

From: [Sunset Advisory Commission](#)
To: [Janet Wood](#)
Subject: FW: PUBLIC HARM CAUSED BY THE TEXAS MEDICAL BOARD DUE PROCESS VIOLATIONS IN THE DR. CALVIN DAY CASE: PROPOSED REMEDIES
Date: Monday, December 19, 2016 8:07:53 AM

From: Eliane Bailey
Sent: Friday, December 16, 2016 3:16 PM
To: Sunset Advisory Commission; Bill Zedler; Charles Schwertner; Cindy Burkett; Dan Flynn; Juan Hinojosa; Kirk Watson; Larry Gonzales; Richard Raymond; Robert Nichols; Senfronia Thompson; Van Taylor
Subject: PUBLIC HARM CAUSED BY THE TEXAS MEDICAL BOARD DUE PROCESS VIOLATIONS IN THE DR. CALVIN DAY CASE: PROPOSED REMEDIES

"I support the proposed changes in the Texas Medical Board Disciplinary protocols that have been recommended by Dr. Calvin Day and his patients" -- Eliane Bailey, , Dallas, TX , and patient of Dr. Day for 20+ years

PUBLIC HARM CAUSED BY THE TEXAS MEDICAL BOARD DUE PROCESS VIOLATIONS IN THE DR. CALVIN DAY CASE: PROPOSED REMEDIES

Dear Members of the Texas Sunset Advisory Commission:

PROBLEM 1: The Texas Medical Board ("TMB") policy of immediate stoppage of physician practices via "Suspension without Notice" causes public harm.

Thank you for taking the time today to hear my testimony and the testimonies of 18 of my former patients who described to you in great detail the harm inflicted upon them by the Texas Medical Board's ("TMB") policy of immediate stoppage of physician practices via **"Suspension without Notice"** (see time marks 4:57:25, 5:17:35, & 5:31:10 thru 6:38:02 at http://tlcsenate.granicus.com/MediaPlayer.php?view_id=40&clip_id=11499). This "excessive force" policy caused my former employees and their children immediate loss of their income without any warning and resulted in subsequent bankruptcies; five years later many of my former employees are still in financial hardship as a result of the board's action. Patients who had already waited weeks or months for an appointment with me had to make new appointments with other doctors, and this caused significant delays not only for my former patients but for my colleagues' patients because my 14,000 active patients were suddenly added to the pool of patients seeking care; these delays gave their cancers more time to grow and metastasize and thus the total number of those harmed will never be known. Mr. Carroll Lake's testimony demonstrates the severe consequences that resulted from being forced to quickly change to a new doctor who was unfamiliar with his case under the adverse circumstances of **"Suspension without Notice"**. Mr. Lake, in his testimony, blamed the Texas Medical Board for his right sided paresis, his disfigurement, his difficulty in walking, his ongoing suffering, and the side effects of his ongoing cancer therapy; the testimonies you heard from his 17 fellow patients support Mr. Lake's opinion.

Solution:

1. We want Commission Members to enact legislation to abolish the TMB's power and authority to cause immediate stoppage of physician practices via **"Suspension without Notice"**. Although the Texas Medical Board proclaims that such actions are carried out in

order to protect the public, this policy causes harm to the public. Inasmuch as there are no studies to demonstrate the safety of this policy and we have clearly demonstrated its public harm we ask for the immediate cessation of this policy pending further study.

