How to "Civilize" State Medical Boards

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The word "civilized " is difficult to define. One might say that we "know it when we see it." It is easy, of course, to exclude from its meaning barbaric behavior such as pillaging and mayhem. The Visigoths who sacked Rome in A.D. 410 were plainly "uncivilized." But being "civilized" means more than keeping barbarians outside the gate.

One astute observer noted that an utter lack of humor is a sign of an uncivilized person. Attila the Hun, perhaps the most uncivilized man of all time, was criticized for his humorless demeanor amid raucous entertainment. At one event, an entertainer amused the audience "by mixing up the languages of the Italians with those of the Huns and Goths." The entertainer "fascinated everyone and made them break out into uncontrollable laughter, all that is except Attila. He remained impassive, without any change of expression, and neither by word or gesture did he seem to share in the merriment …."[1] More than a few bureaucrats fit that mold.

The term "civilized society" is likewise challenging to define. Historians look for order and hierarchy in the way of life before declaring a group of people to be "civilized." Some historians emphasize the need of an agricultural surplus so that not everyone has to work on a farm, and trades (including law, medicine, and engineering) could develop. But as standards have risen over thousands of years, we expect more of a "civilized society" today than was acceptable in the days of slavery and crucifixions.

The term "civilized society" has repeatedly caught the attention of the U.S. Supreme Court. It has used the term in 97 decisions, while "free enterprise" occurs in only 73, "deregulate" or "deregulation" in 64, "family values" in 17, and "politically correct" in three. To the Supreme Court, and to most of us, the ideal of a "civilized society" includes both substantive and procedural rights. Substantively, a civilized society does not arbitrarily mug and rob random people of their property or livelihood. Procedurally, a civilized society does not subject someone to accusations by anonymous accusers.

The Constitution was ratified by the States on the promise that a Bill of Rights be added, which would safeguard the people against uncivilized oppression by the new federal government. These 10 Amendments, which set forth the foundational safeguards essential to preserving civilized government, include the right to free speech, the right to petition, the right to bear arms, and the right to be free of unreasonable search and seizure. Some of the rights are substantive, as in the right to be free of cruel and unusual punishment; others are procedural, as in the right not to be tried twice by the same sovereign for the same offense.

In 1791, when the Bill of Rights became part of the U.S. Constitution, these tenets of a civilized society were intended to restrain the new and growing federal government. But their wisdom has become abundantly clear ever since, and they became the model for all justice systems, not just the one in Washington, D.C. The Supreme Court eventually "incorporated" the Bill of Rights to protect against State government actions, while States themselves had been incorporating the underlying principles of the Bill of Rights in their Constitutions and local legal proceedings. The right of an accused to hire an attorney, for example, has been independently incorporated into many state Constitutions and the rules for most other legal proceedings.

The right to "be informed of the nature and cause of the accusation" is in the Sixth Amendment, but its roots go back further to the original civilizing document, the Magna Carta in 1215 in England:

> [N]one shall be taken by petition or suggestion made to our lord the King, or to his Council, unless it be by indict-ment or presentation of good and lawful people of the same neighborhood where such deeds be done, in due manner, or by process made by writ original at the common law.

Hence an accusation requires, as a fundamental tenet of a civilized society, the statement of specific charges and the use of peers of the accused in judging him. This requirement was incorporated into the Virginia Declaration of Rights, which in turn became the basis for the famous Declaration of Independence.

How well do state medical boards comport with this right of an accused? More generally, do medical boards uphold standards of a civilized society?

State Medical Boards

A state medical board defines and enforces a system of justice for both physicians and patients, within the boundaries established by the state legislature. Like other forms of justice, medical boards allow accusations and enforce the taking of property, in the form of depriving or limiting a physician's ability to earn his livelihood. For every physician disciplined, medical boards also limit the ability of hundreds or thousands of his patients to preserve their lives by obtaining medical care. In this respect a medical board is more powerful than even a criminal court, which rarely affects more than a defendant and perhaps his immediate family.

