

## RULE ANALYSIS

**Introduction:** THE AMENDMENTS ARE SUBMITTED TO THE BOARD FOR CONSIDERATION AS ADOPTED RULES

**Short Title:** Informal Disposition of a Contested Case

**Rule Numbers:** §281.22

**Statutory Authority:** Texas Pharmacy Act, Chapter 551-566 and 568-569, Occupations Code:

- (1) Section 551.002 specifies that the purpose of the Act is to protect the public through the effective control and regulation of the practice of pharmacy; and
- (2) Section 554.051 gives the Board the authority to adopt rules for the proper administration and enforcement of the Act.

**Purpose:** The amendments, if adopted, implement S.B. 404 as passed by the 83rd Texas Legislature.

**The Board reviewed and voted to propose the amendments during the August 6, 2013, meeting. The proposed amendments were published in the September 27, 2013, issue of the *Texas Register* at 38 TexReg 6499.**

1 **CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES**  
2 **SUBCHAPTER B. GENERAL PROCEDURES IN A CONTESTED CASE\**

3 **§281.22**

4 The Texas State Board of Pharmacy proposes amendments to §281.22, concerning an Informal  
5 Disposition of a Contested Case. The amendments, if adopted, implement Senate Bill 404 as  
6 passed by the 83rd Texas Legislature.

7 Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year  
8 period the amended rule is in effect, there will be no fiscal implications for state or local  
9 government as a result of enforcing or administering the amended rule.

10 Ms. Dodson has determined that, for each year of the first five-year period the amended rule will  
11 be in effect, the public benefit anticipated as a result of enforcing the rule is to correctly  
12 reference the appropriate citation. There is no fiscal impact for individuals, small or large  
13 businesses, or to other entities which are required to comply with the amended section.

14 Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S.,  
15 Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite  
16 3-600, Austin, Texas 78701, fax (512) 305-8008. Comments must be received by 5:00 p.m.,  
17 October 31, 2013.

18 The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act  
19 (Chapters 551 - 566, 568 and 569, Texas Occupations Code). The Board interprets §551.002 as  
20 authorizing the agency to protect the public through the effective control and regulation of the  
21 practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules  
22 for the proper administration and enforcement of the Act.

23 The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566, 568 and  
24 569, Texas Occupations Code.

25 ***§281.22. Informal Disposition of a Contested Case.***

26 (a) (No change.)

27 (b) Prior to the imposition of disciplinary sanction(s) against a respondent [~~licensee or~~  
28 ~~registration~~], the board shall provide the respondent [~~licensee or registrant~~] with written notice of  
29 the matters asserted, including:

30 (1) a statement of the legal authority, jurisdiction, and alleged conduct under which the  
31 enforcement action is based, with a reference to the particular section(s) of the statutes and rules  
32 involved;

33 (2) information the board staff intends to use at an informal conference;

34 ~~(3)~~ ~~(2)~~ an offer for the respondent [~~licensee or registrant~~] to attend an informal conference at a  
35 specified time and place and show compliance with all requirements of law, in accordance with  
36 §2001.054(c) of the Administrative Procedure Act;

37 ~~(4)~~ ~~(3)~~ a statement that the respondent [~~licensee or registrant~~] has an opportunity for a hearing  
38 before the State Office of Administrative Hearings on the allegations; and

39 ~~(5)~~ ~~(4)~~ the following statement in capital letters in 12 point boldface type: FAILURE TO  
40 RESPOND TO THE ALLEGATIONS, BY EITHER PERSONAL APPEARANCE AT THE  
41 INFORMAL CONFERENCE OR IN WRITING, WILL RESULT IN THE ALLEGATIONS  
42 BEING ADMITTED AS TRUE AND THE RECOMMENDED SANCTION MADE AT THE  
43 INFORMAL CONFERENCE BEING GRANTED BY DEFAULT. The notice shall be served by  
44 delivering a copy to the respondent [~~licensee or registrant~~] in person, by courier receipted  
45 delivery, by first class mail, or by certified or registered mail, return receipt requested to the  
46 respondent's [~~licensee's or registrant's~~] last known address of record as shown by agency records.

47 (c) The respondent will be provided the opportunity to appear at an informal conference prior to  
48 a hearing at the State Office of Administrative Hearings. The notice of the time and place of the  
49 informal conference, along with the written notice required in subsection (b) of this section, will  
50 be given to the respondent at least 45 days before the date of the informal conference. If such  
51 notice is not timely provided, the respondent may reschedule the informal conference.

