



SUNSET ADVISORY COMMISSION

Board of Law
Examiners



Staff Report
March 2002

BOARD OF LAW EXAMINERS

SUNSET STAFF REPORT

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SUMMARY



Summary

Sunset Staff Report

Board of Law Examiners

As the State Bar of Texas is unique in its role of overseeing the regulation of lawyers, so is the Board of Law Examiners unique in its role of determining who gets to practice law in Texas. The agency is in the Judicial branch, under the dual oversight of the Texas Supreme Court and the Legislature. The Board, like the State Bar, has a responsibility both to uphold the standards and integrity of the legal profession and to protect the public from persons who do not have the capacity, attainment, and character to practice law. One way the Board addresses this responsibility is through a character and fitness process to determine if persons have a condition or illness, or traits and behavior, that could adversely affect their abilities as a lawyer.

The Board has a responsibility both to uphold the standards and integrity of the legal profession and to protect the public.

The Sunset review of the Board of Law Examiners focused on this character and fitness process, seeking to balance the need for public disclosure with traditional Sunset standards of public participation in governmental functions and public access to information. The review considered the adequacy of the Board's statute to identify ways to improve the effectiveness of the existing process in protecting the public. The review also assessed the Board's process for judging character and fitness and making other decisions to determine if it is fair and consistent.

A summary of the recommendations in this report is provided in the following material.

Issues / Recommendations

Issue 1 The Board's Character and Fitness Process Does Not Adequately Balance the Need to Protect the Public With the Need to Safeguard the Prospective Attorney.

Key Recommendations

- Clarify existing protections to prevent the release of confidential information in character and fitness hearings.
- Make probationary license status subject to disclosure.

For more information, contact Michelle Luera, (512) 463-1300. Sunset staff reports are available online at www.sunset.state.tx.us.

- Eliminate district committees from character and fitness investigations.
- Eliminate the current statutory definition of chemical dependency, and require the Board to develop a new definition by rule.

Issue 2 The Board Makes Decisions on Character and Fitness Issues and Waiver Requests Without the Benefit of Guidelines Based on Its Past Decisions.

Key Recommendation

- The Board should develop guidelines to assist its decisionmaking on character and fitness determinations, probationary licenses, and waiver requests.

Issue 3 Board Members' Term Length, and a Lack of Staggered Terms, Hinders Continuity on the Board.

Key Recommendations

- Lengthen the Board members' terms to six years.
- Place the Board members' terms on a staggered schedule, with one-third of the Board's membership to be appointed every two years.

Issue 4 Texas Has a Continuing Need for the Board of Law Examiners.

Key Recommendation

- Continue the Board of Law Examiners for 12 years.

Fiscal Implication Summary _____

The recommendations in this report would not have a fiscal impact to the State or the Board of Law Examiners.

ISSUES / RECOMMENDATIONS

Issue 1

The Board's Character and Fitness Process Does Not Adequately Balance the Need to Protect the Public With the Need to Safeguard the Prospective Attorney.

Summary

Key Recommendations

- Clarify existing protections to prevent the release of confidential information in character and fitness hearings.
- Make probationary license status subject to disclosure.
- Eliminate district committees from character and fitness investigations.
- Eliminate the current statutory definition of chemical dependency, and require the Board to develop a new definition by rule.

Key Findings

- Character and fitness proceedings allow the disclosure of confidential information unnecessary to protect the public.
- Probationary license status is not subject to disclosure, depriving the public of information it has a valid need to know.
- District committees no longer serve a meaningful purpose in character and fitness investigations.
- The statutory definition of chemical dependency is ambiguous, allowing possibly chemically dependent applicants to receive law licenses.

Conclusion

The Board of Law Examiners assesses the character and fitness of persons seeking to practice law, protecting the public and the integrity of the profession by ensuring that these people will be able to meet their obligations and responsibilities as lawyers. By its nature, a character and fitness assessment considers private, personal issues which may not need to be disclosed publicly. One of these issues, chemical dependency, is governed by statutory language that may not allow the Board to take necessary action to protect the public. The Board considers these issues after a staff investigation that has become increasingly sophisticated, shifting from its historic reliance on volunteer committees.

The Sunset review of the character and fitness process sought to balance the necessity for public disclosure with traditional Sunset standards of public participation in governmental functions and public access to information. The review also considered the adequacy of the Board's statute and the effectiveness of existing processes in protecting the public in the Board's character and fitness determinations.

Support

The Board conducts public character and fitness hearings to investigate persons intending to practice law in Texas.

- To ensure that individuals will be able to meet their obligations and responsibilities as attorneys, the Board of Law Examiners assesses the character and fitness of persons who have declared an intent to study law or applied for admission to practice law. The chart on page 28 summarizes the character and fitness determination process. After reviewing an application, the Board may require individuals to appear in a public hearing, before a three-member panel, to determine whether to certify their character and fitness.
- Initially, district committees served an important role in character and fitness determinations. District committee members are appointed by the Supreme Court to review those persons whose permanent residence before law school is located within their district.¹ District committees were created to provide character insight, increasing the Board's awareness of local knowledge or reputation of the person. Initially, district committees reviewed the person's entire file, often requesting an interview. Based on this information, the district committee would make a character recommendation to the Board. Now, the committees receive only limited information from the Board of Law Examiners, and they conduct virtually no interviews.
- The Board of Law Examiners is responsible for determining whether all candidates for a Texas law license possess present good moral character and fitness. Common issues include dishonesty, chemical dependency, criminal history, lack of candor, IRS/debt problems, child support arrearage, or law school or undergraduate discipline. Full hearings can result in certification, denial, or the issuance of a probationary license.
- If character and fitness cannot be certified at the hearing, the Board may issue a probationary license. Probationary licensees have all the rights and privileges of regular licensure, requiring only periodic activity reporting to the Board of Law Examiners by mail, as well as adherence to conditions specified in the order. If a licensee fails to adhere to the conditions of his probationary license, the Board may extend the probationary period or recommend revocation of the license.

Character and fitness hearings can result in certification, denial, or issuance of a probationary license.

Character and fitness proceedings allow the disclosure of confidential information unnecessary to protect the public.

- Character and fitness proceedings allow public disclosure of confidential information, including medical records relating to chemical dependency and psychiatric issues. This is a result of an inconsistency between statute and Supreme Court rule. The current

statute requires all character and fitness *records* to be closed.² However, a Supreme Court rule states character and fitness *hearings* are open to the public.³ The character and fitness hearings themselves have not been construed as character and fitness records, which must remain closed. This inconsistency allows disclosure of highly confidential information raised in hearings, yet does not provide public notice of hearing results and determinations.