The Declaration of Independence, based in part on the principles discussed above, sets forth that:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness**.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The "pursuit of Happiness" is an "unalienable Right" of both the physician and his group of many patients. The ability to pursue one's professional calling (for the physician) and ability to seek improvement of one's health (for the patients) would seem to be essential elements of this right.

So while medical boards often operate in an obscure, unelected realm far from public view, the actions taken by medical boards

implicate the most fundamental rights recognized by the 56 signers of the Declaration of Independence, and by millions of people who have defended those rights against tyrannical governments ever since.

In 2009, is there any system of government or justice in the United States of America that acts in an uncivilized manner by arbitrarily stripping away decades of training from good, skilled professionals, destroying their lives and depriving thousands of patients their ability to seek good health and happiness from their physician?

Welcome to the Texas Medical Board.

The Texas Medical Board - An Uncivilized System of Justice?

The Texas Medical Board conflicts with and contravenes basic principles of justice in at least a dozen ways:

- Anonymous complaints are welcomed.
- Accusations and "expert" reports are unsworn, and even the experts are anonymous.
- There is no meaningful oversight of the tribunal.
- The Board can and does disregard findings of law and fact by administrative law judges.
- Discipline can be imposed without clear proof.
- Patient privacy can be and is violated by the Board, and doctors are often punished for care that the patients wanted and benefited from.
- Careers of physicians are destroyed over minor documentary issues, or fee disputes.
- Lawyers receive a right to a jury trial before license revocation, but doctors do not.
- There is no meaningful appeal.
- The Executive Director of the TMB has no medical degree or real medical training.
- Physicians are harassed for fee disputes having nothing to do with quality of care.
- Clear, specific charges against physicians are not provided.

Like the Visigoths sacking Rome, the Texas Medical Board has been "sacking" the medical profession. The above uncivilized behavior violates many of the bedrock principles of the Bill of Rights, ranging from the right of an accused to "be confronted with the witnesses against him" to the right to "be informed of the nature and cause of the accusation," both from the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.

Specific Examples of Abuse

One physician was ruined for merely charging the hospital rate rather than physician rate for copying medical records, a difference of only about $40 (which the patient never paid anyway).

Many physicians practicing pain management in or around Abilene, Texas, have been burdened by complaints of unknown origin filed with the TMB. One of those physicians observed in a letter to a senator, "I am the only doctor left in a 150 mile radius that is involved in Pain Management in any form or fashion that has not been sanctioned by TMB one way or another, but God knows [TMB President Kalafut] has been trying."[2]

In an ongoing lawsuit against the Texas Medical Board, *AAPS v. TMB*, AAPS filed a motion to compel the TMB to produce the copies of these complaints against Kalafut's competitors. As of press time the federal court in Austin had not yet ruled on that motion.

Edward J. Brandecker, M.D., husband of Board president Roberta Kalafut, D.O., and a partner in her medical practice, was asked about his competitors in a deposition in *AAPS v. TMB*. The dialog was reminiscent of President Bill Clinton's notorious answer in his deposition, "It depends on what the meaning of the word 'is' is":

Q. Who are your competitors?
A. I—I think our practice is unique.
Q. All right. Are you saying you don't have any competitors?
A. I think the focus of our practice is unique and therefore distinguishes us from what other people do.
Q. But surely you have competitors, don't you?
A. I think you need to define what you mean.
Q. By competitor I mean an individual who has business that could go your way if that individual was not there.
A. So can you repeat your question?
Q. Do you have any competitors?
A. There are some physicians who provide some similar services.
Q. I would like to introduce as Exhibit 1 a health care provider summary of designated doctors in Brown County.
(Brandecker Exhibit 1 marked. [This Exhibit showed only two physicians on the list of designated doctors in Brown County: Dr. Brandecker and Dr. ___)
Q. After looking at Exhibit 1, would you agree that [Dr. ____] is a competitor of yours?
A. I disagree.

