

# On The Record . . .

Official Newsletter of BERTOLINO LLP

May 2023



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## Our Firm

Tony R. Bertolino, Esq.  
*Managing Partner*

Sheri L. Middlemas  
*Chief Operating Officer*

Troy Beaulieu, Esq.  
*Director of Legal Services*

LaJuana Acklin, Esq.  
*Senior Associate Attorney*

Kerry J. Bloodsaw, Esq.  
*Associate Attorney*

London de la Teja  
*Accounts Receivable Manager*

Penny Smith  
*Certified Paralegal*

Melissa Hooper  
*Certified Paralegal*

## A Look at the Role of the Texas Medical Board in Promoting Telehealth and Other Innovations in Medical Practice

by Tony Bertolino, Esq.

The primary function of the Texas Medical Board (TMB) is to license and regulate doctors and some other medical professionals. However, the TMB is also often at the forefront of innovations in medical practice, such as telehealth. In addition, as the medical profession has increased its technological capabilities, partially in response to the COVID-19 pandemic in recent years, the TMB also has developed guidelines and rules to allow practitioners to utilize these developments while maintaining the utmost quality in patient care.



As a physician or another licensed medical professional, you are responsible for familiarizing yourself with the rules and laws concerning telemedicine and other medical care innovations, even as they evolve and change over time. If you are facing allegations that you have violated a rule or law related to your profession, you should consult an experienced Texas Medical Board defense attorney. Your attorney can represent your interests from the outset of any investigation and during disciplinary proceedings by the TMB. In addition, you can benefit from legal representation throughout this process.

### **Telemedicine Laws and Rules**

The Texas Occupational Code outlines some broader responsibilities for physicians, dentists, and health

professionals concerning telehealth services, teledentistry dental services, and telemedicine medical services. These code sections also give the TMB broad authority to create and adopt rules concerning telemedicine.

*Defining Telemedicine Medical Services*

Tex. Occ. Code §111.001(4) defines “telemedicine medical service” as “a health care service delivered by a physician licensed in this state, or a health professional acting under the delegation and supervision of a physician licensed in this state and acting within the scope of the physician's or health professional's license to a patient at a different physical location than the physician or health professional using telecommunications or information technology.”

*Standards for Delivering Telemedicine Medical Services*

Tex. Occ. Code §111.002 requires that a patient give informed consent before a physician or any health professional provides any telemedicine medical services or telehealth services. The professionals also must ensure confidentiality, such as if they were providing in-person services. §111.04 also specifically enables the TMB to adopt rules in consultation with the commissioner of insurance that is necessary to:

- ensure that patients using telemedicine medical services receive appropriate, quality care;
- prevent abuse and fraud in the use of telemedicine medical services, including rules relating to the filing of claims and records required to be maintained in connection with telemedicine medical services;
- ensure adequate supervision of health professionals who are not physicians and who provide telemedicine medical services; and
- establish the maximum number of health professionals who are not physicians that a physician may supervise through a telemedicine medical service.

Subsequent sections specify the methods physicians can use to effectuate telehealth, including synchronous audiovisual interaction, asynchronous store, and

forward technology with synchronous audio interaction.

TMB implemented the Board Rules on telemedicine years before the COVID-19 pandemic, although these services only became commonplace in the past few years. 22 Tex. Admin. Code §174.6 states that any health professional providing a health care service or procedure as a telemedicine medical service is subject to the same standard of care as the provision of the service or procedure in an in-person setting. Accordingly, the health care professional must form a practitioner-patient relationship, maintain complete and accurate medical records as required by law, and implement adequate measures to maintain patient confidentiality and privacy as required by law.

Finally, physicians must have a regular medical license to administer telemedicine medical services to Texas residents in Texas and are subject to the disciplinary procedures under the Texas Medical Practice Act, just as if they were practicing medicine in person.

#### *Preventing Fraud and Abuse in Telemedicine*

Likewise, in 2004, the TMB adopted 22 Tex. Admin. Code §174.3, which requires physicians using telemedicine medical services to adopt protocols to prevent fraud and abuse. Physicians must show a good faith effort to adopt adequate protocols by ensuring that their protocols are consistent with the standards of the Health and Human Services Commission. Additionally, physicians utilizing these services must provide notice of their privacy practices with language compliant with federal standards related to the privacy of individually identifiable health information and how to file a complaint about the services they receive.

#### *Telemedicine and Treatment of Chronic Pain*

Doctors also must issue prescriptions according to the same standards and procedures as if they were issued in person to a patient. In addition, the TMB amended prescription-related rules concerning telemedicine under 22 Tex. Admin. Code §174.5 to place limitations

on prescribing medications for chronic pain. These rules focus on balancing the treatment of chronic pain as a legitimate medical condition with concerns about patient safety and the health crisis of overdose deaths.

### **Interstate Medical Licensure Compact**

In 2021, due to the efforts of the TMB, Texas became the 33rd member state of the Interstate Medical Licensure Compact (IMLC). The IMLC provides a voluntary expedited pathway for qualifying physicians to practice in multiple states, including Texas. Physicians from other states could begin applying for licensing in Texas as of March 1, 2022. TMB helped facilitate this process to allow more healthcare choices for Texas residents and greater opportunities for access to telemedicine medical services.