- The public disclosure of this information is not necessary to protect the public and the integrity of the profession. If the person is certified, the Board has determined that person has the requisite character and fitness to practice law, and no interest is served in disclosing this information. If denied, that person will not be admitted to the Bar, and therefore poses no danger to the public. The issuance of a probationary license, however, is of public concern, as discussed below.
- The Board's character and fitness hearings are inconsistent with State Bar grievance hearings. Initial stages of the State Bar grievance hearings are closed to the public to protect the reputation of the attorney and allow confidential fact-finding. This same protection is not afforded in the character and fitness process even though, unlike licensed attorneys, the applicant poses no threat to the public.

Probationary license status is not subject to disclosure, depriving the public of information it has a valid need to know.

- Currently, 44 attorneys are practicing under a probationary license. While the probationary licensees have the rights and privileges of fully licensed attorneys, they remain under the oversight of the Board of Law Examiners, because certain concerns could not be satisfied through the character and fitness hearing. Clients and employers of these probationary licensees may have no knowledge that the person is acting on their behalf without a regular law license. Last year, the Board extended or recommended revocation of more than 25 percent of all probationary licenses because the probationary licensee did not have the requisite character and fitness to later be issued a regular law license. The public has a valid interest in the disclosure of such information.
- The State Bar, which regulates fully licensed attorneys, discloses the grievance history of all attorneys, yet the Board of Law Examiners keeps probationary license status confidential.

District committees no longer serve any meaningful purpose in character and fitness investigations.

- District committees originally assisted the Board by providing personal knowledge or local information about potential licensees. These committees are a remnant of the past when they were more instrumental in character and fitness investigations. At one time,

Character and fitness records are closed, but character and fitness hearings are open to the public.

district committees were a standard component of all character and fitness investigations. By the last Sunset review in 1991, district committees were involved in only about ten percent of all cases, and then only when staff sought further review.⁴

Even though the statute requires district committee review, virtually no committees have conducted interviews within the past five years. The information provided to the committees has become so generic that the committees are unable to make any valid determinations. In 2001, only one district out of seventeen requested additional information.

Almost no district committees have conducted interviews within the past five years.

- The district committees themselves feel that they serve no meaningful purpose.⁵ When interviewed, a long-time Board member was unaware of the existence of district committees. Board of Law Examiners staff also support the elimination of these committees to expedite the investigation process.
- The increase in law school admissions combined with high-tech investigative techniques have made these committees obsolete. The Board of Law Examiners provides sufficient public protection with objective and comprehensive investigative methods such as Department of Public Safety criminal background checks, Internet credit reports, and FBI fingerprinting. Professional staff investigation also provides greater consistency than review by 17 different district committees.

The statutory definition of chemical dependency is too ambiguous, allowing possibly chemically dependent applicants to receive law licenses.

- The current statutory definition of chemical dependency refers to the use, abuse, or dependence on alcohol or a controlled substance. The textbox, *Current Statutory Definition*, provides the Board’s definition of chemical dependency.⁶
- The Third Court of Appeals ruled in *Coulson v. Board of Law Examiners* that, to meet the statutory definition of chemical dependency, the Board must find that the person “does suffer” present chemical dependency.⁷ Due to the recent *Coulson* decision, findings based on past evidence that a person “may suffer” chemical dependency are now legally insufficient to warrant a denial of a license and issuance of a probationary license. Board members

Current Statutory Definition
“Chemical dependency” means:
<ul style="list-style-type: none"> • the abuse of alcohol or a controlled substance; • a pathological use of alcohol or a controlled substance that chronically impairs the applicant’s ability to competently provide legal advice or services; or • a physiological or physical dependence on alcohol or a controlled substance.

have converted numerous probationary licenses to full licenses to comply with the required finding of “does suffer.” This ambiguity exposes employers and clients to potentially chemically dependent attorneys.

- The current statutory definition of chemical dependency is not accepted by experts within the field, nor does it reconcile with other mental health statutes.⁸ The most common source of clinical definitions, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), is recognized by the courts as a valid clinical reference tool. Appendix C lists the specific criteria required for substance dependence/abuse under DSM-IV.

Recommendation

Change in Statute

1.1 Clarify existing protections to prevent the release of confidential information in character and fitness hearings.

This recommendation would amend current statutory language to close all character and fitness records, including hearings where such matters are discussed. This would allow medical and psychiatric records of persons seeking to enter law school and seeking admission to the Bar to remain confidential. Hearing determinations would also be confidential without sacrificing public protection – public notice is unnecessary if an applicant is denied licensure.

1.2 Make probationary license status subject to disclosure.

This recommendation would allow clients and employers to have access to information concerning the probationary status of a newly-licensed attorney. However, any information which formed the basis for the issuance of the probationary license would remain confidential. The Board would make this information available only upon request, in coordination with the State Bar. This recommendation would be prospective, maintaining the confidentiality of past probationary license orders.

1.3 Eliminate the role of district committees in character and fitness investigations.

This recommendation would eliminate an unnecessary and obsolete stage in the character and fitness investigation process. Allowing the Board to rely on more objective and comprehensive investigations by staff would also better serve the public.

1.4 Eliminate the current statutory definition of chemical dependency, and require the Board to develop a new definition by rule.

Requiring the Board to develop a new definition by rule, subject to Supreme Court approval, would result in application of a widely accepted clinical definition of chemical dependency, and enable the Board to effectively address possible chemical dependency issues of license candidates. The Board should consider the elements contained in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, when developing the required rules.

Impact

The intent of these recommendations is to achieve a successful balance between the interests of persons seeking to practice law and the interests of the public. Consistent confidentiality provisions would protect the personal records of the applicant, while disclosure of probationary status serves to inform and protect the public. Elimination of district committees would allow the staff to solely conduct the character and fitness investigations, ensuring greater consistency and improved investigative methods. An accurate definition of chemical dependency would authorize the Board to address chemical dependency issues and effectively protect both the profession and the public.

Fiscal Implication

This recommendation would have no fiscal impact to the State or to the Board of Law Examiners.

¹ Tex. Govt. Code Ann. § 82.031-32.

² Tex. Govt. Code Ann. § 82.003(c).

³ Rules of the Supreme Court Governing the Admission to the Bar of Texas, Rule XV(a).

⁴ Texas Sunset Advisory Commission, *Staff Report, Board of Law Examiners* (Austin, Texas, July 1990), p. 22.

⁵ Interview with Board of Law Examiners, District Committee Chair (Fort Worth, Texas, December 19, 2001).

⁶ Tex. Govt. Code Ann. § 82.038(i)(1).

⁷ *Board of Law Examiners v. Coulson*, 48 S.W.3d 841 (Tex. App.-Austin 2001).

⁸ Health & Safety Code § 462.001(3). “Chemical dependency” means: (A) the abuse of a controlled substance; (B) psychological or physical dependence on alcohol or a controlled substance; or (C) addiction to alcohol or a controlled substance.

