



# Texas State Board of Medical Examiners

# Texas State Board of Physician Assistant Examiners

# Texas State Board of Acupuncture Examiners

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S.B. 419 Nelson (Solomons)

## Summary

Texas began regulating physicians in 1837, and created the current Texas State Board of Medical Examiners (Medical Board) in 1907 to ensure that only qualified physicians practice medicine and provide health care to Texans. In 1993, the State established both the Texas State Board of Physician Assistant Examiners and the Texas State Board of Acupuncture Examiners as advisory boards to the Medical Board to assist in regulating physician assistants, who provide medical services under the supervision of licensed physicians, and acupuncturists. The boards' main functions include issuing licenses to qualified individuals; investigating and resolving complaints, including taking disciplinary action when necessary; and monitoring compliance with disciplinary orders. With a staff of 133 employees and a budget of about \$8.3 million, the boards regulate about 56,000 physicians, 6,500 physicians-in-training, 3,500 physician assistants, 700 acupuncturists, and 260 surgical assistants.

Senate Bill 419 continues the Medical, Physician Assistant, and Acupuncture boards for 12 years and contains the Sunset Commission's recommendations to increase the boards' ability to protect the public and provide fairer, more efficient processes for license holders. The bill improves stakeholder input into the boards' rulemaking process, builds on recent legislative directives to further strengthen the boards' enforcement efforts, clarifies the Medical Board's use of peer review documents, authorizes the Medical Board to issue several new types of licenses, establishes grounds for disciplinary action for physicians who perform certain abortions, and enhances the Acupuncture Board's role as a regulatory board. Senate Bill 419 also changes the name of the Texas State Board of Medical Examiners and the Texas State Board of Physician Assistant Examiners to the Texas Medical Board and the Texas Physician Assistant Board, respectively. The list below summarizes the major provisions of S.B. 419, and a more detailed discussion follows.

## Sunset Provisions

1. Require the Boards to Provide Stakeholders With Meaningful Opportunities for Input Into the Rulemaking Process.
2. Update the Boards' Licensing Process to Ensure Fair, Consistent Decisions.
3. Provide Further Improvements to the Medical, Physician Assistant, and Acupuncture Boards' Investigation Processes to Better Protect the Public.
4. Define Clear Roles, Responsibilities, and Authority for the Boards' Informal Hearings Process.
5. Clarify Language Regarding the Use and Confidentiality of Peer Review Documents in Hearings by the Medical Board and the State Office of Administrative Hearings.
6. Update the Boards' Private Rehabilitation Order to Ensure Adequate Public Protection.

7. Require Physicians Who Use Moderate Sedation in Outpatient Settings to Comply With the Medical Board's Safety Requirements.
8. Update the Authority for Regulating Acupuncture to Ensure Efficiency and Protect the Public.
9. Grant the Medical Board Flexibility in How it Regulates the Delegation of Prescription Authority by Physicians.
10. Conform Key Elements of the Boards' Licensing and Regulatory Functions to Commonly Applied Licensing Practices.
11. Prohibit Medical Board Members From Using Information Obtained Through Their Duties for Personal Gain.
12. Require the Medical Board to Publish Updated or Corrected Disciplinary Actions.
13. Clarify the Boards' Authority to Modify a Proposal for Decision Received From the State Office of Administrative Hearings.
14. Continue the Medical Board for 12 Years and Eliminate the Separate Sunset Dates for the Physician Assistant and Acupuncture Boards.

## **Provisions Added by the Legislature**

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15. Authorize the Medical Board to Issue a Faculty Temporary License.
16. Direct the Medical Board to Consider if a Violation Directly Relates to Patient Care When Determining a Sanction.
17. Require the Medical Board to Document Reasons for Rejecting Recommendations From Informal Hearings Panels.
18. Require a Joint Interim Study on the Medical Peer Review Process.
19. Restrict a Physician From Performing a Third-Trimester Abortion, Except Under Certain Circumstances.
20. Require a Physician to Get Parental Consent Before Performing an Abortion on a Minor.

