

April 25, 2018

Sunset Advisory Commission

Re: Texas Medical Board Sunset Review

Honorable Chairman and Distinguished Members of The Committee, thank you for this opportunity to testify in favor of the Texas Medical Board Request #3.

My name is Dr. Ralph Menard and I am a board-certified anesthesiologist and a practicing board-certified pain management physician. I spent 16 years in the US Navy before going into private practice in Lubbock, Texas for 25 years before moving to Fredericksburg 4 years ago where I practice Pain Medicine at Hill Country Memorial Hospital. I am a Texas Pain Society Board Member and am here today representing myself and the Texas Pain Society. The Texas Pain Society is a 501c6 nonprofit organization that represents over 350 pain specialists in Texas. The Texas Pain Society's mission is to improve the quality of life of Texans who suffer from pain.

I appreciate the opportunity to speak to you today and share our thoughts regarding improvements to the Texas Medical Board. The Texas Pain Society has been active over the last several sessions working to help close loop holes that continue to allow prescription drug abuse and diversion to occur. I am here today to discuss two of these types of loopholes.

The Texas Medical Board discusses four new issues in their letter dated April 9, 2018, I would like to focus on the third issue that we see as a loop hole from prescription drug abuse and diversion:

“Third, eliminate the current statutory exemption that allows Advance Registered Nurse Practitioners (APRN) to own pain management clinics. The reason for this request is that in the face of the opioid crisis this exemption is a major loophole to the oversight and accountability of these important healthcare practitioners. An APRN cannot practice independently in Texas and must practice under the supervision and delegation of a physician. To allow ownership of clinics by APRNs creates an untenable situation in regard to supervision and delegation. The APRN can be the employer of physicians yet the physician-employee is supervising, and delegating to, the APRN-employer. Moreover, the physician-employee is responsible and liable for all the acts of the APRN-employer.”

This arrangement creates an untenable position for the physician and an obvious conflict of interest. The statutes that prohibit the corporate practice of medicine address these very issues. Clinical decision making should not be subject to oversight by the business owner. This current statutory exemption allows for advanced practice registered nurses (APRNs) to own and operate pain management clinics but they cannot prescribe any pain medications without delegation from a physician hence the conflict of interest. This exemption creates a loophole for the diversion of controlled substances and needs to be closed to help deal with the Texas and national opioid epidemic. In other words, this exemption allows for an APRN to own a clinic and hire a physician to delegate prescribing authority to them and sign prescriptions for them. It is a conflict of interest for the physician to supervise their employer because if they say no they will probably lose their job.

The second loophole I want to discuss with you today is dovetailed with this exemption. This pain clinic ownership rule problem with prescriptive authority agreements is but the tip of the iceberg. The much bigger problem, “the elephant in the room”, is the unintended consequences in the use/abuse of the prescriptive authority agreements that have

occurred after the law was passed. Prescriptive authority agreements are being used as a source of additional income and a source of additional referrals by some physicians (an apparently legal but not exactly ethical practice) - because of administrative loopholes. These loopholes are a lack of oversight and employer-employee restrictions. Currently a physician can register with the medical board to supervise a mid-level practitioner without proof of having a prescriptive authority agreement. This is akin to getting your driver's license without taking a driving test. This has led to abuse by some practitioners. Unfortunately, the extent of this abuse is unknown because there is no oversight, review, or registry of prescriptive authority agreements. It is our recommendation that it should be illegal for any physician to work for a mid-level practitioner regardless of the clinical setting for all the reasons that I have just discussed.

Restrictions on physician business ownership relations is not new to Texas or our Medical Board. In 2011, HB 2098 was passed and clarified the authority of physicians and physician assistants to form certain entities. This bill included language that, amongst other things, specified "A physician assistant may not contract with or employ a physician to be a supervising physician of the physician assistant or of any physician in the corporation". More to our point, HB2098 also states "Nothing in this section may be construed to allow the practice of medicine by someone not licensed as a physician under Subtitle B, Title 3, Occupations Code, or to allow a person not licensed as a physician to direct the activities of a physician in the practice of medicine."

<http://www.statutes.legis.state.tx.us/Docs/BO/htm/BO.22.htm#22.0561>

TPS recommends that the sunset commission review these loopholes and make recommendations prohibiting these unintended consequences not only in pain management clinics but universally in all clinical practices.

