

Written Testimony of

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Sunset Commission of Texas

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Dear Chairman and Members of the Sunset Commission of Texas:

My name is David Brown, and I am a lawyer with the law firm of Ewell Brown Blanke & Knight LLP, here in Austin, Texas. Together with my partner, David Blanke, and Ryan Clinton, we represented Dr. Ellen Jefferson pro bono in her disputes with the Vet Board that are reflected in the Staff's report.

Over the more than two years from the time the first TBVME complaint was filed against Dr. Jefferson, we handled:

- A trial in the District Court
- A trial at the State Office of Administrative Hearings
- Settlement conferences
- A mediation
- Briefing and Oral argument at the Court of Appeals
- And multiple, unrelated informal investigative proceedings at the Board

After briefing to the Court of Appeals was complete, the Board dismissed its cases with prejudice, wrote off its other investigations as without foundation, and argued to the Court of Appeals that the issues were moot. After argument, the Court of Appeals ruled in Dr. Jefferson's favor on her rules challenges and dismissed her appeal of the trial court's decision on jurisdiction because the Board had dismissed the disciplinary proceedings with prejudice.

Between us, Mr. Blanke, Mr. Clinton, and I incurred thousands of hours of time. Had we charged Dr. Jefferson for our efforts at our usual rates, her bill easily would have exceeded half a million dollars. The biggest irony in the Jefferson cases is that before bringing its cases, the Board had written in its official publication, "Board Notes," that it held exactly the same view of the law that we did—in particular, in the context in which Dr. Jefferson does her work, animal shelters.

We took Dr. J's case because the heavy-handed agency was ignoring the evidence, and most importantly, the Board was ignoring its enabling Act.

Even today, the Board continues to inflict penalties upon Dr. Jefferson by serially assaulting her with allegations that either we proved conclusively to be false or that the Board unapologetically abandoned as unsupportable after years of litigation. To be clear, the Board never proved any

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of the allegations against Dr. Jefferson it repeated in its Self-Evaluation Report, or that the Staff parrots in its “recommendations,” but clings to them in the irrational hope that this Commission and the Texas Legislature as a whole will entrust the agency in disarray with more power, not less.

Consequently, my focus today is on Issue Nos. 2 and 5 of the Staff’s Report, dealing first with the Staff’s comments on enforcement and second with its argument that the Legislature should undo over 100 years of Texans’ property rights.

First, enforcement.

Our experience in the Jefferson cases has shown that the Board would rather listen to any crackpot with social media access, including PETA and its adherents, than the vets they license or the cities who actually investigate incidents.

It would rather bleed out the resources of its licensees through unprincipled and interminable investigations to extort a capitulation than to understand the facts.

It would rather conduct SWAT-style raids on animal shelters than ask questions or understand the answers.

Most importantly in the long run, the Board thinks that it can ignore or even change the law through the adoption or interpretation of rules to fit whatever “the-Board-knows-better-than-the-legislature” agenda it wants to accomplish.

The result of the Agency’s agenda is that anyone who does not bend to the will of the Board faces years of legal struggles and debilitating expense.

The Agency must be reeled in on enforcement, and the Staff’s recommendations are just a start.

Second, policy.

Here, there are two, related elements—the statutory exception to regulation we call the “Owner Exemption” and the fundamental purpose of the Board, consumer protection.

To some extent, the issues raised in the Staff’s discussion of the Jefferson cases are beyond the scope of ordinary Sunset review, calling for the legislative nullification of Texans’ property rights, but they bear a little discussion here.

First, the Staff’s conception in its Report that the “Owner Exemption” is an “outdated statutory exception” borders on the ridiculous. The Texas Legislature first adopted a form of the “Owner Exemption” in 1911 as a simple expression of the fundamental property rights of Texans with respect to their animals and a recognition that consumer protection was needed.

It has been reenacted with different words, but substantially the same import, for more than 100 years.

At bottom, the Owner Exemption is an animal owner’s right to do lawful things with his or her own property—and to be able to authorize others to do what he or she wants done with it.

