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August 28, 2012

Office of Governor Rick Perry
P.O. Box 12428
Austin, TX 78711-2428

Dear Governor Perry,

Before responding to each of the allegations in the Texas Medical Board's letter addressed to you last week, in response to Public Citizen's August 22, 2012' letter and report, we first note that it is astounding that nowhere does the Board's letter acknowledge its staff's own evidence of a lack of funding (two-thirds of Board revenue from doctors' licensing fees are taken away from the Board)¹ and, subsequently, the lack of staff resources to adequately keep up with the significantly increased volume of complaints to the Board. In Texas Medical Board documents, as noted in our report, and in emails to Public Citizen, Board staff noted that the lack of resources has impacted their ability to do timely investigations and enforcement.

Below are our specific responses to the Texas Medical Board's letter

1. Adequate Discipline by the Texas Medical Board

For more than 20 years, Public Citizen has annually ranked state medical boards on the basis of the rate of serious disciplinary actions (revocation, suspension, surrender, or probation) taken per 1,000 licensed physicians in that state. We do not include in this rate nonserious actions (slaps on the wrist such as fines and reprimands) because our previous analyses have shown that most of the offenses committed by doctors who receive these nonserious disciplinary actions are, in fact, serious offenses that clearly merit serious disciplinary actions. The Texas Medical Board, boasts that it ranks among the top five states in 2010 and 2011 (if you also include these nonserious actions), but it ranks 34th and 30th if only serious actions are included. As Public Citizen has found, the Board is, de facto, admitting that the only way Texas ranks well among medical boards is by including these less stringent disciplinary actions.

2. Physicians with Clinical Privilege Sanctions by Hospitals

The Board's August 22 letter to you states, "Public Citizen Reports that 438 Texas Physicians over almost two decades (Sept. 1990 – Dec. 2009) have one or more clinical privilege actions reported by a hospital to the National Practitioner Data Bank" (NPDB) but no medical board action.

¹ Texas Medical Board: Agency Strategic Plan, Fiscal Years 2013-2017. Austin, TX: Texas Medical Board; p. 15. http://www.tmb.state.tx.us/TMB_Strategic_Plan_2013-2017.pdf.

Rather than responding to our August 22, 2012, report and letter to Governor Perry, the Board response mistakenly refers to our earlier March 14, 2011, letter to Executive Director Mari Robinson (see attachment) in which we asked the Texas Medical Board to look into the then such 438 cases. The Board never adequately responded to our March 14, 2011, request. However, in a March 22, 2012, email to Public Citizen, the Medical Board advised us that it could not respond to the March 14, 2011, letter because of the “lack of resources ... which is continuously the case for us at any given time.”

Because of this lack of an adequate Texas Medical Board response to our March 14, 2011, letter, Public Citizen decided to initiate the investigation that led to the August 22, 2012, follow-up report and letter to you. This most recent report contained additional, up-to-date data in which we identified a total of 459 physicians with clinical privilege sanctions but no Board action. The time period covered was an additional two years, from September 1990 through December 2011.

As we acknowledged in our report, in December 2010, the Texas Medical Board obtained, on its own initiative, a list of 147 Texas physicians from the NPDB. These Texas physicians all apparently had clinical privilege reports in the NPDB. The Board has reported that it had received clinical privilege reports from hospitals on only 60 of these doctors. According to the Board letter to the governor, “87 reports had never been received. ... Since the Texas Medical Board is a complaint-driven entity, it would not be able to take action unless a report has been sent by a hospital.” This statement is disingenuous, misleading, and conflicts with what the Board told Public Citizen in a March 22, 2012, email, because basic oversight responsibility would clearly include getting to the bottom of why the Board did not receive reports from hospitals on these 87 sanctioned physicians and following up on the reports once it got them more than a year ago. As mentioned above, in its March 22, 2012, email to Public Citizen, the Board stated that it did not have the resources to do a review to answer why it had not received the 87 reports.

The Board argues that not all clinical privilege actions necessarily result in an enforcement action. While we agree with this point, it defies logic and the public interest that the Board had not taken any action on any of the 641 clinical privilege reports associated with these 459 physicians. As noted in our report and letter to Governor Perry, the reasons for the 641 clinical privilege sanctions included cases where physicians were considered an immediate threat to the health or safety of patients, incompetent, negligent, delivering substandard care, or impaired by alcohol or substance abuse. Thirty-four of the physicians had their clinical privileges suspended on a summary/emergency basis. One physician had a clinical privilege sanction and 22 medical malpractice payouts, and was expelled from a professional medical society. This doctor, as well as all of the other 458 physicians in our study, had never been disciplined by the Board, as of December 31, 2011.

3. Texas Medical Board Enforcement Resources (Backlog Issue)

The Texas Medical Board accuses Public Citizen of implying that because of funding and staff shortages, the Board has a backlog of cases, which we define to include cases unresolved. What we noted was the fact that, through August 31, 2011, unresolved cases went back as far as 2007, 2006, and 2005 and that the Board has resolved only about one-third of documented cases in a six-month time period for the past several years. We should also point out that the 2009 Sunset Advisory Commission report indicated that the Board was taking, on average, 270 days to resolve complaints against physicians², indicating

² http://www.sunset.state.tx.us/81streports/tmb/tmb_sr.pdf, page 15

that many were unresolved by one year, the limit after which the board must report unresolved cases to the state legislature.³

Furthermore, the Board fails to mention its assessment that “[t]he continued growth in complaints filed makes it impossible for enforcement staff to meet statutory deadlines for case closure.”⁴

In summary, the Board’s misleading response to our report is yet another reason why the second recommendation in our letter to you last week needs to be implemented:

2. Appoint an independent medical board enforcement monitor, similar to that used to address problems involving the Medical Board of California’s performance. The monitor would be charged with evaluating the disciplinary system and procedures of the board’s enforcement program and ensuring that disciplinary actions and consent orders are commensurate with violations of the Texas Medical Practice Act. In addition, the monitor would oversee investigation caseloads to ensure that investigations lasting for long periods of time do not compromise the safety of Texas patients.

Sincerely,

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³ Senate Bill 104, passed by the legislature in 2003.

⁴ Texas Medical Board: Agency Strategic Plan, Fiscal Years 2011- 2015. Austin, TX: Texas Medical Board; p. 24.