



Physicians Caring for Texans

April 10, 2018

Director Ken Levine
Sunset Advisory Commission
PO Box 13066
Austin, Texas 78711-1300

Via email to sunset@sunset.texas.gov

*Re: The Sunset Advisory Commission Staff's Review of the Texas Medical Board;
2018-2019, 86th Legislature*

Dear Sunset Commission Members:

The Texas Medical Association (TMA) is a private, voluntary, nonprofit association of more than 51,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its mission is to "Improve the health of all Texans." TMA's diverse physician members practice in all fields of medical specialization.

TMA appreciates the opportunity to participate throughout the Sunset process for the commission's review of the Texas Medical Board (TMB). TMA has demonstrated commitment to participation in this process, having previously commented during the deliberation phase prior to the 85th Regular Session and again during the staff evaluation phase last fall in preparation for the 86th Regular Session. Many of the concerns raised previously remain unaddressed. As it did then, TMA now offers comments in the interest of improving the operation of the TMB.

TMA also recognizes that the Sunset Commission staff report focuses on its own recommendations identified during the 2015-2016 evaluation review and does not address new issues the Sunset Commission adopted during last session's deliberation phase. TMA supports some of those issues, and asserts that those issues, as identified below, adopted last session should similarly be adopted this session. Additionally, TMA recommends new issues that it asserts would contribute to more effective operation of the TMB.

I. SUNSET RECOMMENDATIONS IDENTIFIED IN THE STAFF REPORT OR PREVIOUSLY ADOPTED BY THE SUNSET COMMISSION

The Sunset Commission adopted final recommendations relating to the TMB that failed to pass in the 85th Regular Session. TMA provides the following comments on several of those issues.

1. TMA Supports Authorizing Increased Availability of Remedial Plans.

In the Sunset Commission’s final TMB recommendations for the 85th Legislature, the Commission added a recommendation relating to remedial plans—a nondisciplinary action for less serious violations (e.g., those that involve minor administrative violations).¹ Although the idea for remedial plans was initially borne out of the need to provide a “more educational and corrective process at TMB” to resolve investigations without “formal disciplinary action,” the applicable statute affords physicians just one remedial plan in the physician’s lifetime.² Realizing that this was a significant limitation on a physician’s “opportunity to learn and improve the physician’s practice,”³ the Sunset Commission recommended making remedial plans available to a physician once every five years.

TMA supports the direction of this recommendation. Administrative aspects of the practice of medicine are increasingly complex, so allowing physicians to have additional opportunities to resolve an alleged minor administrative violation with a nondisciplinary, educational option will allow remedial plans to continue to be a useful tool in the efficient resolution of complaints and investigations.

TMA further asserts, though, that there should be no limit on remedial plans when a remedial plan is otherwise appropriate, and that the TMB is in the best position to determine whether a remedial plan is appropriate given a particular situation. Whether the TMB enters into a remedial plan with a physician is already subject to the board’s discretion—the TMB judges whether the circumstances of a physician’s violation is an opportunity to learn and improve the physician’s practice.⁴ Removing the time restriction entirely will not interfere with the board’s discretion. In fact, the TMB has historically been careful in entering into remedial plans and its caution to do so reflects a commitment to its mission to protect the public. Further, the legislature has already provided guardrails for the application of remedial plans by spelling out circumstances when a remedial plan is not appropriate.⁵

For these reasons, removing all statutory time restrictions on remedial plans carries little chance of abuse and the TMB should be entrusted to exercise further discretion in using remedial plans when appropriate. Removing the restriction would allow the TMB to determine on a case-by-case basis whether a physician could benefit from additional remedial and educational opportunities, or whether, because of repeated similar violations, the physician should be subject to discipline in order to correct behavior. This would also further foster the board’s ability to avoid the expense of protracted investigations for minor administrative violations, and it would

¹ More specifically, a remedial plan may not be imposed to resolve a complaint concerning a patient death, the commission of a felony, or a matter in which the physician engaged in inappropriate sexual behavior or contact with a patient or became financially or personally involved with a patient in an inappropriate manner, or a complaint in which the appropriate resolution may involve a license restriction. §164.0015(c), Tex. Occ. Code.

² §164.0015(d), Tex. Occ. Code. provides that the board may enter into a remedial plan with a licensee only if the licensee has never previously entered into a remedial plan with the board.

³ Bill Analysis of S.B. 227, 82nd Leg., R.S. (2011), Enrolled Bill version (July 13, 2011).

⁴ The legislature affords the TMB with discretion by stating that the board “may” enter into a remedial plan to resolve a complaint investigation. *See* § 164.0015(a), Tex. Occ. Code.