## Sunset Provisions

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### **1. Require the Boards to Provide Stakeholders With Meaningful Opportunities for Input Into the Rulemaking Process.**

Senate Bill 419 requires the Medical, Physician Assistant, and Acupuncture boards to develop guidelines for the early involvement of stakeholders in the rulemaking process. In addition, the Medical Board's guidelines must include procedures for receiving input from the Physician Assistant and Acupuncture boards, as rules proposed by the Medical Board may affect individuals under these boards' jurisdiction. The Medical Board's guidelines also must accommodate stakeholders' comments on rules proposed to the Medical Board by the Physician Assistant and Acupuncture boards, as these advisory boards do not have independent rulemaking authority and therefore must have their rules approved by the Medical Board.

The Legislature modified the Sunset provision to delete language allowing the boards to decide which rules need early stakeholder involvement. Instead, the Legislature added language specifying that a rule adopted by the boards may not be challenged on the grounds that the boards did not comply with the provisions for receiving input during rulemaking. In this situation, the boards must state in writing the reasons why they were not able to solicit a significant amount of input.

### **2. Update the Boards' Licensing Process to Ensure Fair, Consistent Decisions.**

Under S.B. 419, the Medical, Physician Assistant, and Acupuncture boards must develop, in conjunction with each board's associated stakeholders, guidelines for evaluating applicants' and license holders' mental and physical health, as well as alcohol or other substance abuse, and professional behavior problems. The bill limits the ability of the boards to refer a person to a specified type of specialist for evaluation unless medically indicated or too few physicians are available to perform the appropriate examination in an area. The guidelines do not affect the boards' power to make independent licensing decisions.

The bill removes from the Medical Practice Act the current exceptions to the number of allowed licensing examination attempts, instead requiring all applicants to complete each of the three licensing exam sections within three attempts. The Medical Board must adopt rules that prescribe how the limit on the number of examination attempts applies to applicants who attempt both the allopathic and osteopathic medical licensing examinations.

In addition, the bill authorizes the Medical Board to issue a medical license limited to the practice of administrative medicine to applicants who meet specific licensing requirements established by the Board. Individuals who hold an administrative license must prove clinical competence and meet all other eligibility requirements if they later seek to practice with an unrestricted license. The Legislature modified the Sunset provision regarding institutional medical licenses for foreign medical graduates to authorize the Board instead to issue a license limited in scope to an applicant by virtue of the applicant's conceded eminence and authority in the applicant's specialty. License holders are restricted to practicing only their medical specialty within the specific institution or program that recommended the license holders, and must meet all Board licensing requirements to be eligible for an unrestricted license.

### **3. Provide Further Improvements to the Medical, Physician Assistant, and Acupuncture Boards' Investigation Processes to Better Protect the Public.**

Building upon recent legislative directives, S.B. 419 strengthens the boards' investigation process. The bill directs the Medical Board to adopt rules regarding its panel of expert physician reviewers, including length of service, grounds for removal, and conflicts of interest related to standard-of-care cases. The Legislature modified the provision to require that the rules also address situations in which an expert reviewer and the physician under review live or work in the same geographical area or are competitors. The Medical Board also must randomly select expert reviewers within the same or similar specialty as the affected physician for standard-of-care cases.

Under a process established in the bill, an expert physician reviewer reviews each medical competency case to determine if the affected physician violated the standard of care and issues a preliminary report of that determination. A second reviewer conducts an abbreviated review of the first physician's report and other information and, if the two reviewers do not agree, a third expert physician reviewer will examine the case. The Legislature added a provision to clarify that expert physician reviewers may consult and communicate with each other about a complaint. To help ensure that the Medical, Physician Assistant, and Acupuncture boards can secure experts to assist in the evaluation of medical competency cases, the bill provides that persons serving as expert reviewers or consultants to the boards are immune from suit and judgment and may not be subjected to a suit for damages if the expert acted without fraud or malice.

The bill, as modified by the Legislature, requires the boards to complete a preliminary investigation and determine whether to officially proceed on a complaint no later than 30 days after receiving the complaint. In addition, the Medical Board may not dismiss complaints solely because the Board has not set the complaint for an informal hearing within 180 days. If a hearing has not been scheduled within 180 days, the Medical Board must notify all parties to a complaint and include information about such complaints in its annual report to the Legislature. Additionally, the bill requires the Medical Board to further define in rule the reasons a Board investigation may extend beyond 180 days.

