

Decision Meeting Material

August 22, 2016

River Authorities

Texas State Board of Pharmacy

Executive Council and Texas Boards of Physical Therapy and
Occupational Therapy Examiners

State Board of Dental Examiners

State Bar of Texas

Board of Law Examiners

SULPHUR RIVER BASIN AUTHORITY

Issue 1

The SRBA Board Has Not Built the Trust Needed to Effectively Carry Out Its Mission. (Page 11)

Change in Statute

Rec. 1.1 (Page 17) Institute new leadership at SRBA by requiring the terms of all SRBA board members to expire on September 1, 2017.

Management Action

Rec. 1.2 (Page 18) Direct the SRBA board to hire an executive director.

Rec. 1.3 (Page 18) Direct SRBA to seek local financial investment in its water development projects.

Rec. 1.4 (Page 18) Direct SRBA to seek bids for the next phase of its feasibility study.

Rec. 1.5 (Page 19) Direct SRBA to implement best practices to improve transparency and openness in its operations.

Representative Flynn Proposed Modification

Adopt Recommendation 1.5, but also require SRBA, after posting board materials on its website, to create a listserv to enable people to sign up for updates when the board posts new materials to the website.

CENTRAL COLORADO RIVER AUTHORITY

Issue 2

CCRA No Longer Serves a Necessary Public Purpose. (Page 23)

Change in Statute and Management Action

Rec. 2.1 (Page 26) Transfer CCRA's functions and jurisdiction to UCRA.

Senator Watson Proposed Modification

Do not adopt Recommendation 2.1, but provide that the Legislature, by separate legislation, should transfer CCRA's

functions and jurisdiction to UCRA and abolish CCRA, as directed in the Sunset staff recommendation.

This modification also directs the Texas Commission on Environmental Quality (TCEQ), as a management action, to inspect each of CCRA's three lakes, determine the condition and any repair needs of the dams and report the results by December 31, 2016.

Change in Statute

Rec. 2.2 *(Page 27)*

Clarify UCRA's territory, boundaries, and board makeup to accurately reflect its jurisdiction.

Senator Watson Proposed Modification

Adopt Recommendation 2.2, but modify it to remove Coleman County from UCRA's updated boundaries since CCRA's functions and jurisdiction would not transfer to UCRA if the previous modification is adopted.

UPPER COLORADO RIVER AUTHORITY

Issue 3

UCRA Has Not Set Priorities to Ensure Its Operations Meet Changing Local Watershed Needs. (Page 31)

Management Action

Rec. 3.1 *(Page 33)*

Direct UCRA to work with local partners to identify priorities and develop strategies to meet changing watershed needs.

PALO DURO RIVER AUTHORITY OF TEXAS

Issue 4

PDRA Lacks Flexibility to Adapt to Changed Local Circumstances. (Page 37)

Change in Statute

Rec. 4.1 *(Page 39)*

Reclassify PDRA as a local water district and remove it from Sunset review.

Rec. 4.2 (Page 39)

Authorize one or more members to withdraw from or dissolve PDRA, but only if its members agree and ongoing obligations are met.

CROSS ISSUE

Issue 5

River Authorities Lack Basic Good Government Standards That Would Enhance Transparency, Accountability, and Compliance With State Law. (Page 41)

Change in Statute and Management Action

Rec. 5.1 (Page 46)

Require opportunities for public testimony at board meetings and direct river authorities to implement additional best practices to improve openness and transparency.

- a. Public testimony (Change in Statute)
- b. Website (Management Action)
- c. Record retention plan (Management Action)
- d. Public Information Act requests (Management Action)
- e. Board updates (Management Action)
- f. Update governing laws (Management Action)

Senator Watson Proposed Modification

Adopt Recommendation 5.1(a), but modify it to require UCRA and PDRA to provide the public the opportunity to provide comment on any agenda item at board meetings and remove the requirement for public testimony as an item on monthly meeting agendas.

Vice Chair Taylor Proposed Modification

Adopt Recommendation 5.1(f), related to updating the governing laws of the Sulphur River Basin Authority (SRBA) and the Palo Duro River Authority (PDRA), but modify the recommendation to include the series of agreed-to changes needed to allow the Texas Legislative Council to prepare these laws for codification.

Change in Statute

Rec. 5.2 (*Page 47*)

Apply good government standards to river authorities' governing laws to promote accountability, transparency, and best practices.

- a. Conflict of interest
- b. Presiding officer designation
- c. Grounds for removal
- d. Board member training
- e. Separation of duties
- f. Complaint information
- g. Alternative Dispute Resolution

Senator Schwertner Proposed Modification

Adopt Recommendation 5.2(d), but also require SRBA, PDRA, and UCRA to develop a training manual that each board member attests to receiving annually and require board member training to include information about the scope of and limitations on the board's rulemaking authority.

Management Action

Rec. 5.3 (*Page 47*)

Direct SRBA and UCRA to comply with TCEQ rules by adopting required administrative policies.

Proposed New Issues

Vice Chair Taylor Proposed New Issue 1

Repeal Sulphur River Basin Authority's unused authority to provide hydroelectric power, parks and recreation facilities, solid waste service, and forestation services.

Vice Chair Taylor Proposed New Issue 2

Repeal Palo Duro River Authority's unused authority to impose certain regulations and criminal penalties.

Representative Flynn Proposed New Issue 3

Require the Sulphur River Basin Authority to seek the advice and consent of the Ark-Tex Council of Governments before making a decision on a project for which it would seek permits.

[SRBA]

Modification to 1.5: Adopt Recommendation 1.5, but also require SRBA, after posting board materials on its website, to create a listserv to enable people to sign up for updates when the board posts new materials to the website.

Member:
Flynn

Staff Contact: 512.463.0880
David Erinakes

Fiscal Impact:

Background & Purpose

Central Colorado River Authority

Rec. 2.1 Transfer CCRA's functions and jurisdiction to UCRA.

Modification: Do not adopt Rec. 2.1 but provide that the Legislature, by separate legislation, should transfer CCRA's functions and jurisdiction to UCRA and abolish CCRA, as directed in the Sunset staff recommendation. To inform any future legislation, this modification would also direct TCEQ, as a management action, to inspect each of CCRA's three lakes and determine the condition and any repair needs of the dams. TCEQ should report the results of these inspections to the Sunset Commission, CCRA, and UCRA by December 31, 2016.

Member: Sen. Watson

Staff Contact Kate Alexander 512.463.0114

Fiscal Impact: NA

Background & Purpose

As CCRA's statutory language expressly provides that it may not be abolished in the Sunset process, it's not appropriate for the Sunset Commission to recommend de facto abolishment of CCRA by proposing to transfer its functions and jurisdiction to the UCRA in the Sunset bill.

Based on the current operations and functions of the CCRA, it may be appropriate for the Legislature to consider such an action, but it would need to be considered in a stand-alone bill separate from the Sunset bill.

Talking Points

This change ensures that the Sunset recommendation is consistent with the enabling legislation that put CCRA and the other river authorities under Sunset review.

Upper Colorado River Authority

Rec. 2.2 Clarify UCRA's territory, boundaries, and board makeup to accurately reflect its jurisdiction.

Modification: Adopt Rec. 2.2, but modify it to remove Coleman County from UCRA's updated boundaries since CCRA's functions and jurisdiction would not transfer to UCRA (as per Modification 1).

Member: Sen. Watson

Staff Contact Kate Alexander 512.463.0114

Fiscal Impact: NA

Background & Purpose

If the modification to Recommendation 2.1 for the Central Colorado River Authority is adopted, this modification is necessary so that Coleman County is not included in UCRA's updated boundaries.

Talking Points

This change is necessary for consistency with the Central Colorado River Authority modification.

Across the Board for All Subject River Authorities

Adopt Rec. 5.1(a), but modify the language as follows.

Public testimony. This recommendation would require UCRA and PDRA to provide the public the opportunity to provide comment on any each agenda item at board meetings, ~~as well as an opportunity to comment on any issue or matter under the river authority's jurisdiction. While this recommendation would be a statutory change, UCRA and PDRA should also include "public testimony" as an agenda item on every monthly board agenda.~~

Member: Sen. Watson

Staff Contact Kate Alexander 512.463.0114

Fiscal Impact: NA

Background & Purpose

This modification allows the public to comment on agenda items that have been posted by the river authority consistent with the Texas Open Meetings Act rather than any topic under the river authority's jurisdiction.

Talking Points

Allowing public testimony on any topic under the river authority's jurisdiction would risk the river authority violating the Texas Open Meetings Act because the board is not permitted to discuss issues that have not been properly posted for discussion.

The revisions will allow the river authority to craft its own procedure for public comment rather than imposing an overly prescriptive requirement.

Modification and Summary of Changes for Codification

Recommendation 5.1(f) - Update governing laws. This recommendation requests that the Texas Legislative Council prepare legislation codifying the laws governing the SRBA and PDRA for introduction during the 86th Legislative Session. This recommendation also requests that the legislative council submit to the Sunset Commission, not later than the date of Sunset's public hearing at which the commission's staff presents its recommendations for the SRBA and PDRA, a list of any issues regarding the law governing each authority that might present an impediment to codifying that law and should be addressed in the authority's sunset bill in order to facilitate the codification of that law. Sunset staff would work directly with the authorities and the legislative council to determine whether and how to address the identified issues before the Sunset Commission's decision hearing at which the commission votes on the recommendations for the SRBA and PDRA.

Modification: Adopt 5.1(f), related to updating the governing laws of the Sulphur River Basin Authority (SRBA) and the Palo Duro River Authority (PDRA), but modify the recommendation to include the series of agreed-to changes needed to allow the Texas Legislative Council to prepare these laws for codification, as summarized below.

Background. SRBA's and PDRA's governing laws contain out-of-date references to defunct state agencies and code sections that have been amended, renamed, or no longer exist, complicating full understanding of the authorities' powers and duties. Clarifying these portions of the authorities' governing laws will remove potential impediments to codification.

As directed by the recommendation, the Texas Legislative Council has already submitted a list of issues that could present impediments to codification of SRBA's and PDRA's governing laws. Sunset staff has worked with the authorities and Council, in addition to consulting the Texas Water Development Board and the Texas Commission for Environmental Quality, to determine how to best address these issues. Both SRBA and PDRA agree with the recommendations. The recommended changes would not expand or shrink the powers or duties of either river authority.

Summary of Changes. The following summarizes the agreed-to changes that would be addressed through SRBA's and PDRA's Sunset bills.

Sulphur River Basin Authority

- Updates references to various state agencies and departments, specifically the Texas Water Development Board and the Texas Commission for Environmental Quality.
- Makes grammar corrections to clarify meanings of various provisions.
- Resolves conflicting language regarding director compensation and solid waste resource recovery financing.

Palo Duro River Authority

- Updates references to various state agencies and departments, specifically the Texas Water Development Board and the Texas Commission for Environmental Quality.
- Makes grammar corrections to clarify meanings of various provisions.
- Updates PDRA's current territory and provisions for member detachment that are no longer applicable.
- Resolves conflicting language regarding director appointments, terms, qualifications, vacancies, and compensation.

- Clarifies PDRA's authority to perform certain functions, such as developing and constructing dams, reservoirs, or infrastructure, or to engage in condemnation for these activities within and outside of PDRA's boundaries.
- Resolves conflicting language regarding requirements for bonds to be secured with tax revenue; imposing and enforcing tax liens; considering pledged revenue when setting a tax rate; and limiting the interest rates of bonds.
- Clarifies a reference to property of the authority, which mistakenly refers to property of the attorney, and a reference to holders of bonds instead of the bonds themselves.
- Changes references to Palo Duro River, which does not exist, to the actual water bodies over which PDRA has authority: Palo Duro Creek and Horse Creek.

River Authorities

Modification to Recommendation 5.2- (Statutory) Adopt Rec 5.2(d), but also require SRBA, PDRA, and UCRA to develop a training manual that each board member attests to receiving annually and require board member training to include information about the scope of and limitations on the board's rulemaking authority.