Issue 2

The Board Makes Decisions on Character and Fitness Issues and Waiver Requests Without the Benefit of Guidelines Based on Its Past Decisions.

Summary

Key Recommendation

- The Board should develop guidelines to assist its decisionmaking on character and fitness determinations, probationary licenses, and waiver requests.

Key Findings

- The Board makes fundamental decisions affecting an individual's ability to practice law.
- Without guidelines, the Board cannot ensure fairness and consistency in deciding character and fitness issues, and waiver requests.
- Decisionmakers – especially in the Judicial branch – commonly rely on guidance to assist in their work.

Conclusion

While the Board has a process in place for judging the character and fitness of persons seeking to practice law, and for granting waiver requests for various fees and deadlines, the Board does not have guidelines in making decisions on these cases. Without guidelines, Board members cannot ensure the consistency of their own rulings over time or the consistency of their actions with those of other members. They also cannot ensure that external considerations will not slip into the process, potentially affecting the fairness of decisions.

By developing guidelines, based largely on past Board decisions, Board members would have additional information to help them make decisions. Further, basing these guidelines largely on precedents is a natural approach for a judicial agency making such important decisions affecting who practices law in the state.

Support

The Board makes fundamental decisions affecting an individual's ability to practice law.

- The Board determines if individuals declaring their intention to study law or seeking a license to practice law have the present good character and fitness to indicate their ability to carry out the responsibilities of an attorney. The Board makes these determinations in three-member panels, convening in a judicial hearing, with sworn testimony and a court reporter.

The hearings consist of the introduction of documentary evidence, opening statements, direct and cross-examination of witnesses, and closing statements. The Board receives information, such as evaluations by licensed chemical dependency counselors, arrests, judgment records, and credit reports, to help its assessments. Panel decisions are appealable to district court in Travis County under the substantial evidence rule. The Board adjudicates approximately 100 character and fitness cases each year.

- While the Board's basic decision is whether or not to certify an individual's present good character and fitness, it may also grant conditional approval through the recommendation to issue a probationary license. In these cases, persons may be licensed to practice law, but remain subject to conditions imposed by the Board, and may have their license revoked if they fail to satisfy these conditions. In FY 2000, nine people received a probationary license; and in FY 2001, 27 people received a probationary license.¹
- The Board also hears requests to waive filing deadlines and fees, such as those associated with the Bar examination. The Board may grant waivers for specific requirements if an individual shows "good cause" or indigent status. Considerations of waiver requests occur in less formal settings before three-member panels of the Board. The Board received 72 waiver requests in FY 2001, down from 95 the previous year.²

Without guidelines, the Board cannot ensure fairness and consistency in deciding character and fitness issues, and waiver requests.

- While the Board has a well-developed process for judging a person's character and fitness and considering waiver requests, it does not have guidelines to use in making decisions in many of these cases. It receives considerable information to help it evaluate character and fitness and waivers. However, the Board does not receive information, such as a record of outcomes and Board actions, to indicate how

The Board makes character and fitness determinations in three-member panels, convening in a judicial hearing.

comparable issues have been dealt with in the past. It also does not receive information to help guide its decisions, such as weights to apply to different issues, and how to apply mitigation measures.

- Board members appropriately apply their discretion and judgment to each case, but without guidelines, they cannot ensure the consistency of their own rulings over time, or the consistency of actions by various panels dealing with similar issues. Board members may also be susceptible to basing their decisions on external factors or on extra information and assumptions about the person, potentially affecting the fairness of decisions.

Without guidelines, the Board cannot ensure the consistency of its own rulings over time.

An extreme example of such an external factor, not directly related to the case, is the potential that the Board considers its budget needs in making a waiver decision.³ A Board member may have extra information and make assumptions about such things as a foreign attorney's ability to pay or the financial status of a person whose father is an attorney.⁴ This extra information may not be available to all Board members and the assumptions may not always be accurate.

- The lack of guidelines is a disadvantage to newer Board members who do not have the experience or a frame of reference to fully judge matters before them. The absence of guidelines may also give considerable power to staff when it is asked to provide information about past cases. To the extent this information is not documented and catalogued, it is at risk of being lost if the agency loses an experienced employee.

Decisionmakers – especially in the Judicial branch – commonly rely on guidance to assist in their work.

- Precedents are a cornerstone of the legal system. While they are not the same as guidelines, they provide a thorough record of prior decisions that guide judicial decisions, without inhibiting judges' flexibility.
- The State Bar and the State Commission on Judicial Conduct rely on guidance in their decisionmaking process regarding complaints against attorneys and judges. While these agencies do not have guidelines based on their own decisions, they do use court rulings involving misconduct. The State Bar can refer to an index of court cases involving disciplinary issues and ethics opinions issued by the Supreme Court's Committee on Professional Ethics. The Commission considers the Code of Judicial Conduct, which lists basic standards that govern the conduct of all judges, and lists summaries of court rulings on improper judicial conduct.
- The Board itself receives some guidance from the rules and statute on issuing a probationary license for an applicant suffering from chemical dependency. The Board cannot refuse to issue a probationary

Without guidelines, new Board members have difficulty fully judging matters before them.

license to an individual, who passed the bar exam, solely because of chemical dependency.

- The Administrative Procedure Act requires state executive agencies to index, cross-index to statute, and make available for public inspection all final orders, decisions, and opinions. The requirement provides agencies with a basis for their decisionmaking.

Recommendation

Management Action

2.1 The Board should develop guidelines to assist its decisionmaking on character and fitness determinations, probationary licenses, and waiver requests.

The guidelines that the Board would develop should generally be based on the record of past decisions the Board has made to guide consideration of comparable cases. The guidance could also include any other criteria the Board feels will assist in its decisionmaking processes, such as factors to help it evaluate the seriousness of different issues and steps taken by the person to mitigate the issue. This recommendation would not require specific action by Board members on the basis of these guidelines. It is intended instead to simply provide the members with additional information to help make decisions, preserving the same flexibility they currently enjoy.

The recommendation does not specify which past decisions would need to be catalogued in developing these guidelines. The Board would need to determine how far back in time this record should go in reflecting Board action. The Board would, however, also need to update this record and guidelines as the Board's view of issues changes based on subsequent information, or changing conditions or philosophy. Because guidelines on character and fitness would need to be based largely on precedent from specific cases in the past, of necessity, these guidelines would fall under the existing statutory provision exempting character and fitness records from public disclosure.

Impact

By having guidelines based on its past record, the Board would have additional information to help ensure that its decisionmaking is consistent and fair. Because of the judicial nature of its proceedings, and because of the place of prominence it enjoys as the gatekeeper to the practice of law, the Board should have such guidelines as a matter of course.

Fiscal Implication

This recommendation would have no fiscal impact to the State or to the Board of Law Examiners.

¹ Letter from the Board of Law Examiners to the Sunset Advisory Commission, January 30, 2002 (fax).