### **4. Define Clear Roles, Responsibilities, and Authority for the Boards' Informal Hearings Process.**

Senate Bill 419 addresses the roles and responsibilities of informal hearings participants, including board members, District Review Committee (DRC) members, and all appropriate staff. A minimum of two panelists – including at least one physician for cases heard by the Medical Board – must serve on all informal hearings panels that deliberate on disciplinary matters. The two-panelist requirement does not apply to hearings for showing compliance with a Board order or in hearings where the respondent waives the requirement. At least one of the informal hearings panel members must be a public member. For the Medical Board, the public member can be a Board member or a member of one of the District Review Committees. To give the Medical Board a larger pool of public members to draw from for informal hearings, the bill increases the number of public members on each District Review Committee by two, from one to three.

The Medical Board must provide a license holder scheduled for an informal hearing with information regarding the grounds of the hearing at least 30 days before the hearing. If the Board fails to do so, the license holder may reschedule the hearing. The Legislature modified this provision to specify that, if the complaint alleges a violation of the standard of care, the Medical Board must include the

expert physician reviewers' reports in the information sent to the license holder. The Legislature also added language to require the license holder to submit any rebuttals at least five business days before the informal hearing in order for the information to be considered at the hearing.

The Legislature extended existing statutory deadlines regarding investigations that apply to the Medical Board to the Physician Assistant and Acupuncture boards, and to investigations conducted by the Medical Board regarding surgical assistants. For example, the boards must schedule an informal hearing within 180 days of determining whether to proceed on a complaint. In addition, the Legislature modified the Sunset provision to specify that only informal hearings panel members and the board attorney acting as counsel to the panel may be present during deliberations, and that the role of the boards' attorney during the deliberations is limited to providing advice on legal issues and precedents.

Senate Bill 419 clarifies that DRC members assist the Medical Board in informal hearings and establishes eligibility requirements for DRC members. DRC members are subject to the same conflict-of-interest and grounds-for-removal requirements as Medical Board members, and must complete training relevant to serving on a District Review Committee. In addition, DRC physician members who participate in informal hearings involving standard-of-care cases must meet the same qualifications as the Medical Board's expert physician reviewers.

Finally, the bill authorizes a committee of agency staff to resolve cases that do not directly relate to patient care or that involve only administrative violations, subject to delegation by the boards. The boards must approve all staff decisions during a public meeting and a license holder retains the right to request that the case be heard at an informal hearing.

## **5. Clarify Language Regarding the Use and Confidentiality of Peer Review Documents in Hearings by the Medical Board and the State Office of Administrative Hearings.**

Senate Bill 419 clarifies that the Medical Board's current authority to disclose peer review documents in disciplinary hearings extends to formal contested case hearings before the State Office of Administrative Hearings (SOAH). The bill specifies that peer review information may not be used as evidence at SOAH, except as the basis for the opinion of an expert witness called by the Medical Board. For cases that the Medical Board files at SOAH based on the grounds that a peer review action occurred, the Board must provide evidence from its investigation to verify the peer review evidence. The bill clarifies that peer review documents remain confidential at the Board and SOAH.

The Legislature added language to specify that if medical peer review documents are admitted into evidence for any purpose at SOAH, the documents must be admitted under seal. In addition, if a decision of the Board or SOAH is appealed to district court or other court, the confidentiality protections relating to medical peer review committee documents continue. The Legislature also modified a Sunset provision to clarify that medical records used by a medical peer review committee – including a patient's medical records – or any records made or maintained in the regular course of business are not confidential if the records are not considered confidential by other laws and are otherwise available to the Medical Board.

## **6. Update the Boards' Private Rehabilitation Order to Ensure Adequate Public Protection.**

To strengthen the boards' ability to protect the public, S.B. 419 clarifies that the boards may issue a private, nondisciplinary rehabilitation order to an applicant or license holder with a current condition or history of substance or alcohol abuse only if the license holder has not violated the standard of care as a result of the impairment. If the boards receive a valid complaint related to the license holder's impairment before the license holder signs a private order, the license holder is no longer eligible for the private order.

