



Physicians Caring for Texans

November 16, 2016

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

Via email to sunset@sunset.texas.gov

Re: The Sunset Staff Report on the Texas Medical Board

Dear Director Levine:

The Texas Medical Association (TMA) is a private, voluntary, nonprofit association of more than 49,000 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 applauds the diligence of the Sunset staff in its work to ensure that Texas agencies are well organized and operate effectively. That diligence is reflected in the staff's report of the Texas Medical Board. TMA also appreciates the opportunity to review and provide comment on that report. As most of TMA's members are licensed and regulated by the board, TMA has a keen interest in ensuring the medical board continues to be effective and fair as it regulates the practice of medicine.

Generally, TMA supports the Sunset staff's report. The Sunset staff has clearly been attentive to detail in its evaluation of the medical board, and TMA believes that most of the staff's recommendations will improve the operation of the board.

TMA's review of the report did reveal, however, a couple of issues that, if properly addressed, could do even more to ensure the medical board continues to operate effectively. The first issue relates to the Sunset staff recommendation relating to the removal of the statutory limitations on the board's fee-setting authority. TMA asserts that the current statutory license fee cap should be retained. TMA's other comment relates to an issue that was disappointingly not addressed in the Sunset staff report. TMA believes the Sunset staff overlooked improvements that could be made with respect to the board's disciplinary processes.

These two issues are discussed in greater detail below.

I. Issue 2: Removing Statutory Limitations on the Medical Board's Authority to Set Fees.

The Sunset staff report recommends that the legislature “eliminate statutory language that sets caps and fees and give the Medical Board greater discretion to set its own fees at the level necessary to recover costs as conditions change.”¹ TMA recommends that the current statutory license fee caps be retained. The Sunset Commission should also, from a broader perspective, reexamine the current process occurring across state professional licensing agencies, whereby revenue from license fees is paid to the General Revenue Fund as a mechanism to help balance the state budget.

The Problem with Lifting Professional Licensing and Administrative Fee Caps and with the Use of Professional Licensing Fees to Help Balance the State Budget

Current medical board licensing and administrative fees are capped by statute.² The Sunset staff report recommends the removal of these caps and replacement with a mechanism that allows the board to set fees by rule.³ TMA is concerned that this removal and replacement would place physicians (and other licensees similarly situated) in a perennial position of uncertainty and concern as to the timing and amount of the next round of professional licensing and administrative fee increases. TMA also believes that the use of professional licensing and administrative fees to fund the state budget, through allocation of these fees in part to General Revenue, constitutes a hidden tax. Even with the removal of the occupations tax in 2015 (which TMA supported), the medical board's current fee structure brings in more than the legislature allocates to the medical board. The agency should be authorized to assess fees that directly correlate to the amount reasonably necessary for the agency's efficient operation.⁴

Possible Alternatives to the Sunset Staff Recommendation to Remove and Replace the Current Process

TMA recommends that the medical board be authorized to assess professional licensing and administrative fees that directly correlate to the amount of revenue the agency reasonably needs for its efficient operation. The Sunset staff should examine the broader issue whereby revenue from professional licensing agencies, such as the medical board, is being used by the legislature as a means of funding the state budget through General Revenue.

TMA also recommends that the current medical board statutory framework setting forth caps on licensing and administrative fee be retained. In the event that the medical board concludes that one

¹ Sunset Advisory Commission Staff Report, *Texas Medical Board* (Nov. 2016), pg. 21.

² Tex. Occ. Code §153.051.

³ Staff Report, pg. 18.

⁴ TMA acknowledges that the board has increased two licensing or administrative fees beyond their current respective statutory limits. These are the fee for an initial PIT training permit, and the fee for reinstatement of license after cancellation for cause. This disconnect can and should be addressed by the legislature through legislation that raises these statutory caps to a level sufficient to accommodate the actual fee structure.

or more of the caps should be raised due to increased costs to run the agency, this need should be addressed by the legislature through legislative review and through its biennial appropriation process.