I also want to call your attention to the letter that I have attached from my esteemed pain medicine colleague and fellow Board member Cheryl White M.D. Not only does she share the same concerns, but she also knows firsthand the dynamics of these situations because she was a registered nurse before she went to medical school and became a physician.

I appreciate your time and appreciate your efforts to improve patient care in Texas and help fight prescription drug abuse, prescription drug diversion and prescription drug overdose deaths.

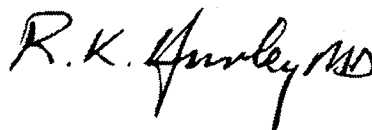
The Texas Pain Society is available as a resource.

Do you have any questions?



Ralph Menard, MD

Board-certified Anesthesiology  
Board-certified Pain Medicine  
Texas Pain Society Board Member



Richard Hurley, MD

President  
Texas Pain Society

April 23, 2018

Senator Birdwell, Chair  
Representative Paddie, Vice Chair  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, TX 78711-3066

Dear Mr. Chair and Vice Chair:

I am writing regarding a new issue brought forth to the Sunset Commission by the Texas Medical Board in their letter to the Commission dated April 9, 2018. Specifically, I strongly support the TMB's proposal to eliminate the current statutory exemption that currently allows Advanced Practice Registered Nurses to own and operate pain management clinics.

I am a dual board-certified anesthesiologist and pain management physician. I serve on the Board of Directors of the Texas Pain Society and hold an active medical license in Texas. I believe that I have a relevant and important perspective on this issue because of my prior background and training.

I was previously a practicing critical care-certified Registered Nurse but the limitations of my training and licensure precluded my being able to diagnose and treat patients as an RN; therefore, I sought and successfully completed medical training, post-graduate training in anesthesiology and subsequently a fellowship in pain medicine. I can unequivocally say that even with additional training in advance practice nursing, my skill set and knowledge background would have been inadequate to address the unique and varied complexities of chronic pain patients including their associated disease processes, poly-pharmacology, psychological and most significantly, potential dependence and addiction issues.

Both the Board of Directors of Texas Pain Society and I believe that allowing Advance Practice Registered Nurses (APRNs) to own pain clinics creates a most dangerous public health situation, especially during the current opioid crisis as well as current concerns regarding inappropriate prescribing, fraud and abuse. These consequences are intimately connected with the currently inadequate Medical Board Rules and enforcement regarding Prescriptive Authority Agreements (PAAs) between physicians and APRNs, who cannot practice independently in Texas. A PAA between a pain clinic owner who is a nurse and a physician who works for the same creates a moral, ethical and professional conflict of interest whereby the physician "supervises" his/her employer, which inevitably jeopardizes the physician's liability, employment status, and

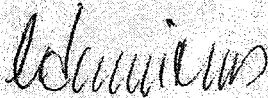
livelihood as a part of the clinic's quest for revenue, rather than the APRN functioning in their intended role as a physician extender.

Additional unintended consequences of the current exception rule are that PAAs are potentially being used as a source for additional income and referrals by some physicians through current administrative loopholes which at best, blur mandated physician involvement in delegated patient care and at worst, present additional opportunities for fraud, abuse and further inappropriate prescribing. Unfortunately, the extent of PAA abuse is unknown because of the current lack of oversight or review of how PAAs are being created and reviewed.

In summary, I ask the Commission and the Texas Medical Board to consider this: the opioid epidemic is already catastrophic. Why are we allowing more prescribers, with less training, to contribute to it? Please consider introducing legislation that removes the exemption for an advanced practice nurse to own and operate a pain clinic and in addition, introduce more stringent legislation regarding more detailed oversight for prescriptive authority agreements.

I appreciate your time and consideration and am available for any further questions.

Respectfully,



Cheryl White, M.D.  
Board Certified in Anesthesiology and Pain Medicine  
Texas Pain Society Board member

Cc: Members, Texas Medical Board  
Alison Jones, M.D., Texas Physician Health Program  
Sherif Zaafran, M.D., President, Texas Medical Board  
Scott Freshour, J.D., Interim Executive Director, Texas Medical Board  
Stephen Brint Carleton, J.D. Executive Director, Texas Medical Board