TEXAS MEDICAL ASSOCIATION

Physicians Caring for Texans

July 29, 2016

Ms. Rita Chapin
P.O. Box 2018
Austin, TX 78768-2018
Via email: rules.development@tmb.state.tx.us

Re: Comments on proposed new 22 TEX. ADMIN. CODE §187.18 as published in the Texas Register on July 1, 2016 (41 TexReg 4765).

Dear Ms. Chapin:

TMA is a private, voluntary, non-profit association of more than 48,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its mission is to "Improve the health of all Texans." TMA's diverse physician members practice in all fields of medical specialization. The Texas Medical Association ("TMA") appreciates this opportunity to comment on the Texas Medical Board's ("TMB") proposed new rules concerning informal show compliance proceedings and settlement conferences (i.e., proposed 22 TAC §187.18), as published in the Texas Register on July 1, 2016.

TMA recognizes that informal show compliance and settlement conferences (ISC) are a valuable way for physicians to resolve complaints without having to incur the costs of a more formal hearing. But for ISCs to adequately serve their purpose, it is important that physicians have a fair and meaningful opportunity to be heard and to present their defense. While TMA appreciates TMB's efforts in this proposed rule to improve on the ISC process, the proposed rule is moving in the wrong direction—instead of allowing the process to become fairer and more transparent, the proposed rule makes ISCs more like a formal administrative hearing without the guaranteed accompanying protections. What good, then, is an informal process intended to create a more efficient forum for complaint resolution, but is so fundamentally deficient in fairness that it only creates a need for a more fair and formal review?

TMA interprets the authorizing statute for ISCs as indicating a legislative intent in favor of an informal *meeting*—not a hearing. In Section 164.003 of the Occupations Code, the legislature actually seems to have carefully described the "informal meeting" in a way that would preclude anything resembling a more formal hearing. An informal "meeting" would not have opening and closing arguments, prescriptive lists of what parties can and cannot do, and may not even have oral witness testimony.

In what seems to be in contravention of the legislative intent, ISCs have become more and more formal, prescriptive, and regulated. The problem with this is that ISCs, under the guise of an "informal conference," allow TMB to avoid the hassle of due process or even fundamental fairness. ISCs thus seem to have fallen into a grey area, the result of which is physicians feeling forced to participate in an "informal" conference that has no guarantees of fairness.

As evidence of this, one need only look as far as TMB's proposed rule, as it is symptomatic of the regimented yet unfair nature of the ISC process. As TMB admits in the preamble for the proposed rule, the proposed rule reflects current practice and TMB is only being changed to comport to that practice. But if the proposed rule—which, as discussed in detail below, is replete with risks of unbalanced treatment—truly is a reflection of the reality of the ISC conference, then TMA is deeply troubled by what must be an inherently unfair process, regardless of how formal the conference is.

TMA thus **strongly encourages TMB to withdraw these rules** to allow for meaningful stakeholder participation and consultation. To be clear, TMB should convene a stakeholder meeting in order to consult with relevant parties—including key attorneys who regularly participate in ISCs—in order to formulate a more appropriate and, frankly, fair redefinition of the ISC process. The fact that the proposed rule even remotely resembles current TMB practice is striking evidence that the ISC process is in dire need of reform and redefinition, and stakeholders have valuable insight into how that reform should happen. In fact, Occupations Code Section 153.0015 requires TMB to follow guidelines that "must provide an opportunity for [individuals and groups that have an interest in matters under TMB's jurisdiction] to provide input *before the board provides notice of the proposed rule*" (emphasis added).

To further illustrate the significant need to consult with stakeholders to improve the fairness of transparency of the ISC process, TMA herein lays out questions and issues raised by the proposed rule about the fairness of the ISC process. More specifically, the proposed rule raises questions about the fairness with which TMB allows the presentation of witness testimony in an ISC and the excessively broad discretion board representatives have in determining which evidence to consider in an ISC.

1. **The Proposed Rule Disfavors a Licensee's Opportunity to Present Witness Testimony.**

TMA is concerned that the proposed rule creates an uneven playing field that limits a licensee's opportunity to present witness testimony. In making this a more formal process, TMB has bolstered its own ability to present witness testimony, but has unfairly withheld the same right to licensees.

To be clear, TMA is not confident that witness testimony is even appropriate in an ISC. The legislature authorized TMB to create an "informal meeting" process that would include the presentation of facts that one "reasonably believes [one] **could** prove by competent evidence or qualified witnesses **at a hearing**." Sec. 164.003(b)(6) and (c)(2), Tex. Occ. Code (emphasis added). TMA could not emphasize this enough: this is not a legislative authorization for TMB to

allow witness testimony at an informal meeting. Rather, it seems fairly clear that the legislature intended a more informal summary of the facts that *could be* presented *if the complaint were to proceed to a formal hearing.*

At the very least, if TMB is going to allow witness testimony, it should be fair. Whether a licensee has equal opportunity to present oral witness testimony, or whether TMB provides advance notice of its intention to present witness testimony and allow for a licensee's rebuttal witness, there are many ways in which this process could be made fairer. But the proposed rule is devoid of any attempt to be so.

