



MEMORANDUM

DATE: April 22, 2016

TO: Texas Sunset Advisory Commission

FROM: Dr Craig S. Armstrong, President

SUBJECT: Comments: Texas Sunset Advisory Commission, Staff Report, Texas State Board of Dental Examiners

Introduction

The Texas Dental Association (TDA) is a professional association representing more than 9,000 dentists who are committed to delivering quality, comprehensive oral health services to all Texans.

The TDA appreciates the opportunity to comment on the Texas Sunset Advisory Commission's "Staff Report" on the Texas State Board of Dental Examiners (TSBDE).

Sunset Staff Report Issues and Recommendations

Issue 1: *The Unusually Large Dental Board Inappropriately Focuses on Issues Unrelated to Its Public Safety Mission.*

Recommendation 1.1

Reduce the size of the board from 15 to 9 members and adjust its composition to consist of 4 dentists, 2 dental hygienists, and 3 public members.

TDA Response to 1.1: The TDA has concerns about recommendation 1.1. Although the dental board continues to make improvements in meeting its mission to

Regardless of the board's size, a dentist majority must be maintained. The best example of this need concerns informal settlement conferences (ISCs)—a valuable case resolution tool enabling the legal division, licensees, and board to work together to achieve a mutually agreeable case resolution. According to the TSBDE's "Self-Evaluation Report," the agency tries to dedicate at least 16 days each year to ISCs permitting the movement of approximately 128 cases annually.¹ Settlement conferences

involve dental care issues requiring the attendance of dentist board members to answer dental questions and provide expertise.² Although the TSBDE's dental review panel performs initial technical complaint reviews to identify possible standard of care violations,³ reducing the number of dentists on the board could jeopardize the availability of dentist board members needed to preside at ISCs, possibly resulting in more contested cases going to the State Office of Administrative Hearings at increased expense for state taxpayers and the licensees. The TDA has long supported the creation and utilization of the dental review panel as part of the investigation process, but their work should not be comingled with the enforcement responsibilities of the board itself.

1. Texas State Board of Dental Examiners, Self-Evaluation Report, September 2015.
2. 22 Texas Administrative Code §107.63 (c, 1-10).
3. House Bill 3201, 83rd Texas Legislature, Regular Session, 2013.

Recommendation 1.2

Allow the board's statutory advisory groups to expire and direct the board to establish clearer processes for stakeholder input in rule.

TDA Response to 1.2: The TDA supports recommendation 1.2.

There are currently many opportunities, and the agency continues to enhance opportunities, for stakeholders to give the board input. Additionally, specially convened stakeholder workgroups can provide subject matter expertise to the board on an as-needed basis (eg, Anesthesia Workgroup). Continued improvements in processes for stakeholder input will strengthen the agency's responsiveness to stakeholder concerns.

Existing dental board rules allow the board to appoint committees of various stakeholders to advise the board about contemplated rulemaking.⁴

4. 22 Texas Administrative Code §107.60(e).

Recommendation 1.3

Clarify the use and role of board members at informal settlement conferences.

TDA Response to 1.3: The TDA is neutral on recommendation 1.3, and requests modification.

Clearly explaining in statute and rule the duties and responsibilities of board members pursuant to ISCs will better allocate agency resources toward its core public safety mission.

However, the TDA does request clarification of the sunset staff's recommendation to revise board rule to require all board members, including dental hygienists and public members, to preside at ISCs on a rotating basis with the dental director and staff hygienists providing dental and dental hygiene expertise as needed. The dental director has specific investigatory agency responsibilities that should not cross over into ISC complaint resolution in order to protect the integrity of the settlement process. The same can be said for staff hygienists. Although public members bring valuable insight as to the needs and expectations Texas' health care consumers, they do not have the dental expertise to preside at ISCs. Due to the complexities of complaints, it is necessary for dentist members of the board to preside at every ISC.

Issue 2: *State Regulation of Dental Assistants Is Unnecessary to Ensure Public Protection and Is an Inefficient Use of Resources.*

Recommendation 2.1

Discontinue the board's dental assistant certificate programs.

TDA Response to 2.1: The TDA supports recommendation 2.1 with modification.

The TDA agrees with the sunset staff's recommendation to remove the board's formal regulatory responsibility of dental assistants by eliminating the TSBDE's dental assistant certification programs. However, the TDA requests modification of the sunset staff's recommendation to preserve the existing foundational education requirements and continuing education requirements for dental assistants in both statute and rule.