52 ~~(d)~~ ~~(e)~~ The respondent [~~licensee or registrant~~] shall respond [~~by~~] either by personal appearance  
53 at the informal conference, or by providing a rebuttal [~~or~~] in writing no later than 15 days before  
54 the date of the informal conference. If the respondent [~~licensee or registrant~~] chooses to respond  
55 in writing, the response shall admit or deny each of the allegations. If the respondent [~~licensee or~~  
56 ~~registrant~~] intends to deny only a part of an allegation, the respondent [~~licensee or registrant~~]  
57 shall specify so much of it is true and shall deny only the remainder. The response shall also  
58 include any other matter, whether of law or fact, upon which the respondent [~~licensee or~~  
59 ~~registrant~~] intends to rely upon as a [~~for his or her~~] defense. If the respondent [~~licensee or~~  
60 ~~registrant~~] fails to respond to the notice specified in subsection (b) of this section, the matter will  
61 be considered as a default case and the respondent [~~licensee or registrant~~] will be deemed to  
62 have:

63 (1) admitted all the factual allegations in the notice specified in subsection (b) of this section;

64 (2) waived the opportunity to show compliance with the law;

65 (3) waived notice of a hearing;

66 (4) waived the opportunity for a hearing on the allegations; and

67 (5) waived objection to the recommended sanctions made at the informal conference.

68 ~~(e)~~ ~~(d)~~ Default orders.

69 (1) The informal conference panel may recommend that the board enter a default order, based  
70 upon the allegations set out in the notice specified in subsection (b) of this section, adopting the  
71 recommended sanctions made at the informal conference. Upon consideration of the case, the  
72 board may enter a default order under §2001.056 of the Administrative Procedure Act or direct  
73 that the case be set for a hearing at the State Office of Administrative Hearings.

74 (2) For a contested case before the State Office of Administrative Hearings, the judge may  
75 announce a default upon receiving the required showing of proof to support a default, and then  
76 recess the hearing, issue an order dismissing the case from the docket of the State Office of  
77 Administrative Hearings, and return the file to the board for informal disposition on a default  
78 basis in accordance with §2001.056 of the Administrative Procedure Act. The board may then  
79 enter a default order or direct the case back to the State Office of Administrative Hearings.

80 (f) [(e)] Any default judgment granted under this section will be entered on the basis of the  
81 factual allegations in the notice specified in subsection (b) of this section, and upon proof of  
82 proper notice to the respondent's [~~licensee's or registrant's~~] address of record. For purposes of  
83 this section, proper notice means notice sufficient to meet the provisions of §2001.054 of the  
84 Administrative Procedure Act and §281.30 of this title (relating to Pleadings and Notice in a  
85 Contested Case).

86 (g) [(f)] A motion for rehearing which requests that the board vacate its default order under this  
87 section shall be granted if the motion presents convincing evidence that the failure to respond to  
88 the notice specified in subsection (b) of this section was not intentional or the result of conscious  
89 indifference, but due to accident or mistake, provided that the respondent [~~licensee or registrant~~]  
90 has a meritorious defense to the factual allegations contained in the notice specified in subsection  
91 (b) of this section and the granting thereof will not result in delay or injury to the public or the  
92 board.

93 (h) [(g)] Informal conferences shall be attended by the executive director/secretary or designated  
94 representative, legal counsel of the agency or an attorney employed by the office of the attorney  
95 general, and other representative(s) of the agency as the executive director/secretary and legal  
96 counsel may deem necessary for proper conduct of the conference. The respondent [~~licensee or~~  
97 ~~registrant~~] and/or the respondent's [~~licensee's or registrant's~~] authorized representative(s) may  
98 attend the informal conference and shall be provided an opportunity to be heard. All  
99 communications from the respondent [~~licensee or registrant~~] shall be directed to the legal counsel  
100 of the agency.

101 (i) [(h)] In any case where charges are based upon information provided by a person  
102 (complainant) who filed a complaint with the board, the complainant may attend the informal  
103 conference, unless the proceedings are confidential under §564.002 and §564.003 of the Texas  
104 Pharmacy Act or other applicable law. A complainant who chooses to attend an informal  
105 conference shall be provided an opportunity to be heard with regard to charges based upon the  
106 information provided by the complainant. Nothing herein requires a complainant to attend an  
107 informal conference.

108 (j) [(+)] Informal conferences shall not be deemed meetings of the board, and no formal record of  
109 the proceedings at such conferences shall be made or maintained unless the respondent requests  
110 such a recording in writing at least 15 days before the informal conference. Board staff will  
111 arrange for the presence of a court reporter to make the recording. The respondent shall be  
112 responsible for the cost of the recording. The recording will be part of the board's investigative  
113 file and will not be released to a third party unless authorized under §565.055 of the Act. The  
114 board will provide a copy of the recording to the respondent upon request.

115 (k) [(+)] Any proposed consent order shall be presented to the board in open meeting for its  
116 review. At the conclusion of its review, the board shall approve or disapprove the proposed  
117 consent order. Should the board approve the proposed consent order, the appropriate notation  
118 shall be made in minutes of the board and the proposed consent order shall be entered as an  
119 official action of the board. Should the board disapprove the proposed consent order, the matter  
120 shall be scheduled for public hearing.