² Board of Law Examiners, Waiver Requests minutes, September 1999 to August 2001.

³ Board of Law Examiners, Waiver Request Meeting, (Austin, Texas, December 10, 2001).

⁴ Board of Law Examiners, Waiver Request Meeting, (Austin, Texas, October 18, 2001).

Issue 3

Board Members' Term Length, and a Lack of Staggered Terms, Hinders Continuity on the Board.

Summary

Key Recommendations

- Lengthen the Board members' terms to six years.
- Place the Board members' terms on a staggered schedule, with one-third of the Board's membership to be appointed every two years.

Key Findings

- The Board of Law Examiners is a judicial body with unique responsibilities regarding admission to the State Bar.
- The short term length for its members hinders continuity on the Board, and could potentially impair the Board's ability to do its job.
- Staggered, six-year terms are standard for state officials.

Conclusion

Board member duties involve developing bar exam questions, administering the exam, supervising the grading of exams, providing analyses to failing exam applicants, and conducting character and fitness hearings. A great deal of time and effort is invested in and by Board members. A two-year term is too short to participate meaningfully in Board activities. Without a staggered schedule for the expiration of terms, the Board is susceptible to uncontrolled turnover. The Sunset review examined the terms for Board members and concluded that lengthening a member's term, and placing members' term expirations on a staggered schedule, would ensure continuity of experience and expertise on the Board.

Support

The Board of Law Examiners is a judicial body with unique responsibilities regarding admission to the State Bar.

- The Board of Law Examiners is composed of nine attorneys, appointed by the Supreme Court, who must be 35 years of age and have practiced law for ten years. Board members serve two-year terms, with each member's term expiring on August 31 of odd-numbered years. A Supreme Court resolution allows Board members to serve up to five terms, for a total of ten years.
- Unlike most boards, the Board has significant work responsibilities that require a large commitment of time and effort. For example, it is responsible for developing and administering the bar exam, overseeing its grading, providing exam analyses, and conducting character and fitness determinations, used in evaluating the eligibility of individuals seeking admission to the Bar. In return for service and labor, each Board member is compensated \$20,000 annually plus actual expenses.¹

A two-year term does not allow for staggering terms, making the Board susceptible to problems from turnover.

The short term length for its members hinders continuity on the Board, and could potentially impair the Board's ability to do its job.

- With two-year terms expiring at the same time every two years, the Board cannot ensure the orderly succession from one panel to the next. The short term does not allow for staggering terms, making the Board susceptible to uncontrolled turnover, potentially draining it of knowledge and expertise, and depriving it of continuity among its membership. The Board could conceivably lose all nine members at the same time, every two years.
- Because the Board's responsibilities are so labor intensive, requiring many hours of work to perform its duties, members need time and training to develop the skills and experience to do their jobs. Typically, members need to serve at least one full two-year term to participate most meaningfully in Board activities. When members serve just one term, the Board does not receive the full benefit that these members have to offer.
- Without a mechanism for staggered terms, the Board is not assured of a more orderly and defined process by which Board members learn about the agency and their responsibilities under the guidance of more senior members. In periods of high turnover, it could spend an inordinate amount of time training new members regarding Board requirements, at the expense of conducting its normal business. In each of the last five years, the Board has lost a member, requiring an ongoing effort to train new Board appointees.

In each of the last five years, the Board has lost a member, requiring an ongoing effort to train new Board appointees.

Staggered, six-year terms are standard for state officials.

- The Texas Constitution authorizes a board to be composed of an odd number of three or more members who serve for a term of six years, with one-third of a board's membership to be appointed every two years.² As a result, the six-year term, and staggered schedule of appointments, is standard for state agencies in Texas.
- Board member terms are not consistent with other state officials of the Judicial branch. The Texas Supreme Court consists of nine justices, elected by voters to six-year terms. Their terms are staggered so that every two years, one-third of the seats are up for election. In addition, the 11 members of the State Commission on Judicial Conduct also serve staggered, six-year terms.

Recommendation

Change in Statute

3.1 Lengthen the Board members' terms to six years.

3.2 Place the Board members' terms on a staggered schedule, with one-third of the Board's membership to be appointed every two years.

These recommendations would require members of the Board to hold office for staggered terms of six years, with the terms of three members expiring every two years. Each member would hold office until a successor is appointed and has qualified for office. The terms would expire on August 31st of odd-numbered years. This recommendation does not address term limits. Any decision on term limits would need to come from the Texas Supreme Court, as in the past.

Impact

The intent of these recommendations is to provide continuity on the Board. The staggered terms would help preclude too many new members joining the Board at the same time, and help maintain a level of experience at all times. The extended term would allow members to gain a level of knowledge and experience to better perform their job of determining admission to the State Bar of Texas.

Fiscal Implication

These recommendations would have no fiscal impact to the State or the Board of Law Examiners.

¹ Texas Government Code Ann., ch. 82, sec. 82.005 (a).

² Texas Constitution, article XVI, section 30a.

Issue 4

Texas Has a Continuing Need for the Board of Law Examiners.

Summary

Key Recommendation

- Continue the Board of Law Examiners for 12 years.

Key Findings

- The Board regulates admission to practice law under the auspices of both the Texas Supreme Court and the Texas Legislature.
- The State has a continuing interest in determining eligibility to practice law in Texas.
- The Board's unique structure, as an independent agency under the dual oversight of the Supreme Court and the Legislature, is an accepted approach to the regulation of the legal profession.

Conclusion

The Board of Law Examiners' main responsibility – to determine individuals' eligibility for admission to practice law – is important to citizens in Texas. The Board ensures individuals seeking a law license are able to serve the public in a competent and ethical manner. It accomplishes the task under the oversight of the Texas Supreme Court and the Texas Legislature.

The Sunset review evaluated the continuing need for a single, independent agency to regulate bar admissions. It also assessed whether the agency's functions could be successfully transferred to another agency, looked at how other states regulate bar admissions, and considered the Supreme Court's role in overseeing the Board. Despite previous Sunset findings that the Supreme Court, through its inherent powers to regulate the practice of law, should oversee the Board, the review concluded that the Board should be continued for 12 years and remain under the oversight of the Supreme Court and the Legislature.

Support

The Board determines the eligibility of candidates to practice law in Texas.

The Board regulates admission to practice law under the auspices of both the Texas Supreme Court and the Texas Legislature.