In addition, if the boards impose a private rehabilitation order that requires a license holder to participate in programs provided by a private medical association, the boards must inform the association of the license holder's duties under the order, as well as provide specific guidance to the association to assist in the license holder's rehabilitation. The Legislature modified the Sunset provision to authorize the boards to provide private associations with any information – including a copy of the private order – necessary to assist the association. Any information received by the association remains confidential.

## **7. Require Physicians Who Use Moderate Sedation in Outpatient Settings to Comply With the Board's Safety Requirements.**

Senate Bill 419 removes a provision in the Medical Practice Act that exempts from the Medical Board's regulations physicians who use certain drugs for moderate sedation in an outpatient setting. The bill requires these physicians to register with the Board and comply with Board rules regarding minimum standards for providing anesthesia services or be subject to disciplinary action for violation of office-based anesthesia rules.

## **8. Update the Authority for Regulating Acupuncture to Ensure Efficiency and Protect the Public.**

Senate Bill 419 strengthens the Acupuncture Board's regulatory authority. The Acupuncture Board now has independent authority to approve applications for licensure and take a full range of enforcement actions, including assessing administrative penalties, without the Medical Board's approval. However, the Medical Board retains oversight of the Acupuncture Board's rulemaking process.

In addition, the bill gives the Acupuncture Board tools to quickly stop activity that could harm the public. This includes allowing the Acupuncture Board to temporarily suspend a license without holding an initial hearing or Medical Board approval, as well as authorizing the Acupuncture Board, without Medical Board approval, to issue cease-and-desist orders.

The Acupuncture Board's process for approving continuing education will be streamlined as the result of S.B. 419. The bill requires the Acupuncture Board to establish guidelines for preferred providers and course content, then directs the Board to allow agency staff to approve continuing education course applications. Staff will refer any questionable applications to the Board for review and final approval. The bill also clarifies that the Texas Higher Education Coordinating Board approves Texas acupuncture schools and acupuncture degree programs. The Legislature modified this provision to require the Coordinating Board to seek input from the Acupuncture Board regarding

the standards to be used for assessing whether a school or degree program adequately prepares an individual for the practice of acupuncture. Finally, the bill requires the presiding officer of the Acupuncture Board to be a licensed acupuncturist.

## **9. Grant the Medical Board Flexibility in How it Regulates the Delegation of Prescription Authority by Physicians.**

The Medical Board's ability to waive site and supervision requirements for physicians who delegate prescriptive authority to physician assistants and advanced nurse practitioners will continue under S.B. 419, which removes the expiration date for Board waiver of delegation requirements. However, the Prescriptive Delegation Waiver Committee, which currently reviews requests for waivers and makes recommendations to the Medical Board, will expire as scheduled on September 1, 2005; the Medical Board will assume this responsibility through its committee structure.

The bill also eliminates the requirement that physicians, physician assistants, and advanced nurse practitioners register their intent to practice or to supervise delegated prescriptive authority with the Board, and instead requires physicians who delegate prescriptive authority to document in their own records when prescriptive authority is delegated.

## **10. Conform Key Elements of the Boards' Licensing and Regulatory Functions to Commonly Applied Licensing Practices.**

Senate Bill 419 includes 13 provisions that bring the Medical, Physician Assistant, and Acupuncture boards in line with standard licensing agency practices, including the following.

- Requires physician assistant and acupuncture applicants to pass a jurisprudence exam as a condition for licensure.
- Clarifies that the boards must address felony and misdemeanor convictions in the standard manner defined in the Occupations Code, except when the boards' enabling statutes are stricter.
- Authorizes staff to issue licenses to qualified physician, physician assistant, acupuncture, and surgical assistant applicants.
- Clarifies the Physician Assistant Board's responsibility to establish a system of continuing medical education.
- Changes the basis for the Physician Assistant Board's late-renewal penalties.
- Authorizes the Medical and Physician Assistant boards to adopt a system under which physician and physician assistant licenses expire on various dates during the year.
- Authorizes the Physician Assistant and Acupuncture boards to refuse to renew a license and to accept the voluntary surrender of a license.
- Authorizes the boards to provide for refunds by licensees to the consumer as part of the agreed settlement process.
- Authorizes the Medical and Physician Assistant boards to issue cease-and-desist orders.
- Allows medical faculty members to be eligible to serve on the Medical Board.

