

TEXAS STATE BOARD OF DENTAL EXAMINERS

**Staff Report
to the
Sunset Advisory Commission**

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FOREWORD

The Texas Sunset Act (Article 5429k V.A.C.S.) terminates named agencies on specific dates unless continued. The Act also requires an evaluation of the operations of each agency be conducted prior to the year in which it terminates to assist the Sunset Commission in developing recommendations to the legislature on the need for continuing the agency or its functions.

To satisfy the evaluation report requirements of Section 1.07, Subsection (3) of the Texas Sunset Act, the Program Evaluation section of the Legislative Budget Board has evaluated the operations of the Texas State Board of Dental Examiners, which will terminate on September 1, 1981 unless continued by law.

Based on the criteria set out in the Sunset Act, the evaluation report assesses the need to continue the agency or its function and provides alternative approaches to the current method of state regulation. The material contained in the report is divided into seven sections: Summary and Conclusions, Background, Review of Operations, Alternatives and Constraints, Compliance, Public Participation, and Statutory Changes. The Summary and Conclusions section summarizes the material developed in the report from the standpoint of whether or not Sunset criteria are being met, assesses the need for the agency or the agency's functions relative to the findings under the various criteria and develops alternative approaches for continued state regulatory activities. The Background section provides a brief history of legislative intent and a discussion of the original need for the agency. The Review of Operations section combines, for the purposes of review, the sunset criteria of efficiency, effectiveness, and the manner in which complaints are handled. The Alternatives and Constraints section combines the sunset criteria of overlap and duplication, potential for consolidation, less restrictive means of performing the regulation, and federal impact if the agency were modified or discontinued. The Compliance Section combines the Sunset criteria relating to conflicts of interest, compliance with the Open Meetings Act and the Open Records Act, and the equality of employment opportunities. The Public Participation section covers the sunset criterion which calls for an evaluation of the extent to which the public participates in agency activities. The final section, Statutory Changes, deals with legislation adopted which affected the agency, proposed legislation which was not adopted and statutory changes suggested by the agency in its self-evaluation report.

This report is intended to provide an objective view of agency operations based on the evaluation techniques utilized to date, thus providing a factual base for the final recommendations of the Sunset Commission as to the need to continue, abolish or restructure the agency.

I. SUMMARY AND CONCLUSIONS

Regulation of the practice of dentistry has been an on-going concern of the state since 1889. The state's interest in regulation of the profession centered on protection of the public's health, safety, and welfare. Legislation passed in 1897 established an independent board made up of licensed dentists. Over time, regulation has been extended to encompass dental hygienists, dental laboratories and dental technicians.

The board, composed of nine dentists, presently regulates approximately 6,836 dentists, 3,272 dental hygienists, 607 dental laboratories, and 1,680 laboratory technicians. Additional responsibilities include administration of provisions of the Act and prevention of the unauthorized practice of dentistry. Operations of the board are supported entirely from fees collected by the board. All board funds are held in the State Treasury.

Review of board operations shows that the regulatory activities of the board generally function in an efficient manner. However, the pattern of agency expenditures suggests the need for greater control in the areas of travel, per diem, and telephone expense. In addition, an improvement could be made in voucher-processing by allowing the board to delegate authority to sign vouchers. Finally, the function of the Dental Hygiene Advisory Committee could be more adequately fulfilled through board membership.

In the area of licensing, statutory authority should be provided for imposition of a fee for duplicate licenses. Processes related to licensing are handled efficiently and effectively. However, examination procedures used by the board for the dental exam contain the potential for introducing bias and subjectivity into the process. Improvements could be made in the areas of blind-grading procedures

and the use of dental students as proctors and assistants during the exam. In addition, duplication of effort could be avoided if foreign students were only tested once over jurisprudence and denture set-ups and not required to repeat these sections in both the qualifying exam and the regular state exam.

Another problem in the area of licensing is that licensure prerequisites contained in the statute are ambiguous and difficult to verify. Modification of these to include only those which would require the board to apply a clear, objective standard would increase the board's ability to screen applicants effectively and appropriately.

Review of the functions performed by dental hygienists indicated that they are capable of performing a broad range of procedures which are not currently permitted in Texas. Analysis indicated that requisite education, a method of determining and certifying competency and the degree of supervision necessary to ensure public protection in the performance of such functions by hygienists can best be determined by board rule with consultation from members of the professions involved, as is currently provided for in statute.

Finally, the current level of regulation of dental laboratories and technicians does not appear to justify the continuance of the Dental Laboratory Advisory Board. Moreover, one-time registration instead of the currently required annual registration would still maintain an adequate level of public protection.

Evaluation of the enforcement process indicated that it functions in a manner designed to ensure public protection. Local peer review committees could increase regulatory effectiveness through the addition of public members and by instituting a system to provide the board with information on committee activities. Effectiveness could also be strengthened and improved by authorizing a broader range of disciplinary sanctions by the board and by removing all advertising restrictions

except those pertaining to false, deceptive, and misleading advertisements.

Review of the board's compliance with conflict-of-interest provisions indicated that the board is in compliance. However, it was noted that the agency executive director is beneficiary of a trust established by the trade association for his many years of employment with the association. Specific conflict-of-interest provisions should be enacted to maintain the separation of board and staff of the regulatory agency and the association. It was further noted that the board has not conducted all board meetings within the requirements of the Open Meetings Act. Some meetings were conducted without proper notice to the public and were improperly closed to the public. Final decisions have been made in closed sessions, and in disciplinary proceedings, the board asks the defendant to waive the right to be present for the decision of his case. Finally, the board utilizes conference calls and mail voting for decision-making. These practices should be discontinued.

With regard to public participation, the review indicated that public involvement in the board's policy processes has been minimal. Board use of emergency rule-making procedures has deterred public participation. Such practices should be limited to situations where clear public peril is evident. Finally, to ensure that the public's viewpoint is properly represented, public members should be placed on the board in addition to the nine dentist members.

Need to Regulate

As in the case of other regulated activities, regulation of the dental professions should be undertaken by the state only when there is a need to protect the public health, safety, or welfare. The need to regulate the practices of dentistry and dental hygiene is recognized in fifty states and implicitly recognizes the technical nature of the professions and the potential for harm to the public which exists in the practices of dentistry and dental hygiene.

Conditions which exist today indicate a continued need to protect the public because the practice of both dentistry and dental hygiene remain technical professions which should be practiced by skilled individuals and because there continues to be a potential for harm to the public from incompetent practitioners. Without state regulation, there would be no official determination of minimal levels of competency before a person could practice dentistry and dental hygiene. Thus, the public would be subject to an unnecessary risk of harm from incompetent and unsafe practitioners. It can be concluded, therefore, that there is a continuing need to license and regulate the professions from the standpoint of public protection.

The need to regulate the practice of dental laboratory technicians and the operations of dental laboratories is recognized in all states by certain restrictions which are placed in statute. However, Texas is one of only seven states which further regulate this profession by requiring some form of registration or licensure. Regulation of laboratories and technicians is directed at prohibiting the unauthorized practice of dentistry. Conditions which exist today indicate that continued regulation of laboratories and technicians is needed to protect the public from persons who would expand their functions in an unsafe or incompetent manner and would be practicing dentistry without a license. It can be concluded, therefore, that there is a continuing need to register dental laboratories and technicians from the standpoint of public protection.

Alternatives

If the legislature determines that the regulatory function and/or board should be continued, the following alternatives could be considered:

1. CONTINUE THE BOARD AND ITS FUNCTIONS WITH MODIFICATIONS.

- a) adopt budgeting procedures and expenditure policies which will preclude need for emergency appropriations for travel (page 15);
- b) investigate alternatives to reduce telephone expense (page 15);
- c) raise board member per diem to \$100, but limit payment of per diem to days of board meetings and other meetings when the board designates a member(s) as its representative (page 15);
- d) modify statute to allow the board to delegate the responsibility for signing vouchers (page 16);
- e) modify the statute to authorize a fee for duplicate licenses (page 17);
- f) modify statute to require one-time registration of laboratories and technicians; maintain only the current practice restrictions in both statute and rules; and abolish the Dental Laboratory Advisory Board (page 28);
- g) consider modifications of the examination procedures for dentists to improve the blind-grading system of the clinical portions (page 21);
- h) consider modifications to exam procedures to prohibit dental students from participating in the examinations as proctors or assistants (page 22);
- i) modify the exam procedures so that graduates of foreign schools will not have to repeat identical parts of the test found in both the qualifying exam and the regular exam (page 22);
- j) modify licensure prerequisites and grounds for disciplinary action to include only those to which the board can apply a clear objective standard (pages 23 & 26);
- k) require public membership on Peer Review Committees and establish a Peer Review reporting mechanism to the board (page 29);
- l) remove all advertising restrictions from the statute and rules except those which prohibit false, misleading or deceptive advertisements (page 31);

- m) discontinue board practice of asking respondent's permission to consider and act on his case at the convenience of the board; notify all parties to a complaint of the time and place of disciplinary deliberations and actions if these are held on other than the day of the hearing (page 42);
- n) discontinue voting by mail and by conference call (page 42);
- o) modify statute to include specific conflict-of-interest provisions (page 41);
- p) limit use of emergency posting of rule changes and other actions to those matters constituting serious public peril (page 45);
- q) modify composition of board by adding three members: one licensed dental hygienist and two public members; abolish the Dental Hygiene Advisory Committee (page 16 and 45).