2. In addition, we want Commission Members to enact laws to abolish physician license suspension based merely on an indictment. People are innocent until proven guilty and the threshold for getting an indictment is can be exceedingly low if the prosecutor is keen to obtain one. My indictment for example was apparently the result of a pre-existing adverse personal relationship with the Bexar County District Attorney. I lost 5 years of my livelihood and the death of my son because the TMB acted on an indictment which turned out to be nothing more than a personal vendetta.
3. In place of **"Suspension Without Notice"** we ask the Sunset Commission Members enact legislation to accomplish the following:
 - Only a SOAH judge would have the power and authority to enact an emergency suspension and then only after a probable cause hearing with 14 days' notice. Apparently all of the other health licensing agencies do something similar; there is no reason that TMB cannot do this also.
 - If an emergency suspension is determined by the SOAH judge to be warranted, then for the safety of the patients, and the job security of employees, the doctor should be given 90 days to 1) either shut down his practice in an orderly manner or 2) have a new doctor come in and take over his practice. The 90 day period would give employees a chance to find a new job and allow patients an orderly transfer of care to their new physician.
 - Legislation should be passed stating that SOAH judges and TMB members should give priority to alternatives to suspension of a physician's license. For example, in my case where allegations were limited to sexual impropriety and there were no allegations regarding patient care, TMB could have placed an independent monitor such as a female RN in my office at my expense to always be at my side while I was seeing patients (in addition to my medical assistants who were always present in the exam room anyway). This would have prevented all of the carnage that occurred as a result of the **"Suspension without Notice"** and would have ensured public safety concerning the specific allegations.
 - There is a more simple elegant solution for dealing with physician who has been indicted and that is to simply make sure that all staff and all patients are informed of the indictment and informed of the nature of the allegation and then let them have freedom of choice. Under this solution the physician would be required to give a copy of the indictment to all patients and staff and to have all patients and all staff sign a consent form stating that they had been given a copy of the indictment. **The elegance of this solution is that it protects the public through informed consent, it allows for freedom of choice to either continue to see the doctor or to find another, and it protects the doctor's right to the presumption of innocence.** This solution is analogous to what is done with cigarettes where the government has not banned them but instead has placed a warning on the package so that folks who choose to smoke are aware of the danger. There is a growing feeling that government and government agencies are overreaching. Many people would prefer to make their own decisions and resent being told what to do by a government agency. As my former patient Mr. John Neyland espoused in his testimony before the Sunset Commission earlier today, "I was fully aware of the allegations against Dr. Day when they were made public. I resent that the government is telling me that I'm not smart enough to make my own decision about

who I want to go see for my healthcare.”

PROBLEM 2: A Hearing with Notice following a Suspension without Notice is not Due Process; Practical Considerations Show that it is a joke.

I could find no instances in the last 10 years where a “Hearing WITH Notice” panel reversed a “Hearing WITHOUT Notice” physician license suspension. What this means is that once the WITHOUT Notice Hearing panel makes a determination to suspend a physician’s license then the physician is screwed. This is not due process. The WITH notice hearing panel is compelled to uphold the WITHOUT notice determination because as a practical matter a reversal would result in the TMB being overwhelmed with bad press, irate calls from legislators, and probably lawsuits for having put a physician out on the street in a rush to judgement without just cause. TMB members are acutely aware of this and apparently feel as if they have no choice but to endorse the WITHOUT notice ruling. Consider my case where the WITHOUT notice fax informing me of my suspension occurred on 6/14/2011 and the WITH Notice Hearing was held 6 weeks later on 7/25/2011. By the time the WITH Notice Hearing occurred, I had already been served with an eviction notice for the office space that I had occupied for 28 years to be out by 7/31/2011 because a clause in my lease was tied to having an unrestricted medical license. Not only that but on 7/15/2011 the TMB staff attorneys gave us an evidence package for the Hearing on 7/25/2011. The evidence package contained approximately 600 pages of documentary materials, over 200 photographs, and recordings of 15 interviews. It is a far cry from Due Process to be given such a large volume of material to review in only ten days’ time. Thus, I was moving out my 4000 square foot office space with my 40,000 paper records and simultaneously reviewing a gargantuan mountain of hearing materials. Can you imagine how terrible the press would have been if the WITH Notice panel had reversed the temporary suspension after I had already been evicted from my office? The WITH Notice Panel had no choice but to uphold the WITHOUT Notice determination, as they are compelled in every instance to uphold WITHOUT Notice determinations for the obvious reasons stated above. The real purpose of the WITH Notice Hearing is to benefit the TMB’s public image by giving the public appearance of Due Process by confirming (rubber stamping) the WITHOUT Notice Hearing determination. It is an ingenious arrangement that benefits the TMB, dupes the public, fools the Sunset Commission Members, and cripples the physicians’ prospects for an effective defense by cutting off his or her income stream needed to pay attorneys.