*Member:
Senator Charles Schwertner*

Staff Contact: Taylor Borer 3-0105

*Fiscal Impact:
No Fiscal Impact*

Background & Purpose

This modification applies the Across-the-Board recommendation on board member training that the Sunset Commission changed at its last meeting to ensure that board members are adequately trained on their responsibilities and the limits of their authority.

This information would normally already be included in the Sunset staff report, but since this staff report was released before the Sunset Commission adopted changes we must make these changes as a modification.

Sulphur River Basin Authority

Repeal Sulphur River Basin Authority's authority to provide hydroelectric power, parks and recreation facilities, solid waste service, and forestation services.

Member: Senator Van Taylor

Staff Contact: Jeremy B. Mazur 512.463.0108

Fiscal Impact:

Background & Purpose

The special law creating the Sulphur River Basin Authority provides the entity with broad powers and duties relating to water reclamation and development. That law further authorizes the Authority to provide services and develop facilities that are separate and removed from its core functions relating to water supply. Specifically, SRBA may develop hydroelectric power; provide forestation and reforestation services within the basin; provide solid waste services and develop disposal sites; and develop and maintain parks and recreational facilities. To date, the Authority has never exercised any of these powers.

This new issue for the Commission's consideration is to repeal the Sulphur River Basin Authority's authority to perform the following:

- Develop water supplies and other infrastructure for hydroelectric power purpose;
- Forest and reforest the watershed area of the basin;
- Develop sites for solid waste collection and provide solid waste collection and disposal services; and
- Develop parks and recreational facilities.

The intent of this recommendation is to limit the SRBA's powers and duties to what is necessary to perform its core function.

Talking Points

Both the Sunset staff report and the public hearing revealed that SRBA has done little with regard to its core function of developing water supplies within the Sulphur River basin. Given this anemic progress, any "re-boot" of the authority should direct the entity to focus exclusively on that core mission.

This recommendation pares down SRBA's legal authority to needed authorities to perform its core mission. The Authority does not operate a dam or hydroelectric facilities, provide trash services, or own or operate any parks. Nor does the Authority provide tree planting services. Given that these powers are not applied or exercised, the should be repealed.

Repealing SRBA's authority to perform these functions limit the entity's powers and duties. This recommendation is consistent with the statutory expectation of the Sunset process as defined within the Texas Sunset Act.

If SRBA's constituents are interested in these services in the future, they can file legislation to reinstate these provisions within the Authority's statute.

Palo Duro River Authority

Repeal Palo Duro River Authority's authority to impose certain regulations and criminal penalties.

Member: Senator Van Taylor

Staff Contact: Jeremy B. Mazur 512.463.0108

Fiscal Impact:

Background & Purpose

The board of directors of the Palo Duro River Authority are authorized to issue regulations to preserve and maintain the sanitary condition of all water flowing in to Palo Duro reservoir, as well as hunting, fishing, boating, camping, as well as recreational and business privileges along or around the reservoir. PDRA's enabling legislation authorizes the Authority to impose penalties of fines up to \$200 and imprisonment for up to 30 days. During the public hearing, PDRA representatives testified that they have not assessed criminal penalties, nor do they plan on using the authority to imprison persons found acting in violation of PDRA regulations.

This new issue proposes to repeal PDRA's authority to jail individuals for violating Authority regulations.

Talking Points

PDRA's authority to impose criminal penalties on individuals that violate its regulations is excessive. A river authority or other special district should not be allowed to imprison people for violating its own regulations. This is a bad precedent, and opens the door for potential abuse.

This recommendation is a "right on crime" measure that removes PDRA's authority to put people in jail for violating its regulations.

This recommendation only proposes to remove PDRA's authority to impose criminal penalties. This recommendation does not infringe on the Authority's or other law enforcement's ability to enforce federal, state, and local laws that include criminal penalties.

[SRBA]

Issue 1: The SRBA Board Has Not Built the Trust Needed to Effectively Carry Out Its Mission.

New Recommendation in Issue 1: Require SRBA to seek the advice and consent of the Ark-Tex Council of Governments before making a decision on a project for which it would seek permits.

Member:

Flynn

Staff Contact: 512.463.0880

David Erinakes

Fiscal Impact:

Background & Purpose

Talking Points

TEXAS STATE BOARD OF PHARMACY

Issue 1

Texas Lacks Key Tools Needed to Ensure Safe Dispensing of Dangerous, Highly Addictive Drugs to Patients. (Page 9)

Change in Statute

Rec. 1.1 (Page 15) Beginning in 2018, require pharmacists to search the Prescription Monitoring Program database before dispensing certain controlled substances.

Senator Schwertner Proposed Modification

Modify Recommendation 1.1 to require registration in the Prescription Monitoring Program system, rather than requiring pharmacists to search the database prior to dispensing controlled substances.

Rec. 1.2 (Page 16) Require pharmacists to enter dispensing information in the Prescription Monitoring Program database within one business day of dispensing controlled substances.

Senator Schwertner Proposed Modification

Modify Recommendation 1.2 to require pharmacists to enter dispensing information in the Prescription Monitoring Program database within three business days of dispensing controlled substances.

Rec. 1.3 (Page 16) Authorize the board to send push notifications and to set related thresholds.

Management Action

Rec. 1.4 (Page 16) Direct the board to create delegate accounts for pharmacy technicians.

Rec. 1.5 (Page 16) Direct the board to work with vendors and stakeholders to integrate the Prescription Monitoring Program with pharmacy dispensing software.

Rec. 1.6 (Page 16) Direct the board to make trend data about controlled substance prescriptions in Texas publicly available.

Issue 2

Key Elements of the Texas State Board of Pharmacy's Statute Do Not Conform to Common Licensing Standards. (Page 19)

Change in Statute

- Rec. 2.1 (Page 21)** Remove unnecessary qualifications required of applicants for licensure or registration.
- Rec. 2.2 (Page 21)** Require the board to create a system of graduated penalties for late renewal of pharmacy technician registration.
- Rec. 2.3 (Page 22)** Clarify statute to authorize the board to delegate tasks to the executive director.
- Rec. 2.4 (Page 22)** Clarify statute to require the board to develop continuing education standards for pharmacy technicians.
- Rec. 2.5 (Page 22)** Authorize the board to deny renewal applications from noncompliant applicants.

Management Action

- Rec. 2.6 (Page 22)** The board should remove requirements that renewal forms be notarized.
- Rec. 2.7 (Page 22)** Direct the board to query a national disciplinary database before license renewal.

Issue 3

The State Has a Continuing Need to Regulate the Practice of Pharmacy. (Page 25)

Change in Statute

- Rec. 3.1 (Page 29)** Continue the Texas State Board of Pharmacy for 12 years.
- Rec. 3.2 (Page 29)** Apply the standard Sunset across-the-board requirement for the board to develop a policy regarding negotiated rulemaking and alternative dispute resolution.

Senator Schwertner Proposed Modification

Adopt Recommendation 3.2, but modify the recommendation to also apply the newly updated Sunset across-the-board recommendation on board member training.

Representative Flynn Proposed Modification

Modify the Schwertner Modification regarding board member training to require the Pharmacy Board to post a copy of each board member's signed acknowledgement sheet verifying receipt of the agency's training manual on the agency's website.

Management Action

Rec. 3.3 (*Page 30*) The board should develop and implement a succession plan to prepare for impending retirements.

Proposed New Issues

Senator Schwertner Proposed New Issue 1

Require wholesale pharmaceutical distributors to report their sales of controlled substances to the Pharmacy Board and the Prescription Monitoring Program database, as they currently submit to the DEA.

Representative Flynn Proposed New Issue 2

Require the Board of Pharmacy to recognize all pharmacy technician certifications offered by an entity accredited by the National Commission for Certifying Agencies.

Pharmacy Board

Modification to Recommendation 1.1- (Statutory) Require registration in the Prescription Monitoring Program system, rather than requiring pharmacists to search the database prior to dispensing controlled substances.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
No fiscal impact

Background & Purpose

Pharmacists are not currently required to search the Prescription Monitoring Program (PMP) database prior to dispensing controlled substances, but are required to enter data on prescriptions after they are filled. Sunset's recommendation would require pharmacists to search the PMP database and review a patient's prescription history before dispensing opioids, benzodiazepines, barbiturates, or carisoprodol. This requirement wouldn't go into effect until 1-1-18.

The recommendation would also give the board authority to define "red flag" circumstances that would require pharmacists to search the PMP before dispensing.

This modification would require pharmacists to be *registered* to use the PMP database, but would defer to their professional judgment in determining when to search the database prior to dispensing. The modification would maintain the Sunset staff recommendation that the board be given authority to define "red flag" circumstances in which pharmacists would be required to search the database prior to dispensing.

A major reason pharmacists do not utilize the PMP proactively prior to dispensing is the clunky, time consuming system operated by DPS. The program has been transferred to the Board, and they have contracted with a vendor to create a streamlined, intuitive and user-friendly system which goes live on Sept 1, 2016. It is likely that *voluntary* use of the database will increase under this new system.

Pharmacy Board

Modification to Recommendation 1.2- (Statutory) Require pharmacists to enter dispensing information in the Prescription Monitoring Program database within three business days of dispensing controlled substances.

Member:

Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:

No Fiscal Impact

Background & Purpose

Currently, pharmacists are required to enter information on controlled substances within 7 business days. Sunset expresses concern that this allows too much time for doctor shoppers to fill more prescriptions without prescribers and pharmacists having information about their activity.

The Sunset staff recommendation allowing Pharmacy Technicians to enter dispensing information in the PMP will necessitate shorter timeframe for entering information, but going from 7 to 1 days may cause unintended costs and consequences for pharmacies.

This modification would require pharmacists to enter information on dispensed controlled substances within 3 business days.

Pharmacy Board

Modification to Recommendation 3.2- (Statutory) Adopt recommendation 3.2 but modify the recommendation to also apply the newly updated Sunset across-the-board recommendation on board member training. This modification would require the Pharmacy Board to develop a training manual that each board member attests to receiving annually and require board member training to include information about the scope of and limitations on the board's rulemaking authority.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
No Fiscal Impact

Background & Purpose

This modification applies the Across-the-Board recommendation on board member training that the Sunset Commission changed at its last meeting to ensure that board members are adequately trained on their responsibilities and the limits of their authority.

This information would normally already be included in the Sunset staff report, but since this staff report was released before the Sunset Commission adopted changes we must make these changes as a modification.

[Board of Pharmacy]	
Modify the Schwertner modification regarding board member training to require the Pharmacy Board to post a copy of each board member's signed acknowledgement sheet verifying receipt of the agency's training manual on the agency's website.	
<i>Member:</i> Flynn	<i>Staff Contact:</i> 512.463.0880 David Erinakes
<i>Fiscal Impact:</i>	

Background & Purpose

This recommendation modifies the Across -the-Board recommendation on board member training that the Sunset Commission changed at its last meeting and that is being separately updated for the Pharmacy Board in Sen. Schwertner's Modification 1. This recommendation would help assure the public that each board member has received training on their proper roles as members of the policy making body by requiring the agency to post the signed acknowledgement sheet to the agency's website.

Pharmacy Board

New Issue 1- (Statutory) Require wholesale pharmaceutical distributors to report their sales of controlled substances to the Pharmacy Board and the Prescription Monitoring Program database, which is to submit the same information they currently send to the DEA.

Member:
Senator Charles Schwertner

Staff Contact: Drew 3-0360

Fiscal Impact:
No Fiscal Impact

Background & Purpose

Currently, wholesale pharmaceutical distributors sell to pharmacies and report what drugs they are distributing and where to the DEA. The pharmacy board cannot see this information unless they request it from the DEA which is a slow process.

This new issue would require wholesale pharmaceutical distributors to submit the same information they submit to the DEA to the Pharmacy Board.