2. ABOLISH THE BOARD AND TRANSFER ITS FUNCTIONS TO THE DEPARTMENT OF HEALTH (page 36).

The board of health has a licensed dentist member. Further, the department has an established enforcement mechanism and regional offices throughout the state. However, utilizing this enforcement would not result in cost reductions. No cost reductions are foreseen in administrative or licensing functions as a result of this approach. Effective implementation of this alternative would require certain modifications which include the following:

- a) retain the board in an advisory capacity; and
- b) the structural and substantive changes contained in the preceding alternative should also be made.

II. BACKGROUND

Historical Perspective

Regulation of dentistry in the United States first occurred in 1841, when Alabama passed a dental licensing act. By 1900, thirty-seven states had enacted similar laws. In Texas, a law regulating the practice of dentistry was passed in 1889, designating district judges as the registering authority. A panel of three dentists was appointed by each judge to examine prospective licensees in the respective district.

In response to the need for better protection of the public, the Twenty-fifth Legislature (1897) passed legislation which created the State Board of Dental Examiners and required all persons wishing to practice dentistry in Texas to be examined and licensed. In 1935, the board was given limited rulemaking authority and was charged with the enforcement of the Act. As the practice of modern dentistry evolved, use of support personnel, such as dental hygienists, dental assistants and dental laboratories and technicians has expanded. The board's regulatory authority has been broadened to encompass virtually every aspect of the delivery of dental care through general rulemaking authority granted in 1951 and further broadened in 1971.

Dental hygienists and dental assistants are employed by and supervised by dentists in the dentist's office. Functions of dental hygienists are limited by board rule and include cleaning teeth, taking x-rays, and performing certain other specified acts, most of which must be performed under the direct or general supervision of a dentist. Although dental assistants are not statutorily required to be licensed, board rule extends to the activities and level of supervision of assistants. Permissible activities include taking x-rays, giving chairside assistance to the dentist, and providing a limited amount of direct patient care.

In 1951, the State Board of Dental Examiners was charged with the responsibility of regulating hygienists through licensure. In 1977, the Sixty-fifth Legislature passed Senate Bill No. 779 creating the Dental Hygiene Advisory Committee to advise the board on matters concerning dental hygienists. The six-member advisory committee is composed entirely of licensed dental hygienists, appointed by the State Board of Dental Examiners to serve one-year terms. In addition to their advisory duties, the committee members assist in the administration of the dental hygiene exam.

Unlike hygienists, dental laboratory technicians do not necessarily work in the dental office setting. However, dental lab personnel are prohibited from direct patient contact. Technicians make, adjust and repair prosthetic or orthodontic dental appliances or dentures on the basis of a written work order from a dentist. Dental laboratories and dental laboratory technicians were first regulated in Texas in 1973. The Act provided for the registration of dental laboratories and technicians and created the Dental Laboratory Advisory Board to advise the State Board of Dental Examiners on matters concerning dental laboratories and dental lab technicians. The six-member advisory board is appointed by the State Board of Dental Examiners for six-year terms. The advisory board is composed of four dental lab owners or managers and two lab technicians. Dentists may not serve on the advisory board.

In 1971, State Board of Dental Examiners membership was increased from six to the current nine members, all of whom must be licensed dentists. Board members serve six-year terms and must have resided and practiced in Texas for five years prior to appointment. Faculty members of a dental college or dental division of a medical college, or dentists with financial interests in any dental

college are not eligible for board appointment. Board duties consist primarily of administering dental and dental hygiene examinations and enforcement of the provisions of the Act which deal with dentists and others involved in the delivery of dental care.

The board employs a staff of eleven full-time employees and two part-time employees and seasonal help as needed. Currently, the board has three vacant staff positions. At present, 6,836 dentists and 3,272 hygienists are licensed by the board. Additionally, 607 dental laboratories and 1,680 dental laboratory technicians are registered with the board. Board operations are funded entirely from fees collected. All fees are deposited in the Dental Registration Fund No. 086 in the State Treasury. In fiscal year 1979, the board collected \$574,560 in revenues and expended \$514,307. Fiscal year 1979, expenditures included \$15,394 for Dental Laboratory Advisory Board activities and \$10,125 for Dental Hygiene Advisory Committee activities.

Comparative Analysis

To determine the pattern of regulation of the occupations of dentistry and dental hygiene within the United States, a survey of the fifty states was conducted.

The need to regulate dentists and dental hygienists is currently recognized through licensing requirements imposed by all fifty states. From the standpoint of organizational patterns, twenty-two states, including Texas, meet this expressed need through an independent board or commission. In nineteen states, the regulation of dentists and dental hygienists is carried out through a board associated with a state agency charged with multiple regulatory functions. Board members are appointed by the chief executive in forty-one states.

Licensing boards composed entirely of dentists administer dentistry laws in thirty-nine states, including Texas. In ten states, the regulation of dentistry is achieved through a board consisting of dentists, other professionals, and public members. Dental hygienists are members of licensing boards in three states. Boards in thirty-nine states, including Texas, are supported at least partially by the fees they collect. Unlike Texas, twenty-six states received appropriations from general revenue.

In forty-two states, including Texas, dental boards conduct investigations in response to consumer complaints. Complaint inquiries are conducted by an investigative unit of a centralized agency in eight states.

In nineteen states, licensure by some form of endorsement or reciprocity is authorized for dentists. Texas has statutory authority to permit endorsement, but does not do so. Thirty-eight states, not including Texas, permit licensure by endorsement or reciprocity for dental hygienists.

III. REVIEW OF OPERATIONS

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the efficiency with which the agency operates; the objectives of the agency and the manner in which these objectives have been achieved; and the promptness and effectiveness with which the agency disposes of complaints concerning persons affected by the agency.

Organization and Objectives

The Texas State Board of Dental Examiners regulates dentists and the practice of dentistry, dental hygienists, dental technicians, and dental laboratories. The board's stated objectives include the examination of applicants for licensure as dentists and dental hygienists, registration of dentists, dental hygienists, dental technicians, and dental laboratories, and enforcement of pertinent laws and rules and regulations. In order to achieve its objectives, the board performs three major functions: administration, licensing, and enforcement.

The board is composed of nine dentists appointed by the governor for six-year overlapping terms. To be qualified for appointment, individuals must be Texas residents, and have engaged in the practice of dentistry for at least five years immediately preceding appointment. In addition, no member of the board may be a member of the faculty of any dental or dental hygiene school or college nor have any financial interest in any such school or college. Statutorily required board duties include promulgating rules and regulations, examination of applicants for licensure as dentists and dental hygienists, registering dental technicians and laboratories, issuing licenses, applying disciplinary sanctions, and generally aiding in the enforcement of the Act. The board is aided in its regulatory efforts by a

Dental Hygiene Advisory Committee and a Dental Laboratory Advisory Board.

Staff for the board consists of a full-time executive secretary, five clerical staff, and four investigators. In addition, the board employs two permanent part-time employees, one of whom serves as a secretary to the board's secretary-treasurer. Activities generally performed by the staff in the traditional areas of administration, licensing and enforcement include processing license renewals, checking license applications for completeness, processing examination applications, maintaining records, accounting for revenues and expenditures, assisting the board in scheduling for examinations, and investigating violations of the Act.

Funding for the board is provided exclusively from fees collected by the agency under provisions of the Act and deposited in the State Treasury to the credit of the Dental Registration Fund. There is no statutory provision for reversion of excess fund balances to the General Revenue Fund.

Evaluation of Agency Activities

As with most other licensing agencies, the operations of the Texas State Board of Dental Examiners can be broken down into three basic activities: administration, licensing, and enforcement. Below, each of these activities were reviewed to determine the degree to which agency objectives have been met. To make this determination, the evaluation focused on whether the board has complied with statutory provisions; whether these provisions facilitate accomplishment of the objectives; whether agency organization, rules, and procedures are structured in a manner that contributes to cost-effective accomplishment of the agency's task; and whether procedures provide for fair and unbiased decision-making.