- Clarifies that the Senate must confirm appointments to the Physician Assistant and Acupuncture boards.
- Authorizes the Physician Assistant Board to establish a fee for individuals who hold an inactive license.
- Requires the Acupuncture Board to recommend licensing and other fees to the Medical Board.

### **11. Prohibit Medical Board Members From Using Information Obtained Through Their Duties for Personal Gain.**

Senate Bill 419 prohibits physicians on the Medical Board or physicians acting as agents of the Board from using information acquired solely by virtue of their Board duties for the advancement of their personal medical practice, or for assisting in the advancement or gain of any other physician or affiliate.

### **12. Require the Medical Board to Publish Updated or Corrected Disciplinary Actions.**

The Medical Board must publish acknowledgments of any errors or reversals related to its disciplinary actions, under S.B. 419. This information must be disseminated in the same format, size, style, and manner as the originally published action. The Legislature modified the provision to specify that the Board may not publish any corrections or reversals if the physician who was subject to disciplinary action requests that the information not be disseminated.

### **13. Clarify the Boards' Authority to Modify a Proposal for Decision Received From the State Office of Administrative Hearings.**

Senate Bill 419 clarifies that the boards may only change a finding of fact or conclusion of law, or modify or vacate an order made by an administrative law judge at the State Office of Administrative Hearings under certain provisions outlined in the Administrative Procedure Act. The boards must state in writing the specific reason and legal basis for any changes they make.

### **14. Continue the Medical Board for 12 Years and Eliminate the Separate Sunset Dates for the Physician Assistant and Acupuncture Boards.**

The Texas State Board of Medical Examiners will continue as a separate, stand-alone agency for the standard 12-year period, although to better reflect and communicate the Board's responsibilities, S.B. 419 changes the agency's name to the Texas Medical Board. In addition, the Legislature changed the name of the Texas State Board of Physician Assistant Examiners to the Texas Physician Assistant Board. The Physician Assistant and Acupuncture boards will continue as advisory boards under the Medical Board, but the bill removes their separate Sunset dates. As a result, future Sunset reviews of these two boards will be conducted in conjunction with reviews of the Medical Board.

## Provisions Added by the Legislature

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### **15. Authorize the Medical Board to Issue a Faculty Temporary License.**

The Legislature established in statute the Medical Board's authority to issue a faculty temporary license to a physician appointed by a Texas medical school. A license holder must meet specific eligibility requirements, including licensure in another state without any restrictions or disciplinary orders, and is prohibited from practicing medicine outside the setting of the medical school. A license holder wishing to practice medicine in Texas outside the medical school must meet the requirements for the Board's unrestricted license, including any examination requirements.

### **16. Direct the Medical Board to Consider if a Violation Directly Relates to Patient Care When Determining a Sanction.**

The Legislature added a provision to S.B. 419 to require the Medical Board, when determining the appropriate disciplinary action, to consider whether the violation relates directly to patient care or involves only an administrative violation.

### **17. Require the Medical Board to Document Reasons for Rejecting Recommendations From Informal Hearings Panels.**

If the Medical Board rejects a recommendation for settlement or dismissal of a complaint from an informal hearings panel, the Board must notify a license holder and document in the Board's minutes the reason for rejecting the recommendation and note the further action to be considered. The Legislature also directed the Medical Board to consider previous attempts to resolve the matter when determining what further action to take.

### **18. Require a Joint Interim Study on the Medical Peer Review Process.**

The Lieutenant Governor and the Speaker of the House will appoint a joint interim committee to study the medical peer review process in hospitals and other health-care entities in Texas. The study must include an examination of the use of medical peer review in identifying, reporting to the Medical Board, and disciplining a physician based on the conduct of or quality of care provided by physicians who are members of medical staffs of hospitals and other health-care entities. Also, as part of the study, the committee will investigate the adequacy of the Medical Board's oversight and investigation of physician claims that the medical peer review process is misused, and whether the Board's oversight and disciplinary powers should be strengthened. The committee must report its findings to the Governor, Lieutenant Governor, and Speaker of the House by January 1, 2007.