Florida implemented a similar requirement and was able to locate multiple pill mills.

[Board of Pharmacy]

Require the Board of Pharmacy to recognize all pharmacy technician certifications offered by an entity accredited by the National Commission for Certifying Agencies.

Member:
Flynn

Staff Contact: 512.463.0880
David Erinakes

Fiscal Impact:

Background & Purpose

This recommendation would require that all accredited pharmacy technician certification programs be recognized in Texas which will ensure that Texas is able to meet the ongoing demand for qualified pharmacy technicians.

EXECUTIVE COUNCIL OF PHYSICAL THERAPY AND OCCUPATIONAL THERAPY EXAMINERS

TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

Issue 1

The Requirement to Register Physical Therapy and Occupational Therapy Facilities Is Unnecessary. (Page 9)

Change in Statute

Rec. 1.1 *(Page 12)* Discontinue the registration of physical and occupational therapy facilities and temporarily authorize the boards to expunge facility-related administrative violations from a licensee's record.

Issue 2

The Physical and Occupational Therapy Statutes Unnecessarily Impede Increasingly Mobile Workforces. (Page 13)

Change in Statute

- Rec. 2.1** *(Page 16)* Adopt the Physical Therapy Licensure Compact.
- Rec. 2.2** *(Page 17)* Provide clear statutory authority for licensure by endorsement.
- Rec. 2.3** *(Page 17)* Clarify that occupational therapy assistants licensed in other states may practice in this state temporarily under the same conditions as occupational therapists.
- Rec. 2.4** *(Page 18)* Remove provisions prescribing educational requirements beyond completion of an accredited program or substantially equivalent to an accredited program.

Issue 3

Key Elements of the Boards' Statutes, Rules, and Policies Do Not Conform to Common Licensing Standards. (Page 19)

Change in Statute

Rec. 3.1 (Page 24) Clarify statutes to reflect current standards and conditions.

Rec. 3.2 (Page 24) Remove the boards' authority to delegate to other entities the responsibility of approving continuing education and continuing competence while clarifying their authority to preapprove course providers.

Vice Chair Taylor Proposed Modification

Modify Recommendation 3.2 to require the Texas Board of Occupational Therapy Examiners and Texas Board of Physical Therapy Examiners to adopt rules relating to the approval of continuing competence or continuing education courses inclusive of a request for proposal and bid process and implement that process within 12 months, and no less than once every four years thereafter.

Representative Flynn Proposed Modification

Prohibit the physical therapy board from adopting rules that only allow for a single provider of continuing competence for Texas physical therapy professionals.

Rec. 3.3 (Page 24) Require the boards to conduct fingerprint-based criminal background checks of licensure applicants and licensees.

Rec. 3.4 (Page 25) Require the boards to develop a disciplinary matrix.

Rec. 3.5 (Page 25) Remove the "good moral character" standard as a criterion for foreign-trained licensure applicants.

Management Action

Rec. 3.6 (Page 25) Direct the OT board to adopt rules to specify the types of criminal activities that may result in denial, suspension, or revocation of a license.

Rec. 3.7 (Page 25) Direct the OT board to grant administrative dismissal to staff for low-level misdemeanor offenses.

Rec. 3.8 (*Page 25*) Direct the agency to develop a formal process to refer non-jurisdictional complaints to the appropriate agency.

Issue 4

The State Has a Continuing Need to Regulate Physical Therapy and Occupational Therapy. (Page 27)

Change in Statute

Rec. 4.1 (*Page 33*) Continue the executive council, PT board, and OT board for 12 years.

Rec. 4.2 (*Page 33*) Apply the standard Sunset across-the-board requirements to the executive council, PT board, and OT board.

Senator Schwertner Proposed Modification

Adopt Recommendation 4.2, but modify the recommendation to also apply the newly updated Sunset across-the-board recommendation on board member training.

Proposed New Issues

None received.

Executive Council of Physical Therapy and Occupational Therapy Examiners

Require the Texas Board of Occupational Therapy Examiners and Texas Board of Physical Therapy Examiners adopt rules relating to the approval of continuing competence or continuing education courses inclusive of a request for proposal and bid process and implement that process within 12 months, and every four years thereafter.

Member: Senator Van Taylor

Staff Contact: Ryan Paylor 512.463.0108

Fiscal Impact:

Background & Purpose

Sunset recommendation 3.2 for the Texas Board of Occupational Therapy Examiners and Texas Board of Physical Therapy Examiners calls for the removal of the boards' authority to delegate the responsibility of approving continuing education and continuing competency courses to other entities. The Board of Physical Therapy Examiners currently delegates its authority to approve continuing education and continuing competency courses to the Texas Physical Therapy Association (TPTA). The Board asserts that it does not have resident experts to support the approval program nor the resources to assume the responsibility of approving continuing education and continuing competency courses. Interested parties, however, contend that the unilateral delegation of authority lacks transparency and a bidding process utilized by most state boards and agencies. Interested parties also contend that exclusively delegating to TPTA approval authority for continuing competence or continuing education courses without a proper bidding process creates an impression of impropriety regardless of merit.

The request of for modification would require the Texas Board of Occupational Therapy Examiners and Texas Board of Physical Therapy Examiners to establish within the next six months rules relating to the approval of continuing competence or continuing education courses inclusive of an request for proposal (RFP) and bid process, including the issuance of agreements or Memorandums of Understanding with other entities. The request will also require the board to evaluate and reissue such agreements, utilizing a bid process in accordance with applicable statutes and rules, allow for new bidders, and utilize the process no less than once every four years. The intent of this change is to allow the board to continue to delegate the approval authority for continuing competence or continuing education courses, but require a standardized open and transparent process.

Talking Points

The Board of Physical Therapy Examiners currently delegates its authority to approve continuing education and continuing competency courses to the Texas Physical Therapy Association

(TPTA); which lacks transparency, a proper and fair bidding process, and creates an image of impropriety.

The request for modification requires Texas Board of Occupational Therapy Examiners and Texas Board of Physical Therapy Examiners to establish within the next twelve months rules relating to the approval of continuing competence or continuing education courses inclusive of an open and fair request for proposal (RFP) and bid process.

Most state boards and agencies require an RFP and bidding process for outsourced projects. Requiring the Texas Board of Occupational Therapy Examiners and Texas Board of Physical Therapy Examiners to develop a similar process will permit the boards to continue to outsource the authority to approve continuing education and continuing competency courses while making the process more fair and transparent.

[Executive Council of Physical Therapy and Occupational Therapy Examiners
Texas Board of Physical Therapy Examiners Texas Board of Occupational Therapy
Examiners]

Recommendation 3.2 – Remove the boards’ authority to delegate to other entities the responsibility of approving continuing education and continuing competence while clarifying their authority to preapprove course providers.

Modify Recommendation 3.2 by adding the following clarification:

Prohibit the physical therapy board from adopting rules that only allow for a single provider of continuing competence for Texas physical therapy professionals.

Member:
Flynn

Staff Contact: 512.463.0880
David Erinakes

Fiscal Impact:

Background & Purpose

To ensure consumer choice for Texas physical therapy professionals taking continuing competence, statute must prohibit the physical therapy board from adopting rules that only allow for a single provider in the state’s market for physical therapy continuing competence.

PT/OT Board

Modification to Recommendation 4.2- (Statutory) Adopt recommendation 4.2 but modify the recommendation to also apply the newly updated Sunset across-the-board recommendation on board member training. This modification would require the PT board and OT board to develop a training manual that each board member attests to receiving annually and require board member training to include information about the scope of and limitations on each board's rulemaking authority.

Member:
Senator Charles Schwertner

Staff Contact: Jonathan Connors 3-0360

Fiscal Impact:
No Fiscal Impact

Background & Purpose

This modification applies the Across-the-Board recommendation on board member training that the Sunset Commission changed at its last meeting to ensure that board members are adequately trained on their responsibilities and the limits of their authority.

This information would normally already be included in the Sunset staff report, but since this staff report was released before the Sunset Commission adopted changes we must make these changes as a modification.

STATE BOARD OF DENTAL EXAMINERS

Issue 1

The Unusually Large Dental Board Inappropriately Focuses on Issues Unrelated to Its Public Safety Mission. (Page 11)

Change in Statute

Rec. 1.1 (Page 16) Reduce the size of the board from 15 to nine members and adjust its composition to consist of four dentists, two dental hygienists, and three public members.

Senator Hinojosa Proposed Modification

Do not adopt staff Recommendation 1.1. Instead adopt a modification to reduce the size of the board from 15 to 11.

Rec. 1.2 (Page 17) Allow the board's statutory advisory groups to expire and direct the board to establish clearer processes for stakeholder input in rule.

Rec. 1.3 (Page 17) Clarify the use and role of board members at informal settlement conferences.

Senator Schwertner Proposed Modifications

Adopt Recommendation 1.3, but to help with the reduced board size created by Recommendation 1.1, create a state Dental Review Committee consisting of nine governor-appointed members, including six dentists and three dental hygienists, to serve at informal settlement conferences on a rotating basis.

Adopt Recommendation 1.3, but modify the recommendation to strike language in the Dental Practice Act regarding informal settlement conferences (Texas Occupations Code, sections 263.007, 263.0075, and 263.0076) and replace with the attached language on structure and conduct of informal proceedings.

Issue 2

State Regulation of Dental Assistants Is Unnecessary to Ensure Public Protection and Is an Inefficient Use of Resources. (Page 19)

Change in Statute

Rec. 2.1 (Page 23)

Discontinue the board's dental assistant certificate programs.

Senator Hinojosa Proposed Modification

Do not adopt staff Recommendation 2.1. Instead adopt a modification to combine the board's four dental assistant certificate programs into one registration for dental assistants.

Issue 3

The Board Lacks Key Enforcement Tools to Ensure Dentists Are Prepared to Respond to Increasing Anesthesia Concerns. (Page 27)

Change in Statute

Rec. 3.1 (Page 31)

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

Senator Schwertner Proposed Modification

Adopt Recommendation 3.1, which clarifies that the Dental Board has authority to regulate and inspect all methods of anesthesia when performed in a dental office, but modify the recommendation to include the attached detailed statutory changes regarding permitting and training for administration of anesthesia.

Management Action

Rec. 3.2 (Page 32)

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

Vice Chair Taylor Proposed Modification

Adopt Recommendation 3.2 and modify to also require the State Board of Dental Examiners to appoint an independent 5 to 10 member blue ribbon panel to investigate dental anesthesia deaths and mishaps over the last five years and make recommendations to the legislature prior to the meeting of the 85th Texas Legislature.

Senator Schwertner Proposed Modification

Adopt Recommendation 3.2 as a statutory rather than management recommendation and modify to include certain emergency protocols.

Issue 4

Key Elements of the State Board of Dental Examiners' Licensing and Regulatory Functions Do Not Conform to Common Licensing Standards. (Page 33)

Change in Statute

- | | |
|----------------------------------|---|
| Rec. 4.1 <i>(Page 36)</i> | Require the board to monitor licensees for adverse licensure actions. |
| Rec. 4.2 <i>(Page 36)</i> | Authorize the board to deny applications to renew a license if an applicant is not compliant with a board order. |
| Rec. 4.3 <i>(Page 36)</i> | 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. |
| Rec. 4.4 <i>(Page 37)</i> | Remove unnecessary qualifications required of applicants for licensure or registration. |

Management Action

- | | |
|----------------------------------|--|
| Rec. 4.5 <i>(Page 37)</i> | Direct the board to make data on the board's enforcement activity information publicly available on its website. |
| Rec. 4.6 <i>(Page 37)</i> | Direct the board to stagger registration and certificate renewals. |

Issue 5

A Continuing Need Exists for the State Board of Dental Examiners. (Page 39)

Change in Statute

- | | |
|----------------------------------|--|
| Rec. 5.1 <i>(Page 42)</i> | Continue the State Board of Dental Examiners for 12 years. |
| Rec. 5.2 <i>(Page 42)</i> | Update the standard Sunset across-the-board provision regarding conflicts of interest. |

Senator Schwertner Proposed Modification

Adopt Recommendation 5.2 but modify the recommendation to also apply the newly updated Sunset across-the-board recommendation on board member training.