Administration

The general objective of any administration activity is to provide for the

efficient operation of all agency functions. The review of these activities indicated that administration is generally conducted in an efficient and effective manner. The agency's record-keeping and accounting procedures are thorough and well-organized. Efforts to improve administrative efficiency are currently underway and include a complete revision of the data processing system and the microfilming of all licensee files. While agency management is generally efficient, several aspects of the current process can be improved.

In the related areas of budgeting and expenditures, the board requested and received emergency appropriations in fiscal years 1976 (\$20,020) and 1977 (\$21,441) as a result of unanticipated expenditures related to board meetings and other operating costs. Agency staff indicated that another emergency appropriation may be necessary for fiscal year 1980 to cover travel costs. Consequently, expenditures and policies of other state agencies were reviewed to determine the feasibility of greater budgetary control in areas related to travel.

Expenditures for travel and per diem of board members represented from seventeen percent (17%) to twenty-two percent (22%) of total agency expenditures during the years under review. From 1976 to 1979, the board averaged thirteen meetings per year with an average of approximately sixty days of per diem paid per board member per year. In addition, the board attended numerous out-of-state meetings, and board members were compensated for other board-related business including work performed at home.

In general, the appropriations process serves as an adequate control over state agency expenditures. In addition, many state agencies control expenditures through limitations placed on meal and travel allowances, out-of-state travel for staff and board members, and number of days of per diem payable to a board member. For example, the Texas State Board of Medical Examiners and the State

Board of Pharmacy both are limited in the number of days allowable for board member per diem to sixty days per year. The Dental Board currently allows \$20 per day for board member meals, and an appropriation bill rider requires prior approval of the board president for items for which per diem will be paid. A review of state agencies involved in the licensure of health-care professionals indicated that the Dental Board has the second highest average expense for board member travel and per diem.

In fiscal year 1979, the telephone expenses totaled \$14,217. Nineteen credit cards are used by the board, the Dental Laboratory Advisory Board, and the board investigators. Operator-assisted calls, including person-to-person calls, are frequently used and are approximately three times the cost of other methods available to the board. Four board members have TexAn lines which is the most cost-effective method. The board should investigate the feasibility of installing either TexAn or business lines for the other board members and discontinue routine use of more expensive methods of telephone calling.

While it was not possible to evaluate the necessity for each of the individual items, the expenditures in these areas do suggest that the board should carefully evaluate the necessity for each board meeting, place a limitation on out-of-state travel, and explore methods of reducing telephone expense for board-member calls, possibly including the installation of business or TexAn lines in board member offices to facilitate use of direct-distance dialing. In addition, the statute should be modified to raise board per diem to \$100 and to limit the days of per diem received by the board to actual days of board meetings and instances where members have been selected to act as an official board representative. Such a provision would allow some flexibility in the payment of per diem but would not

include per diem for work performed at home.

Another area of administration which could be improved involves the processing of vouchers. Currently, the statute requires the president and secretary-treasurer of the board to sign all vouchers. This process is cumbersome and may involve up to two weeks for completion. Review with the Comptroller's Office indicated that it is common practice for other boards to designate a staff member to sign vouchers and that it would not be difficult to implement such a change. Therefore, in order to improve operating efficiency, the statute should be amended to authorize the board to delegate this function.

Currently, the board licenses approximately 3,272 dental hygienists. Every aspect of dental hygiene is governed by the board including examination of applicants, practice definition, and complaint disposition. The Dental Hygiene Advisory Committee advises the board on matters pertaining to dental hygiene and assists the board on matters pertaining to dental hygiene and assists the board in administration of the dental hygiene examination.

While the committee appears to be a viable method of providing examination assistance to the board, it cannot provide adequate representation of the profession because of its inability to participate in the final decision-making process of the board. This exclusion of a sizeable portion of the board's licensed population from board membership represents a departure from the general practice of allowing members of an occupation to regulate themselves. Consequently, the statute should be amended to provide for a dental hygienist board member to ensure that the concerns of the occupation are adequately addressed. Should this occur, the Dental Hygiene Advisory Committee could be abolished as an advisory body. Examination expertise and assistance can still be provided on an as-needed basis

since the board has statutory authority to appoint and reimburse consultants and examiners as deemed necessary.

A final concern during the review involved record-keeping of compensatory time taken by clerical staff. At the time of the review, the agency did not have a formal system for recording the accrual and use of compensatory time. However, since the review, the agency has established a mechanism to record compensatory time.

Licensing

The objective of the licensing activity is to ensure that a minimum standard of competency has been achieved by individuals authorized to practice dentistry and dental hygiene. To achieve this objective, the board evaluates and examines applicants for licensure and issues license renewals. The board also registers dental laboratories and dental technicians.

The board is directed by statute to collect certain fees for licensure and registration. Exhibit III-1 details the fee structure designated by statute for specific purposes. The Act does not provide for a fee for duplicate licenses although the agency currently charges a fee of \$10 for this service. Review indicated that administrative costs associated with the issuance of duplicate licenses justifies statutory authorization.

Exhibit III-1

FEE STRUCTURE

Type of Fee	Statutory Limit	Current Fee
Examination		
Dentists	\$ 100	\$ 100
Dental Hygienists	\$ 25 to \$ 70	\$ 50
Foreign Students		
Qualifying Exam	Not specified	\$ 100
Certification of Documents (for foreign dentists)		
	Not specified	\$ 50
Annual Registration		
Dentists	\$ 12 to \$ 75	\$ 50
Dental Hygienists	\$ 10 to \$ 50	\$ 25
Dental Laboratories	\$ 25 to \$ 200	\$ 50
Dental Technicians	\$ 10 to \$ 25	\$ 15
Late Registration	\$ 5	\$ 5
Duplicate License	Not provided	\$ 10

Review of the licensing activity indicates that it functions smoothly in general. Licenses, registrations and renewals are issued without unnecessary delays and notification processes for examinations and renewals are handled properly. In reviewing the licensing process, an assessment was made of the effectiveness of statutory requirements and board action in ensuring a minimum level of competency and in providing adequate public protection. Included in the review were examination of applicants, other prerequisites for licensure, reciprocity and practice requirements. For purposes of clarity, each group regulated by the board is presented separately.

Dentists

With regard to the examination process, the board has established an examination requirement for dentists which includes a national written exam, a written jurisprudence exam, a denture set-up and a clinical competence exam. The national examination is given at the dental schools and graded by a national testing service which provides grades to the state board. Texas graduates, on average, do well on the national exam, which covers areas such as basic sciences, oral pathology and radiology, pharmacology, dental anatomy, operative dentistry, prosthodontics, oral surgery and anesthesia, orthodontics, pedodontics, and endodontics and periodontics.

The State Board of Dental Examiners fomulates and administers the remaining examination portions. The state exam is usually a three-day exam and is given at each dental school in Texas at least once a year.

At each exam, applicants must pass each section of the state examination before they are allowed to go on to the next portion. All applicants are required to bring their own patient for the clinical examination, and each patient must meet certain criteria specified by the board. Data in Exhibit III-2 indicate that, overall, the examination of dentists is not overly restrictive nor overly permissive.

Exhibit III-2

**DENTAL EXAMINATION PASS/FAIL RATES
FISCAL YEARS 1976 - 1979**

Year	Number Passed	Percent Passed	Number Failed	Percent Failed	Total Examined
<u>1976:</u>					
In-state applicants	241	92%	22	8%	263
Out-of-state applicants	<u>47</u>	<u>76%</u>	<u>15</u>	<u>24%</u>	<u>62</u>
Total	288	89%	37	11%	325
Foreign Students Qualifying Exam	4	66%	2	34%	6
<u>1977:</u>					
In-state applicants	261	88%	35	12%	296
Out-of-state applicants	<u>76</u>	<u>57%</u>	<u>58</u>	<u>43%</u>	<u>134</u>
Total	337	78%	93	22%	430
Foreign Students Qualifying Exam	7	40%	11	60%	18
<u>1978:</u>					
In-state applicants	252	91%	26	9%	278
Out-of-state applicants	<u>43</u>	<u>39%</u>	<u>66</u>	<u>61%</u>	<u>109</u>
Total	295	76%	92	24%	387
Foreign Students Qualifying Exam	1	9%	10	91%	11
<u>1979:</u>					
In-state applicants	329	91%	32	9%	361
Out-of-state applicants	<u>56</u>	<u>44%</u>	<u>72</u>	<u>56%</u>	<u>128</u>
Total	385	79%	104	21%	489
Foreign Students Qualifying Exam	5	17%	24	83%	29

Since much of the state exam is a practical exam rather than a written, objective exam, the procedures used by the board in the administration and grading process were reviewed to determine whether the board has taken steps to assure

that the exam produces fair and unbiased results. The board has recently implemented new policies which provide that a majority of board members must judge a candidate's work before the candidate is failed on any portion. In addition, check-in of applicants is handled largely by staff and numbers are assigned to all candidates and used in place of names during the exam process. These steps contribute to a fair and unbiased examination process and should be continued.

