

Medical Board Stripped of Power

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The Association of American Physicians and Surgeons and our members have achieved what some thought to be impossible: stripping the Texas Medical Board (TMB) of key powers.

The ambitious goals set by AAPS in 2007 were partially realized in June 2011. Given that it typically takes five legislative sessions to pass a new law in Texas—which is 10 calendar years because that legislature meets only once every two years—this milestone was attained six years ahead of schedule.

Four out of five key people identified as problems on the TMB in 2007 have since resigned. Indeed, a majority of the TMB itself has left. Then, on June 17, 2011, historic provisions stripping this irresponsible medical board of certain powers became law.

This news is grim for those who are anti-doctor and anti-life. Enemies of good physicians include newspapers (allegations against physicians make headlines, and stories are often heavily biased against the doctor), bloggers, and disgruntled, unsuccessful competitors. Nurses can be a source of harassment of good physicians, as can hospital administrators. Trial attorneys, socialists, insurance companies, pharmaceutical companies, and even some private organizations thrive on bringing down good physicians and denying their patients accessible care.

Overzealous disciplining of good physicians in Texas has resulted in a dire shortage of care, even after the passage of tort reform in 2003. For example, while the TMB had been harassing good obstetrician/gynecologists, a majority of Texas counties lack a single obstetrician who can deliver a baby. Imagine that: as Texas residents spend their hard-earned tax dollars funding the TMB, it spends that money denying care to those same residents, leaving expectant mothers in the majority of the counties without accessible care. Against whom can one file a complaint about that?

In going to extraordinary and ingenious regulatory lengths, the TMB violated the constitutional rights of hard-working physicians. For example, then-TMB President Roberta Kalafut allegedly directed the filing of anonymous or confidential complaints against many of her competitors. As another example, an insurance company apparently arranged for the filing of an anonymous or confidential complaint against an out-of-network physician, which the medical board then used to badger the physician for years, although patients were very pleased with his services. As to conflicts of interest, a member of the TMB was testifying in perhaps 50 malpractice cases, typically against physicians, and was even receiving compensation from an insurance company as he presided on the board. The list of abuses by a medical board lacking in any meaningful oversight or accountability goes on and on.

The TMB even welcomed complaints against physicians that were filed from thousands of miles away by opponents of freedom in medicine, despite the fact that the complainants had no connection with the patient, the physician, or the medical services rendered. A simple internet search about physicians reveals a shocking display of invective against the profession as well as individual physicians. That's free speech, but allowing anti-doctor cranks to file confidential complaints without any personal knowledge about the care provided is an outrage. These complaints can subject good physicians to legal defense expenses amounting to tens or hundreds of thousands of dollars, an unconscionable abuse. Yet that is what the TMB has been welcoming.

Consider the plight of an AAPS member in Corpus Christi, who is rated as one of the top physicians in the nation in his field. Victimized by numerous frivolous complaints filed by someone harassing him, costing him more than \$100,000 to defend, this physician then exercised his First Amendment right to complain. He filed a lawsuit and obtained a temporary restraining order (TRO) against this abuse. The TRO expressly restrains the harasser from filing "false statements" or "any additional actions" with the TMB. Yet the TMB then retaliated against this physician with frivolous harassment, not for a quality-of-care issue, but because he dared to exercise his First Amendment right in complaining about this, and obtaining judicial relief.

In protection of its members, AAPS filed suit against the TMB in 2007. After AAPS won an important procedural victory at the appellate level,¹ proceedings resumed at the district court level. As expected, no other medical society joined AAPS in its defense of the practice of private medicine. Meanwhile, many AAPS members, most notably Steven F. Hotze, M.D., repeatedly called on the Texas legislature to reform the board and stop the abuse. Both the courts and the legislature can independently act to curb violations of the constitutional rights of physicians and patients.

Medical boards in each state are appointed by the governor, who should remain politically accountable for the abuse of power by his appointees and their staff. In practice, most governors are unaware of how their medical boards are being run, or of improper or abusive actions against physicians. Republican politicians are typically afraid of the media, and the media are against physicians and medical freedom. A suggestion to take power away from a medical board is met with the canard that this would somehow unleash dangerous physicians on the public. Of course, the evidence is to the contrary: it is the abuse of power by medical boards that exacerbates the shortage of physicians, promotes the rationing of care, and holds back improvements in care.