Daniel L. Munton, M.D., was the former partner of Kalafut and Brandecker, and he was subject to a non-compete agreement after he left "for ethical reasons" in 2004. That demonstrates that Brandecker was very aware of competition, despite his testimony. Munton explains in a letter he sent to Texas Governor Rick Perry:

> My name is Dr. Dan Munton, I am the former partner of Roberta Kalafut D.O. and her husband Ed Brandecker M.D. I voluntarily for ethical reasons resigned from their practice in 2004. I left Abilene to serve out a contractual non compete. Upon hearing of my planned return to Abilene, Ed Brandecker sent me a threatening letter stating that if I had stayed away they would have "let bygones be bygones." I shortly thereafter received my first of two "anonymous" complaints from the Texas Medical Board where Roberta sits as President. Then Vince Viola, my physician assistant, who previously worked for them, was also turned into the board "anonymously." I don't feel this was all just coincidence. It has cost me countless hours and thousands of dollars to defend myself from these fraudulent complaints.

AAPS v. TMB has uncovered further revelations about how the TMB really operates. A deposition of the top former disciplinarian of the TMB, Dr. Keith Miller, revealed that he was receiving monthly payments from Blue Cross/Blue Shield as he punished physicians through the TMB. Any judge having that kind of conflict of interest would be removed from the bench, or perhaps even jailed.

This same TMB disciplinarian was also testifying for trial attorneys *against physicians* in malpractice cases—not in just a few cases, but in nearly 50 cases, earning $300 per hour.

Plan of Action

Abuse by the TMB in harassing good physicians has obviously gone too far. It is long overdue to reform the laws that enabled and encouraged this abuse, and the Texas legislature is holding its biennial session now. It will not convene again until 2011.

AAPS seeks to end the abuse once and for all in this legislative session in Austin, with the following model reforms, which below reference sections of the Medical Practice Act, Title 3, Health

Professions. Though the formatting below refers to the Texas Code, this model legislation may be useful in any State.

- **First**, instill some accountability by the TMB to an advisory commission having oversight and subpoena powers:

MEDICAL PRACTICE ACT TITLE 3. HEALTH PROFESSIONS

Sec. 152.0021. ADVISORY COMMISSION

(a) An Advisory Commission shall consist of 6 members, of whom 3 shall be appointed by the Speaker and 3 shall be appointed by the Lieutenant Governor, as follows:
  (1) at least one member who is a graduate of a reputable medical school or college with a degree of doctor of medicine (M.D.) or doctor of osteopathic medicine (D.O.), and at least one member who is a graduate of a reputable law school or college with a degree in law (J.D. or its equivalent); and
  (2) four members who represent the public.

(b) Appointments to this Advisory Commission shall be made without regard to race, color, disability, sex, religion, age, or national origin of the appointee.

(c) This Advisory Commission shall receive and investigate complaints by patients and license holders concerning the operations of and disciplinary actions by the Texas Medical Board. This Advisory Commission shall hold public hearings at least four times a year. The Texas Medical Board shall comply with requests for information by and testimony before the Advisory Commission, for the purpose of oversight.

(d) This Advisory Commission shall provide a report annually to the members of the Texas legislature and the Governor.

(e) This Advisory Commission may adopt rules and bylaws as necessary to:
  (1) govern its own proceedings;
  (2) perform its duties; and
  (3) enforce its authority under this subtitle.

- **Second**, end the conflicts of interest:

Sec. 152.003. ADDITIONAL MEMBERSHIP REQUIREMENTS

(b) A person may not be a public member of the board if the person or an immediate family member:
  (1) is registered, certified, or licensed by a regulatory agency in the field of health care; … or
  (6) is receiving any compensation by any entity that has a financial interest at stake with any license holders, including insurance companies, regulatory agencies, pharmaceutical companies, or malpractice attorneys.