Observation of examinations did, however, reveal two aspects of the process which should be improved. First, although the candidates are assigned numbers and not referred to by name during the exam, the examiners (board members) and candidates are in face-to-face contact and conversation regularly throughout the exam. While no particular instances of bias through this process were documented, the potential exists for bias to be introduced in this type of exam setting. This problem appears to have been successfully addressed in at least one instance, while maintaining the practical exam. The Western Regional Exam (a compact of five states utilizing a joint exam process) has implemented a process whereby all the aspects of the Texas examination are maintained, but the examiners and examinees never come in face-to-face contact. In addition, the Texas board, in its administration of the dental hygiene exam, has implemented a mechanism avoiding this direct examiner-examinee contact. In the case of the dentist exam, in contrast to the hygiene exam, the patient must be checked numerous times by the examiner and communication concerning the examinee's proposed steps in treatment of the patient and the examiner's assignments would have to be written. The benefits of the completely blind grading system appear to outweigh the potential procedural difficulties, however, and the board should investigate the possibility of improving its process to include this approach.

Related to the face-to-face contact of board members and examinees is the

board's policy of permitting dental school students to serve as proctors and as chairside assistants to examinees. This policy permits student (future applicants) to become acquainted personally with board members. Additionally, it permits the students to observe the examination process prior to the time when they are examined. The students who serve as proctors are selected and paid by the dental school. Assistants are selected and paid by the examinee, with assistance from the school in the selection process upon request. No other board was found which utilized a procedure which permitted students who would soon be examinees to observe an examination. Further, the examination and board meetings at which examination procedures and content are considered are generally closed to the public. The only authority for such action is that the examination content and procedures are confidential and the attorney general has ruled that a meeting to consider matters which the state has an interest in maintaining confidential, may be closed. Therefore, the board should consider discontinuation of procedures which permit selected students to participate in administration of an examination which they will be required to take.

In addition to the concerns arising from potential bias and subjectivity in the examination, it was noted that the board requires a separate examination process for foreign students and students from non-accredited schools. These applicants are screened for minimum competency before they are allowed to take the state exam. This preexamination screening consists of a jurisprudence examination, a denture set-up and an examination requiring dental procedures to be performed on an inanimate model. If successful, the applicants go on to take the state exam which also covers jurisprudence and denture set-up. This represents an unnecessary duplication of effort on the part of both the applicants and the board. Therefore,

these applicants should be exempted from the jurisprudence and denture set-up portions of the state exam.

To qualify for licensure as a dentist, several prerequisites in addition to examination must be met. Applicants must be: 1) at least twenty-one years old; 2) a United States citizen; 3) a graduate of a reputable dental college; 4) of good moral character.

Review of the prerequisites to licensure specified in the statute revealed several aspects which could be improved. The first of these areas deals with the requirement in the board's statute that applicants be citizens of the United States. The courts and Attorney General's Office have stated in several opinions that such a requirement for licensure is unconstitutional under the equal protection clause of the 14th Admendment to the United States Constitution. While this citizenship provision has not been applied by the agency since the issuance of these opinions, the unconstitutional language should be removed.

In another general area of concern, the statutory framework developed for this agency concerning grounds for refusal to allow an individual to sit for an examination and the grounds for removal of a license once issued contains the same confusion of thought and vagueness of terminology found in the statutes of many other licensing agencies. The statute erroneously requires the licensing board in many cases to act essentially as a court of competent jurisdiction in determining the legal status of an individual and requires the board to define and apply terms which may have no legal basis. To correct this situation and to place the licensing board in an appropriate setting, the statute dealing with the grounds for disqualification should be structured in such a manner that each of the grounds meet a two-part test. First, the grounds for disqualification should be as clear as possible and relevant to the practice and second, the ground for disqualification should be

stated in terms of a currently existing condition rather than an absolute condition which exists throughout the lifetime of the individual.

Exemptions from the provisions of the Dental Act were also reviewed. Exemptions from licensure include: physicians and surgeons; faculty and students of dental colleges; dental hygienists employed by schools, hospitals, state institutions on public health clinics; persons performing lab work on inert matter; members of an established church that practice healing by prayer; employees of a dentist who make x-rays in a dental office and under the supervision of a licensed dentist; dental interns, residents and assistants as defined and regulated by the board; Dental Health Service Corporations; and licensed dentists who perform services for themselves. Additionally, the Act exempts licensees from registration fees who are engaged in active military duties. Analysis of these exemptions indicated that they are appropriate.

Presently, the concept of endorsement is statutorily authorized. However, the board has not chosen to utilize this provision in its licensure process. Standards such as graduation from an accredited dental college, national and regional board scores, and performance as a licensee in another state, provide the board with objective criteria upon which it could base licensure through endorsement. However, the board has determined that such criteria are not adequate in guaranteeing the competency of dental practitioners and, further, maintains that the successful completion of the board examination is the only acceptable means of protecting the health and welfare of the public.

Dental Hygienists

Applicants for licensure as dental hygienists must first pass a national exam before they are eligible to sit for the state examination. The board prepares and administers the state exam with the assistance of the Dental Hygiene Advisory

Committee. The exam consists of written portions covering jurisprudence and x-ray interpretation and clinical portions including doing a prophylaxis and taking a set of x-rays on a patient brought by the examinee. The board's procedures appear to result in an unbiased and objective exam. Observation of the examination revealed that the procedures established for protecting the identity of examinees worked well. This process requires that after applicants complete the prophylaxis on patients in cubicles, the patients are brought to a common grading area. Thus, applicants are not in face-to-face contact with the examiners (board members). The examination results presented in Exhibit III-3 indicate that the examination is neither too restrictive nor too permissive in general.

Exhibit III-3

**DENTAL HYGIENE EXAMINATION PASS/FAIL RATES
FISCAL YEARS 1976 - 1979**

Total	Number Passed	Percent Passed	Number Failed	Percent Failed	Total Examined
<u>1976:</u>					
In-state applicants	247	94%	15	6%	262
Out-of-state applicants	<u>36</u>	<u>80%</u>	<u>9</u>	<u>20%</u>	<u>45</u>
Total	283	92%	24	8%	307
<u>1977:</u>					
In-state applicants	270	80%	66	20%	336
Out-of-state applicants	<u>90</u>	<u>73%</u>	<u>34</u>	<u>27%</u>	<u>124</u>
Total	360	78%	100	22%	460
<u>1978:</u>					
In-state applicants	275	86%	43	14%	318
Out-of-state applicants	<u>70</u>	<u>66%</u>	<u>36</u>	<u>34%</u>	<u>106</u>
Total	345	81%	79	19%	424
<u>1979:</u>					
In-state applicants	294	84%	57	16%	351
Out-of-state applicants	<u>76</u>	<u>72%</u>	<u>29</u>	<u>28%</u>	<u>105</u>
Total	370	81%	86	19%	456

In order to qualify for licensure, a dental hygienist must meet several prerequisites. An applicant must be: 1) at least eighteen years old; 2) a United States citizen; 3) a high school graduate or the equivalent; and 4) a graduate of a recognized and accredited dental hygiene educational program. Review indicated that these requirements are appropriate with one exception. The courts and the Attorney General have ruled that the requirement of U.S. citizenship is unconstitutional under the equal protection clause of the 14th Amendment to the United States Constitution. While this provision has not been applied by the agency since the issuance of these opinions, the unconstitutional language should be removed.

Another general concern was noted with regard to the statutory framework developed concerning grounds for refusal to allow an individual to sit for an exam and the grounds for removal of a license. As with the provisions for dentists, those for dental hygienists contain the same confusion of thought and vagueness. This situation should be clarified to meet the criteria of relevance and currently existing conditions.

Provisions of the dental act dealing with the practice of dental hygiene do not apply to several categories of practitioners. These exceptions include: 1) licensed dentists; 2) physicians and surgeons; 3) employees of dentists who make x-rays in the dental office and under the supervision of the licensed dentist. Review of these exceptions indicated that they are appropriate.

As with licensure for dentists, provision for the endorsement concept is in place with regard to licensure of dental hygienists. Standards of graduation from accredited dental hygiene programs, national exam scores, and performance as a licensee in another state are available to the board as licensure criteria. However, the board has applied the same standard for dental hygienists as for dentists, maintaining that public protection can best be provided through examination of all

applicants.