⁵ § 164.0015(c), Tex. Occ. Code.

still allow the board to have greater latitude to establish remedial plans for administrative errors that have no bearing on the physician's ability to practice medicine.

2. TMA Supports the Disclosure of Each Preliminary Expert Report Prior to an Informal Settlement Conference and the Redaction of Identifying Information in the Reports.

The Sunset Commission last session recommended that participants in an informal settlement conference (ISC)—an informal meeting in the investigation process that takes place between board members and a licensee who is subject to investigation—should be entitled to obtain each preliminary written report produced by an expert physician reviewer for the license holder's case—not just the final report as is currently required.⁶

TMA supports this change, as it would ensure that a licensee has more complete information when preparing a case or when making the determination of whether to settle a case, and that the board considers more complete information—good and bad—when making a decision relating to the physician's license to practice.

The Sunset Commission had also added to staff recommendations the legislative change that would require redacting of any identifying information, other than the specialty, of an expert physician reviewer. TMA supports redacting identifying information and providing only an expert physician reviewer's specialty and board certification. TMA asserts this change will ensure expert anonymity, will protect the integrity of an expert report, and will encourage robust physician participation in expert panels.

3. TMA Supports Increasing Access to Medical Licensure in Texas.

The Sunset Commission had also recommended—and the staff report currently recommends—that the Texas Legislature adopt the Interstate Medical Licensure Compact ("Compact"), which would allow expedited licensure privileges for physicians licensed in other member states, and would allow Texas physicians to have the same privilege when seeking licensure in other member states. TMA supports this recommendation as it will make it easier for qualifying physicians to practice in Texas and would thus help address the physician shortages that many areas in Texas are facing.

TMA also proposes that the Sunset Commission consider an alternative to adoption of the Compact that would still bring the same benefit. The TMB currently has an expedited licensure process for certain physicians who will work in rural and underserved areas in Texas.⁷ These physicians are also exempt from time restrictions relating to the passage of medical examinations.⁸

⁶ For investigations that include an allegation that the license holder has violated the standard of care, an expert physician reviews the clinical aspects of a complaint to assess the complaint's legitimacy. Two physician experts review the case materials, and if there is agreement as to the conclusion, the first physician expert issues a final written report. If there is a disagreement, a third physician expert reviews, and that physician issues the final report. It is only this last final report that is provided to the licensee in preparation of an ISC. Tex. Occ. Code §§154.0561, 164.003(f)

⁷ 22 TAC §163.13.

⁸ 22 TAC §§163.6(f).

TMA recommends that the Sunset Commission explore the possibility of expanding the expedited licensure process and examination exemptions to out-of-state physicians who have been board certified and who have not been disciplined in any state in which they have been licensed. TMA believes offering expedited licensure would allow Texas to offer increased access to licensure in Texas with a flexible solution over which Texas would have complete control.

II. TMA RECOMMENDATIONS FOR THE SUNSET COMMISSION'S CONSIDERATION.

TMA also recommends examination of the following issues in connection with the commission's review of the TMB:

1. **Require Expedited Resolution of Temporary Suspensions or Restrictions at the State Office of Administrative Hearings.**

The TMB is authorized to temporarily suspend or restrict a license holder's license in certain situations.⁹ When this happens, the board must hold an ISC "as soon as practicable," and if that is unsuccessful, the TMB files a formal complaint with the State Office of Administrative Hearings (SOAH) "as soon as practicable."¹⁰ TMA has learned anecdotally of instances in which this process can take many months or even years to complete—all while the physician has either a suspended or restricted license. This delay can be crippling—just the delay destroys a physician's practice, even though months or years later the matter can be resolved in the physician's favor. In short, leaving a case unresolved for such a protracted amount of time does no good to physicians or their patients. The TMB's prolonged resolution of these cases is in spite of a statutory provision that requires the SOAH proceedings to begin within 30 days of the suspension or restriction order is signed.¹¹ Further, many other licensing agencies have expedited timeframes for resolving temporary suspensions and restrictions, some of which require a final hearing to be held within 60 days of the date of the temporary suspension or restriction.¹²

In order to facilitate a more expeditious resolution of a physician's temporary suspension, TMA recommends allowing the TMB and SOAH to have no more than 60 days to hold a final hearing in a contested case relating to a physician's license suspension or restriction. This would align the requirements for resolution of a temporary suspension or restriction for the TMB with most of the other health professions regulating agencies. Additionally, making this change will at least allow a physician to more quickly return to treating patients when the matter is finally resolved.

⁹ §164.059, Tex. Occ. Code.

¹⁰ §164.059(e) and (f), Tex. Occ. Code.