Solution: We ask that the Sunset Commission Members abolish the current TMB protocols for physician license suspension because they are far cry from Due Process. We ask that you pass laws to put into effect the Solutions proposed to Problem 1 above and in addition to include language stating that the proposed stoppage of any physician’s practice should be considered with great care, consideration, and deliberation after hearing all arguments and examining all evidence and should not be done in a 30 minute telephone conference hearing as is what happened in my case. I had practiced for 27 years, cared for 40,000 patients, and employed 396 women, yet in 27 years had no complaints to the medical board, save for two minor billing complaints which were decided in my favor. Someone on the panel should have stopped the young female junior staff attorney who was advocating immediate suspension and said “wait a minute, this does not add up – let’s gather more information and speak with him.” We also request that the Sunset Commission Members include language in these laws stating that alternatives to license suspension be given preference and priority; these alternatives include such strategies as placing monitors in physicians’ offices at the physicians’ expense and the informed consent option discussed above. **Our number one request by far is that the Sunset Commission Members pass laws to adopt the informed consent model advocated above because that is the least expensive alternative that effectively addresses the significant issues of patient safety, right to choose, and the presumption of innocence.**

PROBLEM 3: Misconduct / unprofessionalism by TMB staff is the most frequent complaint we hear and have heard from physicians.

In my own case there were multiple apparent acts of misconduct / unprofessionalism by TMB staff. Conversations with at least nine health care licensure attorneys and the several lawsuits alleging unfair, unethical, illegal, and harassing actions on the part of TMB staff indicate that this unprofessional behavior is pervasive within the agency. Yet, other than filing a lawsuit, there is no simpler, less expensive, and timelier recourse within the current TMB structure to seek recompense for apparent acts of misconduct. The fact that there is no or little consequence to this apparent misconduct indicates a serious lack of oversight by the TMB hierarchy, and this apparent lack of oversight appears to have been emboldened some TMB staff to ignore the basic tenets of Due Process and fundamental fairness. Examples apparent TMB staff misconduct and or unprofessionalism in my case include the following:

- 1.
2. Not only were these two medical records withheld from the evidence package by TMB staff, but Pajak and Rodriquez also withheld fourteen voice recordings favorable to my case, and publicly admitted this act of apparent misconduct as evidenced in the transcript from this hearing on transcript page 136 to wit:

“10 MS. LESHIKAR: Let’s run this through one 11 more time. The 15 CDs were not provided as evidence? 12 MS. PAJAK: A portion of them were.” In truth only one of the 15 CD’s was provided as evidence. In an apparent attempt to cover up/minimize their apparent misconduct, Rodriquez made the following untruthful statement on transcript page 136

“6 MS. RODRIGUEZ: Those interviews have been 7 reduced to writing, which and those reductions to 8 writing are what’s in the packet as part of the San 9 Antonio Police Department investigative file.”

Pajak made a similar untruthful statement on transcript page 136 “20 It contained video -- video recorded 21 statements of the witnesses that was then reduced to 22 writing in sworn statements in the police officer’s 23 report.” Yet, in truth NONE of the 15 recordings had been reduced to writing, only one of the fifteen was put into the evidence package, and the recordings not put into evidence contained statements that were inconsistent with subsequent sworn statements and thus were favorable to my case. This withholding of evidence favorable to my case by Pajak and Rodriquez appears to be a clear cut case of misconduct.

