

**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:** Thursday, December 22, 2016 8:04:33 AM

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**From:** Donna Brown  
**Sent:** Wednesday, December 21, 2016 11:21 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; William.Meadows@hubinternational.com  
**Subject:** Fwd: PUBLIC HARM CAUSED BY THE TEXAS MEDICAL BOARD DUE PROCESS VIOLATIONS IN THE DR. CALVIN DAY CASE: PROPOSED REMEDIES

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**



**PUBLIC HARM CAUSED BY THE TEXAS MEDICAL BOARD DUE PROCESS VIOLATIONS IN THE DR. CALVIN DAY CASE: PROPOSED REMEDIES** The letter written below to the Sunset Advisory Commission exposes the harm of a policy exercised on many many occasions by the Texas Medical Board to cause immediate stoppage of physician practices in what is referred to as "Suspension Without Notice". Not only does this practice cause public harm but the extent of its harm has never been studied and for that reason should be ceased immediately.

Furthermore, it is a fundamental violation of due process and as exemplified by the Dr. Calvin Day case (and other sources cited below) violations of due process have been rampant within this agency's practices and protocols for the last 10 years under the direction of executive director Mari Robinson, who resigned from the agency two months before she was to be figuratively be "hanged, drawn, and quartered" by the Texas Sunset Advisory Commission. But her removal will have little effect if her disciples and clones remain with the agency. Intuitively, under these circumstances one would envisage a massive agency overhaul including the rescinding of all governor appointees and the re-appointment of only the "reasonable" board members, the hiring of a new "outside" medical director who is a physician, and the firing of all TMB staff and the rehiring by the new outside director of only those "reasonable" staff who have not committed apparent acts of misconduct such as those cited below that were apparently committed by attorneys Wendy Pajak and Susan Rodriguez.

RE: Texas Medical Board Due Process Failures 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](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.**

**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.**

**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 Rodriguez 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.**

**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.**

**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.**

**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,

Donna . Brown(patient) in support of:

Calvin L. Day Jr. M.D.,

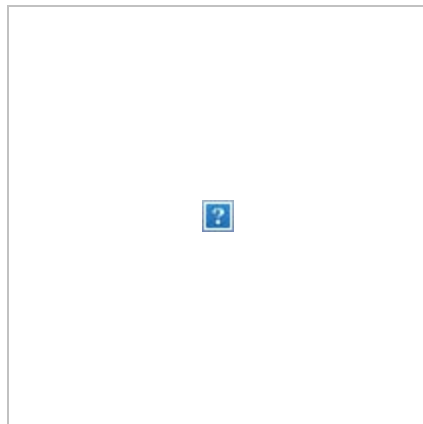
CALVIN L DAY JR MD |

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## Donna

***'A woman's heart should be so hidden in Christ that a man should have to seek Him first to find her.'.....Maya Angelou***