¹¹ §2001.054(c-1), Tex. Govt. Code. This provision requires SOAH proceedings to begin within 30 days "unless expressly provided otherwise by another statute." While statutes relating to the TMB require a formal complaint to be filed "as soon as practicable," this is not an *express* provision otherwise, and the Government Code provision providing only a 30-day timeframe should still apply.

¹² See e.g., §. 263.004(c) and (d); § 201.507(c) and (d); § 503.403(c); § 501.402, Tex. Occ. Code

2. Require the TMB to Disclose All Information to a License Holder Before an ISC.

Texas law requires the board to provide to a licensee before the licensee's informal settlement meeting "a written statement of the nature of the allegations and the information the board **intends to use** at the [informal] meeting."¹³ Because the board is required to turn over only what it *intends* to use, there may be instances in which the board is in possession of exculpatory information that it has no intention of presenting, and is thus under no obligation to provide to the physician subject to the review.

TMA recommends that the legislature require the board to disclose to the physician who is the subject of a review not only the information that the board intends to use at the meeting but also *all* information or evidence in the possession of or received or gathered by the board relating to the matter, especially including exculpatory evidence.. This requirement would ensure that a licensee has all available information when preparing a case or weighing settlement options, and that the board considers all information—good and bad—when making a decision relating to the physician's license to practice

3. Require the Removal of a Remedial Plan and Other Actions from a Physician's Public Profile after the Passage of Time.

Remedial plans, even those that correct the simplest of administrative mistakes, are published in the physician's public-facing profile on the board's website under a heading entitled "TMB Filings, Actions and License Restrictions." While a remedial plan may be a board "action," grouping it with license restrictions and disciplinary actions may overstate any wrongdoing, which can potentially damage a physician's reputation or negatively impact the physician's opportunities to be included in insurance networks or to receive or maintain hospital credentials.

While this information should be public, it is not certain that the information is useful as published on the physician's profile in association with disciplinary actions and license restrictions. And any usefulness that it does have would certainly diminish over time. But the board publishes remedial plan information for an indefinite amount of time. It thus has a punitive effect, because something as simple as an administrative error becomes a permanent blemish on a physician's profile, published in a way that reflects negatively on the physician's ability to practice. There comes a point at which the usefulness of this information being published is outweighed by considerations of the costs to physicians and their reputations.

TMA thus recommends that the legislature require the TMB to remove mention of a remedial plan from the physician's profile after the passage of a set amount of time.

Additionally, the legislature in the most recent session adopted a similar measure to be applied to nurses. House Bill 2950 (85th R.S.) added a provision of law that requires the removal of even *disciplinary* actions if certain conditions are met.¹⁴ TMA recognizes that the TMB's duty is to

¹³ Tex. Occ. Code §164.003(f) (emphasis added).

¹⁴ § 301.1583, Tex. Occ. Code. The law provides that a disciplinary action must be removed if 1. the disciplinary action is the only disciplinary action taken against the nurse; 2. the disciplinary action was for a violation not related

protect the public interest, and disclosing some information regarding physicians is important in fulfilling that duty. But to the extent that information regarding a physician's disciplinary history has no bearing on the physician's ability to provide care and the quality of that care, that information can be more harmful to the physician than helpful to the public. This is clearly what the legislature had in mind in with the requirement to remove disciplinary actions from a nurse's licensure verification page, when certain conditions are met.

TMA thus encourages the commission to consider applying the same criteria found in HB 2950 (85th R.S.) to the removal of TMB actions from a physician's public profile.

4. Provide express authorization for the board to file a complaint against a license holder who maliciously makes a complaint the license holder knows to be false.

Being the subject of a complaint and board investigation requires a physician's money and time spent away from treating the physician's patients. For that reason, competing physicians, hospitals, or other practitioners, insurance executives, and others may have an incentive to file a false or baseless complaint to bog down a licensed physician. The motive could be for retaliatory or other nefarious purposes. Though the board should eventually dismiss baseless complaints, even baseless complaints require action by the board staff and causes hassle for the physician who is the subject of the complaint, wasting the time of all involved (i.e., both the board staff and the subject physician).

TMA recommends that the legislature make it clear that knowingly making a false complaint against another physician is unprofessional and dishonorable conduct that would subject a complainant to board discipline. Express legislative authorization to this effect will discourage malicious complaints and will reduce the likelihood that physicians and the board staff are hassled with baseless complaints.

5. Require that the notice of a complaint include a statement of the alleged violation in plain language.

The TMB is obligated to provide to a license holder a notice that the license holder is the subject of a complaint, but the notice must state only the "nature of the complaint."¹⁵ TMA has learned anecdotally of some circumstances in which the stated nature of the complaint was alleged to be so vague that license holders had no context for the complaint and were thus unable to adequately begin to defend the case.

