

STATE BAR OF TEXAS

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May 13, 2016

Ken Levine, Director
Sunset Advisory Commission
P.O. Box 13066
Austin, TX 78711-3066

Dear Mr. Levine:

On behalf of the State Bar of Texas, enclosed, please find our response to the Sunset Advisory Commission's Staff Report. We appreciate the opportunity to comment on the staff report and look forward to continuing to work with you, your staff and the Commission.

Special thanks to Katharine Teleki, Sean Shurtleff, Amy Tripp and Kay Hrick for their thorough efforts in examining the State Bar of Texas.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Michelle Hunter". The signature is written in a cursive, flowing style.

Michelle Hunter
Executive Director



RESPONSE
to the
SUNSET ADVISORY
COMMISSION'S
STAFF REPORT

MAY 13, 2016

ISSUE 1

The Rulemaking Process at the State Bar Obstructs Changes Needed to Effectively Regulate Attorneys.

Recommendations

Change in Statute

- 1.1 Repeal requirements for a referendum of State Bar members to approve changes to rules and membership dues, clarifying the Supreme Court's inherent authority to oversee attorney discipline and administration of the State Bar.**
- 1.2 Require the Supreme Court to develop a standard rulemaking process for the State Bar ensuring ample opportunity for State Bar members and other stakeholders to vet changes to attorney regulation rules or membership dues.**

(Combined response for recommendations 1.1 and 1.2):

The State Bar of Texas (SBOT) understands the concern that the existing process – which has not permitted any meaningful updates to the Rules in two decades and is shared with only one other (5,000-member) state bar – may be ill-suited to the rapidly evolving practice of law and to our almost 100,000-member organization's duty to protect the public and provide sound ethical guidance to our lawyers. While we agree that an alternative process may have benefits, we believe that the referendum requirement should be repealed **only** if: (1) the process is transparent and provides members of the State Bar ample opportunity for input into the development of rules changes, with the ability to review and comment on proposed rules and to request hearings, and (2) the existing steps in the rulemaking process are preserved (including State Bar committees developing rule proposals and the requirement of State Bar Board approval of proposed rules for consideration by the Supreme Court), up to the point of but excluding the full membership vote. Members of the State Bar are themselves the best informed resource regarding the complexities of the law and the regulatory measures that should be implemented to guide attorneys and protect the public.

Management Action

- 1.3 The State Bar should develop a consistent process for collecting membership input on proposed rule changes to inform Supreme Court rulemaking.**

In connection with past referenda, the SBOT has conducted extensive public education campaigns to inform lawyers about rule proposals—through bar journal articles, special publications, and presentations at local bar meetings and continuing legal education courses. We agree that the process could be expanded to also collect membership feedback and input, both

electronically and in person, to ensure that attorney members are able to provide meaningful input into the rulemaking process.

ISSUE 2

Texas' Attorney Discipline System Lacks Best Practices Needed to Ensure Fair, Effective Regulation to Protect the Public.

Recommendations

Change in Statute

2.1 For new and recently licensed attorneys, authorize the State Bar to access criminal background information obtained by the Board of Law Examiners during initial licensure.

The SBOT agrees it would be beneficial to access criminal background information already obtained by the Board of Law Examiners. Continued access to fingerprint-based criminal history information would serve as an additional and systematic monitoring tool for relevant criminal activity warranting disciplinary action.

2.2 For currently licensed attorneys without information on file with the Board of Law Examiners, require the State Bar to obtain new fingerprint-based criminal background checks, phased in over a two-year period.

The SBOT agrees that access to fingerprint-based criminal history information would serve as an additional monitoring tool. While a two-year implementation timeline seems reasonable, it could be problematic for certain attorneys—those licensed in Texas but residing out of state, or attorneys on active duty in the military, for example. The phase-in period should be long enough to ensure that the SBOT is able to develop a simple and efficient process for collection of fingerprints that minimizes logistical burdens for members who are practicing all around the state, especially in rural areas.

2.3 Require licensed attorneys to report criminal activity and discipline imposed by other jurisdictions to the Office of the Chief Disciplinary Counsel.

The SBOT agrees with the recommendation to require licensed attorneys to self-report criminal activity and discipline imposed by other jurisdictions in a method determined by the Supreme Court to be most efficient and effective. These self-reporting requirements will provide additional monitoring tools in determining whether disciplinary action is warranted. We will work with other stakeholders in the disciplinary system to develop appropriate rules and guidelines.

2.4 Require overdraft notifications for attorney trust accounts so that the chief disciplinary counsel has an early warning system for possible unethical conduct.

The SBOT agrees with the recommendation and acknowledges that Texas is one of four states that has not implemented the American Bar Association's recommendation to institute attorney trust fund overdraft notification. The dishonor of drafts for insufficient funds can be an "early warning" that a lawyer is improperly using client funds or it may indicate a lack of sound management practices. An overdraft notification process would allow the Office of Chief Disciplinary Counsel (CDC) to pursue discipline before clients were significantly harmed, and also to identify lawyers in need of education regarding proper trust account practices without the need for formal disciplinary action.

