

## **TITLE 22. EXAMINING BOARDS**

### **PART 9. TEXAS MEDICAL BOARD**

#### **CHAPTER 165. MEDICAL RECORDS**

##### **22 TAC §§165.7 - 165.9**

The Texas Medical Board (Board), TAC 22, proposes new §165.7, concerning Exceptions to Abortion Ban, §165.8, concerning Abortion Ban Exception Performance and Documentation, and §165.9, concerning Complaints Regarding Abortions Performed.

The new sections do not regulate or prohibit abortion but are promulgated to clarify the regulatory analysis to be utilized by the Board in the event that the agency receives a complaint and must determine what is, if any, an appropriate disciplinary action against a physician who violates other laws that regulate or prohibit abortion.

The rules reaffirm that when investigating a complaint regarding allegations of performing an abortion, the Board will investigate the complaint utilizing the standard processes that apply to every other complaint and investigation. This clarifying language is a direct result of recent litigation and requests from private individuals and groups.

The proposed new sections are as follows:

New §165.7, titled Definitions, describes the specific definitions for certain terms used in this section.

New §165.8, titled Abortion Ban Exception Performance and Documentation, explains that physicians need to comply with all applicable laws, rules and court opinions related to abortion and its exceptions in Texas. The rules also provide the minimum required information that must be included in the medical record.

New §165.9, titled Complaints Regarding Abortions Performed, explains the procedures that the Board will utilize in the event a complaint is received. The rule also explains the limitation of any Board decision and that possible criminal or civil action under the law is separate and independent of any Board decision.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of enforcing these proposed sections will be to clarify the laws and minimum requirements the Board will utilize in regard to determining exceptions to the prohibition on abortions.

Mr. Freshour has also determined that for the first five-year period the proposed new sections are in effect, there will be no fiscal impact or effect on government growth as a result of enforcing the proposed sections.

Mr. Freshour has also determined that for the first five-year period these proposed new sections are in effect there will be no probable economic cost to individuals required to comply with these proposed sections.

Pursuant to Texas Government Code §2006.002, the agency provides the following economic impact statement for the proposed new sections and determined that for each year of the first five years the new sections will be in effect there will be no effect on small businesses, micro businesses, or rural communities. The agency has considered alternative methods of achieving the purpose of the proposed new sections and found none.

Pursuant to Texas Government Code §2001.024(a)(4), Mr. Freshour certifies that this proposal has been reviewed and the agency has determined that for each year of the first five years these new sections are in effect:

(1) there is no additional estimated cost to the state or to local governments expected as a result of enforcing or administering the proposed new sections;

- (2) there are no estimated reductions in costs to the state or to local governments as a result of enforcing or administering the new sections;
- (3) there is no estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the new sections; and
- (4) there are no foreseeable implications relating to cost or revenues of the state or local governments with regard to enforcing or administering the proposed new sections.

Pursuant to Texas Government Code §2001.024(a)(6) and §2001.022, the agency has determined that for each year of the first five years the proposed new sections will be in effect, there will be no effect on local economy and local employment.

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed new sections. For each year of the first five years these proposed new sections will be in effect, Mr. Freshour has determined the following:

- (1) These proposed new sections do not create or eliminate a government program.
- (2) Implementation of these proposed new sections does not require the creation of new employee positions or the elimination of existing employee positions.
- (3) Implementation of these proposed new sections does not require an increase or decrease in future legislative appropriations to the agency.
- (4) These proposed new sections do not require an increase or decrease in fees paid to the agency.
- (5) These proposed new sections do not create new regulations.
- (6) These proposed new sections do not repeal existing regulations. These proposed new sections do not expand or limit an existing regulation.
- (7) These proposed new sections do not increase the number of individuals subject to the sections' applicability.
- (8) These proposed new sections do not positively or adversely affect this state's economy.

Comments on the proposal may be submitted to <https://forms.office.com/g/rS4ea217Ym>. A public hearing will be held at a later date.

The new rules are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to perform its duties and enforce this subtitle.

No other statutes, articles or codes are affected by this proposal.

#### §165.7. Definitions.

The following words and terms, when used in this section, shall have the following meanings:

(1) "Abortion" means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:

(A) save the life or preserve the health of an unborn child;

(B) remove a dead, unborn child whose death was caused by spontaneous abortion; or

(C) remove an ectopic pregnancy. This definition is found at Chapter 245, Section 245.002(1) of the Texas Health and Safety Code.

(2) "Ectopic pregnancy" means the implantation of a fertilized egg or embryo outside of the uterus and removing an ectopic pregnancy is not an abortion. This definition is found at Chapter 245, Section 245.002(4-a) of the Texas Health and Safety Code.

(3) "Major bodily function" includes but is not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This definition is found at Chapter 21, Section 21.002(11-a) of the Texas Labor Code.

(4) "Medical emergency" means a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed. This definition is found at Chapter 171, Section 171.002(3) of the Texas Health and Safety Code.

(5) "Reasonable medical judgment" means medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved. This definition is found at Chapter 170A, Section 170A.001(4) of the Texas Health and Safety Code.

*§165.8. Abortion Ban Exception Performance and Documentation.*

(a) An abortion shall not be performed in this state unless it is performed in compliance with all provisions of Texas Health and Safety Code Chapters 170, 170A, and 171, in addition to any other applicable federal and state statutes, rules, and court opinions.

(b) In addition to the requirements above, the physician must specifically document in the patient's medical record:

(1) that the abortion is performed in response to a medical emergency;

(A) that places the woman in danger of death unless the abortion is performed or induced; or

(B) to prevent a serious risk of substantial impairment of a major bodily function of the patient unless the abortion is performed or induced;

(2) the major bodily function(s) at serious risk of substantial impairment;

(3) what placed the woman in danger of death, or what was the serious risk of substantial impairment;

(4) how the danger of death or serious risk was determined;

(5) how the decision was made to proceed with an abortion based on reasonable medical judgement including:

(A) what diagnostic imaging, test results, medical literature, second opinions, and/or medical ethics committees that were used or consulted; and

(B) what alternative treatments were attempted and failed or were ruled out;

(6) how the determination was made that performing a procedure in such a way as to give the child the best opportunity to survive would create a greater risk to the woman; and

(7) whether there was adequate time to transfer the patient, by any means available to a facility or physician with a higher level of care or expertise to avoid performing an abortion.

§165.9.Complaints Regarding Abortions Performed.

(a) The Texas Medical Board will review complaints and perform investigations regarding abortions using the Board's standard complaint process.

(b) If a complaint is determined to be jurisdictional to the Board, the Board will use independent expert physicians, as provided in Texas Occupations Code, Section 154.0561, to review the available information, including the patient's medical record.

(c) Any decision by the Board, to either dismiss the complaint or discipline the physician who is the subject of a complaint, is separate and independent of any other possible criminal or civil action under the law. If the Board is aware the licensee is subject to a pending criminal or civil action, then the Board may defer or delay action. Depending on the outcome of criminal or civil action, the Board retains authority to investigate and potentially take disciplinary action.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Scott Freshour

General Counsel

Texas Medical Board

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For further information, please call: (512) 305-7016

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