



Physicians Caring for Texans

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Texas Medical Association Advocacy Efforts on Behalf of Academic and/or Employed Physicians

The Texas Medical Association (TMA) is a private, voluntary, non-profit association of Texas physicians and medical students and 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.” With over 51,000 members, TMA engages in a multitude of advocacy efforts to promote patient and physician interests.

TMA has been active in its advocacy for employed and academic physicians. This document summarizes some of TMA’s more recent advocacy efforts for these physicians, which have taken many different forms (i.e., legislative efforts, comments on administrative rulemaking, amicus curiae briefs, and committee outreach).

Legislative Efforts

Tort Reform/Medical Professional Liability

TMA has advocated for passage of numerous bills by the Texas Legislature that were aimed at protecting academic and/or employed physicians.

TMA has always been a strong proponent of tort reform in the area of medical professional liability. As a part of that advocacy, TMA strongly supported (and was successful in obtaining) expanded liability protections for physicians employed by governmental entities.

- **Tort Reform** – TMA was a significant player in the 2003 landmark legislation that brought about tort reform in Texas. House Bill 4 (2003) contained procedural, substantive, evidentiary, medical professional liability, and general civil reforms needed to extinguish the litigation crisis prevalent in the state leading up to 2003. As a result of the bill, medical professional liability cases have a clear and stringent framework to minimize frivolous lawsuits, cap non-economic damages, and reduce procedural devices like forum shopping that had been used to exploit weaknesses in the system.

TMA also played a vital role in advocating for voter approval of HB 4’s accompanying constitutional amendment, Proposition 12. Proposition 12 gave HB 4 full effect by amending the Texas Constitution to give the legislature the authority to cap non-economic damages.

The enactment of HB 4, along with voter approval of Proposition 12 in September 2003, have dramatically improved physician access and reduced the prevalence of non-meritorious lawsuits in Texas.

Since 2003, TMA has been actively involved in monitoring cases interpreting HB 4 and filing briefs as needed to ensure proper interpretation of the law. Additionally, TMA has remained dedicated to defending the 2003 landmark liability reforms each legislative session.

- Liability protections for physicians employed by governmental entities – Prior to the enactment of House Bill 4 (2003), physicians were expressly excluded from the liability limitations applicable to employees of governmental entities. TMA advocated for an amendment to that provision in HB 4 that would remove that exclusion, providing to physicians employed by state governmental entities important liability limitations.

Protecting the Independent Medical Judgment of Employed Physicians

TMA has also engaged in repeated advocacy efforts at the Texas Capitol related to protecting an employed physician's independent medical judgment (in the contexts of employment by certified nonprofit health corporations, hospitals, and hospital districts). Among TMA's more recent efforts are the following:

- Complaint process for and protection against retaliation by nonprofit health corporations – TMA supported Senate Bill 833 (85th Regular Session; 2017), which was a bill that was designed to increase transparency of the Texas Medical Board's (TMB) regulation of certified nonprofit health corporations (previously known as 5.01(a)s). The bill would have required the TMB to accept, investigate, and process complaints against certified nonprofit health corporations in the same way that it does for complaints against physicians. Additionally, building upon the non-retaliation language passed in 2011 (discussed below), the bill would have prohibited nonprofit health corporation retaliation against employed physicians who report violations of the corporation.

The bill made it through the Senate and the House committee before it was held up in the House Calendars Committee and ultimately failed to pass. During the 2019 Texas legislative session, TMA plans to continue its efforts to clarify the complaint process regarding certified nonprofit health corporations and to strengthen whistleblower protections for physicians employed by nonprofit health corporations.

- Protections for independent medical judgment – TMA was a strong proponent of Senate Bill 1661 (82nd Regular Session; 2011), which added important protections prohibiting nonprofit health corporations employing physicians from interfering with, controlling, or otherwise directing a physician's professional judgment. The bill also required nonprofit health corporations to adopt, maintain, and enforce policies to ensure that an employed physician exercises independent medical judgment. Additionally, the bill prohibited a nonprofit health corporation from disciplining a physician for reasonably advocating for patient care. The bill also stated that the requirements protecting the physician's independent judgment could not be waived by contract. Finally, the bill authorized the Texas Medical Board to impose an

administrative penalty against a nonprofit health corporation that operated in violation of the Medical Practice Act. (Previously, the Texas Medical Board was only authorized to refuse to certify the organization or to revoke a certification).

The bill passed, was signed into law and is codified in the Medical Practice Act.