Representative Flynn Proposed Modification

Modify the Schwertner modification regarding board member training to require the Dental Board to post a copy of each board member's signed acknowledgement sheet verifying receipt of the agency's training manual on the agency's website.

Proposed New Issues

Senator Schwertner Proposed New Issue 1

Amend the board's statute to create a nine-member governor-appointed standing Advisory Committee on Dental Anesthesia to advise the board on the development and revision of rules related to dental sedation and anesthesia.

Senator Schwertner Proposed New Issue 2

Require the board to track and report anesthesia-related data as detailed in the material previously provided. Also, require the board to make publicly available on their website aggregate data by fiscal year and type of license about the 18 areas shown in the material previously provided.

Senator Schwertner Proposed New Issue 4

Require the board to develop rules establishing minimum emergency preparedness standards necessary prior to administering sedation/anesthesia, including requirements regarding supplies of necessary drugs, defibrillators, inspections, and maintenance logs.

Senator Schwertner Proposed New Issue 5

Amend the board's statute to include a definition of portability, methods to obtain a permit, and establish advanced didactic and clinical training requirements.

Senator Schwertner Proposed New Issue 6

Require dentists to register in the Prescription Monitoring Program to increase awareness and encourage the use of the database.

Senator Hinojosa Proposed New Issue 7

Require the Dental Board to search the Prescription Monitoring Program on a periodic basis.

Senator Hinojosa Proposed New Issue 8

Require dentists to use the Prescription Monitoring Program.

Texas State Board of Dental Examiners

Issue Modification: Do not adopt Staff Recommendation 1.1. Instead adopt the following modification to reduce the size of the Board from 15 to 11.

Member: Senator Hinojosa

Staff Contact: Jennifer Saenz 512.463.0120

Fiscal Impact:

Issue Modification 1.1

In lieu of staff recommendation 1.1, substitute the following as a change in statute:

Reduce the size of the Board from 15 to eleven members and adjust its composition to consist of six dentists, three dental hygienists, and two public members.

To allow for staggering of terms, the recommendation would provide that all current board member terms expire on September 1, 2017, with the governor making initial appointments as specified below. Current members would be eligible for re-appointment if so determined by the governor to maintain needed expertise. To maintain a functioning board and conduct necessary business, board members serving on August 31, 2017 would continue to serve until a majority of new appointments are made.

- Two dentists and one dental hygienist to initial terms expiring February 1, 2019.
- Two dentists, one dental hygienist, and one public member to initial terms expiring February 1, 2021.
- Two dentists, one dental hygienist, and one public member to initial terms expiring February 1, 2023.

Background & Purpose

This modification would allow for a more balanced board by adding an additional dental hygienist. True representation of the dental workforce justifies an additional hygienist since they are significantly growing in number statewide and are helping to fill the dentist shortage gap. Dentists, dental hygienists, and the public will all be fairly represented.

Dental Board

Modification to Recommendation 1.3- (Statutory) Adopt Rec. 1.3, but to help with the reduced board size created by Recommendation 1.1, create a state Dental Review Committee consisting of nine governor appointed members, including six dentists and three dental hygienists, to serve at informal settlement conferences on a rotating basis.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
Minimal costs to reimburse travel expenses, offset by a reduction in the number of board members.

Background & Purpose

The Sunset staff recommendation directs the board to revise rules to require all board members, on a rotating basis, to attend informal settlement conferences to accommodate the workload.

This modification creates a State Dental Review Committee that is modeled after the Texas Medical Board's Governor- appointed District Review Committees. The members of these committees attend Informal Settlement Conferences on a rotating basis to spread the work load previously borne entirely by TMB members. This modification will ensure the board can continue to use ISCs without putting an undue burden on the members of the reduced board according to Sunset staff recommendation 1.1.

Dental Board

Modification to Recommendation 1.3- (Statutory) Adopt recommendation 1.3, but modify the recommendation to strike language in the Dental Practice Act regarding informal settlement conferences (Texas Occupations Code, sections 263.007, 263.0075, and 263.0076) and add the following language in its place.

Informal Proceedings:

- The board by rule shall adopt procedures governing informal disposition of a contested case. Rules must require that:
 - (1) not later than the 180th day after the date the board's official investigation of the complaint is commenced, the board shall determine a future date on which to hold an informal settlement conference to consider disposition of the complaint or allegation, unless good cause is shown by the board for scheduling the informal settlement conference after that date;
 - (2) the board give notice to the licensee of the time and place of the meeting not later than the 45th day before the date the informal settlement conference is held;
 - (3) the complainant and the licensee be provided an opportunity to be heard;
 - (4) the board's legal counsel or a representative of the attorney general be present to advise the board or the board's staff; and
 - (5) a member of the board's staff be at the meeting to present to the Informal Settlement Conference Panel the facts the staff reasonably believes it could prove by competent evidence or qualified witnesses at a hearing.
- An affected licensee is entitled to:
 - (1) reply to the staff's presentation; and
 - (2) present the facts the licensee reasonably believes the licensee could prove by competent evidence or qualified witnesses at a hearing.
- After ample time is given for the presentations, the Informal Settlement Conference Panel shall recommend that the investigation be closed or shall make a recommendation regarding the disposition of the case, unless applicable concerning contested cases requires a hearing.
- If the license holder has previously been the subject of disciplinary action by the board, the board shall schedule the informal settlement conference as soon as practicable but not later than the 180th day after the date the board's official investigation of the complaint is commenced.
- Notice must be accompanied by a written statement of the nature of the allegations and the information the board intends to use at the meeting. If the board does not provide the statement or information at that time, the license holder may use that failure as grounds for rescheduling the informal meeting. If the complaint includes an allegation that the license holder has violated the standard of care, the notice must include a copy of the report by the expert dentist reviewer. The licensee must provide to the board the licensee's rebuttal at least 15 business days before the date of the meeting in order for the information to be considered at the meeting.
- The board by rule shall define circumstances constituting good cause for not meeting the 180-day deadline, including an expert dentist reviewer's delinquency in reviewing and submitting a report to the board.
- The board by rule shall define circumstances constituting good cause to grant a licensee's

request for a continuance of the informal settlement conference.

- Information presented by the board or board staff in an informal settlement conference is confidential.
- On request by a licensee under review, the board shall make a recording of the informal settlement conference proceeding. The recording is a part of the investigative file and may not be released to a third party unless authorized. The board may charge the licensee a fee to cover the cost of recording the proceeding. The board shall provide a copy of the recording to the licensee on the licensee's request.

Board Representation in Informal Proceedings:

- Define the following term to apply to the sections related to Informal Settlement Conferences:
 - Informal Settlement Conference Panel: includes members of the Board and the Dental Review Committee.
- In an informal settlement conference, at least two Informal Settlement Conference Panel members shall be appointed to determine whether an informal disposition is appropriate. At least one of the panelists must be a dentist.
- Pursuant to Board rules, one panelist must be physically present at the ISC, but one panelist may appear by video conference.
- An informal settlement conference may be conducted by one panelist if the affected licensee waives the requirement that at least two panelists conduct the informal proceeding. If the licensee waives that requirement, the panelist may be either a dentist, dental hygienist, or a member who represents the public.
- Only one panel member is required in an informal settlement conference proceeding conducted by the board to show compliance with an order or remedial plan of the board.

Roles and Responsibilities of Participants in Informal Proceedings:

- An Informal Settlement Conference Panel member that serves as a panelist at an informal settlement conference shall make recommendations for the disposition of a complaint or allegation. The member may request the assistance of a board employee at any time.
- Board employees shall present a summary of the allegations against the affected licensee and of the facts pertaining to the allegation that the employees reasonably believe may be proven by competent evidence at a formal hearing.
- A board attorney shall act as counsel to the panel members and shall be present during the informal settlement conference and the panel's deliberations to advise the panel on legal issues that arise during the proceeding. The attorney may ask questions of participants in the informal settlement conference to clarify any statement made by the participant. The attorney shall provide to the panel a historical perspective on comparable cases that have appeared before the board, keep the proceedings focused on the case being discussed, and ensure that the board's employees and the affected licensee have an opportunity to present information related to the case. During the panel's deliberations, the attorney may be present only to advise the panel on legal issues and to provide information on comparable cases that have appeared before the board.
- The panel and board employees shall provide an opportunity for the affected licensee and the licensee's authorized representative to reply to the board employees' presentation and to present oral and written statements and facts that the licensee and representative reasonably believe could be proven by competent evidence at a formal hearing.

- An employee of the board who participated in the presentation of the allegation or information gathered in the investigation of the complaint, the affected licensee, the licensee's authorized representative, the complainant, the witnesses, and members of the public may not be present during the deliberations of the panel. Only the members of the panel and the board attorney serving as counsel to the panel may be present during the deliberations.
- The panel shall recommend the dismissal of the complaint or allegations or, if the panel determines that the affected licensee has violated a statute or board rule, and that violation supports action by the board, the panel may recommend board action and terms for an informal settlement of the case.
- The panel's recommendations must be made in writing and presented to the affected licensee and the licensee's authorized representative. The licensee may accept the proposed settlement within the time established by the panel at the informal meeting. If the licensee rejects the proposed settlement or does not act within the required time, the board may proceed with the filing of a formal complaint with the State Office of Administrative Hearings.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
Yes, but costs would be offset by a reduction in the number of cases going to SOAH.

Background & Purpose

The Dental Board has stated that sending more cases to Informal Settle Conferences (ISC) would reduce their time to case closure and their backlog of cases. This is required at TMB, and it has resulted in reduced caseloads at SOAH and budgetary savings. However, to maximize the effectiveness and fairness of ISCs at the Board, changes need to be made to the current statutory guidelines for Dental ISCs. The Sunset staff recommendation addresses a piece of the changes needed to improve ISCs by clarifying that board members present at ISCs should only make recommendations for the disposition of a complaint or allegation, not revisit the findings of expert reviewers.

This modification overhauls the ISC process at the Board using the best practices currently used at TMB by clarifying the role of ISC panel members, the steps the ISC process will follow, and establishing clear deadlines. These changes will reduce the enforcement process timeline and legal costs for the majority of licensees while ensuring the Board has the necessary enforcement authority to protect the public.

Texas State Board of Dental Examiners

Issue Modification: Do not adopt Staff Recommendation 2.1. Instead adopt the following modification to combine the Board's four dental assistant certificate programs into one registration for dental assistants.

Member: Senator Hinojosa

Staff Contact: Jennifer Saenz 512.463.0120

Fiscal Impact:

Issue Modification 2.1

In lieu of staff recommendation 2.1, substitute the following as a change in statute:

- Remove the separate certification provisions for dental assistants from law and require one registration for dental assistants who provide the following dental support services to a licensed dentist:

- Dental x-rays,
- Pit and fissure sealants,
- Coronal polishing, and
- Nitrous oxide monitoring.

A dental assistant would not be authorized to perform any of the four services above without first obtaining registration from the board.

- Require services provided by a registered dental assistant to be performed under the direct supervision of a licensed dentist, but not to be construed to authorize a dental assistant to practice dentistry or dental hygiene.
- Specify that dentists remain responsible for acts delegated to the registered dental assistant. This modification would not affect the board's authority to determine which acts a licensed dentist may delegate to non-registered dental assistants.
- Establish registration requirements for dental assistants, as follows:
 - A person may not practice as a dental assistant to perform the four dental support services listed above after September 1, 2018 unless the person has registered with the board and received a certificate of registration.
 - The board, by rule, shall establish minimum education requirements for registration as a dental assistant. Requirements must include:
 - a high school diploma or equivalent;
 - a course of instruction and examination to demonstrate competency in the following dental support services:
 - Dental x-rays

- Pit and fissure sealants
 - Coronal polishing
 - Nitrous oxide monitoring
- training in basic life support, infection control, jurisprudence, and any other requirements the board determines necessary.
- The board could consider approving courses of instruction and examinations provided by outside entities such as the Dental Assisting National Board to qualify for this registration.
- Dental assistant registrations shall be renewed biennially on a staggered basis, as established by the board.
- The board shall establish continuing education requirements as a condition of renewing registration as a registered dental assistant.
- The board shall establish standards for taking disciplinary action against a registered dental assistant.
- The board shall establish fees for initial registration and renewals to cover the cost of regulation.