Limiting Government Power

The only real limits on government power are restraints on its authority, on what it has power to do. Where government has authority, there is potential that it will abuse its power. But where government lacks authority, or has authority taken away from it by legislatures, then government officials incur personal liability when they act beyond their powers. The term “limited government” concisely expresses the truism that limiting government power is the best safeguard against tyranny.

Unfortunately, in many states there are no real limits on medical board power. If someone on the staff of a medical board, or a board member, takes a dislike to a practicing physician, there are few protections against harassment. Some medical boards, most notably the TMB, have underlying biases that result in tyranny against many physicians, at the expense of their patients. The principles of limited government are woefully lacking on those medical boards.

Medical board tyranny has severe consequences for patients. Many Texas counties have a serious shortage of physicians. A decade ago this problem was attributed to the liability crisis, but many of the same shortages (such as the lack of obstetricians in rural counties) are still there after passage of tort reform. The real cause is a medical board hostile to good physicians. There has been relentless harassment of obstetricians by the TMB. In one case it pursued a physician for years for supposedly overcharging by a mere \$42 for copying patient records. Few want to step into that maelstrom.

What can be done? When a child misuses a new toy to hit other children, a responsible parent takes the toy away from the child. The problem is then immediately and efficiently solved. Similarly, when state medical boards abuse their power over the practice of medicine, then state legislatures should take power away from these boards. No other remedy even comes close in effectiveness.

It is fine to work for better appointments to medical boards. That can help. It is also good to seek fuller participation by all the board members in the process, rather than allowing a handful of insiders to make the key decisions. Governors can and should be held politically accountable for any biased anti-doctor and anti-patient attitudes, and disregard for the Constitution, that fester among the state medical board members or its staff. Open meetings with public participation, like town halls, can be a step in the right direction if public input is taken seriously. None of these approaches address the heart of the problem; they merely treat the symptoms rather than the disease.

The disease is lack of adherence to the Constitution, and insufficient safeguards against medical boards’ abuse of power.

Inevitably, state medical boards end up being run by a handful of people, a much smaller group than presides on the full board. In many states, a few members of the staff or board who hold a grudge against some or all doctors tend to dominate the process. In some states, particular types of physicians are especially despised: obstetricians who deliver babies,

practitioners of integrative or complementary medicine, caregivers for chronic Lyme disease, pain management physicians, and providers of certain hormone therapies.

When good physicians are appointed to a state medical board, they are often unaware of how the regulatory process is abused and manipulated by others to the detriment of quality medical care. In a courtroom, there are strict rules to prevent injustices, and rules facilitate as fair a result as possible. Rules need to be enforced to restrain medical boards.

For example, insurance companies have long manipulated medical boards to discipline physicians in order to save insurers money. One trick is for an insurance company to let unpaid invoices to a particular physician pile up to an enormous amount, and then the insurance company arranges for the medical board to revoke the physician’s license. In some states, license revocation relieves the insurance company of its obligation to pay all past due obligations that were incurred, even while the physician was still licensed. From a business perspective, this trick is very profitable for an insurance company; from a constitutional perspective, it is wrong and should be illegal.

Medical Board Reform in Connecticut in 2009

In Connecticut, where Lyme disease was first recognized in 1975, when researchers investigated why unusually large numbers of children were being diagnosed with juvenile rheumatoid arthritis, physicians who treat chronic Lyme disease were mercilessly harassed by the state medical board. This was probably at the behest of insurance companies that did not want to pay for long-term treatment. Physicians and patients urged the legislature to take power away from the state medical board over the treatment of chronic Lyme disease. Despite Connecticut’s being the capital of the insurance industry, legislators were willing to stand up to it.