II. Issues Not Addressed in the Sunset Report: The Board's Disciplinary Process.

TMA notices that the Sunset staff report does not address the medical board's process for disciplining licensees. TMA encourages Sunset staff to reexamine the board's disciplinary process and articulate legislative improvements to the board's disciplinary process, as outlined below.

The Problem with the Board's Disciplinary Process

TMA supports the role that an efficient and effective disciplinary process has in ensuring that members of the public have full and accurate information about physicians when seeking health care services and that physicians who do not meet applicable standards of care have appropriate restrictions placed on their practice. Indeed, the medical board's primary purpose is to ensure public welfare.⁵ But because the board is rightfully focused on protecting the public, the medical board has little incentive to give any consideration to the headache that an erroneous investigation or unfair disciplinary process can be for a physician and, consequently, the physician's patients. Thus, legislative guidelines are important for achieving balance between public welfare and a physician's right to a fair process.

In fact, the legislature has already recognized that need for balance. The legislature has, for instance, provided fundamental protection against baseless or ill-intended investigations, requiring the board to dismiss "baseless or unfounded" complaints.⁶ Elsewhere, state law provides that certain disciplinary actions are effective only after the board has provided proper notice and the licensee has been given an appropriate opportunity to show compliance.⁷ And regarding the board's informal settlement of complaints, the legislature has installed several protections, including proper notice requirements, required disclosures of allegations and information, and a licensee's ability to have the proceedings recorded.⁸

Notwithstanding these protections, TMA has learned anecdotally that physicians are still finding it difficult to get fair consideration given the way the board administers its disciplinary process. This happens in circumstances where perhaps there is no legislative guidance or where the existing legislative guidelines have been insufficient to effect the legislatively intended protections. TMA has received from its members and from attorneys representing physicians in board disciplinary proceedings feedback regarding these circumstances and the additional legislative guidance needed to improve the board's disciplinary process. This feedback forms the basis for TMA's recommendation that the Sunset staff reexamine the board's disciplinary process and has shaped TMA's specific recommendations for the improvements described below.

⁵ Tex. Occ. Code. §151.003(1) (finding that regulating the practice of medicine is necessary to "protect the public interest.")

⁶ Tex. Occ. Code §164.0035.

⁷ Tex. Occ. Code §164.004.

⁸ Tex. Occ. Code §164.003(b)(2), (c), (f), and (i).

Proposed Changes to the Board's Disciplinary Process

- **Remedial Plans:** One example of inadequate legislative guidelines that negatively affect physicians involves remedial plans. The legislature has allowed the board to offer physicians a remedial plan in certain cases (e.g., those that involve minor administrative violations)⁹ in a manner that would not restrict a physician's license or assess an administrative penalty.¹⁰ The idea of remedial plans was borne out of the need to provide a "more educational and corrective process at TMB" to resolve investigations without "formal disciplinary action," while providing "a physician an opportunity to learn and improve the physician's practice."¹¹ A remedial plan is certainly a helpful tool in correcting physician error without the hassle and expense of disciplinary proceedings.

But more can be done to effect the intent that the remedial plan is truly an opportunity to learn and improve a physician's practice without formal discipline. For instance, remedial plans, even those that correct the simplest of administrative mistakes, are being published in the physician's profile on the board's website under a heading entitled "TMB Filings, Actions and License Restrictions." While a remedial plan is a board "action," grouping it with license restrictions and disciplinary actions could certainly suggest wrongdoing, which can potentially damage a physician's reputation or exclude the physician from certain opportunities to be included in an insurance network or to receive hospital credentials. Further, if the legislature intended a remedial plan to be an "educational and corrective process," this opportunity should not be limited to just one.¹² Otherwise, if a physician makes a second minor administrative error after a first error resulted in a remedial plan, the board's hands are tied and it has no discretion to establish a new remedial plan to further educate or correct the physician, even if the situation warrants the flexibility that remedial plans otherwise make available.

- *Require the board to remove publication of a physician's remedial plan after the passage of time.* While information relating to the establishment of a remedial plan is public information, 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. 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.

