We have held that under a similarly worded statute authorizing remand, a court may limit the scope of the remand to the record previously established by the agency. *Texas Health Facilities Comm'n v. Nueces County Hosp. Dist.*, 581 S.W.2d 768, 770 (Tex. Civ. App.--Austin 1979, no writ); *see Lewis*, 512 S.W.2d at 64 ("the district court may control the scope of its remand").

The Board points to our ruling in *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group* that a "reviewing court is empowered to issue only a general remand" under the statute in question. 93 S.W.3d 570, 579 n.9 (Tex. App.--Austin 2002, pet. denied). That case, however, is distinguishable because there the district court gave the agency "detailed instructions on how the commission should determine" the issue on remand. *Id*. Instructions to weigh the evidence in a certain manner conflict with the prohibition that a court shall "not substitute its judgment for the judgment of the state

agency on the weight of the evidence." Tex. Gov't Code Ann. § 2001.174. We do not have such detailed instructions in this cause.[8] S*ee also McKillip*, 956 S.W.2d at 802 (holding trial court erred in remanding cause to agency with specific instructions, including instruction ordering agency to adopt proposal for decision). Limiting the scope of the record on remand does not direct the agency as to how it is to weigh the evidence and does not conflict with any statute. The Board had more than enough opportunity at the ALJ level to present evidence. The Board failed to provide sufficient justification for its decision to change the ALJ's findings and conclusions. *See* Tex. Gov't Code Ann. § 2001.058(e); *Flores*, 74 S.W.3d at 539-40. Given the circumstances and procedural history of this case, we hold that the district court did not err in limiting the Board's consideration to the ALJ record on remand.

Conclusion

After M.J.'s tragic death in 1995, the Board did not revoke Dunn's license, instead opting to suspend the license with conditions under which Dunn could seek reinstatement. We believe it is disingenuous for the Board to purport to allow Dunn to seek reinstatement and then essentially make it impossible for him to fulfill the Board's conditions by blocking him from taking required exams or by holding it against him that he has not practiced medicine while suspended or that he is resistant to take complete responsibility for M.J.'s death. Furthermore, the Board states that it denied Dunn's reinstatement in part because his testimony before the ALJ was inconsistent with prior testimony and the Agreed Order. However, the Board had already denied reinstatement three times before Dunn gave that "inconsistent" testimony, and more importantly, the ALJ is charged with resolving issues of credibility and evidentiary conflicts.

We recognize the Board's ultimate responsibility of policing the medical profession to ensure the public's safety. Notwithstanding the importance of this goal, it is not inconsistent with the allocation of fact-finding between the ALJ and the Board and the requirement that the Board establish an evidentiary basis in the record for any modification of the ALJ's findings. We hold that the Board failed to carry its burden to articulate a reasonable evidentiary basis for rejecting the ALJ's findings of fact and conclusions of law.

We affirm the district court's judgment reversing the Board's order and limiting the Board's review on remand to the record that was before the ALJ.

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[8] As noted earlier, the parties agree that the issues related to Dunn's attempts to take the SPEX and JE are moot. We therefore do not consider those instructions in this discussion.