AAPS wrote to the Connecticut governor, urging her to sign the following into law, and she did:

On and after July 1, 2009, a licensed physician may prescribe, administer or dispense long-term antibiotic therapy to a patient for a therapeutic purpose that eliminates such infection or controls a patient’s symptoms upon making a clinical diagnosis that such patient has Lyme disease or displays symptoms consistent with a clinical diagnosis of Lyme disease, provided such clinical diagnosis and treatment are documented in the patient’s medical record by such licensed physician.... [T]he Department of Public Health shall not initiate a disciplinary action against a licensed physician and such physician shall not be subject to disciplinary action by the Connecticut Medical Examining Board solely for prescribing, administering or dispensing long-term antibiotic therapy to a patient clinically diagnosed with Lyme disease, provided such clinical diagnosis and treatment has been documented in the patient’s medical record by such licensed physician.²

That law, which AAPS fully supported, helps only in the field of medicine relating to Lyme disease, and only in Connecticut. AAPS hopes that law will be passed in other states; even Massachusetts was subsequently considering passing a similar version.

But medical board abuse extends far beyond treatment of Lyme disease. AAPS also backs a broad withdrawal of power from medical boards, in order to help patients and physicians in nearly all fields of medical practice.

Broader Medical Board Reforms—Getting Started in Texas

The Connecticut approach of withdrawing power from the state medical board is helpful, but a broader reform can be even better. All medical boards should guarantee due process, end conflicts of interest, and curb potential abuses in general, not simply for one type of practitioner.

The first step in attaining reform in your state is to hold a committee hearing in the state legislature. A committee of the house of representatives or delegates, or of the senate, or in some states a joint committee can hold the hearing. Your own state district legislator will know whom to contact. Witnesses should be called to testify, and board members should answer meaningful questions. Such hearings have been held in New York and Texas, and they can be held in your state. All that is required is for one chairman of a committee having some jurisdiction over medical board matters to call the hearing. The committee can be a budgetary, health, jurisprudence, or other kind of committee.

Representatives Fred Brown, Lois Kolkhorst, Bill Zedler, and Debbie Riddle were courageous leaders during the several hearings held in Texas. The reforms AAPS proposed had bipartisan support.

“Organized medicine,” made up of medical societies aligned with the AMA, is unlikely to help and may actively oppose reforms. The Texas Medical Association (TMA) initially opposed most of AAPS’s reforms in Texas. In many states there is a revolving door between the state medical societies, state medical boards, and the Federation of State Medical Boards (FSMB), with the result that many leaders of state medical societies view the medical boards as their allies rather than as their adversaries. Sadly, most state medical societies no longer truly represent independent physicians, and many look to other sources for additional funding.

Success in Texas in 2011

After committee hearings laid the foundation, AAPS members were tireless in contacting their legislators. Success was finally attained in spring 2011.

Perhaps for the first time in American history, broad curtailment of overreaching powers of the medical board was achieved. On June 17, 2011, Texas Gov. Rick Perry signed HB 680 into law, ensuring five basic reforms as originally proposed by AAPS.³

1. Establish a 7-year statute of limitations on complaints filed with the medical board.
2. End anonymous complaints.
3. Require disclosure to the physician when a complaint is filed by an insurance or pharmaceutical company, or third-party administrator.
4. Allow recording the informal settlement conferences with board officials, an action that will reduce their abusiveness and lack of justice as was occurring behind closed doors.
5. Require the medical board to accept the findings of fact and law by the administrative law judge (ALJ), a change that defenders of the medical board resisted most.

Each of those reforms addresses specific problems in individual instances of TMB’s harassment of good physicians, many of whom are AAPS members.

Observe how each of these reform elements strips TMB of certain powers. This is not phony reform that gives still more power to a runaway governmental agency. Rather, this takes power away after it was misused. For example, the TMB can no longer harass physicians for allegations about care provided more than seven years ago. This establishes a bright-line defense against compelling the costly and virtually impossible task of trying to explain care rendered too long ago for there to be a clear recollection and complete records. (A limited exception exists for minors, who do not acquire rights until they reach adulthood.)

Beginning Sep 1 this year, TMB can no longer accept anonymous complaints, and confidentiality will no longer protect complaints filed by insurance or pharmaceutical companies, or insurance agents, or third-party administrators. This is welcome relief from some of the most egregious examples of harassing complaints, but it is an incomplete reform because, at the insistence of the TMA, confidentiality will still protect other types of bad-faith complaints. There should be no veil of confidentiality behind which wrongdoing, and even racially motivated complaints, can hide and multiply.

There have been many reports of abusive or inappropriate conduct, and of ill-informed pontificating by board members during informal settlement conferences. Just as sunshine is the best disinfectant, allowing recording of these closed-door sessions will help end the tyranny.

