

RECOMMENDATIONS TO SUNSET COMMISSION FOR LEGISLATIVE ACTION:

Coleman Hemphill's recommendations:

Video and audio record and archive every TMB meeting:

Currently the TMB meetings are not video recorded making it very difficult for those who are not attending the meeting to follow the actions of the TMB. Replace the ISC with an Independent 3 Physician Panel similar to the Indiana Model. Establish an independent three physician review panels to replace Informal Settlement Conferences patterned after Indiana's time-tested model.

INCAP (Indiana medical review panel legislation), created as a balance of competing public policy agendas...has met the test of public need (since 1976). Indiana State Medical Association White Paper (2003)

- a. Fair, inexpensive, successful in Indiana since 1975
- b. Efficiently weeds out frivolous cases, encourages settlements in legitimate case.

RULES: the panel is composed of three health care professionals and one attorney who serves as chairman with no vote. Each side chooses one expert health care provider; these two providers choose a third. The panel's findings are:

- a. admissible in disciplinary cases or court;
- b. not legally binding; and
- c. as a practical matter, rarely overturned by a judge.

<http://www.ismanet.org/pdf/legal/RolesMedicalReview.pdf>

For more information see: <http://www.ismanet.org/pdf/legal/RolesMedicalReview.pdf>

Establish an Ombudsman to insure accountability when the TMB is alleged to be violating their own rules or law. Oversight should be afforded to complainants similar right to those who lodge complaints against Child Protective Services or the Department of Public Safety. Currently there is no outlet to make confidential complaints against the TMB or to have review of individual cases. Neither the Sunset Commission nor the Legislature has a method where the TMB or staff can be held accountable. Complaints include the removal of exculpatory evidence, inadequate peer review, hearing dates that exceeded statutory requirements.

Sheila Hemphill's recommendations:

Expand Administrative Law Judges' jurisdiction to include the ability for SOAH to consider constitutionality of medical board rules and actions to insure procedural due process for physicians.

Revert to pre-1992 protocols that allow for Trial de Novo. Given the medical board's power to serve as complainant, investigator, prosecutor, jury and judge, the medical board staff have "absolute immunity" privilege since they function in quasi-judicial and quasi-prosecutorial roles. With "absolute immunity", physicians have no recourse in the event that the staff has failed to follow board rules or law.

Provide for a confidential process for the public and physicians to file complaints against the medical board similar to the current process the medical board uses for complaints filed against physicians. The process should contain provisions to prevent the medical board from taking retaliatory action against the complainant, unless it can be proven that the complaint was made in bad faith. The information on how and who to file a complaint with should be listed on the medical board website. The contents of the complaint are to have equal protection as that which is afforded to physicians when they are subject to a complaint.

Dr. Jesus Antinio Caquias' recommendations:

Ban all parties affiliated with Quackwatch, such as Case Watch, Skeptics Anonymous, including but not limited to Stephen Barrett and Robert Baratz, from being able to file complaints or act as expert witness against any Texas physician or healthcare provider.

Improve protocol to check for bad faith complaints at the onset of the complaint process.

- a. Determine if complainant is a serial complainant in that they have filed more than 3 complaints with the medical board
- b. Determine if complainant is a competitor or has financial conflicts of interest
- c. Determine if complainant is biased against complementary and alternative care protocols.

Only allow complaints to remain confidential if the complaint is filed by:

- a. A patient who has suffered direct harm
- b. A family member of a patient who has suffered direct harm
- c. A health professional who has direct knowledge and contact with the patient or family member with knowledge or information that could lead to patient harm or death.

Letter from Sheila and Coleman Hemphill:

Dear Sunset Commission Member:

Texas Right To Know has been working with and interviewing numerous physicians, attorneys and members of the public who have reported egregious actions of the Texas Medical Board (TMB) and staff since 2009. Complaints include but are not limited to withholding or prohibiting exculpatory evidence, failing to follow board rules and abolition of constitutional rights to physicians and their patients. Based upon their interviews and research of court cases, it may be surmised that many of the problems may lie in how the laws are written and many of the complaints against SOAH or the TMB may have their origins in the laws themselves. However, the complaints regarding the actions of the TMB staff, board and SOAH actions are equally if not more troubling as documented in the following and in the table below.

PROBLEM: THERE ARE NO CONSTITUTIONAL RIGHTS IN SOAH FOR PHYSICIANS OR THEIR PATIENTS.

Physicians have **no** Fourth Amendment right to be free from unreasonable searches, *“The Court finds that the TMB acted in bad faith partnering up with law enforcement to conduct the search of the defendant’s business. The Court finds that the TMB’s interest in serving the subpoenas upon the defendant was not a legitimate pursuit of the administrative authority but an exercise to circumvent both the Texas and US Constitutions’ requirement for a warrant.”* Physician have **no** Fifth Amendment right to remain silent at SOAH when the ALJ’s can fine them if they refuse to speak or to not turn over their patients’ entire medical files to the state. TX Govt. Code §2003.042(a)(4). Physicians have no 14th amendment right to due process when the TMB staff can refuse to release potential exculpatory evidence contained in expert witness reports. For example, if two of the three expert witness reports go against the physician and those two reports are released to the defense, but the third expert report is no released, there is a strong likelihood that the third report could provide evidence to support the physician or why else would the staff refuse to release the third report?