TMA recommends that the TMB be required to include in the notice of the complaint a plain-language description of the alleged violation. A plain-language description of the alleged violation would ensure that licensees have context and more accurate information about the complaint and thus helps licensees formulate a more meaningful response to the complaint. This

to the practice of nursing; 3. the action did not result in suspension, revocation, or probation; 4. the action provides no indication that continued practice by the nurse may risk harm to a patient; and 5. the nurse successfully completed the requirements imposed by the action.

¹⁵ § 154.053(a), Tex. Occ. Code

requirement would facilitate the timely and effective resolution of complaints at the earliest possible stage, thereby potentially saving valuable state resources.

6. Require the TMB to Adopt a Transparent Process for Receiving Confidential Complaints Against and Investigate Alleged Violations by Nonprofit Health Corporations.

The TMB certifies certain health organizations as nonprofit health corporations (NPHC), which are authorized to employ physicians.¹⁶ NPHCs are required to adopt policies that should safeguard the independent medical judgment of a physician employed with the NPHC.¹⁷ TMA has learned anecdotally, however, of certain policies or practices of some NPHCs that were alleged to interfere with independent medical judgment. These physicians, however, are often left without recourse and are in a difficult situation because of the employment relationship they have with the NPHC.

Although the board is authorized to impose administrative penalties against an NPHC for legal violations, there is, at best, only implicit authority for the TMB's investigation of an NPHC. The process by which the TMB should receive and process complaints against an NPHC is not clearly stated.¹⁸ More practically, there appears to be no structure within the TMB to receive and investigate these complaints, as complaint processes are aimed only at license holders.

TMA thus recommends that statute be amended to make explicit the board's authority to investigate complaints against NPHCs, and further, to require the TMB to adopt a process by which it receives and investigates confidential complaints regarding an NPHC's alleged violations of law. This will provide a more transparent process for ensuring that NPHC's adhere to legal requirements that maintain a physician's independent medical judgment.

7. Clarify that Performing Utilization Review is the Practice of Medicine.

TMA has learned of physicians who are not licensed in Texas but who perform utilization review and, in particular, make medical necessity determinations for cases involving patients receiving care in Texas. TMA expresses concern that any failure by these physicians to appropriately perform these medical necessity determinations would be outside the disciplinary authority of the TMB. As a result, patients could have limited recourse when necessary treatment or care is wrongfully denied because of an inadequate or improper review performed by an out-of-state physician.

TMA has adopted the following policy on this issue:

The Texas Medical Association will (1) support legislation that would amend the Texas Insurance Code to require utilization review agents to be supervised by physicians licensed to practice medicine in the State of Texas and all denials of care based on medical necessity to be made by physicians licensed to practice medicine

¹⁶ Subch. A, Ch. 162, Tex. Occ. Code.

¹⁷ §162.0022, Tex. Occ. Code.

¹⁸ §162.003, Tex. Occ. Code.

in the State of Texas and in the same or similar specialty as the treating physician seeking authorization of medical care; and (2) work to amend the Medical Practice Act to clearly include the supervision of persons performing precertification or preauthorization based on medical necessity as the practice of medicine; and include any denial of precertification or preauthorization of medical services based on a determination of medical necessity as the practice of medicine.¹⁹

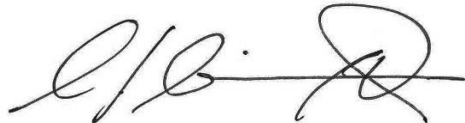
TMA thus recommends clarifying the need for a Texas medical license consistent with the above TMA policy.

III. CONCLUSION

TMA again expresses its appreciation for the opportunity to provide comment on ways to improve the Texas Medical Board. TMA strongly recommends that the Sunset staff formulate recommendations that incorporate TMA's above suggestions.

Should you have any questions, please contact Dan Finch, Director, Legislative Affairs, at dan.finch@texmed.org; Rocky Wilcox, Vice President and General Counsel, at rocky.wilcox@texmed.org; Kelly Walla, Associate Vice President and Deputy General Counsel, at kelly.walla@texmed.org; or Jared Livingston, Assistant General Counsel, at jared.livingston@texmed.org. You may also call TMA's toll free at 800-880-1300 and request to speak to these association staff members.

Sincerely,

A handwritten signature in black ink, appearing to read 'C.J. Cardenas', written over a horizontal line.

Carlos J. Cardenas, MD
President

CJC: JL

¹⁹ TMA Policy 145.024, "Medical Decision Makers Licensed in Texas," available at: <https://www.texmed.org/Template.aspx?id=42851>.