### **19. Restrict a Physician From Performing a Third-Trimester Abortion, Except Under Certain Circumstances.**

The Legislature added this provision that prohibits a physician from performing an abortion on a woman who is pregnant with a viable child during the third trimester of the pregnancy, unless the abortion is necessary to prevent the death of the woman; the viable unborn child has a severe, irreversible brain impairment; or the woman is diagnosed with a significant likelihood of suffering

imminent severe, irreversible brain damage or paralysis. A physician who violates this provision is subject to disciplinary action by the Medical Board.

## **20. Require a Physician to Get Parental Consent Before Performing an Abortion on a Minor.**

This provision, added by the Legislature, establishes that it is prohibited under the Medical Practice Act, subject to disciplinary action, for a physician to perform an abortion on an unemancipated minor without written consent of the child's parent, managing conservator, or legal guardian or without a court order authorizing the minor to consent to the abortion. The bill provides an exception from this provision if the physician concludes that the immediate abortion of the minor's pregnancy is needed to avert her death or to avoid a serious risk of substantial impairment of a major bodily function; and that insufficient time exists to obtain the consent of the child's parent, managing conservator, or legal guardian.

The Legislature also added a provision to S.B. 419 requiring the Medical Board to adopt the forms necessary for physicians to obtain the consent required for an abortion to be performed on an unemancipated minor, and specifies timeframes for the physician to retain the form and any other required documentation.

## **Provision Removed by the Legislature**

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### **1. Direct the Medical Board to Investigate Complaints Regarding Misuse of the Peer Review Process.**

The Legislature did not adopt the Sunset provision requiring the Medical Board to review complaints regarding misuse of the peer review process, including fraudulent and malicious conduct.

## **Fiscal Implication Summary**

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Senate Bill 419 contains provisions that will result in a revenue gain of almost \$66,000 in fiscal year 2006 and a loss of \$121,000 in fiscal year 2007 and each year thereafter. These provisions are discussed below, followed by a five-year summary chart.

The bill contains two provisions that will result in additional costs to the Medical Board. Requiring the Medical Board to use at least two expert panelists for each standard-of-care investigation will cost \$218,000 per year for the additional panelist's review as well as mailing and copying costs. Requiring applicants for physician assistant and acupuncture licenses to pass a jurisprudence exam will result in a one-time cost in fiscal year 2006 of \$960 for the Physician Assistant Board and \$960 for the Acupuncture Board, as the boards will have to develop exam questions.

The bill will also result in annual savings of \$5,928 by authorizing staff to resolve cases that do not directly relate to patient care or that involve only administrative violations, which will result in the need for fewer informal hearings, and thus lower travel costs for board and District Review Committee members. In the General Appropriations Act, the Legislature included a contingency appropriation to cover the net cost to the Medical Board resulting from these provisions. This appropriation, for \$213,992 in fiscal year 2006 and \$212,072 in fiscal year 2007, is contingent on the Medical Board assessing fees sufficient to cover these costs.

Other provisions in the bill will affect the amount of revenue that accrues to the State. Authorizing staff to issue licenses, and thus eliminating the need for temporary licenses, will result in a one-time gain in revenue of \$401,046 in fiscal year 2006 by accelerating the collection of permanent licensing fees in lieu of temporary licenses. The agency will experience a loss of \$121,000 that same year and each subsequent year, resulting from the elimination of the temporary fee.

Creating a statutory basis for the Physician Assistant Board's late-renewal penalty will result in a gain of \$3,775 annually. Establishing a renewal fee for the physician inactive license will result in a gain in revenue of \$13,800 per year.

<b><i>Fiscal Year</i></b>	<b><i>Savings to the General Revenue Fund</i></b>	<b><i>Gain to the General Revenue Fund</i></b>	<b><i>Cost to the General Revenue Fund</i></b>	<b><i>Loss to the General Revenue Fund</i></b>	<b><i>Net Effect on the General Revenue Fund</i></b>
2006	\$5,928	\$401,046	\$219,920	\$121,000	\$65,954
2007	\$5,928	\$212,072	\$218,000	\$121,000	(\$121,000)
2008	\$5,928	\$212,072	\$218,000	\$121,000	(\$121,000)
2009	\$5,928	\$212,072	\$218,000	\$121,000	(\$121,000)
2010	\$5,928	\$212,072	\$218,000	\$121,000	(\$121,000)

