

From: [Sunset Advisory Commission](#)
To: [Janet Wood](#)
Subject: FW: Public Input Form for Agencies Under Review (Public/After Publication)
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From: sundrupal@capitol.local [<mailto:sundrupal@capitol.local>]
Sent: Wednesday, December 14, 2016 10:59 AM
To: Sunset Advisory Commission
Subject: Public Input Form for Agencies Under Review (Public/After Publication)

Agency: TEXAS MEDICAL BOARD

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Your Comments About the Staff Report, Including Recommendations Supported or
Opposed:
December 14, 2016

Texas Sunset Commission/ Texas Medical Board P. O. Box 13066 Austin, TX 78711

Dear Chairman Gonzales, Committee, and Members,

I observed the hearing last Friday (12/9) regarding reauthorizing the Texas Medical Board. I am an attorney in private practice representing physicians before the TMB.

There is a crisis here, where before a 9 a.m. hearing, you have 120 citizens willing to be away from their work or families to sit here all day to make sure you hear their experiences. I heard something like twenty lyme patients tell you that, despite the reform bill passed in 2011, physicians are still not willing or able to diagnose or treat lyme patients. There seems to be a crisis in confidence over this Board, extending from the regulated physicians to the citizens who are supposed to be protected.

Your reviewer who began the meeting on Friday said, as evidence that the Board must be functioning properly that two mutually exclusive conditions were present: that the Board was failing to prosecute some physicians who they should have, and that the Board was over-prosecuting other physicians who they should not be. I would posit that this is the very same description of a Board that is dysfunctional and not working properly.

Not all, but a significant part of my practice is defending physicians who practice alternative medicine/CAM. What I have seen over the years of my practice is that these physicians get short shrift from the Board.

For example, I have yet to see or hear of the Board using any experts who practice alternative/CAM, or are

particularly familiar with TX Occ. Code Chapter 200 providing for CAM practice of medicine. That means that these doctors do not get judged by their peers. If they sign an agreed order to prevent the expense of fighting at SOAH, there is a good chance they will have someone monitoring their practice who really has no idea how they practice medicine-no practice monitors seem to be CAM either. This effectively undoes the protections in Chapter 200 when a physician who does not know Chapter 200 gets to tell them how to practice medicine. The statute does say that the Board is to choose experts who practice in same or similar fields, but that does not happen for CAM physicians.

There are other instances of failure of due process, not all are confined to CAM physicians. The use of the reports of experts hired by the Board is an instance that affects all physicians. The statute says that the Board will turn over the expert reports, even at the preliminary ISC level. This does not happen. The Board cuts and pastes freely from the experts and the Respondent has no way to know what the expert said or what context they said it in.

As others have mentioned, I also have had the experience of lining up multiple experts for the ISC, only to have their testimony completely disregarded. This is a significant waste of resources both in the expert's time and the with issues not being decided at the ISC, leading to increased expense for the State and for the individual physician. I have considered and like the idea of the "Indiana plan" I heard some talk about. One expert chosen by the Board, one by the Respondent, and the third chosen by those two.

Representative Zedler mentioned an issue I feel is very important. Over the last years litigating these issues, I've come to believe that when SOAH was established, many of the statutes explicitly labelled "due process" were effectively dropped, though they are still there in black and white. The jurisdiction of those statutes was not transferred to SOAH, and no one seems to be able to enforce them now. With the result that statutes that say "this shall happen before prosecution" cannot ever be enforced because the SOAH judge has no ability to look at what happened before a complaint is brought by the agency. It is highly frustrating to hear about how the physicians can get "due process" later so we do not need to worry about it. You heard about the expense of getting to a SOAH hearing. They cannot be sure that anyone at the ISC will pay any attention to the experts they bring at that level.

Now, for the more difficult part: solutions! For some of these problems, transparency is a good and needed start.

I know this is a tough one, but there are good arguments for making the complaints available to the physician. Anything less is derivative. Showing the physician the complaint can lead to the physician having a much better understanding of what the problem actually is, and how to fix it.

Making the Board experts identify themselves should be an easier argument.

Any experts the Respondent uses must be named, and that comes at a personal risk for any physician with a Texas license. So the Board's argument that they could not get experts to work if their identities were exposed doesn't really hold water.

Making the Board expert reports actually available to the Respondent, as written by the expert in complete. Again, if the Respondent actually knew who and what was being said about their practice of medicine, instead of so much being hidden, real peer to peer feedback might be of more value. In any case, it's much closer to being fair.

Having at least one member of the Board, and maybe more, be CAM practitioners, would go a long way to resolving some of these issues.

The lack of apparent jurisdiction over some due process statutes is a bit trickier, but vital to resolving. One solution, as Representative Zedler described, might be to give the SOAH judge more discretion to look at whether the conditions for prosecution were met before proceeding to a prosecution.

Another would be a re-write of those statutes to clarify them.

Wrapping up, I will say that in the years I have practiced licensure defense, the process has seemed to become more adversarial, unnecessarily and to no one's obvious benefit. My clients tell me this as well, and they ascribe it to having a lawyer as executive director of an agency regulating physicians. I think this is a pretty unusual circumstance, and while I think that the interim executive director/general counsel is a fine lawyer, I think the Board would be better suited to regulating physicians with a physician at the helm. While the statute allows for a non-physician to be the executive director so long as a medical director is hired, no one I have spoken with thinks this is an effective or acceptable substitute for having a physician executive director.

Thank you for the opportunity to give testimony, and thank you for your time and attention to these matters. If I can be of any assistance, please feel free to contact me.

Yours truly,

/s/

Laurie L. York, Esq.

Any Alternative or New Recommendations on This Agency: Included above.

My Comment Will Be Made Public: I agree