

REPORT TO
TEXAS ASSOCIATION OF ORTHOTICS
AND PROSTHETICS

PASSAGE OF SENATE BILL 202 IN 2015:
OBSERVATIONS & CONSIDERATIONS

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INTRODUCTION

This paper addresses new challenges created by Senate Bill 202, which passed during the regular session of the 84th Texas Legislature (January 13, 2015 to June 1, 2015) and thereafter signed into law by the Governor. The focus of this paper is to provide some insight as to the forthcoming impact of the legislation upon those who engage in the practice of orthotics and prosthetics in the State of Texas.

Please note that the information in this paper does not constitute legal advice. It is intended to provide some insight into the changes that may be expected beginning sometime in 2016.

BACKGROUND

The Texas Sunset Act

In 1977, the 65th Texas Legislature passed the *Texas Sunset Act*. The Act provided for a commission to review most state agencies in order to determine whether the agencies reviewed should continue in operation or be abolished. By the term “most state agencies” what is meant is that some agencies cannot be abolished by legislation (such as certain courts and political offices) because they are mandated by the Texas Constitution or otherwise exempted, such as universities.

The “sunset” process operates by setting a specific date that an agency is

to be abolished, which is usually every twelve years. Thus, an agency that is subject to the Act is abolished by operation of law on its sunset date *unless* a bill is passed by the legislature permitting the continuation of the agency.

The *Texas Sunset Advisory Commission* reviews agencies that are scheduled for abolition. The Advisory Commission issues a number of interim reports and a final staff report with recommendations to the legislature.

The Texas Legislature has historically taken several different types of “sunset” actions. First, it may pass a bill to continue the agency and set a new date for abolition. Secondly, it may permit the abolition of the agency by operation of law and hence eliminate any Texas state regulatory authority over the activities previously regulated by the abolished agency. Third, it may permit abolition of the agency, but transfer regulatory authority over the activities regulated by the abolished agency to another agency.

Since 1977, via the Sunset Act, Texas has completely abolished over thirty-five agencies and has abolished over an additional forty agencies with certain functions of the abolished agencies being given to other agencies.

Texas Department of State Health Services (DSHS)

The DSHS was created in 2003 with the intention of consolidating four existing agencies that administered a variety of health related programs. It

appears that the ultimate goal of the agency was to evolve into a public health system in Texas. Its stated mission was “. . . to improve the health and well being of all Texans.” Ultimately, DSHS would gain authority over some 200 health related programs as well as authority over a number of less populated health care provider specialties, such as orthotics and prosthetics.

DSHS came up on the sunset “radar” in 2013. It provided a self-evaluation report of over 500 pages to the Sunset Advisory Commission in September, 2013. Thereafter, the Commission’s staff performed a comprehensive review of DSHS and issued a series of reports that culminated with a staff report with final results in July, 2015.

The criticisms of DSHS were many, including the failure to consolidate agencies, failure to integrate programs, engaging in crisis management and a general lack of leadership. Many of the criticisms were directed at DSHS’s handling of Texas mental health system, but the ultimate problem identified at DSHS was that the scope of its functions were unmanageable.

SENATE BILL 202

Generally, the sunset “solutions” for DSHS’ problems, which become law, pursuant to Senate Bill 202, effective September 1, 2015, are as follows:

1. the elimination of regulation as to state licensure, certification and registration of ten commercial activities being currently regulated by DSHS;
2. the transfer of regulatory authority of a total of sixteen types of health care providers presently regulated by DSHS to other agencies (12 to the Texas Department of Licensing and Regulation – TDLR and 4 to the Texas Medical Board), with the transition process beginning on September 1, 2015 and being fully completed as to all of the agencies on August 31, 2019.; and
3. comprehensive reforms within DSHS with respect to its responsibilities as to mental health services, emergency medical services (EMS) and vital statistics.

Regulation of the orthotics and prosthetics professions are being transferred to the Texas Department of Licensing and Regulation (TDLR). The transfer of regulatory authority must be completed by no later than August 31, 2017, because the existing Texas Board of Orthotics and Prosthetics is abolished by operation of law on September 1, 2017, pursuant to Section 605.003 of the Texas Occupations Code.

TEXAS DEPARTMENT OF LICENSING & REGULATION (TDLR)

Introduction

While the DSHS was a regulatory “catch all” for a variety of medically related professions, the TDLR is the ultimate “catch all”, with regulatory authority extending across over twenty unrelated commercial activities.

Applicable Law

The statutory authority applicable to TDLR is Chapter 51 of the Texas

Occupations Code. The TDLR's procedural rules are contained within 16 Texas Administrative Code, Chapter 60. *Please note* that references that hereinafter follow that begin with "Sec. 51" or "605" are references to specific sections of the Texas Occupations Code, while references that begin with "Sec. 60" are from the TDLR procedural rules.

Organizational Structure and Functions

The TDLR has a seven member commission appointed by the Governor and approved by the Texas Senate. *Sec. 51.052*. The commission members are appointed as representatives of the general public. *Sec. 51.053*. Terms of service are staggered six year terms with the terms of two or three of the members expiring on February 1 of each odd year. *Sec. 51.055*. Members cannot engage in official activities until completing a mandatory training program. *Sec. 51.054*. The Governor designates one of the commissioners as the "presiding officer", who serves in that capacity at the pleasure of the Governor. *Sec. 51.056*.