In the final area relating to the licensing of dental hygienists, the board is authorized by statute to define the practice of dental hygiene including the functions to be performed and the relationship of the hygienist and dentist in terms of requisite supervision for permissible functions. To evaluate board policy in this area, numerous studies of the abilities and use of dental auxiliaries were reviewed. Also reviewed were pertinent findings presented by the Federal Trade Commission, General Accounting Office and the Council of State Governments. These studies and groups generally found that auxiliaries are capable of performing a broad range of dental procedures which are not presently performed by hygienists in Texas. The board has approved one additional function permitting the application of pit and fissure sealants to teeth by hygienists. If dental hygienists are to be allowed to perform additional dental procedures, consideration must be given to requisite education, a method of determining and certifying competency and the degree of supervision necessary to ensure public protection. The technical nature of these considerations suggests that they can best be determined by board rule with consultation from members of the professions involved, as is presently provided for in statute.

Dental Laboratories and Dental Technicians

In reviewing the registration process for dental laboratories and technicians, an assessment was made of the level of protection provided to the public through registration and of the necessity for continued regulation. Review indicated that six states, in addition to Texas, regulate dental labs and/or technicians. It was determined that the primary concern and justification for regulation of labs and technicians is the prevention of the unauthorized practice of dentistry. Regis-

tration of labs and technicians serves the two-fold purpose of providing a mechanism to identify personnel and businesses involved in dental technology and of enabling the board to apply administrative sanctions against the illegal practice of dentistry through the removal of registration. In addition to registration, current statutory provisions prohibiting the unauthorized practice of dentistry and requiring a work order prescription from a dentist for all work performed by a lab, in conjunction with strong economic controls available through the market place appear sufficient for public protection. Furthermore, a one-time registration with requirements for address and name change notification to the board fulfills the need to identify and locate dental labs and technicians for enforcement purposes.

In 1973, when registration was first authorized, it was anticipated that it would be necessary to promulgate rules and regulations regarding dental labs and technicians. Consequently, a Dental Laboratory Advisory Board was created to aid the board in the promulgation of rules and to advise the board on all matters pertaining to dental laboratories and technicians. Initially, the two boards worked together to promulgate a set of rules, finally succeeding in 1976. However, in 1977 the entire set of rules was repealed by the Dental Board and no rules have been promulgated in this area since that time. The lack of rules and regulations regarding dental laboratories and technicians does not appear to have affected adversely the board's regulatory efforts. Consequently, the existence of such an advisory body cannot be justified.

Enforcement

The basic objective of the enforcement activity is to protect the public by identifying and, where necessary, taking appropriate action against persons not complying with the provisions of the Act or board rules. To accomplish this

objective, the board employs four full-time investigators stationed in Dallas, Houston, and Austin. In fiscal years 1976-1979, the board received 1,366 complaints, thirty-six percent (36%) of which were from consumers. Exhibit III-4 displays the disciplinary actions taken by the board on those complaints brought before the board during the period under review.

The board's enforcement process is supplemented by regional peer review committees which are authorized by statute to arbitrate service, treatment, and fee disputes between dentists, patients, and/or third-party payors. The committees are composed of and elected by the licensed dentists in the area. The statute also provides civil immunity for the committees and for dental society or association committees. While these committees appear to provide a viable, accessible method for the resolution of consumer complaints, greater participation by the public in the arbitration process in the form of public membership on the committees should be established to provide consumer input and to remove the possibility of favoritism inherent in any local peer review committee. Since the committees function, in effect, as a screening device for the board and the board is held accountable for the regulation of dentistry in Texas, a mechanism should be established to report to the board the results of complaints received by each committee.

Review of board enforcement activities indicated that agency complaint procedures are adequate and that complaint files are properly maintained. The agency is in the process of implementing notification procedures for parties involved in complaints, and of updating the complaint tracking mechanism. While the process contributes to efficient enforcement operations, several concerns were noted regarding the enforcement authority of the agency.

Exhibit III-4

**RESULTS OF BOARD HEARINGS
1976-1979**

<u>Offense</u>	<u>Reprimand</u>	<u>Probated Suspension</u>	<u>Suspension</u>	<u>Revocation</u>	<u>Total</u>
Gross Incompetency		1		2	3
Dishonorable Conduct		3	2	1	6
Malpractice		1			1
Patient Death	1	1			2
Drugs		2	1	5	8
Auxiliary PDWDL*		4	1	1	6
Dental Technician PDWDL*		1	1		2
Lack of Proper Diligence		1			1
Fraud		1		1	2
Fraud - Title XIX		24			24
Advertising	1	2			3
Soliciting		1			1
Abandonment of Patient	1	1		1	3
Probation Violation	—	—	<u>1</u>	<u>1</u>	<u>2</u>
Total	3	43	6	12	64

*Practicing dentistry without a dental license

The first concern centers on the board's use of disciplinary sanctions which are not specifically authorized. As evidenced by Exhibit III-4, the board customarily probates license suspensions and occasionally issues reprimands. Neither of these is specifically authorized by statute. As a general principle, an agency's range of enforcement sanctions should conform to the seriousness of the violations presented to it. The review indicated that situations arise in which the use of reprimands or of probation is appropriate. Since an administrative agency should have express authority for the enforcement sanctions it uses, the statute should be amended to authorize the use of reprimands and probations.

Another area of concern relates to both statutory and board rule provisions concerning advertising not related to the provision of dental care. The board is

presently operating under a temporary injunction against enforcement of advertising rules or statutes. The board rules and statutes contain extensive provisions related to advertising. In its consideration of other licensing agencies, the Sunset Commission, through an across-the-board approach, has determined that agency rules regarding advertising should be constructed so as to only prohibit practices that are false, misleading, or deceptive. The statute and board rules should be amended to conform to this across-the-board approach.

Summary

The Texas State Board of Dental Examiners is a nine-member board appointed by the governor for six-year overlapping terms. The board is directed by statute to regulate every aspect of dentistry, including the licensure of dentists and dental hygienists and the registration of dental laboratories and technicians.

Board operations can be categorized in three activities: administration, licensing, and enforcement. The review of board activities indicated that agency administration is generally conducted in an efficient and effective manner. However, improvements could be made in several areas. The first of these centers on the management of agency funds. The agency has had to seek emergency appropriations on three occasions during the years under review, primarily because of the need for additional funds for board member expenses. Review of agency expenditures indicated the need for: 1) budgetary procedures and expenditure policies to preclude the necessity for emergency appropriations for travel; 2) a re-evaluation of telephone use; and 3) a limitation on board per diem to actual meeting days with provision for representation of the board at other meetings when necessary. In addition, the efficient processing of vouchers has been hindered by a statutory provision requiring both the president and secretary-treasurer to sign all vouchers. This requirement should be modified to allow the board to delegate this

functions. With regard to record-keeping, although during the review it was noted that no compensatory time records were kept by the agency for employees, procedures have been instituted to correct this problem.

Review of the activities and function of the Dental Hygiene Advisory Committee indicated a need for more adequate representation of this occupation in the decision-making processes of the board. This can best be achieved through board membership thereby eliminating the need for an advisory committee.

Board operations in the area of licensing generally function smoothly; however, several areas amenable to improvement were noted. First, review of the board's fee structure showed that the board does not have statutory authorization to charge a fee for duplicate licenses although it customarily does so. The Act should be amended to authorize the board to charge such a fee.

The board's examination process was evaluated in terms of examination procedures to determine if adequate safeguards are in place to prevent bias and subjectivity. The results of this evaluation indicated that dental examination procedures could be improved by a more effective blind-grading system and by discontinuing the practice of using dental students as proctors and assistants during the exam. In addition, it was found that there is unnecessary duplication between parts of the foreign student qualifying exam and the regular state exam.

Another concern in the licensing activity regards the statutory framework developed for this agency concerning grounds for refusal to allow an individuals to sit for an examination. Requirements that applicants be United States citizens have been held unconstitutional by the courts and should be removed from the statute. Several of the statutory licensure prerequisites require the board to act essentially as a court of competent jurisdiction in determining the legal status of an individual and require the board to define and apply terms which may have no

legal basis. These statutory provisions dealing with grounds for disqualification should be modified to require the board to base its judgment on a decision of a competent authority on the basis of a current condition.

An evaluation was made of the board's policies with regard to the functions performed by dental hygienists and the relationship of the hygienist and dentist in terms of requisite supervision for permissible functions. The review indicated that dental hygienists are capable of performing a broader range of procedures than are currently permitted in Texas. However, analysis suggests that requisite education, a method of determining and certifying competency and the degree of supervision necessary to ensure public protection in the performance of such functions by hygienists can best be determined by board rule with consultation from members of the professions involved, as is currently provided for in statute.

Finally, an assessment of the need for registration of dental laboratories and technicians indicated that adequate public protection can be achieved by only requiring a one-time registration with provision made for notification of address and name changes. Also, the level of regulation necessary for laboratories and technicians does not appear to justify continuation of the Dental Laboratory Advisory Board.

In the area of enforcement, complaint procedures appear adequate, and complaint files are well-maintained. In addition, the agency has instituted a notification process for parties involved in complaints. However, the effectiveness of several other aspects of enforcement can be improved.