## **Employee Spotlight**

Join us in wishing the happiest of birthdays to Melissa "MJ" Hooper. MJ joined the Firm in October 2022 and quickly became an essential member of our team. Here are a few fun facts about our newest Paralegal.



My nickname at work:  
MJ

I am skilled at:  
Adept at managing multiple things at once and staying organized, all while continuing to be fabulous. 😊

On the weekends and in my free time I am often:  
Spending time with my friends and family discovering some new restaurant or fun activity in the city.

Number one on my bucket list:  
I would love to be able to tour/visit/explore all of the castles throughout the world, especially the ones for Game of Thrones!

The best sweet or salty snack:  
Kettle popcorn; Cool Ranch Doritos; Goey Brownies; and Cupcakes

Best movie ever:  
A Few Good Men – “You can’t handle the Truth” ... lol LOVE IT!

My favorite candy:  
Snickers

My favorite sports teams:

Formula 1

If I had a theme song that played every time I walk into the office it would be:

Not sure I have one or even thought of this.

People say I look like:

A few people have said that I remind them of my mother, some of my facial attributes and my smile.

The best part of my job:

Working with a wonderful group of individuals who are caring and real. Also, knowing that we (the Firm) are assisting those with their careers to receive a better outcome feels amazing. Like I've done my good deed for the day. 😊

Click [here](#) to learn more about "MJ" and Team Bertolino

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## Hallmark Achievements

### Texas Department of Insurance v. TN



**Facts:** Our client, TN, hired us to combat a complaint filed with the Texas Department of Insurance by an insurance company to protect her professional reputation, livelihood, and career from the negative effects of disciplinary action. The Department had notified her in writing that they intended to seek the revocation of her license.

**Outcome:** The Firm met with the client to understand her situation and developed evidence to demonstrate the client had not committed any wrongdoing. The assigned firm attorney spoke to the Department's staff attorney to demonstrate to her how their case was insufficient and needed to be dismissed. We then drafted a robust written response explaining why the complaint was deficient and providing evidence to support the Department dismissing the matter. The evidence showed the client had not violated the law and that the Department lacked sufficient evidence to pursue the matter further. After the staff attorney evaluated the Firm's arguments, the Department of Insurance agreed the complaint against TN lacked merit and dismissed the case against her. The client was given a non-disciplinary warning letter reminding her of her obligations and took no action against her license.

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### Texas Appraiser Licensing and Certification Board v. NM



**Facts:** Our client, NM, hired us to defend her against a complaint filed by an Appraisal Management Company alleging violations of the Uniform Standards of Professional Appraisal ("USPAP") and to protect her license against potential disciplinary action from the Board stemming from the complaint allegations.

**Outcome:** The firm gathered the necessary documentation, coordinated with the client's consulting expert, evaluated the material, and prepared a strong, written response. The response packet we submitted demonstrated why the complaint lacked merit, why the client had not violated the law in completing her appraisal and why disciplinary action was not appropriate. After the Board completed their investigation, they agreed the matter did not warrant disciplinary action and dismissed the complaint. The client was given a non-disciplinary warning letter reminding her of her USPAP obligations and the Board took no action against her license.

## What You Need to Know About Texas Open Government Laws That Facilitate Transparency at Your Regulatory Agency

by Troy Beaulieu, Esq.



Texas recognizes the principle of open government embedded in our democratic republic. This is the concept that government operations should be transparent and accessible to the citizenry so they know what the government is doing, how public funds are being spent and so they can observe and participate in the policymaking process through public commentary on government action. In general, open government laws apply to state, local and municipal government, school districts and other types of government bodies as that term is defined in the law. License holders regulated by a state agency enjoy these same rights. In fact, Texas takes open government so seriously that the Legislature has even created criminal penalties for when a government actor has intentionally violated the law to thwart transparency. Tex. Gov't Code § 551.143-551.146 and Tex. Gov't Code § 552.351-552.353. This article will provide an overview of Texas<sup>[1]</sup> open government laws and their basic components. By utilizing these tools you can stay aware of regulatory activity of public concern which may have impact on your license, livelihood and professional reputation.

### Public Information Laws Protect Your Right to See Government Documents

Texas has a public information act ("PIA") which is formerly known as the open records act, and you may hear people refer to it by that older term. Tex. Gov't. Code Chpt. 552. This PIA statute provides citizens with access to all the records and information government agencies create, collect, and maintain as part of their operations. The law starts with the presumption that government information is generally available to the public for inspection or copying absent narrowly tailored exceptions that are justified based on legitimate government interests. For example, certain information about ongoing law enforcement investigations are usually excepted from public disclosure because doing so would compromise sensitive law enforcement operations and investigations focused on preventing crime and catching criminal offenders.

