

HEARING CONDUCTED BY THE  
TEXAS STATE OFFICE OF ADMINISTRATIVE HEARINGS  
SOAH DOCKET NO. 503-12-1938 .MD  
LICENSE NO. E-3781

IN THE MATTER OF THE  
COMPLAINT AGAINST:

TOMMY ERNEST SWATE, M.D.

BEFORE THE

TEXAS MEDICAL BOARD

**COMPLAINT**

TO THE HONORABLE TEXAS MEDICAL BOARD AND THE HONORABLE  
ADMINISTRATIVE LAW JUDGE TO BE ASSIGNED:

COMES NOW, the Staff of the Texas Medical Board ("the Board"), and files this Complaint against Tommy Ernest Swate, M.D., ("Respondent"), based on Respondent's alleged violations of the Medical Practice Act ("the Act"), TEX. OCC. CODE ANN., Title 3, Subtitle B, Chapters 151-165, and would show the following:

**I. INTRODUCTION**

The filing of this Complaint and the relief requested are necessary to protect the health and public interest of the citizens of the State of Texas, as provided in Section 151.003 of the Act.

**II. LEGAL AUTHORITY AND JURISDICTION**

1. Respondent is a Texas Physician and holds Texas Medical License No. E-3781, issued by the Board on January 18, 1975.
2. Respondent's license was in full force and effect at all times material and relevant to this Complaint.
3. Respondent received proper notice of an Informal Settlement Conference ("ISC") and appeared at the ISC, which was conducted in accordance with §2001.054(c), GOV'T CODE and §164.004 of the Act. All procedural rules were complied with, including but not limited to, Board Rules 182 and 187, as applicable.

4. No agreement to settle this matter has been reached by the parties.
5. All jurisdictional requirements have been satisfied.

### **III. FACTUAL ALLEGATIONS**

Board Staff has received information and based on that information believes that Respondent has violated the Act. Based on such information and belief, Board Staff alleges:

#### **A. General Allegations:**

1. Between approximately 2007 to 2010, Respondent prescribed controlled substances to 10 patients: A, B, C, D, E, F, G, H, I, and J,<sup>1</sup> for the treatment of chronic pain and anxiety.
2. Each and every patient showed signs of possible abuse and/or diversion of the controlled substances prescribed by Respondent. Respondent failed to address such signs, and continued to prescribe controlled substances to all 10 patients despite such signs.
3. For each and every patient, Respondent non-therapeutically prescribed the same or similar combination of hydrocodone, muscle relaxants, and/or benzodiazepines.
4. For each and every patient, Respondent failed to maintain adequate medical records.
5. For each and every patient, Respondent and/or practitioners prescribing under Respondent's supervision and delegation authority failed to implement alternative treatment options to prescriptions for controlled substances, order relevant diagnostic testing, make referrals to specialists as necessary, or comply with other provisions related to the treatment of chronic pain.
6. Respondent failed to adequately supervise mid-level providers who were prescribing controlled substances under Respondent's delegation authority.

#### **B. Specific Patients:**

1. Patient A:

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<sup>1</sup> Identification of the patients will be provided by separate document under seal.

- i. Respondent initially prescribed a combination of hydrocodone, carisoprodol, and benzodiazepines to Patient A on or about November 5, 2007.
- ii. Respondent's initial progress note for Patient A shows that Patient A was not evaluated or diagnosed by Respondent until on or about October 1, 2008. Respondent continued prescribing a combination of hydrocodone, carisoprodol, and/or benzodiazepines to Patient A until at least May of 2010.
- iii. Board staff incorporates General Allegation Nos. 1 through 4.

2. Patient B:

- i. Respondent initially prescribed hydrocodone and carisoprodol to Patient B on or about December 13, 2008.
- ii. Respondent did not evaluate or diagnose Patient B until on or about January 9, 2009. Respondent continued prescribing a combination of hydrocodone, carisoprodol, and/or benzodiazepines to Patient B on an approximately monthly basis until at least May of 2010.
- iii. Board staff incorporates General Allegation Nos. 1 through 4.

