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.

**LEGISLATIVE REQUESTS:**

1. **MODIFY TX Occ. Cod. Sec. 164.009. JUDICIAL REVIEW TO INCLUDE TRIAL DE NOVO:**  
   **PROBLEM:** A frequent 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. 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.

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.

|  |  |  |  |
| --- | --- | --- | --- |
| Year | SOAH  Conducted | SOAHs  Dismissed | Percent  Dismissed |
| 2003-2006 | 110 | 78 | 71% |
| 2007-2010 | 341 | 4 | 1% |
| 2007-2016 | 843 | 9 | 1% |

**REQUEST**: 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.   
  
**Statute Change Request:**

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.*

1. **ESTABLISH OFFICE OF OMBUDSMAN.**

**PROBLEM:** Currently there is no oversight of the board by an Ombudsman like other state agencies are afforded. There is no avenue for assistance or complaints other than the Texas Legislature that only meets every two years. The 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.**

**REQUEST:** Establish a new office of an Ombudsman to provide oversight over the TMB.

1. **TRANSITION 190.8 VIOLATION GUIDELINES FROM RULES TO STATUTE**
2. **PROBLEM:** 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.   
     
   Many physicians have reported their suspicion that complaints originate from their competitors especially for complaints that are not due to patient harm. These include TX [190.8 Violation Guidelines](http://txrules.elaws.us/rule/title22_chapter190_sec.190.8),
   1. (A) failure to treat a patient according to the generally accepted standard of care;
      1. **Statute request:**  
         failure to treat a patient according to the generally accepted standard of care *without patient informed consent.*
   2. (I) using false, misleading, or deceptive advertising;
      1. **Statute request:**

using false, misleading, or deceptive advertising *by presenting information that is not substantiated by medical research*.

1. **MODIFY PATIENT CONFIDENTIALITY DEFINITION  
    *22 Texas Admin Code Rule §178.4(d) Patient Confidentiality***

[*http://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p\_dir=&p\_rloc=&p\_tloc=&p\_ploc=&pg=1&p\_tac=&ti=22&pt=9&ch=178&rl=4*](http://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=22&pt=9&ch=178&rl=4)

1. **PROBLEM:** According to open records request, the oversight of the TMB is under the authority of the Legislature. However due to patient confidentiality statute, the Legislators are not eligible to review complaints against physicians. How can oversight be provided when access is prohibited?

**Statute Request:**

The identity of a complainant, as well as the complaint itself, is part of the **investigative information**\* gathered by board employees and shall remain confidential,*when submitted by a confidential complainant who is the patient who is the subject of complaint, or the patient’s immediate family member, or guardian or by a health care worker directly involved with the patient’s care.*All complaints must provide sufficient information to identify the source or the name of the person who filed the complaint. Confidentiality shall be waived only by a written statement of the complainant specifically waiving confidentiality or by the complainant testifying in a contested case hearing *or by written request from a member of the Texas Legislature*. *Any member of the Texas Legislature is granted investigative privilege to access complaint information with written request submitted to the medical board.*~~Notwithstanding the previous provisions,~~  The name ~~and address~~ of *the* *non-confidential complainant* ~~an insurance agent insurer, pharmaceutical company~~*~~or third-party administrator~~*that files a complaint against a physician*and the complaint itself*shall be reported to the subject physician within 15 days of receipt by the board, unless the notice would jeopardize an investigation.*Staff request to withhold complainant or complaint information to a physician requires physician notification of intent to withhold complaint information and date when staff will seek board approval to withhold confidential information.*

\*The Investigative Information records are scanned and kept forever.   
Below is from a court transcript quoting TMB’s Medical Director, Dr. Bredt   
Q. Okay. And what is the records retention policy with respect to investigative files involving licensed

physicians?

A. Investigative files, as well as agreed board orders, it's forever.

The above legislative and rule change requests are a start to provide for procedural due process 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 due process protections that restore the constitutional rights to physicians and their patients.

Sincerely,

Sheila Hemphill, CEO