The specific duties of the Commission are:

1. to supervise the executive director's administration of the department;
2. to formulate the policy objectives of the department; and
3. approve the department's operating budget and requests for legislative appropriations

Sec.51.201(a)

The official name of the commission is “Texas Commission of Licensing And Regulation”. *Sec.60.10(7)*.

The Commission appoints the Executive Director, who serves at the will of the Commission. *Sec. 501.101*. The Executive Director is the head administrative official of TDLR. *Sec.60.10(13)*.

The Director of Enforcement oversees investigations, prosecutions and other activities of the enforcement division. *Sec. 60.10(11)*.

Commission’s Rulemaking Authority

The Commission has both discretionary and mandatory authority with respect to making rules. When the Commission has discretion with respect to making rules, the statute uses the term “may”. When the Commission is required by law to make a rule, the term used is “shall”.

The Commission *may* adopt rules as necessary for its own procedures. *Sec. 51.201(b)(1)*. The Commission *shall* implement rules as necessary to implement this chapter (meaning Chapter 51, Texas Occupations Code). *Sec. 51.201(b)(2)*. This mandatory requirement includes the adoptions of rules necessary to implement each law establishing a program regulated by the TDLR. *Sec. 51.203*.

The TDLR is also mandated to follow a practice known as “negotiated rulemaking”. *Sec. 51.208(a)(1)*. See also: *Chapt. 2008, Texas Government*

Code. This refers to negotiation between a regulating agency and the industry or profession being regulated as to the content of the regulation(s). Further, TDLR is required to designate someone familiar with negotiated rulemaking to coordinate the implementation of the policy. *Sec.51.208(c)*. Finally, the TDLR procedures for negotiated rulemaking are found at *60.100-102*.

Advisory Boards

Due to the broad range of programs regulated by the TDLR, it utilizes “advisory boards” to advise it as to technical issues unique to a profession or business activity. The following details the setup and operation of the advisory board for orthotics and prosthetics:

Sec. 605.052: advisory board consists of 7 members selected by the presiding officer of the Commission with the approval of the other commissioners. Board consists of 2 orthotist members, 2 prosthetist members, 1 orthotist/prosthetist member, 1 public member who uses an orthoist and 1 public member who uses a prosthesis;

Sec. 605.055: advisory board members serve 6 year staggered terms, with 2 or 3 member terms to expire on February 1 of every odd numbered year;

Sec.605.056: advisory board members shall elect a presiding officer for a term of one year;

Sec. 605.0521: the Advisory Board shall provide advice and recommendations to the department on technical matters;

Sec. 605.059: advisory board shall meet at the call of the presiding officer. Advisory Board may call up to 2 special meetings per year if at least four members want such a meeting and at least 14 days written notice is given to presiding member of the Commission, executive director and the other advisory board members.

Enforcement/Disciplinary Matters

The TDLR has broad authority to conduct inspections and investigations if it suspects violations, including the issuance of subpoenas, entry onto the business of a suspected violator and the examination and copying of records believed to be pertinent. *Sec. 51.3512 & 51.351.*

The Executive Director is empowered to issue emergency orders, with or without notice or hearing, suspending or revoking licenses and halting the operation of an unsafe facility. If such actions are taken without hearing, the Executive Director must set a hearing with the State Office of Administrative Hearings (SOAH) not later than the 10th day after the order is issued. *Sec. 51.3511.* Further, the Executive Director can issue a cease or desist order if it is necessary to prevent violation of law. *Sec. 51.3513.* Finally, the Executive Director, either directly or through the Attorney General, can seek civil injunctions, civil penalties up to \$5,000 per day, attorney's fees and other expenses in response to violations. *Sec. 51.352.*

TDLR's procedures in disciplinary matters are generally similar, whether they be administrative penalty cases (*Sec. 51.301-310*) or cases seeking

suspension or revocation of license (*Sec.51.353-356 & Sec.60.300-311*).

The process goes like this:

1. if, after investigation, the department believes there has been a violation, the Respondent is notified of the violation and proposed punishment. The Respondent can accept the punishment or negotiate an agreed settlement – or contest the violation and/or proposed penalty.
2. if the case is contested, it may be referred to mediation.
3. if the case is not mediated or mediation fails to produce a settlement, the case goes to SOAH. After a hearing, the Administrative Law Judge for SOAH will make proposed findings of fact, conclusions of law and a proposed decision.
4. the department will review SOAH's findings, conclusions and proposed decision and thereafter, the TDLR will ultimately make the decision.
5. the Respondent can seek judicial review by the District Court in Travis County (Austin). Normally, any administrative penalty must be paid into escrow with the Department or a supersedeas bond posted while the review is pending. *Sec. 51.307*.

RECOMMENDATIONS

1. Take immediate action to get quality people on the Advisory Board;
and
2. Take advantage of TDLR's negotiated rulemaking to present any proposed rules the association deems important.