- The Board determines the eligibility of candidates to practice law in Texas through a process of investigating an individual's character and fitness, ensuring adequate legal study by exam applicants, developing and administering the bar exam, and determining if out-of-state attorneys meet eligibility requirements to obtain a law license without taking the exam. Once a person has met all requirements for admissions, the Board certifies the individual to the Texas Supreme Court as eligible for a license. Only the Supreme Court has authority to issue a license to practice law. In FY 2001, the Board recommended licensure for 2,406 individuals who passed the bar exam and 229 individuals who received admission without taking the exam.¹
- The Board is an agency of the judicial branch under dual oversight of the Texas Supreme Court and the Texas Legislature. The Legislature enacts the Board's enabling statute that specifies the basic responsibilities of the Board and provides for a periodic review through the Sunset process. The Supreme Court appoints the members of the Board and promulgates and adopts rules that govern the Board's activities.

The Board receives no legislative appropriations and is supported by fees and investment and interest income. The Supreme Court sets fees and approves the annual operating budget of the agency.

The State has a continuing interest in determining eligibility to practice law in Texas.

The Board develops and administers the bar examination to determine that persons meet the minimum professional competency to practice law.

- The agency's functions are needed to protect the public by determining if individuals seeking a license to practice law are of sufficient capacity, attainment, and character to serve the public in a capable and ethical manner. Through its character and fitness investigations, the Board has a process for determining if persons have a mental and emotional condition or illness, or the traits and behavior that could adversely affect their responsibilities as an attorney to their clients.
- The Board develops and administers the bar examination to determine that persons meet the minimum professional competency to practice law in this state. The Board grades these examinations with procedures to ensure uniformity and fairness, and it provides a review of the performance on request for applicants who fail the exam.
- The Board also ensures the suitability of attorneys from other states to practice law in Texas without having to pass the bar examination. This determination rests largely on these applicants' years of

experience in practicing law and on the standard eligibility requirements such as the character and fitness evaluation.

The Board's unique structure, as an independent agency under the dual oversight of the Supreme Court and the Legislature, is an accepted approach to the regulation of the legal profession.

- While the State Bar of Texas and the Board are both involved in regulating the practice of law, each has distinct responsibilities that have little overlap. Because eligibility determination by the Board is fundamentally different from the Bar's regulatory functions regarding continuing education and the grievance process, these activities would need to be maintained separately, even if the two programs were consolidated. The Supreme Court recognized the need for this separation when it transferred responsibility for character and fitness determination from the State Bar to the Board in 1979. Because the activities of the two agencies are so different and because they do not receive State appropriations, consolidation would offer little opportunity for cost efficiency, and what small savings would result would have no impact on State revenue.
- Most state bars are structured similar to Texas, with admission to practice law and regulation of attorneys administered by separate agencies. In 36 states, a separate agency similar to the Board regulates admissions to a state Bar, while nine states have consolidated the admissions process and the regulation of attorneys within their state bars. The Supreme Courts in five states regulate admission to practice law.
- As a judicial agency, the Board operates under both a statutory framework specified by the Legislature and under the oversight of the Supreme Court, through its inherent powers to regulate the admission to the practice of law. This judicial authority, borne of the constitutional requirement for separation of powers, has given rise to the Supreme Court's primacy over the regulation of the practice of law and lawyers, as officers of the court.

The Supreme Court's pre-eminence in these matters has provided the basis for Sunset staff recommendations in the past to make the Supreme Court solely responsible for the Board's oversight. While the situation that led to that conclusion is largely the same, the Sunset Commission and the Legislature have rejected this recommendation in past Sunset reviews. Continuing this dual oversight would maintain the expertise of the Supreme Court in regulating admission to the legal profession while also providing some accountability to the public through the legislative process.

While the State Bar of Texas and the Board are both involved in regulating the practice of law, each has distinct responsibilities that have little overlap.

Recommendation

Change in Statute

4.1 Continue the Board of Law Examiners for 12 years.

Impact

This recommendation would continue the Board of Law Examiners as an independent agency, responsible for determining the eligibility of candidates for admission to practice law in Texas, including a determination of the present character and fitness of applicants.

Fiscal Implication

This recommendation would have no fiscal impact to the State.

¹ Agency information received by staff. November 6, 2001.

ACROSS-THE-BOARD RECOMMENDATIONS

Board of Law Examiners	
Recommendations	Across-the-Board Provisions
	A. GENERAL
Not Applicable	1. Require at least one-third public membership on state agency policymaking bodies.
Update	2. Require specific provisions relating to conflicts of interest.
Update	3. Require that appointment to the policymaking body be made without regard to the appointee's race, color, disability, sex, religion, age, or national origin.
Not Applicable	4. Provide for the Governor to designate the presiding officer of a state agency's policymaking body.
Update	5. Specify grounds for removal of a member of the policymaking body.
Already in Statute	6. Require that information on standards of conduct be provided to members of policymaking bodies and agency employees.
Apply	7. Require training for members of policymaking bodies.
Update	8. Require the agency's policymaking body to develop and implement policies that clearly separate the functions of the policymaking body and the agency staff.
Already in Statute	9. Provide for public testimony at meetings of the policymaking body.
Apply	10. Require information to be maintained on complaints.
Update	11. Require development of an equal employment opportunity policy.
Apply	12. Require information and training on the State Employee Incentive Program.

Board of Law Examiners	
Recommendations	Across-the-Board Provisions
	B. LICENSING
Not Applicable	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
Not Applicable	2. Provide for notice to a person taking an examination of the results of the examination within a reasonable time of the testing date.
Not Applicable	3. Authorize agencies to establish a procedure for licensing applicants who hold a license issued by another state.
Not Applicable	4. Authorize agencies to issue provisional licenses to license applicants who hold a current license in another state.
Not Applicable	5. Authorize the staggered renewal of licenses.
Not Applicable	6. Authorize agencies to use a full range of penalties.
Not Applicable	7. Revise restrictive rules or statutes to allow advertising and competitive bidding practices that are not deceptive or misleading.
Not Applicable	8. Require the policymaking body to adopt a system of continuing education.

AGENCY INFORMATION

Agency Information

Agency at a Glance

The Board of Law Examiners (the Board) is a judicial agency created by the Legislature in 1919 to examine eligible candidates' qualifications to practice law, and to determine the eligibility of candidates for examination for a law license. The Board's activities are governed by rules adopted by the Supreme Court and include:

- considering moral character and fitness of examinees and out-of-state attorneys seeking admission to the State Bar;
- ensuring that applicants to the State Bar have adequate legal study;
- examining eligible candidates and providing analyses to persons failing the examination; and
- ensuring that out-of-state attorneys meet the eligibility requirements necessary to obtain a law license in Texas.

Key Facts

- **Funding.** The Board is not subject to legislative appropriations. Instead, the Supreme Court sets fees and approves the annual budget of the Board, which totaled \$2.3 million in FY 2001.
- **Staffing.** In FY 2001, the Board employed 19 people, all of whom work in its Austin headquarters.
- **Bar Examination.** The Board conducts the bar examination over two-and-a-half days, twice a year in cities where law schools are located including Austin, Dallas, Houston, Lubbock, San Antonio, and Waco.
- **Applicants.** In FY 2001, the Board certified 2,406 applicants to receive a law license after having passed the bar exam. The Board also certified 229 attorney applicants for admission without examination.
- **Character and Fitness Hearings.** In FY 2001, three-member panels of the Board adjudicated 96 character and fitness cases, certifying good character and fitness for 21 individuals, declining to certify 25 individuals, and recommending 50 individuals for probationary or conditional status.