There is a case that states Administrative law judges (ALJ) overseeing TMB administrative hearings are prohibited from considering the constitutional rights of physicians and their patients, ALJs, *“have no jurisdiction to review the constitutionality or propriety of an agency’s investigative actions”*, *“ALJs generally lack the power of constitutional construction.”* There is a case that demonstrates physicians have no 14th amendment right to procedural due process, *“With these limitations on SOAH, ALJs are powerless to review Staff’s conduct in carrying out the Board’s investigatory function before the case was referred to SOAH”*. There is a case that states that TMB staff have absolute immunity since they function in quasi-judicial and quasi-prosecutorial roles because the TMB can serve as accuser, investigator, prosecutor, jury and judge. *“Absolute immunity, ..., shields a government official from liability for any harm caused by their conduct—even harm caused by the violation of a clearly established statutory or constitutional right.”*

Another problem reported is with the “substantial evidence review standard”, enacted in 1992, that limits the district court’s authority to provide meaningful oversight, and requires the district court to agree with the Texas Medical Board’s findings on disputed questions of fact and prevents submission of new evidence.

Even the respected national media outlet (WebMD) has openly debated whether medical board proceedings are biased “kangaroo courts” with the TMB being labeled as “one of the worst”. U.S. Chief Justice Roberts warned of “the danger posed by the growing power of the administrative state cannot be dismissed.”

When licenses can be revoked by a process that does not afford procedural due process where Constitutional rights are upheld, that equates to a taking of personal property.

SOLUTION: Change the current insufficient substantial evidence review standard to provide for *Trial de novo* where the district court appeal will be before a real judge, a real jury with complete evidence. Trial de novo review of TMB decisions functioned well as the standard in Texas for decades prior to being changed in 1992 to the current substantial evidence review standard. District courts have competently determined standard of care issues for decades in malpractice cases and therefore are competent to determine standard of care issues in TMB cases. Trial de novo review of administrative agency decisions is explicitly permitted under Texas law and allows a district court to try “anew” orders issued by the TMB and permit sufficient judicial checks and balances against mistaken or unjust decisions by the TMB. TX Occ. Cod. Sec. 164.009. JUDICIAL REVIEW. A person whose license to practice medicine has been revoked or who is subject to other disciplinary action by the board may appeal to a Travis County district court not later than the 30th day after the date the board decision is final. **The appeal shall be a trial de novo review.**

PROBLEM – NO OVERSIGHT OR PROTOCOL TO PLACE CONFIDENTIAL COMPLAINT AGAINST THE TMB.

Currently there is no oversight of the board by an Ombudsman like other state agencies are afforded. What avenue is available to a public member or physician as means to file a confidential complaint against the TMB? There is no avenue other than the Texas Legislature that only meets every two years. There is not an “Office of the Legislature” but rather contacting all 181 members is the complaint avenue. Not an Ombudsman, not a particular committee – the Legislature. So how is a public member or physician supposed to go have meetings with their Representative or Senator whose pat responses can be, “we’re not on that committee or that’s not on our priority list”. This Sunset Commission is not even a viable avenue since the commission is prohibited at looking at individual cases. **There is no avenue to file confidential complaints against the TMB.**

SOLUTION: Establish an Ombudsman to provide oversight over the TMB and the TMB should not receive a 12 year Sunset but a 4 year.

Per TMB open records request, the table below depicts a disturbing trend from 2007 – 2016 where it appears that SOAH rulings disproportionately side with the TMB over the physicians when compared to data from 2003 – 2007.

Texas Medical Board Statistics, Fiscal Years 1990-2017*					Year	SOAH Conducted	SOAHs Dismissed	Percent Dismissed
Informal Settlement Conference		Cases Filed at SOAH						
	Conducted	Dismissed	Conducted	Dismissed				
FY 2017	n/a	n/a	n/a	n/a				
FY 2016	609	309	82	0	2003-2006	110	78	71%
FY 2015	610	345	76	0	2007-2010	341	4	1%
FY 2014	608	291	77	0	2007-2016	843	9	1%
FY 2013	752	368	111	5				
FY 2012	755	352	85	0				
FY 2011	683	391	71	0				
FY 2010	645	414	141	0				
FY 2009	775	356	82	0				
FY 2008	521	285	70	2				
FY 2007	482	209	48	2				
FY 2006	427	180	34	27				
FY 2005	469	161	17	19				
FY 2004	420	182	36	22				
FY 2003	477	160	23	10				
FY 2002	172	91	22	n/a				
FY 2001	187	75	11	n/a				
FY 2000	218	85	16	n/a				
FY 1999	164	91	4	n/a				
FY 1998	264	146	18	n/a				
FY 1997	215	106	19	n/a				
FY 1996	291	52	10	n/a				
FY 1995	288	5	9	n/a				
FY 1994	274	1	14	n/a				
FY 1993	2	2	n/a	n/a				
FY 1992	7	7	n/a	n/a				
FY 1991	2	2	n/a	n/a				
FY 1990	2	2	n/a	n/a				

None of the cases cited above can be given to any state official since information received by Representatives or Senators is subject to open records request that could end up in the hands of the TMB. There are claims that the TMB has been used as a weapon against physicians by a physician's competitors, insurance companies and serial accusers like Stephen Barrett with Quackwatch. There have been complaints lodged that the TMB has retaliated against physicians who file complaints against the board or the staff. There is a chance some of the physicians who testifying here today may receive some form of retaliation either by complaints being filed or through audits of their CEUs.

Sufficient procedural due process is critical to prevent mistaken or unjust deprivations of life, liberty or property to physicians and their patients. The TMB orders set precedents which may affect the healthcare of thousands of Texans and therefore I would encourage legislative action to provide for Trial de Novo standards, significant oversight, a confidential avenue to lodge complaints against the TMB and due process protections that restore the constitutional rights to physicians and their patients.

Sincerely,
 Sheila Hemphill Coleman Hemphill