It is undisputed that all procedures performed by dental assistants in Texas must be delegated by a dentist and capable of being reversed,⁵ and the delegating dentist is responsible for all dental acts performed by their dental assistant.⁶ The delegating dentist has the legal responsibility for the dental assistant, but that does not negate the dental board's core responsibility to protect public health and safety, and "promote high quality and safe dental care."⁷

Dentists and dental hygienists can perform the same duties as dental assistants: 1) taking x-rays; 2) applying pit and fissure sealants; 3) monitoring nitrous oxide (dentists may administer nitrous oxide), and 4) performing coronal polishing. However, Texas regulations require dentists and dental hygienists to first complete a formal education program accredited by the Commission on Dental Accreditation (CODA)—"the specialized accrediting agency recognized by the United States Department of Education to accredit programs providing basic preparation for licensure or certification in dentistry and the related disciplines."⁸

Additionally, dental hygienists monitoring nitrous oxide must complete a board-approved course and receive a nitrous oxide monitoring certificate issued by the TSBDE.⁹ Yet, the sunset staff recommendation would allow dental assistants to perform those same procedures without any formal education or training. This creates a lesser professional standard for dental assistants.

The preceding sunset review found that dental assistants not only play a "significant role in infection control activities in the dental office," but provide certain direct care to patients.⁸ The fact of assistants' varied education and training confirms the need for baseline education requirements to remain in statute in rule to reinforce that assistants are adequately trained and fully aware of the "legal limitations of their job."¹⁰

5. Texas Occupations Code, §265.0001(2)(C); 22 Texas Administrative Code §114.1.
6. Texas Occupations Code, §258.003.
7. Texas State Board of Dental Examiners, Agency Strategic Plan Fiscal Years 2015-2019.
8. Commission on Dental Accreditation, <http://www.ada.org/en/coda>.
9. 22 Texas Administrative Code, §115.2(a)(7).
10. Texas Sunset Advisory Commission, Staff Report, February 2002.

Issue 3: The Board Lacks Key Enforcement Tools to Ensure Dentists are Prepared to Respond to Increasing Anesthesia Concerns.

Recommendation 3.1

Authorize the board to conduct inspections of dentists administering parenteral anesthesia in office settings.

TDA Response to 3.1: The TDA supports recommendation 3.1 with clarification.

The administration of anesthesia and sedation are essential to the practice of dentistry and should only be executed by appropriately educated and trained dentists. The TDA's foremost concern is patient safety.

Therefore, it is in the best interest of the public's health and safety for the TSBDE to have clear statutory authority over dentists administering sedation/general anesthesia, including the ability to conduct inspections of dentists using parenteral anesthesia in dental offices, licensed hospitals, ambulatory surgical centers (ASCs), and other facilities.¹⁰ This inspection authority should include pre-permit, random, routine and compliance inspections.

Furthermore, clarification is needed as to the inspection parameters used by the Department of State Health Services and private accrediting bodies pursuant to ASCs and hospitals. For example, is the dentist permit holder's anesthesia record subject to review, or is it simply a facility inspection? Does the hospital or ASC share permit holders' anesthesia records and patient records with the dental board? If the board is going to retain "all existing authority over dentists in those settings,"¹⁰ the parameters need to be elucidated. As spotlighted by recent media coverage, anesthesia complications can occur. The dental board must have full and complete access to every dentist licensee's patient records and sedation/general anesthesia records, regardless of where the services are delivered.

Texas' dental regulations for anesthesia/sedation are based upon the clinical, scientific, and evidenced-based *Guidelines for the Use of Sedation and General Anesthesia by Dentists* and *Guidelines for Teaching Pain Control and Sedation to Dentists and Dental Students* developed by the American Dental Association (ADA). Any refinements to the dental board's statutory and regulatory authority in this area should continue to be directed by experts within the dental community including, but not limited to, the ADA, the TDA, the American Dental Education Association, the American Association of Dental Boards, and dental specialty organizations.

Recommendation 3.2

Direct the board to revise rules to ensure dentists with one or more anesthesia permits maintain related written emergency management plans.

TDA Response to 3.2: The TDA supports recommendation 3.2.

Requiring written emergency action plans will assist dentist anesthesia permit holders with "thoughtful planning and readiness for the unexpected."¹¹ Emergency management protocols for anesthesia/sedation permit holders already exist in dental board rule.¹² Requiring written emergency plans is reasonable and reinforces the agency's ability to increase oversight of anesthesia/sedation services to ensure the patients of Texas are protected. Again, the TDA's foremost concern is patient safety.

11. Texas Sunset Advisory Commission, Staff Report, April 2016.
12. 22 Texas Administrative Code, Chapter 110.

Issue 4: *Key Elements of the State Board of Dental Examiners' Licensing and Regulatory Functions Do Not Conform to Common Licensing Standards.*

Recommendation 4.1

Require the board to monitor licensees for adverse licensure actions.

TDA Response to 4.1: The TDA supports recommendation 4.1.

The objective of the TSBDE's licensing program is to license qualified and competent persons to practice dentistry and dental hygiene in Texas.¹³ Starting January 1, 2016, all new dentist license and permit applicants must submit to the agency self-query results from the National Practitioner Data Bank and the American Association of Dental Boards as part of the initial licensure and permit process.¹⁴ This is a positive first step, but the agency needs to be more proactive in its communications with the National Practitioners' Databank to ensure potential dentist licensees are free from disciplinary actions in other states. Potentially dangerous licensees should not be able to utilize mobility as a means to avoid disciplinary action in order to practice in Texas.