3. Patient C:

- i. Respondent began treating Patient C in approximately 2007 and continued through at least May of 2010.
- ii. During this time period, Respondent's primary course of treatment was to prescribe a combination of narcotics, carisoprodol, and benzodiazepines.
- iii. Board staff incorporates General Allegation Nos. 1 through 4.

4. Patient D:

- i. Respondent treated Patient D from approximately October of 2008 to at least May of 2010.
- ii. During this time period, Respondent's primary course of treatment was to prescribe a combination of narcotics, carisoprodol, and benzodiazepines on approximately a monthly basis.

iii. Board staff incorporates General Allegation Nos. 1 through 4.

5. Patient E:

- i. Respondent treated Patient E from approximately October of 2008 to at least April of 2010.
- ii. During this time period, Respondent's primary course of treatment was to prescribe a combination of narcotics, carisoprodol, and/or benzodiazepines on approximately a monthly basis.
- iii. Board staff incorporates General Allegation Nos. 1 through 4. .

6. Patient F:

- i. Respondent treated Patient F from approximately October of 2008 to at least April of 2010.
- ii. During this time period, Respondent's primary course of treatment was to prescribe a combination of narcotics, carisoprodol, and/or benzodiazepines on approximately a monthly basis.
- iii. Board staff incorporates General Allegation Nos. 1 through 4.

7. Patient G:

- i. Respondent initially prescribed hydrocodone and carisoprodol to Patient G on or about November 1, 2007.
- ii. Respondent's initial progress note for Patient G shows that Patient G was not evaluated or diagnosed by Respondent until on or about June 9, 2008.
- iii. Respondent continued prescribing a combination of hydrocodone, carisoprodol, and/or benzodiazepines to Patient B on an approximately monthly basis until at least May of 2010.
- iv. Board staff incorporates General Allegation Nos. 1 through 4.

8. Patient H:

- i. Respondent treated Patient H from approximately December of 2007 to at least May of 2010.

- ii. During this time period, Respondent's primary course of treatment was to prescribe a combination of narcotics, carisoprodol, and/or benzodiazepines on approximately a monthly basis.
- iii. Board staff incorporates General Allegation Nos. 1 through 4.

9. **Patient I:**

- i. Respondent treated Patient I from approximately December of 2008 to at approximately March of 2010.
- ii. During this time period, Respondent's primary course of treatment was to prescribe a combination of narcotics, carisoprodol, and/or benzodiazepines on approximately a monthly basis.
- iii. Board staff incorporates General Allegation Nos. 1 through 4.

10. **Patient J:**

- i. Respondent treated Patient J from approximately August of 2008 to approximately April of 2010.
- ii. During this time period, Respondent's primary course of treatment was to prescribe a combination of narcotics, carisoprodol, and/or benzodiazepines.
- iii. Board staff incorporates General Allegation Nos. 1 through 4.

**C. Statutory Violations:**

The actions of Respondent specified above violate one or more of the following provisions of the Act:

- 1. Section 164.051(a)(1) of the Act authorizes the Board to take disciplinary action based on Respondent's commission of an act prohibited under Section 164.052 of the Act
- 2. Section 164.051(a)(3) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's violation of a Board Rule(s), Specifically, Board Rule 165.1, requiring a physician to maintain adequate medical records and Board Rule 170, related to the Board's guidelines for the treatment of pain.

3. Section 164.051(a)(6) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's failure to practice medicine in an acceptable professional manner consistent with public health and welfare, generally, and as further defined by Board Rules: 190.8(1)(A), failure to treat a patient according to the generally accepted standard of care; 190.8(1)(B), negligence in performing medical services; 190.8(1)(C), failure to use proper diligence in one's professional practice; 190.8(1)(D), failure to safeguard against potential complications; 190.8(1)(G), failure to disclose reasonably foreseeable side effects of a procedure or treatment; 190.8(1)(H), failure to disclose reasonable alternative treatments to a proposed procedure or treatment; and 190.8(1)(L), prescription of any dangerous drug or controlled substance without first establishing a proper professional relationship with a patient.