Background & Purpose

This modification essentially combines the four separate dental assistant certifications that currently exist into one registration for dental assistants who wish to perform any of these functions. When a dental assistant completes their educational program, they will be certified to do all four procedures. This modification would not require the regulation of all dental assistants. Registration is needed to protect public safety and ensure the dental assistant can properly and safely perform certain procedures on the patient.

Dental Board

Modification to Recommendation 3.1- (Statutory) Adopt Rec. 3.1, which clarifies that the Dental Board has authority to regulate and inspect all methods of anesthesia when performed in a dental office, but modify the recommendation to include the following as statutory changes.

- Define “pediatric” as patients ages 0-12.
- Define "high risk patient" as patients with an American Society of Anesthesiologists rating of Level 3 or 4 or older than 75.
- Require an annual permit for each of the 4 different levels of anesthesia, defined based on the depth of the intended procedure to alter the patient's mental status and the method of drug delivery.
 - Level 1: Minimal Sedation
 - Level 2: Moderate Sedation (Enteral)
 - Level 3: Moderate Sedation (Parenteral)
 - Level 4: Deep Sedation or General Anesthesia
- Require the board to develop rules establishing minimum standards for training, education, and other standards for different permit levels. For level 2 - 4 permit holders, education/training requirements must include training on pre-procedural patient evaluation including the evaluation of the patient's airway and physical status as currently defined by the ASA, ongoing monitoring of sedation and anesthesia, and management of emergencies.
- Require Level 2-4 permit holders to provide proof of additional training for the treatment of pediatric and/or high risk patients including advanced didactic and clinical training requirements. Dentists would not be allowed to treat pediatric and/or high-risk patients without proof of specialized education.
- Allow the board to establish additional limitations on the administration of anesthesia on pediatric and/or high risk patients.
- Allow the board to conduct pre-permit, random, and compliance inspections.
- Require the board to determine an appropriate risk-based inspection schedule for on-site inspections of dental offices of dentists with a Level 2, 3 or 4 permit.
- Allow the board to stagger inspections as long as all relevant offices are inspected at least once every 5 years.

- Allow the board to determine education and training requirements for inspectors.
- Require the board to maintain records of inspections.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:

The Board estimated that the original recommendation would require 3 FTEs, the costs of which would be offset by increased fees. Only requiring inspections of Level 2-4 should reduce this significantly.

Background & Purpose

The Sunset staff recommendation would allow the board to conduct routine, non-complaint based inspections of offices in which dentists perform any type of anesthesia, not just enteral. As a management action, the board would also be required to adopt rules to support a risk-based inspection schedule.

This modification adds statutory definitions for pediatric and high risk patients and ensures the Board is cognizant of the unique needs and elevated risks of these populations when developing training and education requirements for anesthesia permit holders.

This modification codifies the annual permitting process for dentists performing dental sedation/anesthesia, and requires the Board to establish enhanced training and education requirements for Level 2-4 permit holders who administer sedation or anesthesia on pediatric or high risk patients. These changes will ensure dental anesthesia is performed in a safe setting with special consideration for the unique needs and risks of pediatric and high risk patients.

This modification also requires the board to establish minimum standards related to education and training for level 2-4 anesthesia permit holders along with additional training requirements to administer anesthesia on pediatric and high risk patients.

This modification also changes the Sunset recommendation to only require inspections for level 2-4 permit holders instead of inspections of all permit holders. This will focus the Boards inspections on the higher levels of sedation permit holders.

State Board of Dental Examiners

Require the State Board of Dental Examiners to appoint an independent 5 to 10 member blue ribbon panel to investigate dental anesthesia deaths and mishaps over the last five years and make recommendations to the legislature prior to the meeting of the 85th Texas Legislature.

Member: Senator Van Taylor

Staff Contact: Ryan Paylor 512.463.0108

Fiscal Impact:

Background & Purpose

Dental anesthesia, regulated by the State Board of Dental Examiners, poses one of the greatest risks to the health and safety of a dental patient, and is related to at least 51 deaths in the past five years. The State Board of Dental Examiners, however, does not have a formal independent, investigatory panel to investigate and address anesthesia related deaths and make recommendations to improve patient safety and trust.

This request for modification requires that the State Board of Dental Examiners appoint a 5 to 10 member blue ribbon panel comprised of an independent group of dental anesthesia experts to investigate dental anesthesia deaths and mishaps over the last five years and make recommendations to the legislature prior to the meeting of the 85th Texas Legislature. This panel shall also make recommendations to the State Board of Dental Examiners on streamlining and expediting investigations, ensuring that the board has the correct powers to adequately punish wrong doers, and ensure that the public has the information they need to have confidence that malpractice is thoroughly investigated and dealt with appropriately.

Talking Points

The practice of dental anesthesia by dentists is regulated by the State Board of Dental Examiners.

Dental Anesthesia is related to at least 51 deaths in the past five years.

The State Board of Dental Examiners does not have a formal investigatory panel to investigate and advise on issues relating to Dental Anesthesia.

The request for modification requires the State Board of Dental Examiners to appoint a 5 to 10 member blue ribbon panel comprised of an independent group of dental anesthesia experts to investigate and advise the board on dental anesthesia deaths. As part of this recommendation, the panel shall consist of experts in the field of dentistry and dental anesthesia. The blue ribbon panel shall not include any current or former members of the Board of Dental Examiners. The intent of this recommendation is to establish a strictly separate, independent expert panel to review and make recommendations regarding the use of dental anesthesia.

Dental Board

Modification to Recommendation 3.2- (Statutory) Require dentists holding an anesthesia permit to maintain and update written emergency action plans as a statutory instead of a management recommendation. Additionally:

- Level 2-4 sedation/anesthesia permit holders' emergency plans must include current Advanced Cardiac Life Support (ACLS) rescue protocols and advanced airway management techniques.
- For Level 2-4 sedation/anesthesia permit holders treating pediatric patients emergency management plans must include current Pediatric Advanced Cardiac Life Support (PALS) rescue protocols and advanced airway management techniques.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
None

Background & Purpose

This modification ensures the requirement to have an emergency action plan is in statute instead of Sunset staff's recommendation to be a management action. This will make certain this is an ongoing requirement.

This modification also requires that written emergency action plans for level 2-4 permit holders include protocols and techniques on how to treat patients in emergency settings and how to treat children in emergency settings.

Dental Board

Modification to Recommendation 5.2- (Statutory) Adopt recommendation 5.2 but modify the recommendation to also apply the newly updated Sunset across-the-board recommendation on board member training. This modification would require the Dental Board to develop a training manual that each board member attests to receiving annually and require board member training to include information about the scope of and limitations on the board's rulemaking authority.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
None

Background & Purpose

This modification applies the Across-the-Board recommendation on board member training that the Sunset Commission changed at its last meeting to ensure that board members are adequately trained on their responsibilities and the limits of their authority.

This information would normally already be included in the Sunset staff report, but since this staff report was released before the Sunset Commission adopted changes we must make these changes as a modification.

[Board of Dental Examiners]

Modify the Schwertner modification regarding board member training to require the Dental Board to post a copy of each board member's signed acknowledgement sheet verifying receipt of the agency's training manual on the agency's website.

Member:
Flynn

Staff Contact: 512.463.0880
David Erinakes

Fiscal Impact:

Background & Purpose

This recommendation modifies the Across-the-Board recommendation on board member training that the Sunset Commission changed at its last meeting and that is being separately updated for the Dental Board in Sen. Schwertner's Modification. This recommendation would help assure the public that board members have received training on their proper roles as members of the policy making body by requiring the agency to post the signed acknowledgement sheet to the agency's website.

Dental Board

New Issue 1- (Statutory) Amend the Board's statute to create a standing Advisory Committee on Dental Anesthesia to advise the board on the development and revision of rules related to dental sedation and anesthesia.

- ☐ Require the Board chair to appoint nine members to include, but not be limited to: dentists, dentist anesthesiologists, oral and maxillofacial surgeons, pediatric dentists and physician anesthesiologists. The Board chair may not appoint an active dental board member to the advisory committee.
- ☐ Require the Board to provide the committee with a board attorney who will act as counsel to the committee members. The board attorney shall be present during committee meetings and the committee's deliberations to advise the committee on legal issues.
- ☐ Require the committee to report their recommendations and other findings to the dental board on an annual basis, or more frequently as necessary to provide input on rulemaking and make this information available on the Board's website.

Member:

Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:

Potentially minimal costs for travel expenses, but meetings could be conducting via videoconferencing or webinars.

Background & Purpose

New Issue 1 creates a standing Advisory Committee on Dental Anesthesia to advise the Board on the development and revision of rules related to dental sedation/anesthesia. It requires the committee to report recommendations at least annually to the Dental Board.

This new issue will allow a standing group of external experts on anesthesia and dental anesthesia will have input into the development of rules governing the safe administration of dental sedation/anesthesia, and will ensure that rules will adapt to changes in best practices for providing anesthesia.

Dental Board

New Issue 2- (Management) Require the board to track and report the following information related to data:

All information related to an investigation is confidential, except that the agency shall provide the following information on a quarterly basis to the board and the standing Advisory Committee on Dental Anesthesia, and to legislative offices upon request: **De-identified, case specific data reflecting information about jurisdictional, filed complaints resolved during the reporting period related to anesthesia/ sedation including:**

1. Source of initial complaint – public, other agency, self-report of death, self-report of hospitalization, or initiated by the Board
2. Information about licensee:
 - a. Whether respondent is Medicaid provider
 - b. Respondent's highest sedation/anesthesia permit level
 - c. Whether respondent holds portability privileges
 - d. Respondent's self-reported practice area
3. Information about patient:
 - a. Patient ASA (identified in respondent's dental records and/or determined by Dental Review Panel)
 - b. Patient age – 12 and under, between 13 and 18, between 19 and 75, and over 75
 - c. Location of treatment investigated by the agency – dental office, hospital, ASC, office of other practitioner
 - d. Level of sedation/anesthesia administered – Local, Nitrous, I, II, III, IV (determined by Dental Review Panel)
 - e. Sedation/anesthesia administrator – respondent, other dentist, MD, CRNA (determined by Dental Review Panel)
 - f. Whether treatment investigated by the agency was paid by Medicaid
4. Information about investigation:
 - a. Allegation categories identified in preliminary investigation
 - b. Disposition of official investigation – Dismissed by Enforcement, Dismissed by Legal – No Violation, Dismissed by Board Vote, Closed by Administrative Citation/Remedial Plan/Disciplinary Action
 - c. If disposition is public action (Administrative Citation, Remedial Plan, or Disciplinary Action), the violations identified in the public action resolving the official investigation

The Board must make publicly available on their website aggregate data by fiscal year and type of license about the following areas:

1. Number of licensees at the end of the fiscal year
2. Total number of complaints against licensees originating in that fiscal year
3. For all resolved complaints in that fiscal year, break down the resolution by each type of action taken (nonjurisdictional, dismissed, warning, probation, suspension, revocation, etc.)
4. For all resolved complaints in that fiscal year, break down the resolution by the nature of the complaint allegation (standard of care, impairment, dishonorable conduct, continuing education violation, etc.)
5. Number of cases open longer than one year

6. Average administrative penalty assessed
7. Number of cases referred to ISCs
8. Number of cases resolved in ISCs
9. Number of cases referred to SOAH (default + non-default)
10. Number of contested cases heard at SOAH
11. Number of cases that went on to district court
12. Average number of days to resolve a complaint from complaint received to investigation completed
13. Average number of days to resolve a complaint from complaint received to final order issued
14. Average number of days to issue a license
15. Number of cases involving mortality and morbidity
16. Total number of anesthesia complaints against licensees originating in that fiscal year by permit level
17. For all resolved anesthesia complaints in that fiscal year, break down the resolution by each type of action taken (dismissed, warning, probation, suspension, revocation, etc.) by permit level
18. For all resolved anesthesia complaints in that fiscal year, break down the resolution by type of complication that violated the standard of care by permit level

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
None

Background & Purpose

The Sunset staff recommendation requires the Board to report each fiscal year, at a minimum: the number of complaints received broken down by provider type and allegation type; outcomes of cases resolved and number and reason of cases dismissed; and average time to resolve cases and number and age of all cases open at the end of the year.