The Owner Exemption doesn't, as the Board and Sunset Staff seemingly contend, authorize the trafficking of drugs; the Owner Exemption doesn't authorize animal cruelty or other crimes.

But, the Owner Exemption does provide the owner of an animal—whether one animal or many—the sole authority to make decisions on what veterinary care, if any, should be provided to that animal.

The Owner Exemption means that the Board may not second-guess the owner's decisions on the treatment or care of those animals.

The Owner Exemption means that the Board may not require a vet to undertake any particular procedure in the care of an animal because a complainant thought that the animal should have been cared for differently than the owner elected.

The Owner Exemption means that the Board can't write rules that are inconsistent with the laws this Legislature enacted that affect veterinary care just because it thinks that animal shelters are for killing animals, rather than trying to make them adoptable.

Failing to accept responsibility for its refusal to exercise only its limited authority, the Staff claims without basis that the cause of the Board's professed impotence is the "no-kill" shelter movement. While the cases the Board brought against Dr. Jefferson were in that context, its claim that the "no-kill" movement is the cause of its failures is just a distraction.

It is true that all of the restrictions expressed in the Owner Exemption are important in the animal shelter context—but not because the Owner Exemption allows a vet to do unlawful things.

The Owner Exemption is important because all animal owners, including privately or publicly operated animal shelters, must obtain or provide what care they can with the funds they have available. And the Board can't come in later and second guess that decision.

The Board cannot require an animal owner to spend thousands of dollars on veterinary care for a sick or injured animal. No owner can be forced to spend his or her money to obtain chemotherapy for a cat; no owner can be forced to obtain surgery for a dog. But any animal owner may treat that sick or injured animal to reduce suffering or give it a chance at life.

In the animal shelter context—"no-kill" or otherwise—the animal owners, often cities, provide the limited care they can afford to provide. That care is not private-practice, paying-customer-level veterinary care, but is M*A*S*H-unit-style, battlefield-hospital care, because that's the level of care that animal shelters—like so many animal owners—can afford to provide, and their goal is to save as many animals' lives as they can.

But one thing is certain: every animal that was the subject of a complaint about the standard of veterinary care alleged against Dr. Jefferson was a dead dog or a dead cat long before the Board ever heard of it if not for the opportunity to be placed with San Antonio Pets Alive!. Every one of those animals was placed with SAPA only after being placed on the city's euthanasia list with only hours to live before destruction.

The second policy issue raised in this context is the Board's primary function as a consumer protection agency, not a law enforcement agency.

Ironically, the Board in its Self-Evaluation Report acknowledges that the purpose of its enforcement function is, fundamentally, consumer protection, but quickly abandons the principle. The Staff, too, also loses sight of the fact that, fundamentally, the agency is a consumer protection vehicle.

In the Owner Exemption context, the owner is both the purveyor and the consumer. And if the consumer of the treatment or care is satisfied, the Agency should not interfere.

In closing, I'd like to emphasize 4 points on the issues set forth in the Staff Report:

1. Licensing boards should be about helping their licensees obtain compliance with the laws the Legislature enacts. The Vet Board, instead, chooses protectionism and disregards the historic, statutory rights and privileges of not only its licensees, but other animal owners, as well.
2. Veterinarians don't make extraordinary money, leaving them vulnerable to an agency seeking scalps. Had we not undertaken the defense of the agency's complaints, Dr. Jefferson would undoubtedly have had to settle her case with a probated suspension of her license.

That sanction would leave her with a dilemma: Continue her work with Austin Pets Alive! and SAPA! or keep her license. She couldn't have done both.

The Agency should not be in a position to use the threat of financially disastrous legal proceedings as a means of coercing settlement to achieve an unlawful policy.

3. The Agency should focus on consumer protection, rather than paying lip-service to the concept, and leave allegations of crimes to law enforcement.
4. The Agency should not interfere with the decisions property owners make regarding their own property.

I appreciate the opportunity to provide written testimony to the Commission. I also expect to provide a brief oral statement at the hearing, and I am available to provide further information to the Commission or Staff.