- Protections for physicians employed by rural hospitals and other hospital districts – TMA supported Senate Bill 894 (82nd Regular Session; 2011), which allowed certain rural hospitals to employ physicians as long as the hospital complied with the bill's other requirements relating to fundamental protections of physicians' independent medical judgment. These rural hospitals are required to, among other things, appoint a chief medical officer recommended by the hospital medical staff and to adopt, maintain, and enforce policies to ensure that a physician employed by the hospital exercises independent medical judgment. The bill additionally prohibited disciplining physicians for reasonably advocating for patient care, and preserved an employed physician's ability to participate in the selection of professional liability coverage, choose independent defense, and to consent to the settlement of any action or proceeding brought against a physician.

This bill was enacted and is codified in the Texas Health and Safety Code.

Additionally, TMA helped ensure that physicians employed in various hospital districts received the same kind of protection (See e.g., Senate Bills 310, 311, and 860, 82nd Regular Session (2011); House Bills 1247 and 3905, 83rd Regular Session (2013)). TMA supported amendments to legislation that ensured hospitals districts employing physicians adopted, maintained, and enforced policies to ensure that an employed physician exercises independent medical judgment. These policies were required to include policies on such topics as quality assurance, peer review, medical decision-making, and due process. Further, some of these amendments also included requirements for physicians on a medical executive committee to verify that the committee member exercises their best efforts to ensure compliance with those policies, and that the committee member will immediately report to the Texas Medical Board any action that constitutes a compromise of a physician's independent medical judgment.

These provisions are codified in the Texas Health and Safety and Special District Local Laws Codes.

Rulemaking Comments

TMA has continually encouraged the Texas Medical Board to adopt and enforce rules that would protect the independence of employed physicians.

- Rules limiting the authority of non-physicians in the governance of a nonprofit health corporation –TMA successfully supported the adoption of Texas Medical Board rules that established certain requirements for non-physicians who were members of a nonprofit health corporation (22 Tex. Admin. Code Chapter 177, Subchapter B). These rules ensured that the all-physician board of directors would be responsible for adopting the corporation's credentialing, quality assurance, utilization review, and peer review policies, and that the non-

physician member could not amend the organization's bylaws without the approval of at least a majority of the board of directors. The Medical Board did adopt and is responsible for current enforcement of these rules. Additionally, in 2011, TMA supported amendments to the Medical Board rules regarding certified nonprofit health corporations in order to implement the new protections afforded by SB 1661 (discussed above).

- Transparency regarding regulation and enforcement of nonprofit health corporations – TMA has continued to encourage the Texas Medical Board to increase the transparency of its regulation and enforcement of nonprofit health corporations. TMA has noted that the Medical Board has no current structure for receiving and processing complaints that a nonprofit health corporation has violated the law, so TMA recently recommended that the Medical Board adopt rules to construct a clear structure for receiving and processing complaints against a corporation. The Texas Medical Board has yet to take action on these suggestions.

Amicus Curiae Briefs

TMA has filed numerous briefs as amicus curiae (i.e., “friend of the court”) in cases involving employed and/or academic physicians. These cases have been before several courts, including the Texas Supreme Court and the New Mexico Supreme Court. TMA's briefs have addressed a variety of issues, including the importance of governmental immunity for state and local government-employed physicians and the importance of employed physicians retaining independent medical judgment. Below are summaries of cases in which TMA filed amicus curiae briefs over the past three years alone.

Governmental Immunity

- *Perkins v. Skapek* – In this case, the Supreme Court of Texas has been asked to decide whether physician employees of UT Southwestern satisfied the legal definition of “employee” of a governmental entity when they provided care at, and agreed to abide by the bylaws, rules, and regulations of, Children's Medical Center Dallas. In February 2018, TMA filed an amici curiae brief with the Texas Alliance for Patient Access, the Texas Hospital Association, and the Texas Osteopathic Medical Association in support of the UT Southwestern physicians' position that the physicians were indeed governmental employees and thus entitled to immunity from suit.

As of the date of publication of this document, the Supreme Court has not yet granted the plaintiff's petition for review; a final decision is expected in 2018.

- *Marino v. Lenoir* – This case heard by the Supreme Court of Texas decided the issue of whether a resident who was assigned to a residency program sponsored by UT Health Science Center at Houston and employed by the UT Medical Foundation was entitled to governmental immunity from suit. In April 2017, TMA filed an amici curiae brief with the Texas Alliance for Patient Access, the Texas Hospital Association, and the Texas Osteopathic Medical Association that argued Dr. Gonski should be entitled to immunity because she satisfied the legal definition of an “employee” of the UT Medical Foundation, and further argued that immunity for residents was important to promote medical education.

