



Texas Medical Board

BOARD MEETING

JANUARY 16, 2015

333 GUADALUPE, TOWER 2, SUITE 225

AUSTIN, TEXAS

The meeting was called to order on January 16, 2015 at 3:04 p.m. by Michael Arambula, M.D., Board President. Board members present were: David Baucom; Frank Denton; John D. Ellis, Jr., J.D.; John R. Guerra, D.O.; J. Scott Holliday, D.O.; Allan Shulkin, M.D.; Wynne Snoots, M.D.; Surendra K. Varma, M.D.; Timothy Webb, J.D. Paulette Southard, Secretary/Treasurer; and Karl W. Swann, M.D., arrived a few minutes after roll call. Julie Attebury; Carlos L. Gallardo; Manuel G. Guajardo, M.D.; Margaret McNeese, M.D.; Robert B. Simonson, D.O.; Stanley S. Wang, M.D.; George Willeford, III, M.D., were not present. Board staff present were Mari Robinson, J.D., Executive Director; Robert Bredt, M.D., Medical Director, Scott Freshour, J.D., General Counsel; Tonie Knight, Licensure Manager; and Megan Goode, Governmental Affairs & Communications Manager, and various other staff.

Agenda item #2, Consideration and possible action regarding Teladoc lawsuit. Mr. Freshour gave an overview of a recent ruling of the Texas Court of Appeals, Third District, regarding Teladoc lawsuit. Mr. Freshour requested direction from the Board on whether the Board would want to consider appealing the ruling to the state supreme court.

Ms. Robinson clarified the record on the point of the supersedeas that was entered related only to Teladoc and related only to final disciplinary actions. The Board continued to enforce the rule through the investigation process during the pendency of the ruling.

Available options to reach a consensus were outlined. After discussion, **Dr. Varma moved, Dr. Shulkin seconded, and the motion passed to appeal the ruling. The vote was unanimous.**

The reasonably unforeseen situation under this item is as follows:

The emergency meeting is necessary to allow the Texas Medical Board ("Board") to receive timely legal advice related to the decision of the 3rd Court of Appeals, and to be advised of legal recourse available, including a possible appeal. The deadline to file an appeal would expire on the Monday following the next regularly scheduled board meeting February 2015, which does not allow the Board's legal representative from the Attorney General's Office adequate time to prepare the required legal documents, if an appeal is approved by the Board.

Agenda item #3, Discussion, recommendation and possible action regarding emergency Board rule 22 T.A.C. §190.8(l)(L). Violation Guidelines.

Mr. Freshour gave a brief summary of proposed emergency rule and justification to **§190.8(1)(L). Violation Guidelines.** After discussion, **Dr. Varma moved, Ms. Southard seconded, and the motion passed to approve the emergency Board rule §190.8(1)(L). Violation Guidelines. The vote was unanimous.**

Dr. Varma suggested modifying the language included in the draft notice of adoption of proposed rule 190, by replacing “traditional medicine” with “traditional medical practice”.

The imminent threat under this item is as follows:

A recent ruling by the Texas Court of Appeals, Third District found that face-to-face visit between a physician and patient, before issuing prescription medications/drugs, was not required. As a result of this ruling, practitioners may currently prescribe drugs, without ever seeing a patient; thus resulting in imminent peril to public health, safety and welfare.

Specifically, the imminent threat to the public includes: prescribing to a patient without first evaluating and examining the patient in a face-to-face visit or in-person evaluation makes it impossible for a practitioner to insure proper and accurate diagnosis and treatment; to insure proper prescribing practices are followed; to insure the drugs prescribed are therapeutic, i.e., the medications prescribed are actually needed and/or proper for the condition (which has never been verified by an in-person evaluation or face-to-face visit); and/or prevent overuse/abuse of drugs of any kind.

Moreover, by invalidating the rule requiring a face-to-face visit or in-person evaluation, results in a complete lack of review of patient records; allows a patient with a subjective complaint, that is not verified, to simply call any practitioner and receive a prescription drug without an in-person evaluation or face-to-face visit. This situation significantly increases the risk of misdiagnosis, mismanagement of patients, over-prescribing, inappropriate prescribing, drug diversion and drug abuse. Furthermore, there is an immediate threat of incorrect and injudicious of drugs, such as antibiotics, which can result in bacterial overgrowth that thereby lead to the “superbugs, such as MRSA and other antibiotic resistant organisms.

Prescribing drugs without a face-to-face visit or in-person evaluation is not a generally accepted medical practice and does not meet the standard of care. The Board’s statutory mandate to protect the public health and welfare is undermined and seriously compromised without requirements for a practitioner to examine and evaluate a patient, by face-to-face visit or in-person evaluation, prior to prescribing drugs.

There is also a reasonably unforeseen situation under this item as follows:

Rule 190.8(1)(L) was originally challenged by Teladoc in State District Court in Travis County, Texas. Teladoc claimed that a June 2011 letter, from Nancy Leshikar (former General Counsel of the Board) to Teladoc, stating that Teladoc’s business model of providing medical services, including prescribing medications/drugs without establishing a physician-patient relationship through a face-to-face visit, was in violation of Rule 190.8(1)(L), constituted improper rulemaking and was invalid. The State District found in favor of the Board and determined that

the June 2011 letter was a restatement of long-standing law and policy of the Board. Teladoc appealed the District Court ruling to the Texas Court of Appeals, Third District, under Cause No. 03-13-00211-CV, Teladoc, Inc., Appellant vs. Texas Medical Board and Nancy Leshikar, in her Official Capacity as General Counsel of the Texas Medical Board, Appellees. Again, Teladoc claimed that a June 2011 letter, from Nancy Leshikar (former General Counsel of the Board) to Teladoc, constituted improper rule making and was invalid, as it was not properly promulgated under the Texas Government Code. On December 31, 2014, the Third Court of Appeals ruled that the June 2011 letter interpreting Board Rule 190.8(1)(L)(i)(II) indeed constituted improper rulemaking and was invalid. The result of this ruling has precipitated the imminent threat as articulated above.

The proposed emergency amendment to Rule 190.8(1)(L) insures patient safety by setting forth specific parameters and requirements for a practitioner to establish a defined physician-patient relationship prior to prescribing drugs and, thereby, removes the current imminent peril to the public health, safety and welfare. The amendment to Rule 190.8(1)(L) will protect patient health and safety by requiring the use of acceptable medical practices that comply with state law and medical board rules, while still providing ample access to medical treatment, via traditional medicine or telemedicine.

This amendment to Rule 190.8(1)(L) does not expand the requirements for treating patients, via traditional medicine or telemedicine, but rather, clarifies existing requirements for prescribing and is consistent with the board's existing rules related to acceptable medical practices, the current requirements for medical record documentation of patient evaluations and examinations, and existing requirements for the practice of telemedicine.

Agenda Item #4, Adjourn. Mr. Webb moved, Ms. Southard seconded, and the motion passed to adjourn the meeting at 4:09 p.m.