On the Internet

Information about the Board, including bar exam results, statistics, and frequently asked questions, is available at www.ble.state.tx.us.

Major Events in Agency History

- 1919** Legislature centralized the admissions process previously administered by the five existing court of appeals by creating the Board of Law Examiners to govern the admission of attorneys to practice law in Texas, under the jurisdiction of the Supreme Court.
- 1945** Supreme Court authorized the Board to consider any graduate of an American Bar Association-approved law school in compliance with the law study requirement for admission to the bar examination.
- 1956** Supreme Court provided that applicants could take the bar examination a maximum of five times and gave the Board discretion to allow some applicants to take the exam more than five times.
- 1979** Supreme Court delegated the responsibility of determining good character and fitness and removed all responsibility for bar admissions from the State Bar to the Board.
- 2002** Board offered the bar examination in two additional cities, El Paso and Kingsville.

Organization

Governing Board

Board members develop, administer, and grade bar exams.

The Supreme Court appoints the nine-member Board of Law Examiners, composed of attorneys who must be 35 years of age and have practiced law for ten years. The Board elects its Chair from its membership if the Supreme Court does not do so. Members serve two-year terms, expiring on odd-numbered years, and may serve up to five terms. The table, *Board of Law Examiners*, identifies the current members of the Board.

Board of Law Examiners	
Name	Residence
Robert Valdez, Chair	San Antonio
Jack Strickland, Vice Chair	Fort Worth
U. Lawrence Bozé	Houston
Albert Witcher	Waco
Walter Steele	Scroggins
Jerry Grissom	Dallas
Jerry Nugent	Austin
Cynthia Olsen	Houston
Jorge Rangel	Corpus Christi

Among its duties, the Board interprets and implements rules adopted by the Supreme Court; considers policy and budgetary matters; develops, administers, and grades bar examinations; and meets with persons who failed the exam to provide analysis.

The full Board meets five to six times a year. Panels of three members meet monthly in public hearings to consider character and fitness issues and requests for waivers of fees, filing deadlines, or other rule requirements. A three-member committee also meets to consider appeals for decisions made on testing accommodations.

Staff

The agency's Executive Director oversees Board operations and staff, which is basically divided between character and fitness determination and eligibility and examination duties. All agency employees work in Austin.

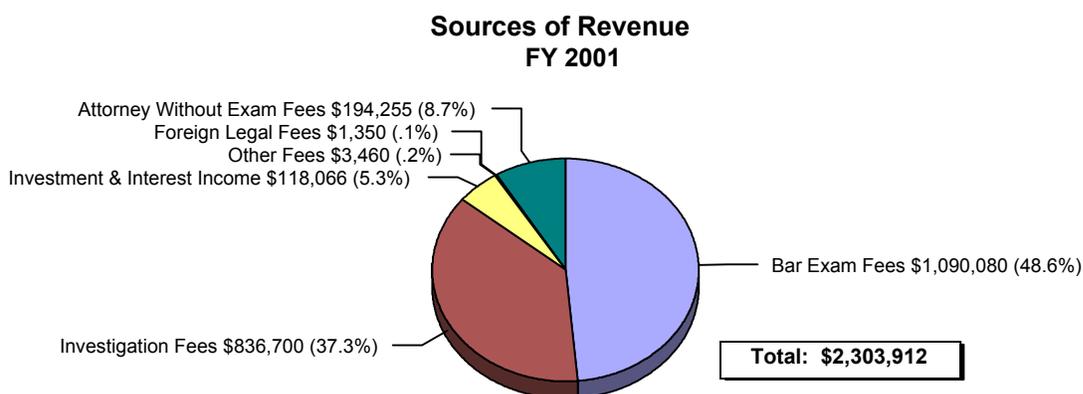
A comparison of the agency's workforce composition to the minority civilian labor force over the past three years is shown in Appendix A, *Equal Opportunity Employment Statistics*. The Board has generally exceeded civilian labor force levels for females in most of the job categories.

The Board is not subject to the appropriations process.

Funding

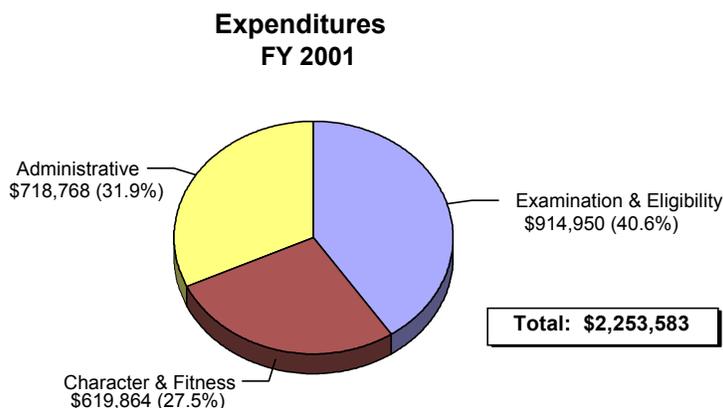
Revenues

Unlike typical state agencies, the Board is not subject to the appropriations process. Instead, the Supreme Court approves the annual operating budget for the agency, with revenue from fees set by the Supreme Court. A breakdown of these fees are listed in Appendix B. As shown in the chart, *Sources of Revenue*, the agency collected \$2.3 million in revenue last year, with almost half of it coming from bar exam fees.



Expenditures

The Board’s expenditures for FY 2001, totaled \$2.25 million, with the bar examination and eligibility activities accounting for the largest share.



Agency Operations

The Board’s mission is to certify qualified individuals for admission to the State Bar. The basic requirements are for the candidates to be of good moral character and fitness, to have a law degree from an approved school, and to pass the bar exam. The textbox, *Admission Requirements*, lists all of the requirements that these candidates must meet to practice law in Texas. The following material provides more information about the Board’s character and fitness, examination, and eligibility activities.

Admission Requirements
<p>Persons seeking admission to the State Bar must:</p> <ul style="list-style-type: none"> • be at least 18 years of age; • be of present good moral character and fitness; • be a U.S. citizen, U.S. national or permanent resident; • have graduated with a juris doctor degree from an American Bar Association-approved law school; • have passed the Multistate Professional Responsibility Exam¹; and • have passed the full bar exam.

Character and fitness issues include dishonesty, criminal history, chemical dependency, and debt issues.

