



THE BRAIN & BODY HEALTH INSTITUTE P.A.

April 25, 2018

To: Sunset Advisory Commission
From: Robert W. Van Boven, M.D., D.D.S.
Re: The Texas Medical Board (“TMB”) Review, 2018–2019
86th Legislature

I wish to thank Chairman Birdwell and other Sunset Commission Members for the opportunity to speak. As a healthcare provider for 27 years without any history of malpractice, hospital discipline, or licensure sanctions (except one over-ruled through appeal and exoneration at SOAH held in May 2017), I wish to raise concerns and a request for considering closure of *chasms in due process and accountability* in the TMB and its staff.

In today’s oral presentation to the Sunset Commission, Dr. Sheriff Zaafran of the TMB intimated that there is “Extensive due process in place”. This fallacious notion assumes that because rights are *cited* in statutes that they are reliably *upheld*. Rules and Laws are akin to soap- they are only useful if they are faithfully *applied*. I would assert the modus operandi of Board staff is void of checks to prevent abuse and safeguards for due process of practitioners. Moreover, in some instances board or staff activity *paradoxically even serves in surrogate reprisal* against physicians who report patient harm or death from avoidable hospital errors¹, a leading cause of death and morbidity in the U.S., nearly ten-fold that of demise from opioid abuse².

First, there is no mechanism for *independent adjudication* of allegations of violations of law or Rules *against* the TMB, its staff or officers. SOAH does not consider such complaints. Unlike the Texas Health & Human Services Commission, the TMB has no Office of the Inspector General or even an Ombudsman. A corollary problem is that *despite* Dr. Zaafran’s assertion, this state agency **lacks any active supervision**- this was highlighted by Judge Pittman’s District Court finding of a lack of active supervision of the TMB to qualify for sovereign immunity for tort claims made by Teladoc³- a position supported by the amicus briefs from the U.S. Department of Justice and Federal Trade Commission⁴.

¹ <https://www.beckershospitalreview.com/quality/the-risk-physicians-face-for-reporting-patient-harm-7-insights.html> Also See <https://www.texmed.org/Template.aspx?id=47199> and <https://www.austinchronicle.com/news/2018-04-20/dr-robert-van-boven-the-whistleblower/>

² <http://www.hospitalsafetygrade.org/newsroom/display/hospitalerrors-thirdleading-causeofdeathinus-improvementstooslow>

³ <https://law.justia.com/cases/federal/district-courts/texas/txwdce/1:2015cv00343/748757/80/>

⁴ <https://www.ftc.gov/policy/advocacy/amicus-briefs/2016/09/teladoc-incorporated-et-al-v-texas-medical-board-et-al>

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Remarkably, the TMB is statutorily delegated the task of **self-monitoring** of complaints *against itself*⁵. The consequences are suspect and not surprising given the inherent lack of independent and objective assessment. For example, the TMB's 2015 self-evaluation report asserted identical "estimates" regarding complaints made *against* the TMB for FY 13 and FY 14: i.e. "estimating" that 10 complaints were received each year, that all were "estimated" to be found without merit or dismissed, and all were "estimated" to be resolved in one month⁶. Open records requests for data regarding these dubious statistics resulted in a TMB "non-responsive" reply which appears to not comport with the law as they are to be released to the public upon request.

Second, nearly 20% of Complaints against practitioners are *self-initiated* by the board⁷. This suffers the risk of **Confirmation Bias**- a problem suggested by Mr. Freshour's and Dr. Zaafran's reference of subsequent investigations as a process of "going after" a *practitioner*, rather than "going after" the *truth*. Similarly, the *very name* of the TMB's informal conferences sends a not so subtle message that it is the *practitioner* who carries the burden of proof to "SHOW COMPLIANCE" with the law. This is, at its core, an affront to our democratic view of justice which holds that there is a **presumption of innocence** of the accused and that the burden of proof rests on the prosecution. The TMB also has a "Key Performance Measure" or "**Target**" of **Disciplining at least 12% of Physicians** with whom the Board receives (or *self-generates*) a Complaint⁸. Such a policy reflects a misguided sense of "justice" and should be eliminated.

Third, although the MPA indicates consideration for **bad-faith** is required, Mr. Freshour's written response to this legal requirement was concerning and revealing. Referring to a *Board-initiated* Complaint based on bad-faith reporting over 15 cases dismissed only after a three-year-long prosecutorial effort by the TMB, Freshour wrote "*Please be advised that the Panel [ISC], when hearing peer review cases, will not look to alleged motivation behind a peer review, but rather focus on the facts....*"⁹ Alas, Mr. Freshour failed to recognize that the bad-faith reporting was that of *bearing false witness*- I had never been subjected to a "peer review" but a hospital investor/board

⁵ EX. ONE. Staff Report, Sunset Advisory Commission. November 2016, Appendix D, at 59; Tex. Occ. Code Sec. 154(a)(6) and 154(b)(1).

⁶ EX. TWO. TMB Self Evaluation Report, August 2015. Exhibit 16: Complaints Against the Agency — Fiscal Years 2013 and 2014, at 136.

⁷ Personal information provided by Yvette Yarbrough, Asst. general counsel, TMB.

⁸ EX. TWO. TMB Self Evaluation Report, August 2015. Exhibit 2: Key Performance Measures, at 6.

⁹ EX. THREE. Freshour LTR 10-12-2015

member misrepresented data to cause the TMB to serve as a proxy retaliatory device¹⁰. The TMB's general counsel's thinly-veiled bias is evidenced by his next remark, despite his "disclaimer": *"Without making any judgment on this case, I can tell you that Panels hear claims of 'retaliation' in nearly every peer review case that is presented."*

Likewise, the abysmal SOAH dismissal rate of board charges against physicians is a statistic that defies a just and fair process. For the last decade, **only nine of 843 cases** contested at SOAH result in exoneration of physicians¹¹, and disciplinary actions against physicians at SOAH were exacted in ALL CASES for 7 of these 10 years. These SOAH outcomes call for serious consideration of prejudice and/or undue and inappropriate influence by Mr. Freshour¹² or others at the TMB on SOAH. Further, consideration of alternative adjudication, such as direct court adjudication afforded to attorneys accused of violations, is warranted.

In conclusion, **state agencies and their employees must be accountable to the rule of law and the public they serve.** Independent vetting for alleged improprieties by the TMB or its staff are crucial and fundamental for checks against abuses of power or denial of the rights of healthcare providers in Texas. This can be achieved via a near budget-neutral assumption of these duties by the Health & Human Services Commission's Office of Inspector General and Office of the Ombudsman.

Sincerely,



Robert W. Van Boven, M.D., D.D.S.

¹⁰ <https://www.austinchronicle.com/news/2018-04-20/dr-robert-van-boven-the-whistleblower/>

¹¹ EX. FOUR(a). G-Mail. SOAH Decisions PIA. 02-23-2018; Also See Ex. FOUR(b). TMB Statistics Exhibit.

¹² EX. FIVE. <https://www.austinchronicle.com/news/2018-03-16/medical-board-loses-a-case-and-attacks-the-judge/>; also See EX. SIX. <https://www.austinchronicle.com/news/2018-04-06/uproar-over-judges-dismissal-at-soah/>