Emotions Run High at House Medical Board Hearing

Contributed by Will Lutz
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Doctors who question the Texas Medical Board’s fairness in disciplinary actions testified before the House Appropriations Committee’s Regulatory Subcommittee Oct. 23.
During the 11-hour-long, often emotional hearing, doctors criticized the agency, while board members defended their role in protecting public safety.

Chairman Fred Brown (R-Bryan) had to warn the audience repeatedly to maintain decorum and even told the crowd the hearing would be suspended if outbursts continued.
Despite the sometimes raucous nature of the board’s critics, they are being taken seriously.
Lawmakers asked detailed questions of agency staff, and several seemed to be concerned by the lack of detail sometimes given to the accused physician in discipline cases and the length and expense for physicians of the statutorily-mandated process.
One of the board’s most vocal critics is Houston physician and GOP campaign activist Steve Hotze, who told the committee the medical board is “a regulatory agency gone berserk.” Specifically, Hotze believes the board should not be allowed to accept complaints from insurance companies, and that physicians should know the identity of those who filed the complaint against them and be able to question witnesses against them.
Another frequent subject of complaints among physicians is the anonymous peer review panels the legislature ordered the board to use in 2003. Hotze and other physicians at the hearing objected to the anonymous nature of the peer review reports.
Staff members with the medical board told lawmakers every health care licensing entity except the massage therapy board accepts anonymous complaints. The Legislature made peer review reports confidential out of fear, that if they were made public, a peer reviewer would not give the state frank information about a colleague’s competence – particularly in medical fields with small numbers of practitioners.
The board’s statutes were significantly strengthened in 2003, as the result of a series in The Dallas Morning News alleging the board gave light penalties to doctors who committed sex offenses and other serious acts of misconduct.
Board president Roberta Kalafut told the committee that in her 2003 confirmation hearings senators made it clear that the Legislature “would not tolerate” a board that did not act against doctors who violate the Medical Practice Act.
At the hearing, dozens of doctors testified about their cases. Lawmakers, however, only got one side of the story. By law, the medical board cannot discuss complaints publicly. Several board members, notably Tim Turner, offered to share the board’s views on each of the cases brought to the committee’s attention in an executive session, provided legislators signed the legally-required confidentiality documents.
Turner added that in some states the complaint is public and immediately posted to the web – both to the physician and the general public. “If we’re going to open the process up,” Turner said, “I’m going to see to it that that’s something that we do. Do the physicians want that? No.”
Lawmakers were told that most states keep complaints confidential, and that letting physicians know the identity of those filing complaints could discourage complaints.
While much of the hearing was devoted to doctors with cases before the board, the Texas Medical Association did testify.
“A strong and adequately funded medical board is important for Texas patients and physicians,” said TMA spokesman Tom Garcia, a Houston cardiologist. Garcia said the organization has three recommendations: 1) Refocus the medical board on the specific mandates of SB 104 (the 2003 law) giving priority to quality of care, sexual misconduct, and impairment issues; 2) Improve the process to provide more fairness to physicians, including providing more information to physicians about the nature of the complaint; and 3) Provide additional funding to the agency to speed licensing and technology at the agency.
TMA this spring reviewed the Medical Board’s disciplinary activities. A survey of Harris County physicians found that 63 percent felt they had too little information about the complaint to explain their side of the issue. TMA’s report also calls for reducing penalties for some recordkeeping violations.
Lawmakers seemed greatly concerned by the length and expense of securing legal representation in a medical board proceeding, which some doctors estimated would cost more than $15,000. Rep. Debbie Riddle (R-Tomball) even suggested creation of a “loser pays” system for medical board complaints.
The medical board conducts a 30-day review of a complaint to see if it warrants investigation. If the case is investigated, the board then has 180 days to complete the investigation and either dismiss the complaint or proceed to an Informal Settlement Conference, where board or district review committee members listen to the case and offer a settlement. After that, if an agreement is not reached, the board can file with the State Board of Administrative Hearings, which will generate a proposal for decision that the board can modify if the law or a rule has been incorrectly applied. Further appeal is to district court.
In response to concerns about the length of the process, the board’s executive director Donald Patrick is creating a streamlined procedure, that some legislators likened to a speeding ticket, for doctors who have committed minor violations of the act – such as failing to complete all the required continuing education – and who do not contest the charges. Most of the procedures the board follows for contested cases are statutory, which the board is not at liberty to change.
Several issues lurked in the background during the hearing, the most obvious being tort reform. An explicit deal was

struck between lawmakers and the medical community in 2003 that the Legislature would enact caps on non-economic damages, but in exchange, the medical groups had to swallow a state regulatory authority that would be more aggressive in ferreting out doctors who violate the standard of care.

“I campaigned hard to convince fellow Texans to vote for tort reform, as did many in this room, and I’m glad I did,” said board member Melinda Fredricks. “… But there could be a down side to tort reform if the medical board is not kept strong and motivated to do the right thing … I believe that some of our detractors want nothing more than for the board to be undermined and weakened so that tort reform will be removed or weakened.”

Whether the medical groups are, in fact, committed to a strong medical board (the quid pro quo in the tort reform deal), is often debated, with consumer groups and some lawmakers accusing the medical groups of trying to water down bills like SB 104.

Another behind-the-scenes issue is the role of alternative medicine in the state’s health care system. Hotze and several of the other doctors at the hearing practice a form of medicine different from that generally accepted by medical science, one that focuses on achieving balance with hormones and other naturally-occurring substances, rather than drugs and surgery.

The state has specific statutes authorizing acupuncture, traditional Chinese medicine, and chiropractic care, even though these forms of care have not always been traditionally accepted by medical science.

The Legislature will have to decide whether alternative medicine should be legal, and if so, under what circumstances and with what disclosures and regulations.

While the doctors clearly made an impression on the committee, their zealous method of presentation may have distracted from their message. When Hotze testified, he said of the medical board that “[T]hese same tactics were used by the Gestapo in Nazi Germany.” He disputed Kalafut’s assertion that doctors can take notes at informal settlement conferences, but he did so by turning around and addressing her, instead of the chairman.

He mentioned his own hearing before Kalafut, on an advertising complaint that was later dismissed, saying, “You stood up and made an [expletive deleted] out of yourself” at the hearing. He later said that “your mama needed to take you over her knee.” Kalafut is a physician, licensed to practice in Texas since 1992.

Brown was out of the room during most of Hotze’s testimony, but when he returned, he shut it down, telling Hotze, “We need to quit personalizing this please ... We agreed we wouldn’t do that.”

“When they’re getting ready to take away your license and destroy your life,” Hotze replied, “it gets pretty personal, Rep. Brown. And I appreciate you holding this hearing. Thank you for the opportunity to testify.”

The lack of decorum at the hearing will undoubtedly be raised as Hotze and his supporters try to press this issue further. That said, during the hearing, Republican lawmakers from Houston who weren’t on the subcommittee actually outnumbered those who were, asking most of the questions during the hearing. Hotze’s influence in the Houston area, combined with the serious concern many lawmakers displayed at the hearing about the transparency and operations of the medical board, probably mean this issue will be on the Legislature’s radar screen in 2009.