To use this law to obtain public information from the government, a citizen simply makes a written request for the information to the government agency. The law makes it clear that no magic language or legal terminology is needed to invoke your right to obtain public information from the government. You

may have to pay for copying costs associated with obtaining copies of the information you want, or you can choose to view the material first and then decide which documents you want to obtain copies of. Generally, a governmental body must provide information responsive to a request as soon as practicable.

The government is also required to maintain a schedule of all the types of records it holds and how long those records will be kept before they are destroyed. Each state agency must get their retention schedule periodically approved by the State Library and Archives Commission and the records retention schedule is available for citizens to review.

If the government believes something requested by the public under the PIA should be withheld because there is an exception to disclosure, they usually must provide you the materials not covered by the exception and then ask for a ruling from the Texas Attorney General's Office on whether the remaining material is covered by the exception and not disclosable. For example, if a request covers documents that involve legal advice, the agency may indicate that it believes some of the information is protected by attorney-client privilege and request an opinion from the attorney general on whether they can withhold that information. If the government wants to withhold information it usually must request an attorney general's opinion within ten business days of the request, otherwise it loses the opportunity to assert the exception and must provide the information. If either party is unhappy with the attorney general's written decision, they can file a lawsuit and ask the courts to decide the issue.

### **Open Meetings Laws Protect Your Right to Observe Government Decision-Making in Action**

Texas also has a law addressing public access to government meetings. Tex. Gov't Code Chpt. 551. The Texas Open Meetings Act ("TOMA") spells out what a governmental body must do when they meet so that citizens can attend the meetings, observe government in action and participate. Just like the public information act's general presumption that government information is available to the public, meetings of governmental bodies are generally considered open to the public to watch, attend, and sometimes even participate. However, certain justifiable exceptions to this general rule are made. For example, TOMA allows a government body to meet in private to obtain legal advice from their attorney on "pending or contemplated litigation". Tex. Gov't Code § 551.071.

Under TOMA, governmental bodies covered by the law must post a written agenda indicating the time, place, and nature of their meeting and the topics to be addressed and must do so a certain amount of time prior to the meeting. For state-wide agencies, the notice must be posted online at least seven days prior to the meeting date (not including the day of the posting or the day of the meeting). These requirements give citizens enough time to plan on attending the meeting and to know what topics will be addressed so they can meaningfully observe and participate. It is also quite common (although not required) for governmental bodies to post a packet of agenda materials that contain various documents germane to specific agenda items to be discussed at the meeting. For example, the packet may include a proposed contract the governmental body is considering approving or a copy of a proposed rule or ordinance the body is considering approving.

Under most circumstances, the meeting must occur in a physical space where people can gather and where a majority of the members of the governmental body are present. However, there are some notable exceptions to this. Our recent struggles with the COVID-19 pandemic led to the use of certain exceptions that allowed for broader use of virtual and remote meetings.

During these public meetings, if an exception to an open meeting applies, the body must inform the public why they are going into a closed session, the legal basis for doing so, and an estimate of when they expect to return to a full, open meeting, and then must return to the open meeting to take any action and conclude any business. The actual body's decision-making must occur in an open session available to the public, not behind closed doors. So, for example, while a governmental body may go into a closed session to get legal advice from their attorney on a pending lawsuit, any decision approving settlement of the lawsuit would need to be voted on in public during the open portion of the meeting so there is transparency about what decisions the governmental body is making and who voted for them.

### Conclusion: What You Should Remember as A License Holder

In summary, Texas law provides citizens with access to view and copy public information unless it is specifically exempted from disclosure for specific reasons. Likewise, the law requires government bodies that meet to discuss public business to do so in a manner that allows for public awareness, attendance, and commentary (when available). Here again, narrowly tailored exceptions to this general concept permit government bodies to meet privately when compelling government interests necessitate doing so. These two important legal tools provide license holders like you with significant access and insight into the activities, policymaking efforts and records your government regulator is responsible for. Remember to take advantage of these legal tools so you understand how your regulator is impacting your industry, your professional reputation, and the license you have worked hard to obtain.

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<sup>[1]</sup> Similar federal open government laws also apply to federal government agencies, but this article focuses on Texas law.

## Side Bar ...



Bertolino LLP is excited to announce the Firm will be participating in the **TexMed 23** conference held in Fort Worth, TX, May 19-20. This annual conference is organized by the Texas Medical Association and is one of the largest gatherings of Texas medical professionals during the year. Managing Partner Tony Bertolino and Director of Legal Services Troy Beaulieu will be speaking about “The Do’s and Don’ts to Avoid a Texas Medical Board Complaint in the Post-Pandemic World”. The Firm is excited to speak with physicians and other medical professionals about the complaint process and how they can minimize their exposure to a complaint from the Texas Medical Board. Go to [www.texmed.org/TexMed](http://www.texmed.org/TexMed) for more information.



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BERTOLINO LLP | (512) 476-5757 | 823 Congress Avenue, Suite 300, Austin, TX 78701  
[www.bertolinolaw.com](http://www.bertolinolaw.com) | [info@bertolinolaw.com](mailto:info@bertolinolaw.com)