This New Issue 2 expands the Sunset staff recommendation by adding a clear list of information the board must track and report. This modification will also provide the Board and the standing anesthesia advisory committee with data to support rule making decisions, and will give the public access to information about the Board's enforcement statistics and licensee's activity so they can make informed dental decisions.

Dental Board

New Issue 4- (Statutory) Require the board to develop rules establishing minimum emergency preparedness standards necessary prior to administering sedation/ anesthesia including requirements related to:

- ☐ Having an adequate, unexpired supply of necessary drugs and anesthetic agents;
- ☐ Having an onsite automated external defibrillator (AED) immediately available;
- ☐ Periodic equipment inspections in a manner and on a schedule determined by the Board; and
- ☐ Maintenance and retention of an equipment readiness log that shall be made available to the Board upon request and to Board staff during inspections.

Member:

Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:

None

Background & Purpose

New Issue 4 adds requirements for the Board to develop rules for emergency preparedness related to the availability of life saving drugs and equipment for anesthesia along with maintenance and inspections of anesthesia equipment. These requirements will ensure dentists performing anesthesia are adhering to the best practices of emergency preparedness.

This new issue would also require an equipment readiness log to certify that all emergency preparedness standards have been met.

Dental Board

New Issue 5- (Statutory) Amend Board's statute to include the following portability requirements:

- ☐ Define "portability" as the ability of a permit holder to provide permitted anesthesia services in a location other than a facility or satellite facility, consistent with the definition in rule.
- ☐ Require the board to establish in rule requirements and methods for a dental sedation and anesthesia permit holder to obtain a portability permit.
- ☐ Require the board to establish advanced didactic and clinical training requirements necessary for a portability permit, with consideration for additional requirements for those using their portability permit to treat pediatric and/or high risk patients.

Member:
Senator Charles Schwertner

Staff Contact: Drew Graham 3-0360

Fiscal Impact:
None

Background & Purpose

There are currently no statutory requirements or guidelines related to portability of sedation/anesthesia permits.

New Issue 5 codifies portability permit requirements to ensure traveling dentists performing anesthesia have the proper training and that the Board makes rules based on best practices for treating anesthesia portably. These requirements will protect the public and provide a consistent level of anesthesia treatment across all patient treatment sites.

Dental Board

<i>New Issue 6- (Statutory)</i> Require dentists to register in the Prescription Monitoring Program to increase awareness and encourage the use of the database.
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<i>Member:</i> <i>Senator Charles Schwertner</i>

<i>Staff Contact:</i> Drew Graham 3-0360
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<i>Fiscal Impact:</i> None

Background & Purpose

The Sunset staff report on the Pharmacy Board recommends mandatory use of the prescription monitoring program (PMP). This modification does not require use of the PMP, but ensures that dentists are registered and have access to the PMP to encourage the use of the system.

Texas State Board of Dental Examiners

New Issue: Require the Dental Board to search the Prescription Monitoring Program on a periodic basis.

Member: Senator Hinojosa

Staff Contact: Jennifer Saenz 512.463.0120

Fiscal Impact:

New Issue:

Require the Dental Board to query the Prescription Monitoring Program on a periodic basis for potentially harmful prescribing patterns among its licensees. The Dental Board would work with the Pharmacy Board to establish potentially harmful prescribing patterns that the Dental Board should monitor by querying the database for dentists who meet those prescribing patterns. Based on the information obtained from the Prescription Monitoring Program, the Dental Board would be authorized to open a complaint for possible non-therapeutic prescribing.

Background & Purpose:

The Prescription Monitoring Program must be utilized by both prescribers and dispensers to adequately ensure public safety. This "two-fold approach" is a collaborative effort on both ends in monitoring both the prescribing and dispensing of controlled substances in an effort to prevent abuse.

Overprescribing of pain medication by dentists can be the start of opioid addiction. The Dental Board should make use of the state's new Prescription Monitoring Program to proactively monitor potentially harmful prescribers and prescribing patterns.

Texas State Board of Dental Examiners

New Issue: Require dentists to use the Prescription Monitoring Program

Member: Senator Hinojosa

Staff Contact: Jennifer Saenz 512.463.0120

Fiscal Impact:

New Issue:

Beginning September 1, 2018, require dentists to search the Prescription Monitoring Program and review a patient's prescription history before prescribing opioids, benzodiazepines, barbiturates, or carisoprodol. A dentist who does not check the program before prescribing these drugs would be subject to disciplinary action by the Dental Board.

Background & Purpose

The Prescription Monitoring Program must be utilized by both prescribers and dispensers to adequately ensure public safety. This "two-fold approach" is a collaborative effort on both ends in monitoring both the prescribing and dispensing of controlled substances in an effort to prevent abuse.

This recommendation would require dentists to register for and use the Prescription Monitoring Program to check their patient's prescription history before prescribing the most addictive controlled substances to their patients. Overprescribing of pain medication by dentists can be the start of opioid addiction.

STATE BAR OF TEXAS

Issue 1

The Rulemaking Process at the State Bar Obstructs Changes Needed to Effectively Regulate Attorneys. (Page 13)

Change in Statute

- Rec. 1.1** *(Page 19)* 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.
- Rec. 1.2** *(Page 19)* 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.

Management Action

- Rec. 1.3** *(Page 20)* The State Bar should develop a consistent process for collecting membership input on proposed rule changes to inform Supreme Court rulemaking.

Senator Watson Proposed Modification

Do not adopt staff Recommendations 1.1, 1.2, and 1.3. Instead, adopt a modification to retain the referendum requirement for State Bar rules while also improving the overall rulemaking process.

Representative Thompson Proposed Modification

Do not adopt the recommendations under Issue 1 that remove the requirement for a referendum for changes in State Bar rules.

Issue 2

Texas' Attorney Discipline System Lacks Best Practices Needed to Ensure Fair, Effective Regulation to Protect the Public. (Page 23)

Change in Statute

Rec. 2.1 (Page 32) 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.

Rec. 2.2 (Page 32) 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.

Senator Nichols Proposed Modification

Modify Recommendation 2.2 to require the State Bar to accept proof of a concealed handgun license to fulfill the fingerprint background check requirement.

Rec. 2.3 (Page 33) Require licensed attorneys to report criminal activity and discipline imposed by other jurisdictions to the Office of the Chief Disciplinary Counsel.

Rec. 2.4 (Page 33) Require overdraft notifications for attorney trust accounts so that the chief disciplinary counsel has an early warning system for possible misuse of client funds.

Rec. 2.5 (Page 33) Reinstate the chief disciplinary counsel's subpoena power during the investigative phase of the attorney discipline process.

Rec. 2.6 (Page 34) Require a process and criteria for conducting investigatory hearings to attempt earlier resolution for certain cases.

Rec. 2.7 (Page 34) Require a re-evaluation and adjustment of time frames governing the grievance process to ensure workability.

Rec. 2.8 (Page 34) Clearly establish the Grievance Referral Program in rule, and expand its use to any point in the attorney discipline process.

Rec. 2.9 (Page 34) Require comprehensive sanction guidelines in the Texas Rules of Disciplinary Procedure.

Management Action

Rec. 2.10 *(Page 35)* Direct the Office of the Chief Disciplinary Counsel to query the national disciplinary database at regular intervals.

Senator Schwertner Proposed Modification

As a statutory change instead of a management action, require the Office of the Chief Disciplinary Counsel to query the national disciplinary database at regular intervals.

Rec. 2.11 *(Page 35)* Direct the chief disciplinary counsel to track and report disciplinary case outcomes in greater detail.

Senator Schwertner Proposed Modification

As a statutory change instead of a management action, require the chief disciplinary counsel to track and report disciplinary case outcomes in greater detail.

Rec. 2.12 *(Page 35)* Direct the State Bar to post more information on its website about attorney disciplinary actions.

Senator Schwertner Proposed Modification

As a statutory change instead of a management action, require the State Bar to post more information on its website about attorney disciplinary actions.

Representative Flynn Proposed Modification

Adopt Recommendation 2.12, but modify it to also direct the State Bar to post summary statistics and trend information regarding the attorney grievance system on the home page of the State Bar's website, including but not limited to data on the number of grievances received, their disposition, and the average time for resolution of each step of the grievance process.

Rec. 2.13 *(Page 36)* Direct the Office of the Chief Disciplinary Counsel to more proactively provide assistance to complainants in understanding reasons for complaint dismissal.

Issue 3

The State Bar Does Not Maximize Informal Dispute Resolution to Most Effectively Resolve Grievances Against Attorneys. (Page 39)

Change in Statute

- Rec. 3.1** *(Page 41)* Require a referral process to divert minor issues from the formal grievance system to the Client-Attorney Assistance Program for informal dispute resolution.
- Rec. 3.2** *(Page 41)* Repeal the requirement to refer dismissed grievances to the Client-Attorney Assistance Program.

Issue 4

Texas Has a Continuing Need for the State Bar. (Page 43)

Change in Statute

- Rec. 4.1** *(Page 46)* Continue the State Bar for 12 years.

Proposed New Issues

Senator Watson Proposed New Issue 1

Establish an independent Ombudsman's office under the Supreme Court to help oversee the attorney grievance system.

Senator Schwertner Proposed New Issue 2

In the State Bar Act, update the Sunset across-the-board recommendation on board member training (ATB 5) recently modified by the Sunset Commission, excluding the portion regarding travel reimbursement.

Representative Flynn Proposed New Issue 3

Amend statute to change the required composition of the State Bar Board to increase the representation of non-attorney public members as shown in the attached materials. As a related management action, direct the State Bar to modify existing State Bar Board member districts as needed to accommodate the changes.

State Bar

Modification – Do not adopt Staff Recommendations 1.1, 1.2, and 1.3. Instead, adopt the following modification to retain the referendum requirement for State Bar rules while also improving the overall rulemaking process.

Member: Senator Watson

Staff Contact: Kelsey Erickson, (512) 463-0114

Fiscal Impact: The modification would not have a fiscal impact to the state, as the State Bar receives no state funds and operates outside of the appropriations process.

Background & Purpose

Under current law, changes to the substantive and procedural rules that govern attorney conduct must be approved by a majority of attorneys who vote in a referendum.¹ Changes to certain fees must go through this same process.² Although this requirement is fairly unique among licensing agencies, it is an important safeguard that has benefitted the state's legal system for decades.

Despite the referendum's long record of success, the latest one, which culminated in 2011, exposed serious flaws, not in the referendum itself, but in the process that leads up to a referendum. For example, the Supreme Court of Texas and the State Bar of Texas appointed two separate committees to study rule changes. These committees spent about six years developing and defending different proposals. Further, many attorneys complained that their voices were ignored and excluded throughout this process. Lastly, the referendum's final ballot created serious problems in part because it grouped completely unrelated topics together in a single proposal. Texas attorneys recognized these problems and soundly rejected the 2011 referendum as a result. Notably, this is the only referendum since 1985 that failed because Texas attorneys voted against it.