…

(e) No board member, or any immediate family member of a board member, shall receive any compensation while serving on the board and for one year prior to service, other than for patient care, by any entity that has a financial interest adverse to any license holders, including insurance companies, regulatory agencies, pharmaceutical companies, or malpractice attorneys.

- **Third**, require that the Executive Director actually hold a medical license:

Sec. 152.051. EXECUTIVE DIRECTOR

(a) The board shall appoint an executive director, **who must be a physician licensed in good standing in the State of Texas**. The executive director serves as the chief executive and administrative officer of the board.

- **Fourth**, limit complaints allowed by the TMB to sworn statements under oath and require full reporting of who actually serves on the "ISC" (informal settlement conference) panels, which are the panels in Texas that review complaints and the physician responses. Limit complaints and investigations to the last four years, as statutes of limitations do, because beyond that time recollections are unreliable and unworthy of the expenditure of time. Finally, remove immunity for complaints filed with malice:

Sec. 154.002. INFORMATION FOR PUBLIC DISSEMINATION

(a) The board shall prepare:
  …
  (7) a list of the names of each person who served on an ISC panel and the number of ISC panels on which each person served; and
  …

(c) An individual may file a complaint against a license holder with the board by swearing under oath to the truth of the statements in the Complaint. The board may file a complaint on its own initiative based only on good cause.

(d) The board shall encourage all complainants to attempt first to resolve their issues with the license holder directly before filing a formal complaint. Any preprinted forms provided by the board shall include a prominent statement that complainants are encouraged first to resolve their differences directly with the license holder before involving the board.

(e) A complaint or investigation shall concern only care rendered within 4 years of the date of the complaint.

(f) Notwithstanding any other provision of law, no immunity shall attach to any complaints filed with malice or with an anti-competitive purpose.

- **Fifth**, provide for reasonable notification and time to respond, and require that the Board attempt to resolve problems amicably rather than abusing their power:

Sec. 154.053. NOTIFICATION CONCERNING COMPLAINT

(a) The board shall notify by personal delivery or by certified mail a physician who is the subject of a complaint filed with the board that a complaint has been filed, and shall provide the physician with a copy of the complaint without any redaction. The physician shall have at least 30 days after receiving the copy of the complaint in order to prepare and submit a response.
  …

(c) The board shall first attempt to resolve each complaint by informally mediating the differences between the complainant and the license holder.

(d) The board shall periodically notify the parties to the complaint of the status of the complaint until final disposition unless the notice would jeopardize an investigation.

- **Sixth**, disclose the identity of the complainants for legislative oversight:

Sec. 154.055. RELEASE OF COMPLAINT INFORMATION TO LEGISLATIVE COMMITTEE

(a) On request from a legislative committee created under Subchapter B, Chapter 301, Government Code, the board shall release all information regarding a complaint against a physician to aid in a legitimate legislative inquiry. The board may release the information only to the members of the committee.

(b) In complying with a request under Subsection (a), the board will identify the complainant or the patient and will reveal the identity of the affected physician only to the members of the committee.

- **Seventh**, limit Board "experts" to those who actually practice medicine:

Sec. 154.056. GENERAL RULES REGARDING COMPLAINT INVESTIGATION; DISPOSITION

(e) The board by rule shall provide for an expert physician panel appointed by the board to assist with complaints and investigations relating to medical competency by acting as expert physician reviewers. Each member of the expert physician panel **must be actively practicing medicine within Texas, by having a clinical practice that accepts and sees new patients on at least a weekly basis**.…

- **Eighth**, improve the procedures for expert review:

Sec. 154.0561. PROCEDURES FOR EXPERT PHYSICIAN REVIEW

(a) A physician on the expert physician panel authorized by Section 154.056(e) who is selected to review a complaint shall:
  (1) determine whether the physician who is the subject of the complaint has violated the standard of care applicable to the circumstances; and
  (2) issue a preliminary written report of that determination.

(b) A second expert physician reviewer shall review the first physician's preliminary report and other information associated with the complaint. **The review by the second expert shall be independent of the first review, without knowledge by the second reviewer of the identity of the first reviewer and without any communication between the two reviewers.** If the second expert physician agrees with the first expert physician, the first physician shall issue a final written report on the matter.