While the Act authorizes local peer review committees, it does not provide for public membership or for a reporting mechanism to the board. The addition of these items to the statute would serve to increase regulatory effectiveness. The statute and board rules both contain prohibitions related to advertising. These prohibitions are inconsistent with the Sunset Commission's across-the-board recom-

mendations regarding advertising and should be amended to prohibit only false, deceptive, and misleading advertisement.

Another concern relates to the range of penalties that the board is authorized to impose on licensees. Although it does not have specific statutory authority to do so, the board does issue reprimands and probate suspended licenses. To provide flexibility in the imposition of disciplinary sanctions, the statute should be amended to allow reprimands and probation.

IV. ALTERNATIVES AND CONSTRAINTS

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the extent of overlap and duplication with other agencies and the potential for consolidation with other agencies; an assessment of less restrictive or alternative methods of performing any regulation that could adequately protect the public; and the impact in terms of federal intervention or the loss of federal funds if the agency is abolished.

Consolidation Alternatives

Organizational structures in other states were reviewed in order to identify consolidation alternatives with potential for use in Texas. The review indicated that dentists and dental hygienists are licensed and regulated in all fifty states. Of these states, twenty-two have independent boards to perform the regulation and twelve have consolidated regulation with "umbrella" regulatory agencies. The other sixteen states have chosen to consolidate the regulation of dentists within an agency with other substantive responsibilities. Of these, eight use a department of health.

Of the consolidation alternatives used in other states, an "umbrella" agency is not a feasible option for Texas since this organizational form does not exist in this state. The state does, however, have a Department of Health which could perform regulatory functions.

To determine the feasibility of this option, the agency was reviewed to determine whether its goals and functions were reasonably compatible with the Board of Dental Examiners. In addition, possible alternatives were considered from

the standpoint of whether consolidation of functions would result in identifiable benefits.

The analysis of the organizational alternative available in Texas indicates that the Department of Health satisfies the requirements of closely related operations with identifiable benefits resulting from consolidation.

From a review of the organization of the Department of Health, it would appear that consolidation would result in identifiable benefits. The membership of the Board of Health includes representation from the dental profession. In addition, the department regulates the use of x-ray equipment. The department also has an established mechanism for investigating complaints and for enforcement through the department's regional offices. Utilization of this mechanism could ensure broader coverage. However, due to the workload involved in the enforcement of dental laws and the technical nature of the enforcement process involved, no cost savings would result. In reviewing the accounting and record-keeping systems of the Dental Board, it was determined that utilization of the Health Department systems in these areas would not result in identifiable benefits or cost savings.

Regulatory Alternatives

Dentists and Dental Hygienists

While not currently used to regulate the practices of dentistry or dental hygiene in any state, two additional regulatory methods are commonly used with respect to other occupational groups. These methods should therefore be considered as possible alternatives to licensure. The first of these general methods is certification. Under this option, the ability to practice dentistry or dental hygiene would be contingent on an applicant taking and passing a one-time "certifying"

examination. The second general method is registration. Under this option, any person wishing to practice dentistry or dental hygiene would be required to be "registered" with the state, without regard to qualifications.

Before any regulatory alternative reviewed can be considered as a reasonable alternative to current regulation in Texas, the option should offer at least the same degree of public protection as the current method. In addition, the alternative should be less restrictive than the present system. With respect to the practices of dentistry and dental hygiene, analysis indicated that while both certification and registration provide less restrictive regulation than the current method, neither would provide public protection equal to that of the current method. Neither certification nor registration would provide mechanisms to assure continued competency or enforcement.

Dental Assistants

With regard to the regulation of the duties of dental assistants, several regulatory alternatives used by other states could be considered for use in Texas. These regulatory methods include: 1) no regulation; 2) regulation by definition of functions; and 3) certification.

With regard to the first alternative, twelve states provide no regulation at all. Responsibility for training and supervision of the dental assistant is left to the employer dentist, and few restrictions are imposed.

The second alternative, used by sixteen states, including Texas, is regulation by definition of practice. As with no regulation, responsibility for training and supervision is the responsibility of the dentist. The statutes or rules in these states specify what functions may be performed by a dental assistant. The practice definition is usually a subset of the practice definition for hygienists.

The third alternative, used by twenty-two states, requires that dental assistants be certified. This method requires that an assistant demonstrate competence in certain areas through education, experience, or examination.

The alternative of providing no regulation is less restrictive than the present form of regulation in Texas, but provides less public protection. The certification alternative could provide more public protection but is more restrictive than the present approach. Therefore, since harm has not been demonstrated under the present approach, it should be continued.

Dental Laboratories and Technicians

With regard to regulation of dental laboratories and dental laboratory technicians, six states, including Texas, utilize some form of registration. Oklahoma and Florida register dental laboratories, while Arizona registers dental laboratory technicians. Texas, Kentucky, and South Carolina register both dental labs and technicians. Regulation in other states is limited to restrictions placed on the practice. While there are no requirements related to competency established for registration, this approach does aid in enforcement of dental practice provisions.

Two practice restrictions are prevalent in the regulation of labs and technicians in addition to registration. First, in all states except Arizona, Maine, and Oregon, labs and technicians are prohibited from providing services directly to patients. The exceptions have established in law a form of service known as denturism, but only Arizona and Oregon have implemented the provisions to date. Secondly, a dentist's work order or prescription is required in all states without denturism and in Arizona. In Oregon, a dentist's certification of oral health is required prior to service by a denturist. These restrictions serve as a public

protection mechanism and place on the dentist the primary responsibility for patient care regarding dentures and other orthodontic devices. Experience is not yet available to indicate how well denturism might work or what might happen to the cost of dental care under such an approach.

Summary

A review of consolidation alternatives indicated that all fifty states regulate the practice of dentistry, with twenty operating through agencies with multiple functions. Eight states use a department of health for regulating the profession.

The review indicated that of the consolidation alternatives used by other states, the Department of Health is an option available in Texas. Advantages include the availability of a regional enforcement network and board composition representing dentistry, the public and other professions. However, no cost savings would be expected.

With regard to regulatory alternatives, the review indicated that licensure is the most effective method of regulating dentists and dental hygienists. Regulation of dental labs and technicians in Texas and other states is by registration. Other alternatives reviewed for regulating dental laboratories and technicians revealed that Texas and all other states, except Maine and Oregon, require that laboratory work be done on a prescription basis. Texas and all other states, except three, prohibit sale of dentures directly to patients by technicians. The present form of regulation in Texas provides needed public protection and should be continued. Regarding dental assistants, certification would provide needed assurance of competence in care provided to patients while maintaining flexibility in the dentist's training of those support personnel and therefore provides more public protection. Certification of dental assistants is, however, more restrictive than the present form of regulation.

V. COMPLIANCE

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the extent to which the agency issues and enforces rules relating to potential conflict of interest of its employees; the extent to which the agency complies with the Open Records Act and the Open Meetings Act; and the extent to which the agency has complied with necessary requirements concerning equality of employment opportunities and the rights and privacy of individuals.

In its efforts to protect the public, the agency's operations should be structured in a manner that is fair and impartial to all interests. The degree to which this objective is met can be partially judged on the basis of potential conflicts of interest in agency organization and operation, as well as agency compliance with statutes relating to conflicts of interests, open meetings, and open records.

Conflict of Interest

Board members, as appointed state officers, are subject to statutory standards of conduct and conflict-of-interest provisions (Article 6252-9, V.A.C.S.). A review of the documents filed with the Office of the Secretary of State indicates that both the board members and executive director have complied with the filing requirements set out in the state's general statute dealing with conflict of interest. However, the review indicated several areas of concern in light of the Sunset Commission's approach to conflicts of interest. This approach imposes a higher standard than that currently required under law and is designed to prevent even the appearance of conflicting responsibilities between licensing bodies and associations composed of licensees.

In the past, the executive director of the board served in various capacities for the Texas Dental Association while also serving as executive director for the Board of Dental Examiners. Upon termination of this relationship, a trust was established by the association for the executive director in lieu of retirement benefits and as a means of recognizing service to the association. While these actions were appropriate and permissible under current standards, they would not be appropriate under the higher standard developed as an across-the-board recommendation by the Sunset Commission.

The application of the Sunset Commission across-the-board recommendation relative to relationships between licensing agencies and associations composed of regulated licensees is appropriate for the Board of Dental Examiners and the board's statute should be modified to include this provision.

Additionally, it was noted during the review that the part-time secretary employed to assist the Secretary-Treasurer of the board is his daughter. The state nepotism statutes prohibit employment of relatives of board members by state boards. When this was pointed out to the agency, employment of the board member's daughter was terminated.