This modification preserves Texas attorneys' right to vote in rule referenda while addressing many of the underlying problems that led to the 2011 referendum's defeat. More specifically, this modification outlines a new rulemaking process that proposals must follow before they are submitted to attorneys in a referendum. This process incorporates best practices from other Texas agencies and is designed to encourage efficiency, collaboration, and expertise. Finally, this process also ensures interested individuals from the State Bar, the Supreme Court, and the public at large have ample opportunity to participate and make informed decisions.

¹ Government Code § 81.024(g).

² Texas Government Code § 81.054.

Lastly, this modification transfers the authority to change membership and related fees from the State Bar's members to the Supreme Court. The Supreme Court is a more appropriate decision-maker when it comes to fees since it already reviews and must approve the State Bar's budget.³

Talking Points

- The current system is broken, but not because attorneys have a right to vote. Instead, the 2011 referendum revealed that the process leading up to a referendum is seriously flawed.
- This modification serves several purposes:
 - It preserves Texas attorneys' right to vote in rule referenda;
 - It transfers the authority to change fees to the Supreme Court, which already has the authority to approve the State Bar's budget; and
 - It corrects many of the problems that led to the failed 2011 referendum.
- The proposed rulemaking process includes the following steps:
 - First, rule proposals may be submitted by various people/entities. These proposals all go to a new, standing committee of the State Bar for review.
 - The committee is made up of Supreme Court and State Bar appointees, as well as attorneys and non-attorneys.
 - Committee members serve staggered-three year terms.
 - The committee is charged with reviewing, developing, and receiving feedback on rule proposals.
 - This structure should create several benefits.
 - Having one, standing committee versus separate, ad hoc committees promotes efficiency.
 - Members serve long enough to develop expertise and relationships with interested stakeholders, but not so long as to slow down the process.
 - Finally, requiring public feedback towards the beginning of the process ensures different groups have a real opportunity to effectuate change.
 - Second, rule proposals must go through an approval process.
 - The State Bar Board, Texas attorneys, and the Supreme Court all have an opportunity to vote on rule proposals.
 - Further, each of these stages has deadlines, ensuring efficient and timely consideration of every proposal.
- Finally, this modification adds additional transparency protections to the rulemaking process. For example, referendum ballots must each be limited to one subject, and proposals must be printed in the *Texas Register* and the *Texas Bar Journal* for public review and comment. With the procedural changes, these protections should make for a much more responsible rulemaking process.

Modification Language

³ See Texas Government Code § 81.022.

1. In statute, create the Committee on Disciplinary Rules and Referenda (the "Committee") as a standing committee of the Bar.

- a. *Basic Functions.* The Committee shall:
 - i. Regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure (the "Rules");
 - ii. Issue a report on the adequacy of the Rules to the Supreme Court and the Bar Board at least once annually;
 - iii. Oversee the initial stages of the rulemaking process, as described below.
- b. *Organization.*
 - i. The Committee shall consist of the following appointments, with three-year, staggered terms⁴:
 - 1. Four attorneys and two non-attorney public members, appointed by the Bar President; and
 - 2. Two attorneys and one non-attorney public member, appointed by the Supreme Court.
 - ii. The Bar President shall designate an attorney member to serve as the chairperson for an annual term.⁵
 - iii. The Bar may hire a staff attorney to assist the Committee.

2. Repeal Government Code § 81.024(b)-(g), and replace it with the following rulemaking process.

- a. *Initiation.*
 - i. The Committee may initiate rulemaking independently or as part of its regular review.
 - ii. In addition, the Committee shall either (a) initiate rulemaking or (b) issue a written explanation regarding why it declined to do so within 60 days of receiving any of the following items requesting a rulemaking:
 - 1. A Bar Board resolution;
 - 2. A Supreme Court request;
 - 3. A request from the Commission for Lawyer Discipline;
 - 4. A petition signed by at least 10% of the Bar's members;⁶
 - 5. A concurrent resolution of the Legislature; or
 - 6. A petition signed by at least 20,000 people.⁷
- b. *Phase 1: Proposal Development.*
 - i. After the Committee initiates rulemaking, it shall study the issue, hold public hearings, and draft rule proposals. As part of this process, the Committee shall take reasonable efforts to solicit feedback from different parts of the state and from different groups of attorneys and non-attorneys. The Committee shall conclude this work and publish draft proposals in the *Texas Register* and in the *Texas Bar Journal* within 6 months or the proposal is defeated.

⁴ The initial appointments would not all have three-year terms in order to create the staggered effect.

⁵ This provision is modeled after the Commission for Lawyer Discipline. See Texas Government Code § 81.076(d).

⁶ These first three methods are similar to current law. See Government Code § 81.024(b).

⁷ See Government Code § 2001.021 for an analogous procedure applicable in the Executive Branch.

- ii. After the draft proposals are published, the public (including attorneys) shall have at least 30 days to submit public comments to the Committee. During this time, the public may petition for a public hearing on any draft proposal.⁸ Lastly, the Committee may amend any public proposal in response to feedback received during this time.
 - iii. Within 60 days of the public comment period closing, the Committee shall vote on whether to recommend each proposal to the Bar Board. If any proposal receives an affirmative vote of at least 5 members of the Committee, it shall be considered by the Bar Board.
- c. *Phase 2: Proposal Approval.*
 - i. Within 180 days, the Bar Board shall vote on each proposal that it received from the Committee. For each proposal, the Board shall vote to (1) approve the proposal, (2) reject the proposal, or (3) send the proposal back to the Committee for further consideration. If any proposal receives an affirmative vote of the majority of the Board, then the Board shall petition the Supreme Court to order a referendum for the relevant proposals.
 - ii. After receiving a petition from the Bar Board, the Supreme Court shall order a referendum, much like they do today. Again the proposals shall be published in the *Texas Register* and the *Texas Bar Journal*, and the Bar's members shall have at least 30 days to consider the referendum before voting begins. Voting shall last for 30 days. Then, the results shall be determined as they are today: on each proposal individually by a simple majority of those members who voted.
 - iii. Finally, the Supreme Court may "veto" any approved proposal in its entirety with a majority vote (but the Court may not veto only part of a proposal). If the Court fails to act w/in 60 days, the proposal is deemed approved.
 - iv. A rule may not be promulgated unless it is approved at each of these steps (with the Committee, the Bar Board, the Bar's members, and the Supreme Court).

3. Codify additional transparency protections and efficiency measures.

- a. All meetings/hearings of the Bar Board and Supreme Court where proposals are deliberated shall be advertised and open to the public. Also, all votes shall be recorded and made public.
- b. Each proposal shall be limited to one subject. Although multiple proposals may appear on one referendum ballot, they shall each pass or fail individually.
- c. As mentioned above, proposals shall be printed in the *Texas Register* and in the *Texas Bar Journal*. Currently they are only published in the *Texas Bar Journal*, which non-lawyers are unlikely to read.
- d. The Committee, the Bar, and the Supreme Court shall maximize technology to reduce delay and increase financial efficiency and stakeholder feedback throughout this process.
- e. The Bar shall allow referendum opponents a substantially equal opportunity to speak when referendums are discussed in Bar-sponsored forums.

⁸ See *Id.* at § 2001.029(b) for a comparable procedure.

- 4. Require State Bar membership fee changes to be approved through the State Bar's existing budget process, instead of through the referendum process.**
- a. Repeal the current requirement that subjects membership and other fee changes to the referendum process.⁹
 - b. Instead, the State Bar shall submit and justify any fee changes as part of its existing annual budget process. These changes shall be clearly described, posted, and considered as part of the State Bar's annual public budget hearing. Finally, any fee change must be approved by the Supreme Court as part of the State Bar's budget.¹⁰

⁹ See Texas Government Code § 81.054.

¹⁰ See Texas Government Code § 81.022.

[State Bar of Texas]

Remove the recommendations under issue 1 that remove the requirement for a referendum for changes in State Bar rules.

Member:
Thompson

Staff Contact: 512.463.0720
Brete Anderson

Fiscal Impact:

Background & Purpose

State Bar of Texas Review

Requested Modification to Recommendation 2.2 which would require the State Bar to accept proof of a concealed handgun license to fulfill the fingerprint background check requirement.

Member: Nichols

Staff Contact: Tina O'Jibway 512.463.0103

Fiscal Impact: None

Background & Purpose

Recommendation 2.2 requires the State Bar to implement fingerprint criminal background checks for all those currently licensed attorneys without information already on file with the Board of Law Examiners. This recommendation would require licensed attorneys to incur the financial cost associated with the fingerprinting, and take time out to obtain the fingerprints.

The requested modification would recognize that those attorneys who hold a concealed handgun license have already passed a fingerprint background check in order to obtain that license, and allow them to simply provide proof of their CHL to fulfill the requirement.

Talking Points

Recommendation 2.2 is a prudent recommendation aimed at protecting the public, but would require a financial and time commitment for tens of thousands of licensed attorneys throughout Texas. Those attorneys who have a current concealed handgun license have already obtained a fingerprint criminal background check, and this modification avoids duplicative regulation for those attorneys.

State Bar of Texas

2.10 - Modify the Sunset recommendation to direct the Office of the Chief Disciplinary Counsel to query the national disciplinary database at regular intervals. Make the recommendation a statutory change instead of a management action.

Member: Senator Schwertner

Staff Contact: Joseph Halbert 512.463.0105

Fiscal Impact: No significant fiscal impact to the State bar is expected by Sunset staff.

Background & Purpose

As Sunset staff explained in their report, the State Bar of Texas reports disciplinary data to the National Lawyer Regulatory Data Bank maintained by the American Bar Association but does not query the database.¹ Recently, they obtained user credentials to the data bank and have expressed an intent to query the database.²

Requiring the State Bar to query the database on a regular basis will help protect the public by ensuring that the Bar has more information in disciplinary actions in other states.

Talking Points

- Improve public protection.
- Provide a check on attorney self-reporting (required in Staff recommendation 2.3).
- No additional cost is expected to the Bar.

¹ Sunset Commission staff. "State Bar of Texas Staff Report", 85th Legislature, p. 25.

² Ibid.

State Bar of Texas

2.11 - Direct the chief disciplinary counsel to track and report disciplinary case outcomes in greater detail. Make the recommendation a statutory change instead of a management action.

Member: Senator Schwertner

Staff Contact: Joseph Halbert 512.463.0105

Fiscal Impact: No significant fiscal impact to the State bar is expected by Sunset staff.

Background & Purpose

Sunset staff found that the chief disciplinary counsel did not collect sufficient data, especially data useful in determining whether violations and sanction decisions are applied uniformly across the state.³ In its staff report, Sunset recommended that the chief disciplinary counsel capture and report more data.⁴ In the June Sunset Commission hearing, members expressed interest in learning more about the number of grievances filed over time, as well as the number of grievances that become complaints.

Requiring the State Bar to collect and report more data would improve public protection by providing more transparency, encouraging uniformity across the state, and allowing for more in-depth data analysis by interested parties.

Talking Points

- Improve public protection by increasing uniformity and transparency.
- No additional cost to the Bar is expected.

³ Sunset Commission staff. "State Bar of Texas Staff Report", 85th Legislature, p. 31.

⁴ Ibid., p. 35.

State Bar of Texas

2.12 - Direct the State Bar to post more information on its website about attorney disciplinary actions. Make the recommendation a statutory change instead of a management action.

Member: Senator Schwertner

Staff Contact: Joseph Halbert 512.463.0105

Fiscal Impact: No significant fiscal impact to the State bar is expected by Sunset staff.

Background & Purpose

Sunset staff found that the State Bar's current policies regarding attorney disciplinary information create barriers between the public and useful public information, such as long-term disciplinary history.⁵ The Bar website only provides reports of minimal information about an attorney, and disciplinary history for a period of ten years. Additional information costs \$15 and cannot solely be accessed online.⁶ Other occupational licensing agencies provide more public information online, and provide it at no cost to the public.⁷

Requiring the State Bar to collect and report more data would improve public protection by providing more transparency, encouraging uniformity across the state, and allowing for more in-depth data analysis by interested parties.