4. Section 164.052(a)(5) of the Act authorizes the Board to take disciplinary action against Respondent based upon Respondent's unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public, as further defined by, Board Rule 190.8(2)(J), provides that upon unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public includes the providing medically unnecessary services to a patient; and 190.8(R), commission of the following violations of federal or state laws whether or not there is a complaint, indictment, or conviction: (i), any felony; (iii), any criminal violation of the Medical Practice Act ; and (xii), substance abuse or substance diversion.

5. Section 164.053(a)(1) authorizes the Board to take disciplinary action against Respondent based upon Respondent's commission of an act that violates any state or federal law if the act is connected with the physician's practice of medicine, specifically, Health and Safety Code, Section 481.129(c)(1), Fraud: A person commits an offense if the person knowingly or intentionally delivers a prescription or a prescription form for other than a valid medical purpose in the course of professional practice.

6. Section 164.053(a)(3) authorizes the Board to take disciplinary action against Respondent based upon Respondent's writing prescriptions for or dispensing to a person who is known to be an abuser of narcotic drugs, controlled substances, or dangerous drugs; or to a person whom the physician should have known was an abuser of the narcotic drugs, controlled substances, or dangerous drugs.

7. Section 164.053(a)(5) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent prescribing or administering a drug or treatment that is

non-therapeutic in nature or non-therapeutic in the manner the drug or treatment is administered or prescribed.

8. Section 164.053(a)(6) authorizes the Board to take disciplinary action against Respondent based upon Respondent's prescribing, administering, or dispensing in a manner inconsistent with public health and welfare dangerous drugs as defined by Chapter 483, Health and Safety Code; or controlled substances scheduled in Chapter 481, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970, (21 U.S.C. Section 801 et seq.).

9. Section 164.053(a)(8) authorizes the Board to take disciplinary action against Respondent based upon Respondent's failure to supervise adequately the activities of those acting under the supervision of the physician.

**D. Aggravating Factors:**

Under Texas Administrative Code, Title 22, Part 9, Board Rule 190.15(a), in any disciplinary action, the following may be considered as aggravating factors that warrant more severe or restrictive action by the Board. This case includes the following aggravating factors:

1. one or more violations that involve more than one patient;
2. increased potential harm to the public;
3. intentional, premeditated, knowing, or grossly negligent act constituting a violation;
4. prior similar violations; and
5. previous disciplinary action by health care entity,:

a. On January 24, 1992, the Board entered a five-year Agreed Order that suspended Respondent's license, stayed the suspension, placed Respondent's license under probation, and restricted Respondent from performing abortions. The Board's action was based upon findings that Respondent failed to meet the standard of care with respect to his treatment for several obstetrics patients.

b. On March 2, 1996, the Board entered an Agreed Order ("1996 Order") that again suspended Respondent's license, stayed the suspension, placed Respondent's license under probation, and among other terms and conditions, restricted him from operating a methadone clinic for 10 years. The Board's action was based on findings that the Drug Enforcement Administration (DEA) and Department of

Public Safety (DPS) certificate of registrations for two methadone clinics where Respondent acted as Medical Director had been revoked, that Respondent had failed to report the Medical Board's investigation on several renewal applications for licensure in Louisiana, and that Respondent had lied to the Louisiana Medical Board regarding his practice status and the clinics' revocation of the DEA and DPS registrations after the entry of the 1992 Order.

- c. On December 9, 2005, the Board entered an Agreed Order that extended the 1996 Order's term so that it would end one year from the date that Respondent resumed the practice of medicine in Texas. On April 4, 2007, the 1996 Order was terminated.

