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**Pre-Litigation: Alternative Means to Resolving  
Cases before SOAH**

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# **PRE-LITIGATION: ALTERNATIVE MEANS TO RESOLVING CASES BEFORE SOAH**

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# **PRE-LITIGATION: ALTERNATIVE MEANS TO RESOLVING CASES BEFORE SOAH**

## **I. INTRODUCTION**

The purpose of this paper is to address the informal proceeding process and statutory and agency rule authority as it relates to agency investigations and the processes that follow leading up to a formal proceeding at the State Office of Administrative Hearings (“SOAH”). This paper is not intended to be a complete audit of all Texas state agencies, nor is it intended to address all agency actions, such as licensure denials or emergency suspensions; rather, this paper will focus on informal proceedings in general contested cases as addressed by the Texas Administrative Procedures Act (“APA”) and the select agency’s enabling statute and rules. The focus of the paper will be on a select group of state agencies that routinely utilize the informal proceeding process to resolve agency investigations prior to litigation and the formal hearing process at the administrative court.

## **II. OVERVIEW OF INFORMAL PROCEEDINGS AS REFERENCED IN THE APA**

The informal proceeding, i.e. informal conferences or informal settlement conferences as practitioners know them to be, is not a process required by the APA in adjudicative matters. In fact, the term “informal proceeding” is not defined nor does it even exist in the APA. As such, the general rule that state agencies must comply with the procedural rules afforded by the APA does not apply to informal proceedings in contested cases.<sup>1</sup> The APA only mandates state agencies comport with provisions of the APA regarding notice and opportunity to show compliance. Technically, this is accomplished through the agency’s formal notice of hearing to the licensee. That being said, the enabling statutes of state agencies and their rules do address informal proceedings and commonly reference the APA, specifically:

*Sec. 2001.056. INFORMAL DISPOSITION OF CONTESTED CASE. Unless precluded by law, an informal disposition may be made of a contested case by:*

- (1) stipulation;*
- (2) agreed settlement;*
- (3) consent order; or*
- (4) default.<sup>2</sup>*

Sec. 2001.056 addresses disposition of a contested case, which under the APA is defined as a “proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.” Despite this language pointing to informal disposition after a case is filed with the administrative court, agency enabling statutes reference to this section of the APA as a basis of agencies’ informal resolution processes, including informal proceedings prior to formal filings.

As my discussion turns to agency-specific agencies and their statutes and rules, informal proceedings are more often than not mandated prior to issuance of a formal notice of hearing; however, there are instances whereby an agency may refuse the opportunity for an informal meeting. It goes without saying practitioners must look to not just the APA but to the agency enabling statute and rules for guidance of not just the procedural rules but of the substantive rights afforded to the licensee.

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<sup>1</sup> *Best & Co. v. Tex. State Bd. of Plumbing Exam’rs*, 927 S.W.2d 306 (Tex. App.—Austin 1996, writ denied)

<sup>2</sup> TEX. GOV’T CODE § 2001.056

### III. TEXAS AGENCIES - STATUTORY AND RULE AUTHORITY FOR INFORMAL RESOLUTION

#### A. Texas Medical Board

##### 1. Medical Practice Act

The statutory authority for an informal proceeding before the Texas Medical Board (“TMB”) is located in Chapter 164.003 of the Occupations Code:

*Sec. 164.003. INFORMAL PROCEEDINGS. (a) The board by rule shall adopt procedures governing: (1) informal disposition of a contested case under Section 2001.056, Government Code; and (2) informal proceedings held in compliance with Section 2001.054, Government Code.*<sup>3</sup>

The Medical Practice Act (“MPA”) refers to the APA and ensures compliance with the APA provisions involving licenses and informal disposition of contested cases. The MPA further addresses the informal proceeding process and protocol, including notice of the informal proceeding to the license holder be issued not later than the 45<sup>th</sup> day before the date the meeting is held:

*(b) Rules adopted under this section must require that (2) the board give notice to the license holder of the time and place of the meeting not later than the 45th day before the date the meeting is held.*<sup>4</sup>

As far as specificity, the MPA gives a more detailed process for what occurs at an informal proceeding than most other agency enabling statutes, including who is required to be present at the informal meeting and the information which must be provided to the licensee.<sup>5</sup>

##### 2. Agency Rules

Delving into the Board’s rules, the informal proceeding or Informal Settlement Conference (“ISC”) as it is labeled by the TMB is addressed in Chapter 187 of the Texas Administrative Code (“TAC”).<sup>6</sup> Again, the procedural rules of the TMB are detailed and specific and not only address the requirements of notice and content of the notice to the licensee, but also the protocols of the ISC itself, including requirements for rescheduling the ISC.<sup>7</sup> The rules further stipulate the process for resolving the matter by Agreed Order and protocol for acceptance of the Agreed Order by the Board.<sup>8</sup>

As a matter of contrast, the TMB’s rules also specifically address mediated settlement conferences in Rule 187.29. These proceedings occur after a complaint is filed and are addressed as part of the formal Board proceedings at SOAH.<sup>9</sup>

##### 3. Practical Considerations

I would point out that the TMB per statute and rule mandates the inclusion of information or “evidence” the Board intends to use at the ISC in the TMB’s notice, including a copy of the Expert Physician

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<sup>3</sup> TEX. OCC. CODE § 164.003

<sup>4</sup> TEX. OCC. CODE § 164.003(b)(2)

<sup>5</sup> TEX. OCC. CODE § 164.003(b)-(f)

<sup>6</sup> 22 TEX. ADMIN. CODE CH. 187

<sup>7</sup> 22 TEX. ADMIN. CODE § 187.16 -.18

<sup>8</sup> 22 TEX. ADMIN. CODE § 187.19-.20

<sup>9</sup> 22 TEX. ADMIN. CODE § 187.29

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