Talking Points

- Improve public protection by increasing accessible information about attorneys.
- No additional cost is expected to the Bar.

⁵ Sunset Commission staff. "State Bar of Texas Staff Report", 85th Legislature, p. 31.

⁶ Ibid.

⁷ Ibid.

[State Bar of Texas]

Require the State Bar to post summary statistics and trend information regarding the attorney grievance system on the home page of the State Bar's website, including but not limited to data on the number of grievances received and their disposition, and the average time for resolution of each step of the grievance process.

Member:
Flynn

Staff Contact: 512.463.0880
David Erinakes

Fiscal Impact:

Background & Purpose

This recommendation would ensure all members of the public and interested parties have easy access to information needed to show how the grievance system is operating overall. While the Commission for Lawyer Discipline publishes some of this information in an annual report, placing this information in a prominent place on the home page of the State Bar's website would increase its availability and potential use. This modification complements Sunset staff Recommendation 2.11 which directs the Chief Disciplinary Counsel to better track and report disciplinary case outcomes in greater detail.

State Bar

New Issue – Establish an independent Ombudsman’s office under the Supreme Court to help oversee the attorney grievance system.

Member: Senator Watson

Staff Contact: Kelsey Erickson, (512) 463-0114

Fiscal Impact: The modification would not have a fiscal impact to the state, as the State Bar receives no state funds and operates outside of the appropriations process.

Background & Purpose

The State Bar of Texas oversees and enforces the Texas disciplinary system. Because the State Bar is also a professional association that all Texas attorneys are required to participate in, there is a legitimate concern regarding conflicts of interest. In particular, some advocates question if the State Bar is protecting its own attorneys, especially since data from the last ten years indicates that the number of grievance actions against attorneys has remained flat while the profession has significantly grown in size.

At the same time, it is important to note that the Sunset staff just completed a thorough review of the State Bar and did not find the kind of evidence that it typically looks for before recommending a significant, structural change. Instead, it found that the State Bar is administering its programs, including the disciplinary system, fairly well.

This proposal seeks to address the concerns of bias that legitimately stem from the State Bar’s unique structure without requiring a wholesale upheaval. More specifically, this modification requires the State Bar to fund one full-time position so that an Ombudsman can be created under the direct authority of the Texas Supreme Court. This Ombudsman can serve several key functions, each of which addresses a concern advocates have shared regarding the current disciplinary process. For example, the Ombudsman can help people access the system by answering questions and giving guidance about the grievance forms. In addition, the Ombudsman can review individual cases to ensure that the State Bar followed its own grievance procedures. And lastly, the Ombudsman can review trends and make recommendations to the Supreme Court and the State Bar Board regarding necessary changes. In summary, the Ombudsman can provide an independent review to help the State identify and correct problems within the State Bar’s disciplinary process.

Modification Language

- (1) The State Bar of Texas shall fund one FTE position to serve as an Ombudsman for the Texas attorney discipline system (the “system”).

- a. Except for the source of the Ombudsman's salary, the Ombudsman shall be completely independent from the State Bar, including the State Bar Board of Directors, the Commission for Lawyer Discipline, and the Office of the Chief Disciplinary Counsel.
 - b. The Ombudsman shall report directly to the Supreme Court of Texas.
 - c. The Ombudsman shall have the same access to confidential case information and duty to protect confidential information as the grievance panel members.
- (2) The Ombudsman shall:
- a. Receive complaints about the system;
 - b. Receive and investigate complaints that the system's procedural rules were violated in a particular case;
 - c. Answer questions from the public about how the system works, how to access the system, and the availability of other Bar programs;
 - d. Help members of the public who wish to submit a lawyer grievance or inquiry by explaining what information is required and how best to present the information; and
 - e. At least once annually, make recommendations to the State Bar Board and the Supreme Court regarding possible improvements to the system, including ways to improve access to the system and revisions to the grievance form.
- (3) On request, any entity of the State Bar shall share information with the Ombudsman that is necessary to:
- a. Determine if the Bar adhered to the procedural rules in a particular case; or
 - b. Evaluate the system's overall efficacy and adequacy.
- (4) Notwithstanding any other provision, the Ombudsman shall have no authority to:
- a. Draft grievances or act as an advocate on behalf of members of the public;
 - b. Overturn specific case outcomes; or
 - c. Access privileged communications and information shared between the Office of the Chief Disciplinary Counsel and the Commission for Lawyer Discipline.

State Bar of Texas

New Issue 1 - (Statutory) In the State Bar Act, update the Sunset across-the-board recommendation on board member training (ATB 5) recently modified by the Sunset Commission, excluding the portion regarding travel reimbursement.

Member: Senator Schwertner

Staff Contact: Joseph Halbert 512.463.0105

Fiscal Impact: No significant fiscal impact to the State bar is expected.

Background & Purpose

This recommendation updates the Across-the-Board (ATB) recommendation on board member training that the Sunset Commission changed at its last meeting in June of 2016. The language ensures board members are adequately trained on their responsibilities and the limits of their authority.

The new issue excludes the ATB language relating to travel reimbursement as the Bar operates outside of the appropriations process and is already able to reimburse members for training.

This information would normally already be included in the Sunset staff report, but since this staff report was released before the Sunset Commission adopted changes we must make these changes as a new issue.

[State Bar of Texas]

Change the required composition of the State Bar Board to increase the representation of non–attorney public members as follows. As a related management action, direct the State Bar to modify existing State Bar Board member districts as needed to accommodate the changes.

- Reduce the number of members elected from State Bar membership from 33 to 27
- Add 6 additional public non–attorney members appointed by the Supreme Court

The resulting composition of voting members of the State Bar Board (total of 46) would be as follows:

- 27 members elected from State Bar membership (including officers);
- 12 non–attorney public members appointed by the Supreme Court;
- Four minority attorney members appointed by the State Bar president (unchanged); and
- Three attorney members of the Texas Young Lawyer’s Association elected by TYLA members (unchanged)

Member:
Flynn

Staff Contact: 512.463.0880
David Erinakes

Fiscal Impact:

Background & Purpose

This recommendation would double the proportion of non–attorney public members on the State Bar Board (among voting members) from 13% to 26%. This change is important to ensure the public interest is appropriately balanced with the profession’s interest.

BOARD OF LAW EXAMINERS

Issue 1

Key Elements of the Board's Statute Do Not Conform to Common Licensing Standards. (Page 51)

Change in Statute

- | | |
|----------------------------------|---|
| Rec. 1.1 <i>(Page 54)</i> | Remove an outdated requirement for applicants to attest they do not have a mental health diagnosis. |
| Rec. 1.2 <i>(Page 54)</i> | Remove the unnecessary requirement that applicants submit a notarized, verified affidavit form. |
| Rec. 1.3 <i>(Page 55)</i> | Remove specific deadlines from statute and require the Supreme Court to adopt deadlines and a schedule of late fees in rule. |
| Rec. 1.4 <i>(Page 55)</i> | Require the board to develop guidelines to assist decision making for character and fitness determinations, probationary licenses, and waiver requests. |
| Rec. 1.5 <i>(Page 55)</i> | Clearly authorize the board to delegate routine matters to the executive director and require related policies. |

Issue 2

Texas Has a Continuing Need for the Board of Law Examiners. (Page 57)

Change in Statute

- | | |
|----------------------------------|---|
| Rec. 2.1 <i>(Page 60)</i> | Continue the Board of Law Examiners for 12 years. |
|----------------------------------|---|

Proposed New Issues

Vice Chair Taylor Proposed New Issue 1

Amend statute to change the end date of board member terms from August 31 to May 31.

Senator Schwertner Proposed New Issue 2

Amend the Texas Government Code to end Board of Law Examiners board member terms on May 31 instead of August 31.

Senator Schwertner Proposed New Issue 3

In the Board of Law Examiners' statute, update the Sunset across-the-board recommendation on board member training (ATB 5) recently modified by the Sunset Commission, excluding the subsections relating to rulemaking authority and travel reimbursement.

The Board of Law Examiners

Changing the end date of board member terms from August 31 to May 31.

Member: Senator Van Taylor

Staff Contact: Richard Gee 512.463.0108

Fiscal Impact:.

Background & Purpose

Board members of the Board of Law Examiners serve staggered six year terms. Each odd numbered year, two terms expire on August 31st. This date occurs during the period that the board grades July exams and drafts questions for February exams, leaving outgoing board members insufficient time to complete both duties. Because of this end date, incoming board members do not begin their terms until September 1st and must immediately begin drafting February exam questions before any training and orientation. In short, the end date of August 31st hinders outgoing and incoming board members from efficiently fulfilling their obligations to the bar exam.

This new issue for the Commission's consideration is to change the end date of a board member's term from August 31st to May 31st. This change provides ample time for new members to complete orientation before question grading and drafting duties begin.

Talking Points

Each board member serves staggered six year terms that end on August 31st of each odd numbered year. This date falls in the middle of the board's busy work cycle of grading and drafting questions for the state bar exam.

Incoming board members must hit the ground running without any training or orientation and begin drafting new questions immediately for the February exam. With over 3,000 exams to grade from the July test date, outgoing board members do not have sufficient time to accomplish their duties.

Grading and drafting questions for the bar exam are sensitive and time consuming matters. To facilitate improved performance by new board members, changing the end date for outgoing members provides new members with sufficient time to complete training and orientation for their upcoming duties.

Board of Law Examiners

New Issue 1 - Amend the Texas Government Code to end Board of Law Examiners board member terms on May 31 instead of August 31.

Member: Senator Schwertner

Staff Contact: Joseph Halbert 512.463.0105

Fiscal Impact: Sunset staff has not estimated the fiscal impact. No significant fiscal impact to the Board is expected.

Background & Purpose

This modification was brought to Sunset Commission's attention by the Board's Executive Director, Susan Henricks in her written testimony from the June 2016 hearing.¹

The Government Code currently requires staggered terms of six years for Board of Law Examiners Members.² These terms expire on August 31 of each odd-numbered year.³ In her written testimony, Ms. Hendricks explained that August 31st is not the optimal time for member transition because it is the middle of exam grading and right before question writing for the next exam. This leaves outgoing members with unfinished work and incoming members without a chance to be properly trained before writing new questions. The nine member Board has many obligations and time-consuming duties that directly impact the profession, so optimizing this transition is important for both Board admissions and the public.

Talking Points

- Increase Board efficiency and effectiveness by aligning board membership with duties.
- No significant fiscal impact to the Board is expected.

¹ Henrickson, Susan. Written Testimony, p. 4. June 23, 2016.

² Texas Government Code, Ch. 82.

³ Gov't Code, Sec. 82.001(b).

Board of Law Examiners

New Issue 2 - (Statutory) In the Board of Law Examiners' statute, update the Sunset across-the-board recommendation on board member training (ATB 5) recently modified by the Sunset Commission, excluding the subsections relating to rulemaking authority and travel reimbursement.

Member: Senator Schwertner

Staff Contact: Joseph Halbert 512.463.0105

Fiscal Impact: No significant fiscal impact to the Board is expected.

Background & Purpose

This recommendation updates the Across-the-Board (ATB) recommendation on board member training that the Sunset Commission changed at its last meeting in June of 2016. The language ensures Board members are adequately trained on their responsibilities.

The modification excludes the new subsection (3) relating to rulemaking authority because the Board of Law Examiners has no formal role in agency rulemaking – the Supreme Court adopts all of the agency's rules with no role for the Board (contrasted with the State Bar, which does have a tangential role in rulemaking due to the referendum process).

The modification also excludes the ATB language relating to travel reimbursement as the Board operates outside of the appropriations process and the Supreme Court separately sets compensation for Board members.

This information would normally already be included in the Sunset staff report, but since this staff report was released before the Sunset Commission adopted changes we must make these changes as a new issue.