1. All three Panelists at my Hearing with Notice were females. At the time, the Board consisted of fifteen men and four women. It is statistically unlikely (i.e., less than 1 chance in 30) that the entire Panel would be comprised of women. These statistics indicate that Board staff “cherry picked” Board members to achieve a desired outcome. This type of behavior is unprofessional and unethical.

Solution:

1. This problem is most easily solved by placing a strong Executive Director at TMB with high ethical standards who would immediately fire or sanction staff who committed acts of misconduct such as Rodriquez and Pajak did in my case. The nefarious and intensely unpopular Executive Director of the TMB, Mari Robinson, who apparently condoned these actions, exited two months prior to the Sunset Commission hearings no doubt because she could see the storm on the horizon. But her leaving will have little impact if the Sunset Commission allows her multiple disciples and clones to remain within the TMB. We ask that the Sunset Commission use their power and influence to see that a general “housecleaning” occurs within TMB.
2. We ask the Sunset Commission Members enact laws that require the TMB to adopt rules analogous to our judicial system where physicians get dismissal of charges and/or re-hearings when their cases are adversely affected by acts of TMB staff attorney misconduct.
3. We ask that Sunset Commission Members enact legislation to establish a rating system for TMB staff such as 5 star system used nationwide for all physicians. Like other rating systems in widespread use, the physician and his attorney(s) would be given an opportunity

to make comments and rate the TMB staff following a Hearing, or an ISC, or Mediation or other interaction with a TMB staff. No comments or ratings would be allowed on the decision itself but rather the TMB staff would be rated only on issues of fairness, conduct, thoughtfulness, etc. Ratings and comments would be available to the public and results would be reported on the TMB website. We believe that such a rating system would encourage good behavior and would serve as a staff shaping and mentoring tool for the TMB Executive Director.

PROBLEM 4: The TMB policy of having the same board member at each stage or level of the disciplinary process is not due process and allows a single board member to “blackball” a physician.

Currently, at each level of the current medical board disciplinary protocol you have as a panelist at least one board member who had previously ruled on a doctor's case thereby essentially eliminating any chance of reversal of the original determination; this is analogous to filing an appeal in our civil or criminal court system and having the very same judge who made the objectionable ruling serve as the appellate judge as well. The net result is that under the current system, a single medical board member with the inherent bias of wanting to uphold his or her prior ruling, has the capability of effectively "black-balling" a physician. This forces the TMB to go through the unnecessary time and expense of a SOAH hearing to resolve a case, when it may have been resolved at lower level had some other board member without this inherent bias been present. This is a misuse of taxpayer resources. In my case for example, the same board member, Dr. Margaret McNeese was a panelist at my Hearing with Notice on July 15, 2011, she was a panelist at my Informal Settlement Conference on February 27, 2012, and she was the Board member at Mediation on August 18, 2016. I was “blackballed” by Dr. McNeese.

Solution: We want commission members to enact legislation specifying that TMB enact policies that parallel our judicial system to wit: if a Board member serves on a Panel on an investigation and the licensee seeks to use the process (i.e. an Informal Settlement Conference or mediation at SOAH), the member who previously heard the case for the same investigation or complaint cannot hear the case again on subsequent review of the case.

PROBLEM 5: TMB decides punishment and not the SOAH judge.

The SOAH judge possesses complete control over the Finding of Fact and Conclusions of Law, yet the Board retains complete control over the sanction. This is one of the biggest Due Process concerns for physicians and members of the public who are concerned about the run-away government because under current law TMB not only investigates and prosecutes a physician, but they also decide the punishment. As an example, I have endured the suicide of my son, the loss of my reputation, the loss of five years of practice income, and am now facing a lengthy SOAH process. Should the judge find in my favor that I am innocent of all serious allegations of sexual impropriety, yet find that I had committed even a minor infraction of the Texas Medical Practice Act or the Board's rules, the Board could nevertheless have my license severely restricted or revoked. This is simply unjust. This is analogous, for example, to having the District Attorney decide punishment in a case that they have just prosecuted, where the DA had the authority to sentence the defendant to life imprisonment for a misdemeanor. This is not true Due Process.