⁹ 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. Tex. Occ. Code. §164.0015(c).

¹⁰ Tex. Occ. Code. §164.0015(b).

¹¹ Bill Analysis of S.B. 227, 82nd Leg., R.S. (2011), Enrolled Bill version (July 13, 2011).

¹² Tex. Occ. Code. §164.0015(d) 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.

TMA thus recommends that the legislature restrict the amount of time that a previous remedial plan is published on the physician's profile.

- *Remove the lifetime limitation of remedial plans.* TMA suggests that the legislature remove the restriction in Section 164.0015(d), which limits physicians to only one remedial plan in the physician's lifetime, and instead leave the availability of a remedial plan up to board approval. TMA notes that, as it currently stands, the board must approve a remedial plan anyway; thus, the statutory limitation seems unnecessary. In an environment in which the administrative burdens of practicing medicine continually increase, this amendment of removing the limitation would allow both the licensee and the board to avoid the expense of protracted investigations for minor administrative violations, and it would 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.
- **Information Provided to a Licensee Prior to Informal Meetings:** 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 it to the physician subject to the review. In fact, TMA has learned anecdotally that the board has withheld exculpatory evidence entirely, or has provided it only at the last minute. Additionally, the board may also be required, in certain circumstances, to provide "a copy of the report by the expert physician reviewer."¹⁴ The trouble with this, though, is that there actually may be differing expert reports that come to different conclusions about violations of the standard of care, but there is no requirement to provide both a favorable and unfavorable report's findings.¹⁵ In other words, the physician who is subject to review may not even be aware that an expert physician reviewer determined that the physician did not violate the applicable standard of care.
- *Require the board to provide all available information to the licensee prior to informal meetings, especially exculpatory evidence.* TMA recommends that the legislature require the board to disclose to the physician who is the subject of a review *all* information and expert physician reviewer reports—preliminary and final—that are in the board's possession. This requirement would ensure that a licensee has all available information when preparing a case or when making the determination to agree to an agreed order, and that the board considers all information—good and bad—when making a decision relating to the physician's license to practice.

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

¹⁴ Tex. Occ. Code §164.003(f).

¹⁵ See Tex. Occ. Code §154.0561. State law requires an initial expert physician to "determine whether the physician who is subject of the complaint has violated the standard of care applicable to the circumstances," and then to "issue a preliminary written report of that determination." A second reviewer may agree or disagree with that determination. If the second reviewer agrees, the first physician writes a final report and there is no issue with the provided report. But if the second reviewer disagrees, a third reviewer is the tiebreaker, deciding between the conclusions reached by the first two reviewers.

- *Ensure that the board does not provide any information directly or indirectly identifying the expert physician reviewer to the physician who is the subject of the review.* While it is important that the board provide all, full reports to the physician who is the subject to the review, it is equally important that the board not divulge any information that would directly or indirectly identify an expert physician reviewer. The board relies heavily on expert physician reviewers and needs a robust pool of possible reviewers. Revealing the identity of a reviewer, however, could discourage physician participation as a reviewer altogether. Ensuring anonymity will protect the integrity of an expert report and will encourage robust physician participation. TMA does, however, suggest that the board be able to disclose an expert physician reviewer's specialty in order to provide context to the physician's review and to be a means of weighing the report's credibility.
- **False and Malicious Complaints:** 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 could have an incentive to bog down a competitor with the trouble caused by a false or baseless complaint. 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).
- *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.* 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. The board may already have implicit authority to do this, but an express legislative authorization to this effect will do more to remove the incentive to make malicious complaints and will reduce the likelihood that physicians and the board staff are hassled with baseless complaints.
- **Expedited Resolution of Temporary Suspensions at the State Office of Administrative Hearings:** The legislature created the State Office of Administrative Hearings to "avoid the situation where [an] agencies' employees acted as hearing officers to ensure that the disputes 'have fairness, independence, and neutrality in both perception and fact.'"¹⁶ The opportunity to have SOAH review a physician's temporary suspension thus plays an important part in ensuring that the board has acted fairly in its disciplinary process. The problem, however, is that when SOAH hears the case of a physician's temporary suspension, the case often takes six months to a year before the case is resolved. Meanwhile, the physician's suspension limits or completely removes the physician's ability to treat patients and earn a living. And for those patients whose physicians have their license reinstated after a SOAH hearing, this delay significantly affects access to care and disrupts continuity of care. After the physician has already exhausted significant time, money, and effort into the physician's defense in just the

