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April 23, 2018

Delivered via email to sunset@sunset.texas.gov

Mr. Ken Levine, Director
Sunset Advisory Commission
P.O. Box 13066
Austin, TX 78711-3066

RE: Texas Medical Board Sunset Review;
Sunset Staff Report to the 86th Legislature

Dear Mr. Levine:

On behalf of the Texas Medical Liability Trust (TMLT), thank you for the opportunity to submit comments to the Sunset Advisory Commission (Commission) on its Sunset review of the Texas Medical Board (TMB). Specifically, TMLT's comments are in response to the TMB Sunset Staff Report, released in March 2018.

TMLT is a not-for-profit self-insurance trust, established by the Texas Medical Association (TMA) during the medical malpractice crisis of the late 1970's, which provides affordable, reliable coverage against medical liability claims for TMA members. TMLT is led by a Board of Trustees who are physicians elected by TMLT policyholders. Today, TMLT has more than 20,000 insureds and covers more physicians in Texas than our five largest competitors combined. We provide a strong claim defense, coverage for medical board and other regulatory defense costs, customized risk management, and enhanced policy features of benefit to Texas physicians.

TMLT appreciates and supports the high value that the TMB places on protecting patient safety. The TMB, however, also owes a duty to physicians to be fair and efficient in its regulation of the practice of medicine. In order to provide physicians more clarity, certainty and efficiency in the TMB regulatory processes, TMLT requests the Commission include the following recommendations in its final report to the Legislature. TMLT also supports the comments submitted to the Commission by the TMA on April 10, 2018, as they are wholly consistent with the comments offered below.

In its latest report, Sunset staff included a summary of the status of 2016 Sunset Commission recommendations. In that summary, staff identified the following three issues supported by TMLT that were not adopted by the 85th Texas Legislature:

1) **Remedial Plans:** The purpose of the existing remedial plan option is to allow physicians to voluntarily accept a course of action to resolve issues in certain complaints, but the plan process should be statutorily enhanced as follows for even more efficacy:

- Current law restricts a physician to one remedial plan for the physician’s entire career.¹ The law should allow a physician, with TMB approval, to enter into more than one remedial plan with no limit.
- Remedial plans are also currently presented as “take it or leave it” offers and are non-negotiable in their terms.² This often results in rejection of the plan, contrary to the ultimate goal of voluntary remedial action on the part of the physician. The statute should direct TMB to negotiate the terms of the remedial plan with the physician, thus encouraging more physician participation in eligible cases and making better use of TMB staff resources.
- Finally, although a remedial plan is intended to be non-disciplinary, it is placed on the TMB website for public review, including review by health insurance networks and hospital credentialing bodies.³ The effect is indistinguishable from a TMB action sanctioning a physician. The statute should be amended to state that a remedial plan is not public information to be posted on the website or otherwise disseminated unless the physician violates the terms of the remedial plan.

2) Enhanced Transparency in the Informal Settlement Conference (ISC) Process:

Sunset staff recommended requiring TMB to share with the physician license holder who is the subject of an allegation a complete copy of each preliminary written report produced by each expert physician reviewer for the license holder’s case, not just the final report currently required by law.⁴ As part of this provision, staff recommended requiring TMB to redact all identifying information of each expert physician reviewer, except the reviewer’s specialty. TMLT supports this recommendation and makes the following additional recommendations for improving the ISC process:

- Under current law, expert physician reviewers may consult with one another when analyzing a complaint.⁵ In addition to making each preliminary report available, the statute should require each physician on the expert physician panel to *independently* determine whether the physician who is the subject of the complaint has violated the standard of care. Each expert would then issue a separate written report. This will prevent even unintended bias among the reviewers, while still allowing all opinions to be considered.
- The statute should direct TMB to consider the schedules of the parties and attorneys when scheduling the ISC.
- The statute should require TMB to disclose the identities of the ISC panelists to the physician at least three days before the ISC.
- At the ISC, if the physician is specialized in an area of medicine, the law should require that at least one panelist practice that same specialty.

1 Tex. Occ. Code §164.0015(d).

2 22 TAC §187.9(f).

3 Tex. Occ. Code §164.002(c).

4 Tex. Occ. Code §154.0561.

5 Id.

- The statute should require that notice of the allegations be detailed, complete and specific.
- The statute should limit the proceedings and presentation of TMB evidence at the ISC to consideration of only those allegations included in the notice to the physician.
- The statute should allow the physician to review all TMB evidence before accepting or rejecting a proposed settlement agreement at the conclusion of the ISC.
- The statute should limit agreed dispositions as “public information” subject to posting on the TMB website for a period not to exceed 10 years from the date the physician fully complies with the terms of the agreed disposition.

3) **ISC (Complementary and alternative medicine):** As part of their evaluation of whether a physician has committed a violation of the standard of care, Sunset staff recommended requiring members of the ISC disciplinary panel to consider whether the physician was practicing complementary and alternative medicine. TMLT supports this recommendation.

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TMLT also supports and requests consideration of the additional issues in the final Sunset Advisory Commission recommendations to the Legislature:

1) **Enhance Due Process in the Complaint Process:** Under current law, TMB is directed to “notify the physician of the nature of the complaint” made against the physician “unless the notice would jeopardize an investigation.”⁶ The statute requires TMB to “dispose of each complaint in a timely manner,”⁷ and has adopted rules allowing it only 45 days from the time it receives a complaint to determine if an investigation is warranted.⁸ If TMB is unable to complete its preliminary investigation in the allotted 45 days, then the case automatically goes to a full investigation. The law should be amended to:

- Require TMB to provide physicians enough information in the notice of the complaint so they can understand the specific allegations made against them; and
- Statutorily extend the duration of the complaint process from 45 to 60 days to allow TMB time to complete its preliminary investigation and clarify any allegations made against the physician. The additional time would give physicians adequate opportunity to respond to the allegations made in the complaint during the initial review.

2) **Expedite TMB Final Review after a Temporary License Suspension:** Under the current system, if a physician’s license has been temporarily suspended, it can take as long as 18 months for the physician to get through the entire administrative hearing process and return to the full TMB for a final decision on license suspension. Since a temporary license suspension impacts the health care of the physician’s patients and the physician’s livelihood, Texas law should expedite that process within a 60-day window so if the suspension is lifted, the physician may avoid unnecessary disruption to patient care.

⁶ Tex. Occ. Code §154.053(a).

⁷ Tex. Occ. Code §154.056(b)(1).

⁸ 22 TAC §178.5(a).

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TMLT appreciates the hard work and dedication of the Sunset Advisory Commission and the Sunset staff in the TMB Sunset Review. Thank you for your consideration of these comments, and please do not hesitate to contact Brian Dittmar, TMLT's Director of Government Relations, at 512-425-5847 or brian-dittmar@tmlt.org if you have any questions or need additional information.

Yours respectfully,



Robert Donohoe
TMLT President & CEO



Pamela Holder, MD
TMLT Board Chair