(c) If the second expert physician does not agree with the conclusions of the first expert physician, **then the license holder shall be notified of this conflict and provided with a copy of the conflicting reports.** A third expert physician reviewer shall review the preliminary report and information and decide between the conclusions reached by the first two expert physicians. The final written report shall be issued by the third physician or the physician with whom the third physician concurs, with the dissenting report also included.

(d) In reviewing a complaint, the expert physician reviewers assigned to examine the complaint may consult and communicate with each other about the complaint in formulating their opinions and reports.

(e) **The identity and qualifications of all reviewers shall be provided to the physician under investigation prior to any use of their reports.**

(f) **The board may not give preference to a report prepared by its own reviewer(s) compared to a report prepared by an expert at the request of a license holder.**

- **Ninth**, require that board consultants have clinically active practices:

Sec. 154.058. DETERMINATION OF MEDICAL COMPETENCY.

(a) Each complaint against a physician that requires a determination of medical competency shall be reviewed initially by a board member, consultant, or employee with a medical background **that includes treating patients within the last year in the same field as the physician**.

(b) If the initial review under Subsection (a) indicates that an act by a physician falls below an acceptable standard of care, the complaint shall be reviewed by an expert physician panel authorized under Section 154.056(e) consisting of physicians who **have a clinically active** practice in the same specialty as the physician who is the subject of the complaint. **The identity of the members of the panel shall be promptly disclosed to the physician.**

(c) The expert physician panel shall report in writing the panel's determinations based on the review of the complaint under Subsection (b). The report must specify the standard of care that applies to the facts that are the basis of the complaint and the clinical basis for the panel's determinations, including any reliance on peer-reviewed journals, studies, or reports. **The report must be an affidavit sworn under oath in order to be considered.**

- **Tenth**, protect patient privacy against prying bureaucracies:

Sec. 160.005. REPORT CONFIDENTIAL; COMMUNICATION NOT PRIVILEGED.

…

(b) In a proceeding brought under this chapter or Chapter 158, 159, or 162, evidence may not be excluded on the ground that it consists of a privileged communication unless it is a communication between attorney and client **or concerns patient records and the patient does not give consent for their disclosure, in which case there shall be no obligation of disclosure by the physician to the board**.

- **Eleventh**, require "clear and convincing evidence" before destroying a professional's livelihood and depriving patients of their physician, and clarify that the Board should not itself be practicing medicine:

Sec. 164.001. DISCIPLINARY AUTHORITY OF BOARD; METHODS OF DISCIPLINE.

(a) Except for good cause shown, the board, on determining a violation of this subtitle or a board rule or for any cause for which the board may refuse to admit a person to its examination or to issue or renew a license, including an initial conviction or the initial finding of the trier of fact of guilt of a felony or misdemeanor involving moral turpitude, shall:
  (1) revoke or suspend a license;
  (2) place on probation a person whose license is suspended; or
  (3) reprimand a license holder.

(b) Except as otherwise provided by Sections 164.057 and 164.058, the board, on **determining by clear and convincing evidence** that a person committed an act described by Sections 164.051 through 164.054, shall enter an order to:
  (1) deny the person's application for a license or other authorization to practice medicine;
  (2) administer a public reprimand;
  (3) suspend, limit, or restrict the person's license or other authorization to practice medicine, including:
    (A) limiting the practice of the person to or excluding one or more specified activities of medicine; or
    (B) stipulating periodic board review;
  …

(c) Notwithstanding Subsection (b), the board shall revoke, suspend, or deny a physician's license if the board determines based on **clear and convincing evidence** that, through the

practice of medicine, the physician poses a continuing threat to the public welfare.