TMA thus offers several point for consideration. Specifically, the proposed rule: 1) provides grounds for excluding untimely written witness statements offered by licensees; 2) removes a physician's opportunity to present oral witness testimony while preserving the board's opportunity to present oral witness testimony; and 3) making the ISC process more formal in nature without including important procedural safeguards afforded in other formal settings.

a. Proposed Rule Limits Physicians' Rights to Present Witness Statements
    i. 22 TAC 187.18(c)

TMB proposes to amend §187.18(c) to clarify that licensees must include written witness statements in the information submitted to board representatives 15 days prior to the date of the ISC. Whether this is a change or a clarification of an already existing practice is irrelevant; TMA expresses concern both that this is a prohibitively restrictive timeline for the preparation of witness statements and that it is applied only to licensees and not the board.

According to the proposed rule, licensees must provide written witness statements to board representatives at least 15 days prior to the date of the ISC. Existing rule in 22 TAC 187.16 provides that a physician receives notice no later than 45 days before the date of an ISC. The result is simple math—the proposed rule adds up to a tremendously tight window of only 30 days to gather witness statements. This would be difficult for a physician defending against one complaint, but, as may often be the case, preparing multiple witness statements for defense against multiple complaints at the same time would be nearly impossible under these time constraints.

If impossible deadlines were not unfair enough, TMA fears that licensees are the only ones subject to them. To be sure, the last two sentences of §187.18(c) provide: "Information must be received *from the licensee* at least five business days prior to the ISC for complaints filed before September 1, 2011. For complaints filed with the board on or after September 1, 2011, the information must be received at least 15 days prior to the date of the ISC" (emphasis added). The second sentence—the provision to which current complaints will apply—does not say from whom the information must be received, but because the preceding sentence singles out only the licensee, TMA is concerned that this rule could be interpreted to apply only to the licensee.

Does this mean that there is no time restriction on TMB if it wanted to present new information in response to the licensee's provided information? Does TMB have unchecked authority to supplement its information submission up to the date of the ISC? And if it does, must TMB also ensure the licensee has prompt notice of that information? Also, if ISCs are intended to be an

informal settlement conference, does all of this really need to be spelled out anyway?

TMA raises these questions regarding the proposed rule, but perhaps more importantly, offers one more: is this fair? From TMA's view, the proposed rule puts physicians under impossible deadlines and even allows TMB to play by a separate set of rules. TMA has even learned of instances in which the board's panel is able to review the licensee's expert report and prepares a supplemental rebuttal report, but does not actually produce it to the licensee or the licensee's attorney until the moment they walk into the ISC.

Physicians, already under tremendous workload pressure, are being forced to drop everything upon notice of an ISC in order to adequately review medical records and reports and prepare their statements in return. TMB has not recognized this perspective in its proposed rule.

ii. 22 TAC 187.18(h)

The provisions in §187.18(c) may exclude a licensee's untimely witness statements, but TMA notes potentially positive revisions to §187.18(h), which may allow admission of an untimely witness statement for good cause. While the possible exception is good, it could be better.

First of all, §187.18(h) is stated as if it is an exception to a licensee's right to have untimely evidence considered. The proposed rule states that the panel "may refuse to consider any written witness statement or evidence not submitted in a timely manner without good cause," but nowhere does the proposed rule state that a licensee may actually submit an untimely witness statement. This provision would be better stated as an affirmative right, both because it would make this provision more clear and because it would make the provision more fair. TMA argues that adding such an affirmative right would more clearly recognize that circumstances exist in which the timely production of important evidence is sometimes simply beyond a licensee's control.

Second, while the "good cause" language in §187.18(h) may be an attempt to provide an objective standard by which the panel may judge the cause for an untimely submission, TMA questions how the board representatives in an ISC approach this standard. For some reason, "good cause" is not defined here, as it is elsewhere in TMB's rules (*see e.g.*, §187.16(e), referring to the definition of "good cause" in §179.6). Does the board panel nevertheless follow this definition? TMA asks for more clarity, and argues that in recognition that licensees are sometimes unable to procure timely witness statements in such a short time period because a witness is temporarily unavailable or initially uncooperative, the proposed rule should add a specific exception for the admission of untimely witness statements when the untimeliness was caused by the witness.