Finally, the reform of requiring the medical board to accept the findings of fact and law by the administrative law judge is a stinging repudiation of the utter inability of the TMB to preside in an impartial and rational manner. Had the TMB wielded its power in an appropriate manner, it would not have become necessary to take this power away from it.

How Full Reform Was Blocked in Texas

Were it not for the opposition of the TMA and a few of their close allies in the Texas Legislature, even stronger reforms would

have passed. The Texas House of Representatives passed AAPS's full set of reforms by an astounding vote of 147-0. But the TMA blocked many of those reforms and would not allow them to pass the Texas Senate.

State Sen. Jane Nelson, entrenched in the Texas Senate since 1992, carried the water for the TMA on this, as she has on other issues. It is an unholy alliance, as the TMA, like the AMA, moves increasingly to the political left on social issues like abortion, while Sen. Nelson pretends that she is still a conservative, and is re-elected by a conservative base. In fact, the health committee that she runs has become little more than a rubber stamp for the left-leaning TMA. For example, while claiming to be pro-life, Sen. Nelson failed to hold a single timely hearing on the issue during the session, and the next opportunity will not be until 2013. The TMA testified against pro-life legislation that was routed to another committee not controlled by Sen. Nelson.

TMA and Sen. Nelson will likely keep opposing additional, meaningful TMB reform. Future TMB reforms will probably need to go around her Health Committee as she pursues the unhelpful TMA agenda and blocks real safeguards for good physicians.

An Example of What Should Not Be Allowed to Happen

Other well-intentioned laws were introduced to curb TMB abuses. Rep. Todd Hunter was the primary Texas House of Representatives supporter of a medical reform bill for protection of physicians who treat chronic Lyme disease, and was listed as its lead author. The bill started out like the Connecticut law by taking power away from the board over Lyme disease treating physicians:

- (a) The board may not investigate or discipline a physician based solely on the physician's treatment of a patient's tick-borne disease if the physician has:
 - (1) personally performed, in good faith, a medical examination of the patient;
 - (2) informed the patient in writing of the patient's treatment options and the known risks of each option; and
 - (3) obtained informed written consent for the treatment option chosen by the patient.⁴

This language should have passed. But behind the scenes this sensible removal of power became something else as this bill wound its way from introduction to passage. While AAPS members were supporting HB 680, the above language in HB 2975 was transformed from something good into something unhelpful. The Lyme disease bill was converted from a removal of power to something entirely different: it became a bill that merely advises the TMB to consider continuing medical education (CME) coursework before disciplining physicians, often unjustly:

- (c) If relevant, the board shall consider a physician's participation in a continuing medical education course approved under Subsection (b) if:

- (1) the physician is being investigated by the board regarding the physician's selection of clinical care for the treatment of tick-borne diseases; and
- (2) the physician completed the course not more than two years before the start of the investigation.⁵

If the medical board had been reasonable, this law would not be necessary; but if the medical board is unreasonable, this law is unlikely to help. As changed, it is even possible that this law could become counterproductive, as Lyme disease physicians may be held to guidelines propagated through CME courses. Under this law the TMB has no obligation to accept what a particular CME course teaches, and may pick and choose whatever gives itself the most power to destroy another good physician.

Taking power away from medical boards is the only way to guarantee improvement for freedom in medicine. This Lyme disease bill is an example of what should not be allowed to happen to well-intentioned reform efforts.

Conclusion and the Next Step

Elements of the broad reform first proposed by AAPS in 2007 have passed as HB 680 and become law in Texas. If the worst medical board in the nation—the TMB—can be stripped of certain of its abusive power, and it has, then reforms are also possible in the 49 other states. AAPS members around the nation can copy and expand on what has been achieved in Texas.

The components necessary for medical board reform include local leadership, legislative allies and sponsors, a willingness to stand up to obstacles created by state medical societies, and persistence in seeing it to conclusion.

After this legislative milestone, more good news came from AAPS's legal efforts in Texas on July 27: the federal district judge denied the TMB's motion for a stay of discovery, and rejected its argument for qualified immunity.⁶ AAPS will now begin uncovering and proving wrongdoing by the TMB, which has until now been hidden.

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