Open Meetings - Open Records

As evidenced by records of the Texas Register, most board meetings have been preceded by notice to the public. However, the review indicated several areas of concern in the board's meeting process. The board failed to file notice of one meeting held concurrently with an examination. Other board business was conducted as evidenced by board minutes and proper notice should have been filed. In addition, the board makes a practice of meeting on days immediately prior to and immediately after the dates filed with the Office of the Secretary of State as

the board meeting dates. If this type of meeting schedule is necessary to make efficient use of the members' time, notice of the meetings filed should include these dates.

Article 6252-17, V.A.C.S. requires that the board's presiding officer announce that a closed meeting is about to be held and identify the section of the Open Meetings Act which authorizes such a meeting. The Act also requires that all final actions taken on subjects discussed in a closed meeting be made in an open meeting. The board has conducted closed meetings on at least nine occasions to discuss and take action on complaints. On another occasion, the board considered business inappropriately in a closed session. On those occasions, sections of the Open Meetings Act which authorize such meetings were not cited nor were final decisions made in open session. Additionally, it is the practice of the board in considering docketed complaints to ask defendants to waive their right to be present when a decision is made on their case. This allows the board to take a case "under advisement" or consider it at any time thereafter. This practice should be discontinued since the effect is circumvention of the intent of the Open Meetings Act.

Finally, the board has initiated a process for conference call voting and voting by mail between meetings. However, since the board meets at least ten times a year and since it is not clear that these forms of decision-making conform to the requirements of the Open Meetings Act, these practices should be discontinued.

The agency cites several categories of records which it considers to be confidential and not available to public inspection: 1) personnel files; 2) records and files of pending investigations; and 3) employee work papers. The agency indicated that no requests for information have been denied.

Employment Policies

The State Board of Dental Examiners submitted an Affirmative Action Plan in 1974 which was up-dated in June 1979. The plan does provide that grievances be reviewed through an internal advisory committee composed of three employees. The board has never received a formal complaint on employment practices.

Summary

Board members have complied with conflict-of-interest reporting procedures. However, the executive director is beneficiary of a trust established by the trade association, after his having been employed by the association for many years. Specific conflict-of-interest provisions should be enacted to maintain the separation of the board and staff of the regulatory agency and the association.

Some board meetings have not been conducted within the requirements of the Open Meetings Act. Specific instances were noted when meetings were conducted without proper notice to the public and improperly closed to the public. Further, final decisions have been made in closed sessions, and in disciplinary proceedings, the board asks a defendant to waive the right to be present for the decision on his case. Finally, the board utilizes conference calls and mail voting for decision-making. These practices should all be discontinued. No difficulties were noted with respect to compliance with the Open Records Act or employment policies.

VI. PUBLIC PARTICIPATION

The review under this section covers the sunset criterion which calls for an evaluation of the extent to which the agency has encouraged participation by the public in making its rules and decisions as opposed to participation solely by those it regulates and the extent to which the public participation has resulted in rules compatible with the objectives of the agency.

The degree to which the agency has involved the public in the rule-making and decision-making processes of the agency can be judged on the basis of agency compliance with statutory provisions on public participation, the availability of information concerning rules and agency operations, and the existence of public members on the board.

Agency Activities

Review of pertinent records indicates that the board has adopted 122 rule amendments and additions in the last four fiscal years. Of this number, fifty-three percent (53%) were passed as emergency rules; thirty-three percent (33%) pertained to advertising restrictions, seventy percent (70%) of which were adopted on an emergency basis; eighteen percent (18%) were related to examination procedures; the remainder concerned professional corporations and designations, the number and type of offices, and various rules related to the practice of dentistry and dental hygiene. It should be noted that over the four-year period many of the rules had numerous amendments. While the adoption of these rules has generally been in compliance with public participation requirements found in state law, the board's excessive use of emergency rule-making procedures has acted as a deterrent to public participation, and has in effect circumvented the intent of the Administrative Procedure Act (APA). Moreover, according to the APA, emer-

gency rules may only be passed when there is a clear peril to the public health, safety, and welfare. Most of the rules passed by the board on an emergency basis do not appear to meet this criterion. Consequently, the board should limit its use of the emergency rule clause to rule changes which clearly fall within APA requirements.

Public Membership

A review of the statutory composition of the board shows the absence of any members from the general public. The lack of such members eliminates one means by which the point of view of the general public in the development of rules and the deliberation of other matters can be represented. This drawback is even more significant for a board such as the Texas State Board of Dental Examiners which regulates a profession which is involved in the provision of health care to the public and whose regulatory activities are not readily visible to the public.

Because of the heavy workload presently placed upon the board in examining applicants for licensure and because public members would not have the professional background to substantially assist in evaluating the qualifications of applicants, it would appear undesirable to reduce the number of dentists on the board when adding public members. Should public membership be desired, the board composition could be expanded to include public members while maintaining nine dentists on the board.

Summary

While the board has complied with public notification requirements, public participation in the policy processes of the board has been minimal. The board's use of emergency rule-making procedures has acted as a deterrent to public participation in the rule-making process. The exercise of the emergency rule

procedure should be limited to situations where there is a clear public peril. To help ensure that the public's point of view is properly represented, public members should be placed on the board in addition to the nine dentist members.

VII. STATUTORY CHANGES

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are whether statutory changes recommended by the agency or others were calculated to be of benefit to the public rather than to an occupation, business, or institution the agency regulates; and statutory changes recommended by the agency for the improvement of the regulatory function performed. In the period covering the last four legislative sessions, the review focused on both proposed and adopted changes in the law. Prior to that period, the staff review was limited to adopted changes only.

Past Legislative Action

Dentists

The regulation of dentistry in Texas began in 1889, and was carried out by three-member boards of dental examiners appointed by the judge of each judicial district. Since the creation of a six-member statewide board in 1897, the enabling legislation and relevant penal code provisions have been amended thirty-five times. Amendments to the statutes have expanded the board's regulatory authority to include dental hygienists, dental technicians and laboratories and dental assistants; increased licensure requirements and practice regulation; further defined in the practice of dentistry; and increased fees.

The first amendment to the statutes regulating dentistry occurred in 1897 (House Bill 90, Twenty-fifth Legislature) when a six-member board composed of dentists, appointed by the governor, was created. Violations of the Act included practicing without compliance with the Act and extracting teeth or performing any

other operation pertaining to dentistry for the purpose of advertising, exhibiting, or selling any medicine, instrument or business. A \$10 license fee was required of new licensees.

In 1905 (Senate Bill No. 84, Twenty-ninth Legislature), the board was given the power to revoke a license for a felony conviction for any fraudulent or dishonorable conduct, and for malpractice. This provision was changed in 1919 with the passage of legislation (House Bill No. 1, Thirty-sixth Legislature) which vested revocation power in the district courts. Provision was made in the penal code for criminal penalties against the illegal practice of dentistry. The 1919 Act also added good moral character and age 21 as licensure prerequisites, prohibited the practice of dentistry under any name other than the licensee's proper and legal name, and required the display of licenses. Students under proper supervision and persons doing laboratory work on inert matter were exempted from licensure requirements.

In 1935, Senate Bill No. 10, Forty-fourth Legislature, strengthened the board's regulatory authority and more clearly defined the practice of dentistry. This legislation charged the board with aiding in the enforcement of the statutes regulating the practice of dentistry; authorized the state to enjoin the illegal practice of dentistry upon conviction in a criminal proceeding; and gave the board limited rulemaking authority. The board was authorized to suspend or revoke licenses automatically upon proof of a felony conviction or for insanity, and to refuse to examine or issue licenses for certain fraudulent or illegal actions, for addiction to drugs, and for habitual intoxication. In addition, licensees were prohibited from making any false or misleading statements or from practicing under a corporate name. The district court was also given authority to suspend or revoke licenses for malpractice; gross incompetency; misrepresentation for the

purposes of obtaining patronage or for procuring a license; drug addiction or habitual intoxication; employment of an unlicensed individual to practice dentistry; lack of proper diligence in safeguarding patients against avoidable infections; and failure to comply with any provisions of the Act. Other provisions of the amendment defined the practice of dentistry, and detailed provisions for licensing dentists from the army and navy and from other states. Attention was also given to the funding of board operations with the authorization of a \$25 examination fee and the establishment of a fund in the treasury with a clause for reversion to the general revenue fund of amounts in excess of \$10,000.

While the issue of advertising by dentists had been addressed in a limited fashion as early as 1897, in 1937 legislation (House Bill No. 36, Forty-fifth Legislature) amending the penal code prohibited "unprofessional conduct" setting out twenty prohibitions including sixteen separate advertising practices . Correspondingly, the board was authorized to suspend and revoke licenses for violations of penal code provisions. The board was also authorized to refuse to grant a license for such violations by an applicant within twelve months prior to filing the application. In addition, the legislation set out court procedures for appeals from orders of the board. Other provisions of the amendment allowed a dentist to maintain two offices, and to associate with or be employed by another dentist.