2.5 Reinstate the chief disciplinary counsel's subpoena power during the investigative phase of the attorney discipline process.

The SBOT agrees that reinstating subpoena power during the investigative phase of the discipline process would allow the CDC to better evaluate the merits of many complaints and increase efficiency. Currently, the CDC is unable to obtain important documents and records, such as bank records or phone logs, while investigating complaints to determine whether enough evidence exists to believe professional misconduct has occurred. A case must proceed to the actual litigation stage, where formal discovery is permitted, in order to obtain relevant records. Providing the CDC the authority to subpoena relevant records during the investigation stage would allow cases lacking merit to be disposed of earlier, promote meaningful cooperation, and provide an opportunity to resolve meritorious cases short of litigation.

2.6 Require a process and criteria for conducting investigatory hearings to attempt earlier resolution for certain cases.

The SBOT agrees with the recommendation to create meaningful opportunity for earlier resolution of certain disciplinary cases. We will work with other stakeholders in the disciplinary system to develop appropriate rules and guidelines.

2.7 Require a reevaluation and adjustment of timeframes governing the grievance process to ensure workability.

The SBOT agrees that timeframes currently included in the Texas Rules of Disciplinary Procedure may need to be reevaluated and adjusted as the result of other modifications to the Rules that may result from the Sunset Commission review. We will work with other stakeholders in the disciplinary system to develop any rules that are needed to ensure a workable and efficient process.

2.8 Clearly establish the Grievance Referral Program in rule, and expand its use to any point in the attorney discipline process.

The SBOT agrees with the recommendation. The criteria for participation in the Grievance Referral Program already exist in State Bar Board Policy and the inclusion of the criteria in the Rules would solidify the use of the program. We will work with the other stakeholders in the disciplinary system to develop additional rules and guidelines for inclusion of the Grievance Referral Program at other stages in the process.

2.9 Require comprehensive sanction guidelines in the Texas Rules of Disciplinary Procedure.

The SBOT agrees with the recommendation regarding further sanction guidelines. The Texas Rules of Disciplinary Procedure currently provide general sanction guidelines (TRDP 2.18; 3.10) and restrictions on the imposition of certain sanctions (TRDP 15.11). Additional guidelines that maintain the grievance committee and district court discretion in considering the specific facts of each case can assist the tribunals in making consistent decisions. We will work with other stakeholders in the disciplinary system to develop these guidelines.

Management Action

2.10 Direct the Office of the Chief Disciplinary Counsel to query the national disciplinary database at regular intervals.

The CDC has acquired login privileges to query the data bank regarding attorneys disciplined in other states on a periodic basis.

2.11 Direct the chief disciplinary counsel to track and report disciplinary case outcomes in greater detail.

The CDC agrees to track disciplinary case data in more detail and evaluate trends, using the suggested factors to the extent feasible under its case management system.

2.12 Direct the State Bar to post more information on its website about attorney disciplinary actions.

The SBOT agrees to post all required information about attorney disciplinary history on its website. Summary information on individual attorneys who have been sanctioned is already being reported to the public through the State Bar website and updated on a monthly basis.

2.13 Direct the Chief Disciplinary Counsel's Office to more proactively provide assistance to complainants in understanding reasons for complaint dismissal.

The SBOT agrees that the CDC should more proactively assist complainants regarding complaint dismissal. Including more information regarding how the grievance system operates, further

explanations of a grievance dismissal, and providing a specific contact person will help to improve the public's overall confidence and satisfaction with the process.

ISSUE 3

The State Bar Does Not Maximize Informal Dispute Resolution to Most Effectively Resolve Grievances Against Attorneys.

Recommendations

Change in Statute

3.1 Require a referral process to divert minor issues from the formal grievance system to the Client-Attorney Assistance Program for informal dispute resolution.

The SBOT agrees with the recommendation, and also agrees that it would help resolve a significant number of attorney-client issues more quickly, improve overall public satisfaction with the grievance process, and provide a clear incentive for attorneys to participate early in the process.

3.2 Repeal the requirement to refer dismissed grievances to the Client-Attorney Assistance Program.

The SBOT agrees with the recommendation to repeal this requirement. The Client-Attorney Assistance Program, a voluntary mediation program, has seen much success in resolving minor concerns, disagreements, or misunderstandings impacting the attorney-client relationship when services are provided before the filing of a formal grievance. However, the referral of matters after grievances have been dismissed has not been effective or beneficial to attorneys or their clients.

ISSUE 4

Texas Has a Continuing Need for the State Bar.

Recommendation

Change in Statute

4.1 Continue the State Bar for 12 years.

The SBOT agrees with the recommendation to continue the State Bar in existence. The functions of the State Bar of Texas are crucial to the administration of justice. The State Bar provides a

structure necessary to ensure that all Texans have access to the court system, that the legal profession maintains the highest standards of integrity and professionalism, and that a system for public protection remains strong and easily accessible.