13. Texas Sunset Advisory Commission, Staff Report, April 2016.
14. Texas State Board of Dental Examiners, tsbde.texas.gov.

Recommendation 4.2

Authorize the board to deny applications to renew a license if an applicant is not compliant with a board order.

TDA Response to 4.2: The TDA supports recommendation 4.2.

On-going monitoring of a licensee's compliance with dental board action is critical to ensure that the action serves its intended purpose and the public is protected. Almost all cases resolved by public board action require the TSBDE's compliance monitoring. In state fiscal year 2015 alone, the dental board resolved 254 cases with public action—the majority of which required compliance monitoring. This is in addition to board actions from past years that still require ongoing compliance.¹⁵

With existing resources stressed, the TSBDE needs to improve the compliance division's ability to effectively monitor on-going compliance of disciplined licensees/registrants with their respective board orders. Authorizing the TSBDE to deny renewal applications for failure to comply with board orders, will improve the dental board's ability to protect health and safety of the public by ensuring that board actions are meaningful and consistently enforced.

15. Texas State Board of Dental Examiners, Self-Evaluation Report, September 2015.

Recommendation 4.3

Authorize the board to require evaluations of licensees suspected of being impaired and require confidentiality for information relating to the evaluation and participation in treatment programs.

TDA Response to 4.3: The TDA supports recommendation 4.3.

Pursuant to Subsection 467.004 of the Texas Health and Safety Code, the TSBDE contracts with the Professional Recovery Network (PRN) to provide peer assistance services to licensees who may be impaired by substance abuse/dependence or mental illness.

The board should have the statutory authority to require evaluation of a licensee by a PRN-approved evaluator in order to determine whether or not the licensee is safe to practice dentistry. PRN offers a means of recovery without the loss of a license by providing access to appropriate intervention programs and treatment services. Being able to require the evaluation before a patient complaint occurs protects the public and affords an opportunity to rehabilitate the licensee.

The TDA agrees with the sunset staff recommendation that, “any information related to participation in a peer assistance program, including the results of an evaluation, be confidential.”¹⁶

16. Texas Sunset Advisory Commission, Staff Report, April 2016.

Recommendation 4.4

Remove unnecessary qualifications required of applicants for licensure or registration.

TDA Response to 4.4: The TDA supports recommendation 4.4.

The dental board’s ability to continue efficiently issuing original licenses and registrations, ensuring that the applicants have met all required qualifications in statute and rule, must remain an ongoing area of agency improvement as more individuals apply for licensure and registration with the dental board each year.

Requiring applicants to be of good moral character¹⁷– necessitating the board to review an applicants’ criminal history – is crucial to identifying applicants that may pose an unacceptable risk to the public health, safety and welfare and is a necessary qualification for applicants for licensure or registration.

17. Texas Occupations Code, §§256.002(a)(2) and 256.053(a)(2).

Recommendation 4.5

Direct the board to make data on the board’s enforcement activity information publicly available on its website.

TDA Response to 4.5: The TDA supports recommendation 4.5.

While the dental board’s updated website does make it easier for licensees, complainants and the citizens of Texas to access publicly available information about the TSBDE’s enforcement activities, additional improvement in this area needs to occur to ensure transparency and accountability. Centrally locating this already public information in an organized manner on the agency’s website will reinforce the agency’s answerability to itself, policymakers, staff, and stakeholders.

Recommendation 4.6

Direct the board to stagger registration and certificate renewals.

TDA Response to 4.6: The TDA supports recommendation 4.6.

Staggering renewals for dental laboratories, mobile dental facilities, and portable dental units is an efficient use of agency staff and fiscal resources while also creating consistency in agency operations.

Issue 5: *A Continuing Need Exists for the State Board of Dental Examiners.*

Recommendation 5.1

Continue the State Board of Dental Examiners for 12 years.

TDA Response to 5.1: The TDA supports recommendation 5.1.

Since its creation in 1897, the TSBDE has safeguarded public health and safety by regulating dental care in Texas. As stated in the sunset staff report, “Regulating the practice of dentistry and supporting functions continues to support the state’s interest in protecting the public. Alternative organizational structures, including the transfer of regulatory programs to other agencies, offer no substantiated benefit at this time. Continuing the board in its current form will provide an independent agency responsible for ensuring quality, safe dental care.”¹⁸

18. Texas Sunset Advisory Commission, Staff Report, April 2016.

Recommendation 5.2

Update the standard Sunset across-the-board provision regarding conflicts of interest.

TDA Response to 5.2: The TDA supports recommendation 5.2.

“Good government” standards ensure open and responsive state government.¹⁹ Conflict of interest provisions already exist in statute prohibiting individuals affiliated with non-profit Texas trade associations from serving on the dental board or as an executive level agency employee. Requiring the same statutory prohibition for those affiliated with for-profit associations supports the good government standards expected in Texas.

19. Texas Sunset Advisory Commission, Staff Report, April 2016.