During the 1940s, legislation was passed which strengthened and delineated the enforcement process. The Act was amended to provide due process to licensees in disciplinary actions (Senate Bill No. 464, Forty-seventh Legislature, 1941); to give the board subpoena power (House Bill No. 362, Fiftieth Legislature, 1947); to require a sworn, written complaint and to permit uncorroborated testimony as sufficient for conviction (House Bill No. 683, Fifty-first Legislature, 1949). Senate Bill No. 278 (Forty-eighth Legislature, 1943) expanded the definition

of dental practice to include the construction of models or impressions of the human mouth and of any prosthetic appliance or structure and required United States citizenship for licensure. The 1943 Act also raised the cap on the board's fund balance to \$20,000; House Bill No. 362 (Fiftieth Legislature, 1947) raised it again to \$30,000 with all excess balances to revert to general revenue at the end of the fiscal year.

In 1951, Senate Bill No. 371, Fifty-second Legislature, gave the district courts and the board concurrent jurisdiction to suspend or revoke a license and also delineated complaint procedures. The authority of the board to refuse to examine was broadened to include conviction of a felony involving moral turpitude and added as cause for revocation non-compliance with board rules. The bill also exempted the faculty of reputable dental schools from licensure.

Additional exemptions from licensure were provided in 1953 by House Bill No. 534, Fifty-third Legislature, with the addition of dental hygienists and healers by means of prayer. Additionally, the 1953 amendment made requirements relating to the board's injunctive power more permissive. Senate Bill No. 425, passed in 1957 by the Fifty-fifth Legislature, exempted from licensure employees of a dentist who make dental X-rays. Additional licensure exemptions were added in 1961 (Senate Bill No. 316, Fifty-seventh Legislature) with the inclusion of Dental Health Service Corporations and in 1969 (Senate Bill No. 5, Sixty-first Legislature, Second Called Session) with the addition of dental interns, residents, and assistants. Other provisions added in the 1961 bill removed the reversion requirement for board fund balances, raised the examination fee to \$50 and made it unlawful for a dentist to prescribe or administer narcotic drugs under certain circumstances.

In 1971, Senate Bill No. 246, Sixty-second Legislature, authorized the board to adopt and enforce rules to: 1) define the areas of practice of dentists, dental hygienists, and dental assistants, and their relationships to each other and to other branches of the healing arts; 2) prescribe and maintain standards of professional conduct; and 3) protect the public health and welfare. All rules were required to be submitted to the attorney general for review as to their legality. While this amendment provided more flexibility in regulation, it also increased the board's authority over the practice of dentistry. Another piece of legislation (Senate Bill No. 365, Sixty-second Legislature) passed in 1971, enlarged the board from six to nine members and revised the annual registration process with associated fee increases. In 1973, Senate Bill No. 831, Sixty-third Legislature, permitted the board to adopt a system of staggered annual renewals. More stringent regulation of advertising was authorized in 1973, when House Bill No. 1520, Sixty-third Legislature, prohibited advertising by any person, firm, or corporation not domiciled in Texas or subject to state laws.

The legislature provided an additional method for the resolution of consumer complaints in 1975 (Senate Bill 529, Sixty-fourth Legislature) through the creation of regional peer review committees to arbitrate fee disputes between licensed dentists, dental patients and/or third party payors. In 1977, the peer review committees, as well as the board and its employees and witnesses, were granted civil immunity in connection with investigations and hearings (Senate Bill No. 565, Sixty-fifth Legislature).

Other legislation passed in 1977 (Senate Bill No. 657, Sixty-fifth Legislature) directed the board to provide by rule, procedures, fees and requirements for licensure of foreign and non-accredited school graduates and increased fees for

registration and examination. Senate Bill No. 563, Sixty-fifth Legislature, also passed in 1977, added negligence and physical or mental incapacity as grounds for disciplinary action. Additionally, Senate Bill No. 656, Sixty-fifth Legislature, made the records of the board public with the exception of certain investigation files and allowed dentists to incorporate under the Texas Professional Corporation Act without violating the prohibitions against practicing under other than a legal and proper name. Finally, in 1977, the board was made subject to the Texas Sunset Act (Senate Bill No. 54, Sixty-fifth Legislature).

Dental Hygienists

The profession of dental hygiene was officially recognized as an adjunct to the dental profession in 1951 with the passage of legislation (Senate Bill No. 453, Fifty-second Legislature) which set out licensure and practice requirements for hygienists. The board was given regulatory authority over dental hygienists including the power to examine for competence, to promulgate pertinent rules, and to suspend or revoke licenses. Provisions for refusal to examine or license hygienists were the same as those pertaining to dentists. In addition, the 1951 Act made it unlawful for a dentist to employ more than one dental hygienist and imposed a limit of two hygienists for any dental office.

Since 1951, amendments to the statute regarding dental hygienists have removed the requirement that all work performed by a dental hygienist be under the direct supervision of a dentist (Senate Bill No. 425, Fifty-fifth Legislature, 1957); set out examination requirements (House Bill No. 712, Fifty-seventh Legislature, 1961); and provided more latitude for the board in defining the practice of dental hygiene (Senate Bill No. 5, Sixty-first Legislature, Second Called Session, 1969). In 1977, the Sixty-fifth Legislature created a Dental Hygiene

Advisory Committee to be appointed by the board, to advise the board on matters related to dental hygiene (Senate Bill No. 779). Also in 1977, the limitation on the number of dental hygienists per dentist was raised from one to two.

Dental Technicians

In a 1959 Act, (Senate Bill No. 268, Fifty-sixth Legislature), dental technicians who had before that time been regulated as dentists were made a separate profession and defined as persons who make, repair, and adjust dental appliances. Dental laboratories were defined as places where any of the services of a dental technician are performed or accomplished. This Act required that a dental technician have a prescription or work order containing specified information from a dentist in order to make any plate or appliance. The laboratory manager or owner was required to keep the prescriptions or work orders on file for a period of two years to facilitate inspection by the State Board of Dental Examiners. An exemption was provided for licensed dentists.

In 1973, the Texas Board of Dental Examiners was given broad authority by Senate Bill No. 365, Sixty-third Legislature, to adopt and enforce rules pertaining to dental laboratories and dental technicians, after recommendations from the Dental Laboratory Advisory Board, a six-member board created by the same Act to be appointed by the State Board of Dental Examiners from registered technicians and laboratory managers or owners. Provisions were made for registration with the State Board of Examiners of owners or managers of dental laboratories and for dental laboratory technicians.

Proposed Legislative Action

Apart from the successful legislation mentioned above, several other bills concerning the regulation of dentistry were proposed, but not adopted, in the last

four legislative sessions. During the Sixty-third legislative session, legislation was introduced to establish separate boards to regulate dental technology (House Bill No. 677) and the fitting and dispensing of dentures (House Bill No. 1427), removing these functions from the Texas State Board of Dental Examiners; to promote an interim study on the regulation of denturism (House Senate Resolution 142); and to permit a dental association to establish a corporation under the Texas Non-profit Corporation Act (House Bill No. 1716).

Legislation proposed during the Sixty-fourth session (Senate Bill No. 530) would have expanded the practice of dentistry to include the surgical and adjunctive treatment for any disease or injury of the oral cavity and associated structures. The Sixty-fifth Legislature considered legislation to limit the regulation of dental technicians and laboratories (Senate Bill No. 1125); to create a Board of Examiners for Denturists (House Bill No. 1628); and to prohibit delegation of the board's examination authority (House Bill No. 2046).

Several bills introduced during the Sixty-sixth session received active support from the board. These include Senate Bill No. 299, which would have amended provisions of the Act relating to unprofessional conduct and advertising; revision of provisions related to the licensing and enforcement process (Senate Bill No. 484); Senate Bill No. 812 relating to board member retirement benefits; and Senate Bill No. 776, authorizing dentists to take case histories and give physical examinations under limited circumstances. Legislation opposed by the board would have created an "umbrella" licensing agency (Senate Bill No. 816) and allowed the formation of Health Maintenance Organizations (HMOs) for the provision of dental care (Senate Bill No. 871). Other legislation considered during this session included a bill to create a Dental Assistant Advisory Committee (Senate Bill No. 1175), and a bill to require public membership on various state boards including the Texas State Board of Dental Examiners (House Bill No. 1533).

Summary

Since the enactment of the board's enabling legislation in 1897, the Act and relevant penal code provisions have been amended thirty-five times. Generally, these amendments have expanded the board's purview to include dental hygienists, dental technicians and laboratories, and dental assistants; added to the board's enforcement powers; delineated the practice of dentistry; and increased licensure requirements. In the last four legislative sessions, the legislature considered, but did not adopt, legislation dealing with denturism, dental technology, the practice and regulation of dentistry and the establishment of Health Maintenance Organizations for the provision of dental care.