The Supreme Court decided against the resident, determining that the UT Medical Foundation's bylaws relinquished control of residents when they performed clinical duties at facilities not owned or operated by the Foundation.

- *Dean v. Phatak* – The United States Court of Appeals for the Fifth Circuit heard this case involving an employed medical examiner-physician and whether the physician should be entitled to qualified immunity as a government official. The physician performed the autopsy following the death of a woman and stated his medical opinion that the woman's death was the result of a homicide. The woman's husband was charged with the woman's homicide, but a later reevaluation of the autopsy findings caused the physician to change his opinion as to the cause of death from "homicide" to "undetermined." Charges against the woman's husband were dropped and the husband sued the physician working for the medical examiner's office for civil rights violations, alleging that the physician's opinion amounted to falsified evidence. In May 2017, TMA filed an amicus curiae brief defending a physician's ability to state medical opinions and supporting the importance of immunity for physicians employed as government officials. TMA also garnered the support of the American Medical Association, the National Association of Medical Examiners, the College of American Pathologists, and the Texas Society of Pathologists, who all joined TMA's brief as amici curiae.

The Fifth Circuit heard oral arguments from the parties in December 2017 and a decision is expected in Spring 2018.

Informed Consent

- *Benge v. Williams* – This case before the Texas Supreme Court decided whether a jury's finding of negligence against a physician was invalid because the finding was based on the plaintiff's argument that the physician was negligent, in part, because he did not adequately disclose the extent to which a medical resident would be involved in the surgery or the experience of that resident. TMA, in a joint amici curiae brief filed in March 2017 with the Texas Osteopathic Medical Association and the Texas Alliance for Patient Access, argued that: (1) a resident's or physician's experience level with a particular procedure is not information required to be disclosed by the Texas Medical Disclosure statutory scheme, and (2) to approve the jury verdict based on that invalid theory would impose an undue burden on physicians and residents.

The Supreme Court heard oral arguments in January 2018 and a decision is expected later 2018.

Independent Medical Judgment

- *Community Health Systems Professional Services Corporation, et al. v. Hansen* – This case involved a physician suing his previous employer for a breach of his employment contract because the employer, a nonprofit health corporation (previously known as a 5.01(a)), allegedly failed to afford due process in accordance with the contract upon terminating the physician. In February 2017, TMA filed an amicus curiae brief that contended that due process was integral for employed physicians to be able to exercise independent medical judgment.

The Supreme Court decided against the physician, holding that because the physician's contract allowed the employer to terminate the physician without cause, the physician was not entitled to due process in the event of a without-cause termination. The Supreme Court did not reach the issue of whether the physician was nonetheless entitled to due process under Texas Medical Board regulations because the physician did not present that argument at the trial court.

TMA further submitted in August 2017 an amicus curiae letter brief in support of the physician's motion to the Supreme Court for a rehearing, but the Supreme Court denied the physician's motion.

Application of Texas' Tort Reform Laws

- *Montano v. Frezza* – In this case, a physician employed by the Texas Tech University Health Sciences Center was sued by a New Mexico patient who sought care at TTUHSC, but had complications from the care that did not present until she returned to New Mexico. The patient sued in New Mexico where the physician was not afforded the protections under Texas state law, including governmental immunity. TMA and many other organizations filed a joint amicus curiae brief in October 2015 and argued that allowing Texas physicians to be haled into New Mexico courts for care provided in Texas would disrupt care and limit patient access.

Following TMA's efforts in raising awareness of the issues in this case, the New Mexico Legislature passed stopgap legislation intended to provide a temporary avenue for Texas tort reform protections to apply to Texas physicians treating New Mexico residents visiting Texas. Though the legislative solution was temporary, the New Mexico Supreme Court finally decided *Montana v. Frezza* in March 2016 in the physician's favor, holding that Texas laws would apply and Texas physicians treating New Mexico residents in Texas would thus have the benefit of the Texas' tort reform protections and governmental immunity.

Committee Outreach

Over the past several years, TMA's Patient-Physician Advocacy Committee has invited member physicians to committee meetings to discuss those physicians' distinct challenges with their employment. These discussions can lead to TMA advocacy on behalf of those physicians (in the form of an amicus curiae brief) and/or for employed physicians more generally (in the form of legislative advocacy). Further, the committee has also supported and informed TMA's advocacy efforts by inviting the TMB President and executive staff to discuss how the board generally handles complaints regarding: (1) interference with medical judgment and (2) a certified nonprofit health organization's failure to provide due process to employed physicians.