#### **IV. APPLICABLE STATUTES, RULES AND AGENCY POLICY**

The following Statutes, Rules, and Agency Policy are applicable to the procedures for conduct of the hearing this matter:

1. Section 164.007(a) of the Act requires that the Board adopt procedures governing formal disposition of a contested case before the State Office of Administrative Hearings.
2. 22 TEX. ADMIN. CODE, Chapter 187 sets forth the procedures adopted by the Board under the requirement of Section 164.007(a) of the Act.
3. 1 TEX. ADMIN. CODE, CHAPTER 155 sets forth the rules of procedure adopted by SOAH for contested case proceedings.
4. 1 TEX. ADMIN. CODE, CHAPTER 155.507, requires the issuance of a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law.
5. Section 164.007(a) of the Act, Board Rule 187.37(d)(2) and, Board Rule 190 et. seq., provide the Board with the sole and exclusive authority to determine the charges on the merits, to impose sanctions for violation of the Act or a Board rule, and to issue a Final Order.

#### **VI. NOTICE TO RESPONDENT**

**IF YOU DO NOT FILE A WRITTEN ANSWER TO THIS COMPLAINT WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS WITHING 20 DAYS AFTER THE DATE OF RECEIPT, A DEFAULT ORDER MAY BE ENTERED AGAINST YOU, WHICH MAY INCLUDE THE DENIAL OF LICENSURE OR ANY OR ALL OF THE**

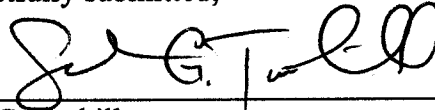


**REQUESTED SANCTIONS, INCLUDING THE REVOCATION OF YOUR LICENSE. A COPY OF ANY ANSWER YOU FILE WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS SHALL ALSO BE PROVIDED TO THE HEARINGS COORDINATOR OF THE TEXAS MEDICAL BOARD.**

WHEREFORE, PREMISES CONSIDERED, Board Staff requests that an administrative law judge employed by the State Office of Administrative Hearings conduct a contested case hearing on the merits of the Complaint, and issue a Proposal for Decision ("PFD") containing Findings of Fact and Conclusions of Law necessary to support a determination that Respondent violated the Act as set forth in this Complaint.

Respectfully submitted,

By:



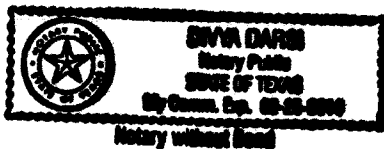
Sarah G. Tuthill  
State Bar No. 24066225  
Texas Medical Board  
333 Guadalupe, Tower 3, Suite 610  
Austin, Texas 78701  
Telephone: 512-305-7015  
Facsimile: 512-305-7007

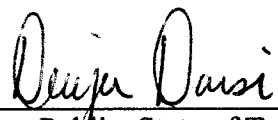
THE STATE OF TEXAS

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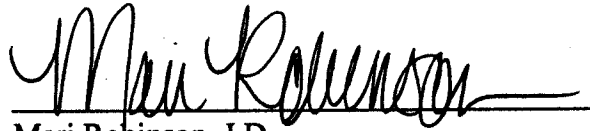
COUNTY OF TRAVIS

SUBSCRIBED AND SWORN to before me by the said Sarah G. Tuthill on this 26<sup>th</sup> day of October, 2011.



  
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Notary Public, State of Texas

Filed with the Texas Medical Board on this 2<sup>1st</sup> day of October, 2011.



Mari Robinson, J.D.  
Executive Director  
Texas Medical Board

**CERTIFICATE OF SERVICE**

I certify that on October 26, 2011 a true and correct copy of the foregoing complaint document has been served as follows:

**VIA E-MAIL TO: docketing@soah.state.tx.us**

Docket Clerk  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Room 502  
Austin, Texas 78701

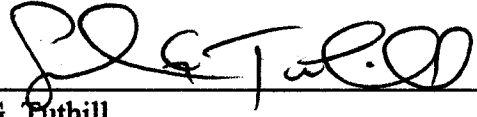
**Via First Class Mail and**

**Certified Mail - Return Receipt Requested: 7008 2810 0000 1404 9082**

12605 East Freeway, Suite 600  
Houston, TX 77015  
Respondent

**Via Hand Delivery**

Sonja Aurelius  
Hearings Coordinator  
Texas Medical Board  
33 Guadalupe, Tower 3, Suite 610  
Austin, Texas 78701



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Sarah G. Puthill