¹⁶ Laski, "What Every Practitioner Should Know Prior to Practicing Before SOAH: The SOAH Rules and Procedure as Compared to the Texas Rules of Civil Procedure," 9 Tex. Tech. Admin. L.J. 237, 239 (2008), citing E-mail from Cathleen Parsley, General Counsel, State Office of Administrative Hearings, to author (Jan. 12, 2008).

board's disciplinary proceedings, going many more months without a resolution—in addition to the additional time and money required for the SOAH case—is a significant drain on a physician's resources.

- *Require SOAH to expedite cases involving a physician's temporary suspension.* In order to facilitate a more expeditious resolution of a physician's temporary suspension, TMA recommends requiring SOAH to conduct an expedited hearing following the board's temporary suspension of a physician's license. Doing so will at least ensure that a physician's livelihood hangs in the balance for as little time as possible, and, especially when SOAH finds that suspension was unwarranted, will allow a physician to more quickly return to treating patients.¹⁷
- **The Need for Additional Administrative Rule Changes:** The above suggestions do not represent an exhaustive list of improvements the board should make to its disciplinary process, and TMA does not expect the legislature to be able to address everything. TMA recognizes that the legislature should not have to create statute for every administrative detail that would ensure a fair process. But the legislature could require the board to work out those administrative details in an open and transparent process, even before the formal rulemaking publication, to ensure that licensees and the public alike have their concerns heard.

State law actually already requires the board to adopt guidelines for receiving input during the rulemaking process, which guidelines must provide an opportunity for interested parties to provide input before the board provides notice of proposed rules.¹⁸ But the validity of a rule may not be challenged if the board does not comply with this requirement, significantly weakening this enforceability of this provision.

While the board is generally responsive to requests to hold a stakeholder meeting before proposing rules, TMA has recently encountered some difficulties with this process. In response to proposed rules—before which there was no stakeholder input process—that would have solidified in rule some potentially unfair practices relating to the informal settlement conferences,¹⁹ TMA submitted a comment in strong opposition, requesting that the rules be withdrawn and that the board convene a stakeholder's meeting to discuss ways in which the board could improve the informal meeting process. While the board did not (as of the date of this letter) adopt the proposed rules, it also has not sought input from stakeholders on the process.

TMA intends to continue to work with the medical board to improve its processes, but firmer and clearer legislative direction to involve stakeholders would make the process easier.

¹⁷ The legislature has already recognized the need for expedited SOAH hearings in certain situations. Most analogously, the legislature requires an expedited SOAH hearing after an assisted living facility has its license suspended. *See* Tex. Health & Safety Code §247.042(e). *See also* Tex. Govt. Code §2003.103 (requiring SOAH to expedite hearings upon the comptroller's request).

¹⁸ Tex. Occ. Code §153.0015.

¹⁹ *See* 41 Tex.Reg. 4765.

III. Conclusion

TMA again expresses its appreciation of the Sunset staff and its diligence in preparing ways to improve the Texas Medical Board. TMA also appreciates the opportunity to provide the above comments. TMA strongly recommends that the Sunset staff modify its recommendations to incorporate TMA's above suggestions.

TMA representative are also available to answer any questions or further discuss the suggestions outlined above. If this is desired, please contact Jared Livingston, Assistant General Counsel, at (512) 370-1345 or by email at jared.livingston@texmed.org.

Sincerely,



Donald P. "Rocky" Wilcox
Vice President and General Counsel



Jared Livingston
Assistant General Counsel