TMA here also points out that the very nature of Subsection (h)'s requires seems to suggest that an ISC is closer to a formal administrative hearing than an *informal* meeting between two opposing parties. Two parties in litigation, for instance, would not likely subject themselves to strict timeline for information submission—as Subsection (h) does—if the parties were simply trying to come together to reach an agreement in an effort to avoid costly further litigation.

Finally, Subsection (h) continues the theme of one-sidedness in favor of the board. Specifically,

the second sentence of Subsection (h) mentions only penalties and consequences if the *licensee* submits untimely evidence, and TMA, licensees, and the general public are left to wonder about the consequences of late submissions by the board. What happens if TMB has a late submission? While this particular instance may seem to be beyond the scope of the proposed rule, this patent lopsided treatment is a pattern that is very much evidenced by the proposed rule and TMA argues that it is thus still very much relevant.

Considering the foregoing points, TMA proposes that TMB convene a stakeholders meeting to consult about these troubling issues. At least as a starting point, TMA suggests that TMB modify the proposed §187.18(h) to read as follows, where additions and strikes are departures from the current rule:

"(h) The board representatives must [~~may refuse to~~] consider any written witness statement or evidence not submitted in a timely manner if the party submitting the untimely statement or evidence can show [~~without~~] good cause or that it was a third party who caused the untimely submission. If the board representatives allow a party [~~the licensee~~] to submit late written witness statements or other evidence, the representatives may reschedule [~~and/or recommend an additional administrative penalty for the late submission~~]."

iii. 22 TAC 187.18(e)(3)

The proposed Subsection (e) provides examples of "explanatory materials" that board staff or a licensee may present and includes "written statements by witnesses that were included in the licensee's responsive material described in subsection (c) of this section."

TMA notes a problem with this language as it technically excludes untimely statements and other evidence submitted by a licensee as permitted under Subsection (h). Here's why: Subsection (e)(3)(A) allows explanatory materials that are "responsive material described in subsection (c)," but Subsection (c) describes relates only to "information *timely* received in response from the licensee" (emphasis added). If "explanatory materials" thus only includes the material that, under Subsection (c), is timely received, the untimely material allowed under Subsection (h) could not presented as evidence. TMA thus recommends amending the language to read as follows:

> (A) written statements by witnesses that were included in the licensee's responsive material described in subsection (c) of this section, or admitted under subsection (h) of this section; and

b. The Rule Removes Physicians' Rights to Present Oral Testimony by Witnesses: 22 TAC 187.18(e)(6)

TMB amends §187.18(e), according to the preamble, in order to "clarify the type of evidence that may and may not be presented during the ISC proceeding, which better comports with the board's current procedures." While the rule change may seem benign enough, the problem hiding underneath this explanation is that this subsection reiterates to TMA a significant problem with ISC regulations: the rule lays out guidelines for ISCs that are more formal than they should be and that are patently unfair in favor of the board.

Specifically, the proposed rule deletes the current Subsection (e)(6), which provides that

"presentation of oral or written statements or testimony by witnesses" is admissible. The proposed rule inserts a replacement provision that limits oral witness testimony to witnesses that only the board would want introduce: TxPHP representatives, compliance officers, or board staff to describe a licensee's compliance status, or testimony by the alleged victim of sexual or assaultive offenses.

In other words, the proposed rule strikes general permission for the presentation of witness testimony for the benefit of both parties, and replaced that general provision with a more restrictive permission that *favors only the board.* TMA cannot support this.

Again, TMA doubts that the legislature even intended oral witness testimony to be presented at these "informal meetings" at all. But if TMB is going to go down that road, at least, in fairness, the let the licensee go too! Yes, TMB is providing an opportunity to licensees to present a defense, but when it authorizes board representatives to selectively plug their collective ears to a licensee's case by disallowing witnesses a licensee may offer, it removes any meaning in that opportunity.

While TMB may not have intentionally proposed this rule to weigh the scales so heavily in the board's favor, this certainly further underscores the need for stakeholder participation in the modification of the ISC process. To be clear, TMA strongly opposes the changes made to Subsection (e)(6) and recommends making no change to Subdivision (6) as it stands currently.

c. The Nature of Permitted Witness Testimony Also Weighs Heavily Against Licensees: 22 TAC 187.18(e)(6) and (7)

Whether legislatively authorized to or not, the proposed rule permits certain witnesses to testify orally. In other administrative or judicial settings, the permission for witness testimony is attended by certain guidelines that protect all parties and the dignity of the hearing itself. Those guidelines are not present in the proposed rule: where other forums place restrictions on the *type* of witness testimony that can be offered and allow witness cross-examination, ISCs do not. The legislature may not have indicated that these protections were necessary in the informal process, but this is only further evidence that the legislature may not have intended to permit oral witness testimony in ISCs in the first place.