…

(i) **In no event shall the board order a physician to practice medicine in a particular manner. The board shall exercise no authority to practice medicine, or direct anyone in the practice of medicine, except in ordering a physician not to engage in a practice that causes actual harm or an imminent risk of harm to patients.**

- **Twelfth**, allow the physician to record or transcribe the proceedings, thereby ending the "Star Chamber" characteristics of secret hearings:

Sec. 164.003. INFORMAL PROCEEDINGS.

(a) The board by rule shall adopt procedures governing:
  (1) informal disposition of a contested case under Section 2001.056, Government Code; and
  (2) informal proceedings held in compliance with Section 2001.054, Government Code.

…

(c) An affected physician is entitled to:
  (1) reply to the staff's presentation;
  (2) present the facts the physician reasonably believes the physician could prove by competent evidence or qualified witnesses at a hearing; and
  (3) **record or arrange for transcription of the proceedings**.

- **Thirteenth**, end the manipulation of the review panels that recommend discipline for physicians by requiring random assignment of the panels:

Sec. 164.0031. BOARD REPRESENTATION IN INFORMAL PROCEEDINGS.

(a) In an informal meeting under Section 164.003 or an informal hearing under Section 164.103, at least two panelists shall be **randomly** appointed to determine whether an informal disposition is appropriate. At least one of the panelists must be a physician.

…

- **Fourteenth**, end the abusive practice of the Board *increasing* punishment beyond what a review panel agreed upon:

Sec. 164.0032. ROLES AND RESPONSIBILITIES OF PARTICIPANTS IN INFORMAL PROCEEDINGS.

…

(g) The panel's recommendations under Subsection (f) must be made in a written order and presented to the affected physician and the physician's authorized representative. **In no event shall there be any increased discipline of the physician beyond what the panel jointly recommended at the informal proceedings**. The physician may accept the proposed settlement within the time established by the panel at the informal meeting. If the physician rejects the proposed settlement or does not act within the required time, the board may proceed with the filing of a formal complaint with the State Office of Administrative Hearings.

- **Fifteenth**, provide physicians with the same protection provided to attorneys: a right to a jury trial before license revocation:

Sec. 164.004. COMPLIANCE WITH DUE PROCESS REQUIREMENTS.

(a) Except in the case of a suspension under Section 164.059 or under the terms of an agreement between the board and a license holder, a revocation, suspension, involuntary modification, or other disciplinary action relating to a license is not effective unless, before board proceedings are instituted:

…

(3) **in the case of revocation of a license, the license holder has a right to a jury trial before the revocation is effective**.

- **Sixteenth**, provide for *meaningful* judicial review:

Sec. 164.009. JUDICIAL REVIEW.

A person whose license to practice medicine has been revoked or who is subject to other disciplinary action by the board may appeal to a Travis County district court not later than the 30th day after the date the board decision is final, **which shall then review the facts and the law *de novo* and require clear and convincing evidence before sustaining any discipline**.

- **Seventeenth**, end the abusive discipline for fee disputes that are unrelated to quality of care:

Sec. 164.051. GROUNDS FOR DENIAL OR DISCIPLINARY ACTION.

(e) Notwithstanding any other provision, the board may not take disciplinary action against a license holder for economic reasons, including but not limited to accepting "fee for service" or the method of billing for "fee for service." Likewise, notwithstanding any other provision, the board may not take disciplinary action against a license holder based on how he maintains his office or records except in the case of proven likelihood of harm to a patient, unless the disciplinary action is of a de minimus and non-reportable, non-publicized nature.

- **Eighteenth**, require patient harm as a condition of discipline:

Sec. 164.053. UNPROFESSIONAL OR DISHONORABLE CONDUCT.

(a) 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:

…

(5) prescribes or administers a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is administered or prescribed, **and is harmful to patients**;

Conclusion

A civilized society does not permit an anonymous complaint to ruin the life of a professional, as the TMB currently encourages. A civilized society does not permit unsworn accusations to be the basis for killing someone's career and his livelihood, as the TMB now allows.

AAPS's draft legislation would immediately end these abusive practices by the TMB.

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