Solution: We ask Members of the Sunset Commission to enact legislation that would specify that the independent SOAH judge would final decision-making authority over all aspects of the decision:

1. Determine the Findings of Fact,
2. the Conclusions of Law and
3. the Sanction, if any.

PROBLEM 6: There is no mechanism for filing and resolving complaints against TMB Board members who have apparent conflicts of interest.

The same Board member who sat in judgement at all of my TMB proceedings, Dr. Margaret McNeese possessed an inherent bias due to the nature of the false allegations against me; her professional background is that she is a pediatrician who specializes in child sexual abuse and she has written multiple professional articles on the topic. Prior to even talking with me or examining any documents, she “knew” I was guilty based on the allegations; despite actual evidence. Due to her inherent bias, this Board member, who is the current Chairman of the Disciplinary Committee for TMB, should have never assigned herself to sit on any TMB panel involving allegations of sexual impropriety. Physicians are not informed of the names of the Board Member panelists’ names until shortly before their Hearing, ISC, or Mediation, thereby depriving the physician of the opportunity to voice objections to certain panelists for cause.

Solution:

1. We ask that Sunset Commission Members enact laws to specify that physicians be given the names of panelist members 60 days in advance and then be allowed 10 days to make objections for cause should a licensee have evidence of bias of a Panelist due to personal, economic, professional, or some other form of bias. Should Board staff object to the physician’s request for removal of the Board member from the panel and replacement by another Board member, arguments could be presented for decision to an independent 3rd party.
2. We ask that Sunset Commission Members pass legislation to require that the TMB should have an outside individual from the Attorney General’s office or ombudsmen to educate Board members of ethical and legal principles to aid with fairness and objectivity because currently, training is conducted by TMB staff, which may be biased and self-serving.
3. We ask that Sunset Commission Members pass laws to require that the TMB adopt a vetting process for its members to ensure that members with specific inherent biases, personal, professional and/or economic are precluded from serving on certain types of cases.

PROBLEM 7: There is no mechanism for rating TMB members and there is no mechanism for filing and resolving complaints against TMB members who conduct themselves in an unprofessional manner, make inappropriate comments, and/or make conclusory and arbitrary decisions without careful thought and without explaining the reasons for their decisions.

Solution:

1. We ask that Sunset Commission Members enact legislation to establish a rating system for TMB members such as 5 star system used nationwide for all physicians. Like other rating systems in widespread use, the physician and his attorney(s) would be given an opportunity to make comments and rate the panelists’ members following a Hearing, or an ISC, or Mediation or other interaction with a TMB member. No comments or ratings would be allowed on the decision itself but rather the TMB member would be rated only on issues of fairness, conduct, thoughtfulness, etc. Ratings and comments would be available to the public on the TMB website and results would be officially reported to the Governor’s Office every six months. We believe that such a rating system would discourage rogue behavior and would help the Governor with his re-appointment decisions.
2. We ask that the Sunset Commission enact laws for establishing a mechanism such as third party mediation for filing and resolving more serious complaints against TMB members because at the present time there appears to be no such mechanism short of filing a lawsuit. One of the options for resolving the more serious complaints should include granting the physician a second Hearing or a second ISC or a second mediation, etc. with different panel members.

In sum, we have identified seven serious problems in our dealings with the Texas Medical Board

and we have proposed reasonable solutions for each problem to the Sunset Advisory Commission. Our goal is to prevent what happened to us from happening to other doctors, their employees, and their patients. We pray that you will take actions so that history does not repeat itself.

Sincerely,

Calvin L. Day Jr. M.D.,

Spring Branch TX

Cc: Texas Legislators, Texas Physicians, Former Patients, General Public