First, the rule states in proposed §187.18(e)(6) that certain individuals may "describe the *status of a licensee's compliance* with a PHP contract, board order(s), . . . or applicable laws and rules" (emphasis added). Determining whether a licensee is complying with board orders and laws and rules is exactly what the panel is to determine in the ISC. Ordinarily, where witness testimony is allowed, there are important restrictions placed on legal conclusions that are allowed ISCs. *See e.g.*, TEX. R. EVID. 701. Yet there are no such restrictions here.

Compounding the trouble with allowing witnesses to offer conclusions concerning compliance is the fact that the proposed rule also appears to eliminate the ability to cross-examine witnesses. The proposed rule strikes current §187.18(e)(7), which allows "questioning the witnesses in a manner prescribed by the panel." This presumably would exclude a licensee's ability to cross-examine witnesses testifying against the licensee. Here again, the ability to cross-examine witnesses is a landmark protection—one that is constitutionally guaranteed—that is ordinarily permitted anytime

witnesses are allowed to testify in hearings. *See Goldberg v. Kelly,* 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.") That protection is absent here. So the proposed rule allows the board to select certain witnesses to testify against a licensee, yet has withheld a foundational protection that should accompany that witness testimony.

Without some of the fundamental protections offered in more formal hearings, it is as if the TMB can appoint the judge of a court proceeding, call all the witnesses to testify, and can throw out the rules of evidence, all without objection from opposing counsel.

To be clear, TMA is not advocating that ISCs become even more judicial in nature. TMA insists, though, that ISCs be fair: "Although administrative hearings need not "measure up to judicial standards," **agencies cannot be arbitrary or inherently unfair**." *Office of Pub. Util. Counsel v. Public Util. Comm'n*, 185 S.W.3d 555, 576 (Tex.App.-Austin 2006, pet. denied) (emphasis added).

To say that TMA opposes the changes made here is an understatement, as they create the very "arbitrary or inherently unfair" conditions that courts have prohibited. Especially if TMB does want to be more prescriptive about ISCs to ensure that ISCs operate smoothly and efficiently, TMB must have the input from key stakeholders to ensure that the ISC guidelines are not only drafted but implemented in a fair way.

2. The Proposed Rule Broadens the Board Representatives' Unchecked Discretion

The proposed §187.18(e)(3) moves the clause "which, in the discretion of the board representatives are relevant to the proceeding" to modify all evidence presented at the ISC, rather than just "explanatory materials" as it is in the current rule. TMA is concerned that this proposed change expands TMB's already unchecked discretion to be able to exclude all evidence a licensee might introduce, not just explanatory materials.

Leaving all admission decisions up to the board panel presents several possible problems. First of all, the board representatives have limited scopes of experience, and may not be able to proficiently determine that some evidence is relevant if that type of evidence is not relevant in one practice or specialty but is in another.

This unchecked discretion could also allow bias or prejudice to be a factor. A panelist could employ the panelist's discretion to exclude evidence for any reason ranging from the personal disliking of a licensee to the panelists desire to go home early after a long day. TMA's point is that, without some governing standard other than the board's discretion, there is simply no way of ensuring a fair hearing. TMA heard of an instance, for example, of one physician who, after travelling to the ISC of a colleague at great expense and inconvenience, was not even allowed to offer any testimony at all because the panel determined that there was nothing the physician could offer that would be relevant. How the panel knew that this physician had nothing relevant to offer—even before the physician offered any testimony—is a mystery, but it is still the sort of abuse that is allowed if evidentiary admission decisions are up to the unchecked discretion of the board without a standard or bearing to follow.

It is possible that, in practice, this unfettered gatekeeping function is something with which the board is already vested, even without the proposed rule, and the rule is simply being changed to match current practice. If that is the case, the proposed rule change still highlights the generous discretion the board representatives are afforded, and if TMB wants this discretion to apply to *all* evidence, the discretion should be checked by some standard. That standard should be reached with stakeholder input.

3. Conclusion

For the reasons outlined above, TMA strongly opposes the adoption of the proposed changes to 22 TAC 187.18. TMA also strongly suggests that TMB withdraw the proposed rule and convene a stakeholders meeting to collaboratively resolve the issues currently undermining ISC's violations of due process.

Once again, TMA appreciates the opportunity to provide these comments. If you should have any questions or need any additional information, please do not hesitate to contact Jared Livingston, Assistant General Counsel, at (512) 370-1345 or by email at jared.livingston@texmed.org.

Sincerely,

Donald P. "Rocky" Wilcox
Vice President and General Counsel

Jared S. Livingston
Assistant General Counsel