Character and Fitness Investigations and Hearings

The Board’s assessment of character and fitness seeks to determine whether an individual has a mental or emotional condition or illness, or has traits or behavior that could adversely affect the responsibilities an attorney owes to the public, the courts, or a client. Examples of issues considered in the character and fitness determination include dishonesty or lack of candor, chemical dependency, criminal history, and debt issues.

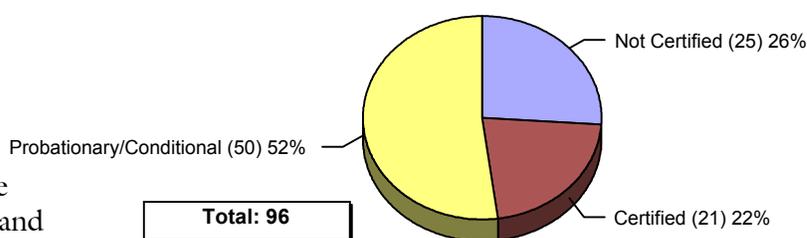
The process typically begins when individuals declare their intention to study law in Texas or when they apply for admission to the Bar. The

flowchart, *Character and Fitness Process*, illustrates the basic steps involved in determining good moral character and fitness. When an investigation reveals no concerns, staff certifies the applicant as having good moral character and fitness. However, if a staff investigation finds that a person may lack the good character and fitness required, the agency will notify that person in writing of that determination through a Preliminary Determination Letter. The person has the right to have the matters raised in the Preliminary Determination Letter considered at an evidentiary hearing before a three-member panel of the Board.

In FY 2001, the agency issued 148 Preliminary Determination Letters, and the Board adjudicated 96 character and fitness cases. The chart, *Results of Character and Fitness Hearings*, shows how many persons were certified, how many were not certified – or essentially denied, and how many resulted in a probationary license or conditional approval. If the panel declines to certify a person, the applicant has the right to appeal the panel's decision to district court in Travis County.

The Board adjudicated 96 character and fitness cases in FY 2001.

**Results of Character and Fitness Hearings
FY 2001**



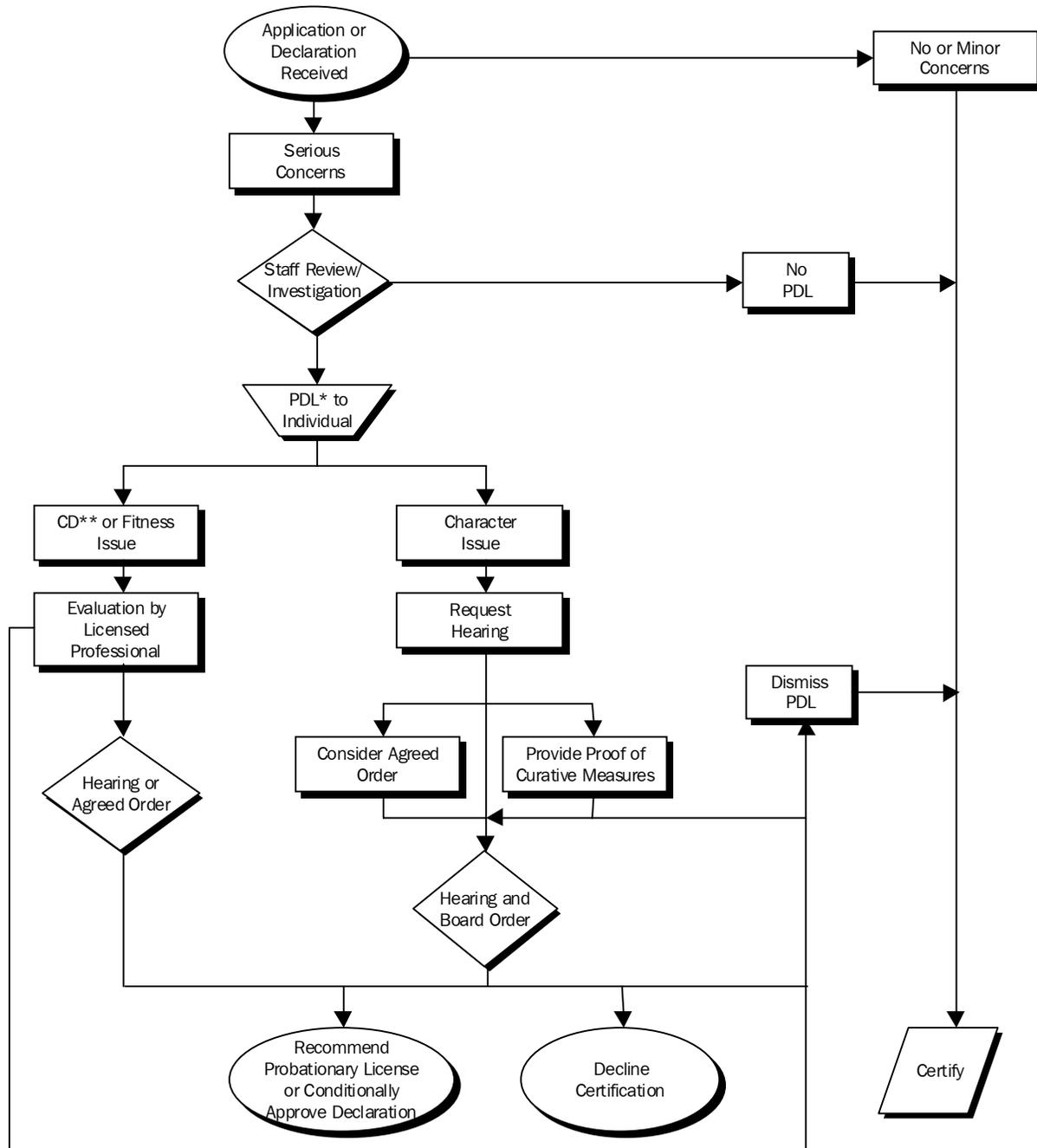
Bar Examination

The Board also conducts the bar examination to judge minimum professional competency for admission to the State Bar of Texas. An applicant is eligible to take the exam if the person holds a J.D. degree from an American Bar Association-approved law school, or is within four semester hours of graduation with such a degree. Board rules allow an attorney licensed in another state or country to take the bar exam, without meeting the law study requirement, by demonstrating the qualifications, specified in agency rules, for an exemption.

Board members develop test questions, as required by Board rule, in different subject areas. The National Conference of Bar Examiners develops the Multistate Performance Test and the Multistate Bar Examination, which are purchased by the Board for inclusion in the exam. Board members and agency staff participate in administering the exam. The agency administers the bar exam in February and July each year in cities where law schools are located, including Austin, Dallas, Houston, Lubbock, San Antonio, and Waco. The Board will pilot two new sites, El Paso and Kingsville, in 2002.

The bar exam requires two and a half days and covers four standard parts. The segment on Texas Civil and Criminal Procedure, known as Procedure and Evidence, represents 10 percent of the overall score. The

Character and Fitness Process



Legend

***Preliminary Determination Letter (PDL)** – written letter that indicates an individual may lack the good character and fitness necessary for licensure for specific reasons and notifies the individual of the right to a hearing.

****Chemical Dependency (CD)** – dependence on, or use or abuse of alcohol or a controlled substance.

Probationary License – recommends conditional approval of an individual's present good moral character and fitness with conditions that lay out actions to take to cure or end any deficiencies in his or her moral character and fitness. This license allows an individual to practice law.

Multistate Performance Test, a long essay-style question designed to test basic lawyering skills, also accounts for 10 percent of the score. The Multistate Bar Examination is a multiple-choice test covering several sections of the law that makes up 40 percent of the overall score. Finally, the Texas Essays are a series of 12 essay questions on the subjects listed in the textbox, *Essay Subjects*, that comprise 40 percent of the score.

Board members grade or supervise the grading of the bar exam and ensure that grading is done in a uniform, fair, anonymous, and timely manner. Board members meet with graders during the grading process to ensure that grading standards applied by the graders consistently measure up with the members' expectations of an acceptable answer.

The Board notifies examinees of the results by letter and posts lists of individuals who passed in the State Law Library, the State Bar, the Supreme Court Clerk's office, and on the Board's Internet web site. Upon successful completion of the bar exam and assuming all other requirements have been met, persons must pay a license fee to the Supreme Court, Bar dues, and an occupation tax before they may legally practice law. In FY 2001, the Board certified 2,406 individuals, who passed the exam, for licensure.

Applicants with failing scores may request a review of their performance on failed parts of the exam. If an applicant has failed the exam at least twice, the applicant may request a formal review and meet with Board members. The other option is an informal review, consisting of a written report or a telephone conference.

Eligibility

The Board also examines the qualifications of out-of-state attorneys seeking admission to the State Bar without examination. In addition to meeting basic requirements such as a character and fitness determination, these candidates must meet additional requirements for bar admission, such as having practiced law for at least five of the last seven years immediately preceding the filing of an application. In FY 2001, the Board certified 229 individuals for licensure seeking admission without examination.

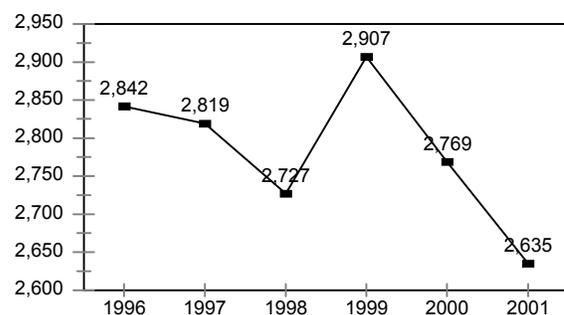
The graph, *Individuals Licensed*, indicates the number of individuals certified by the Board to receive a law license over the last six years.

Essay Subjects

- Civil and criminal procedure and evidence;
- Business associations;
- Consumer rights;
- Family law;
- Real property, including oil and gas;
- Trusts and guardianships;
- Uniform Commercial Code; and
- Wills and administration.

In FY 2001, the Board certified 2,406 individuals, who passed the exam, for licensure.

**Individuals Licensed
FY 1996 - 2001**



¹ Tests a person's knowledge of legal ethics, and is generally administered in law school – not by the Board – but by a national testing service.

APPENDICES

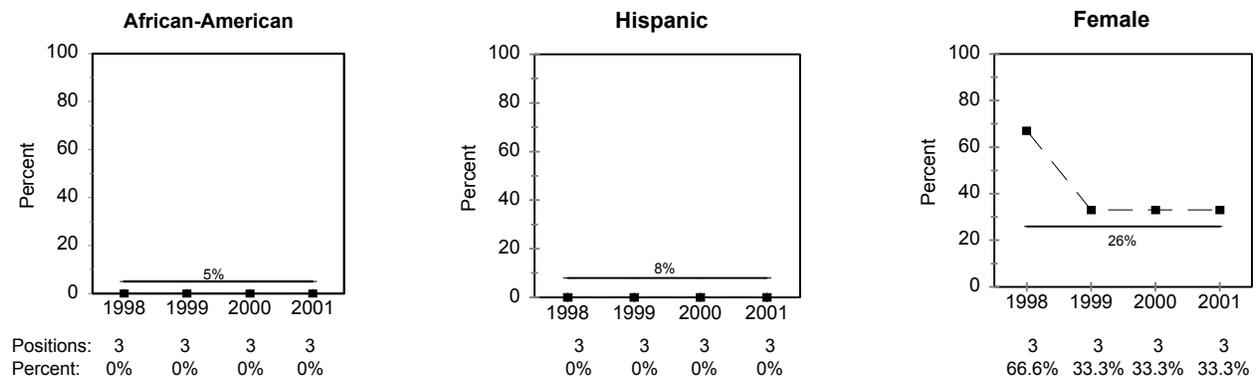
Appendix A

Equal Employment Opportunity Statistics

1998 to 2001

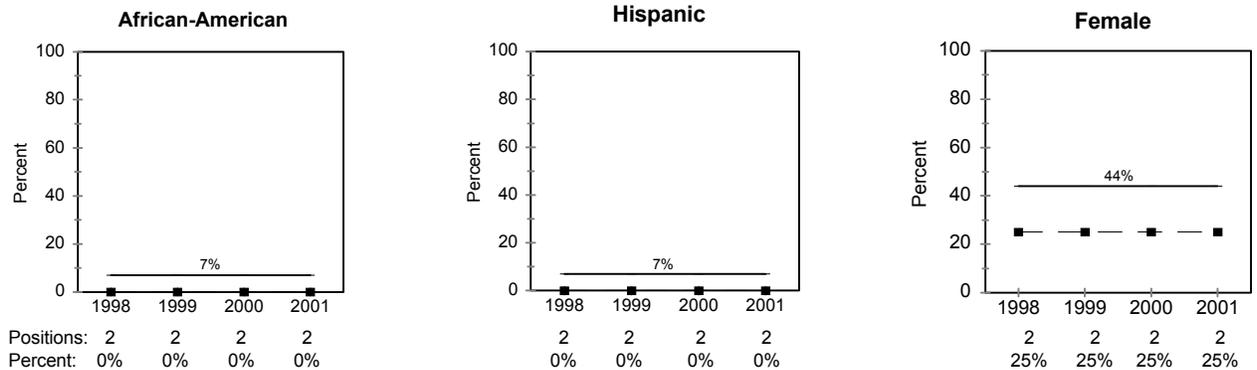
In accordance with the requirements of the Sunset Act, the following material shows trend information for the agency’s employment of minorities and females in all applicable categories.¹ The agency maintains and reports this information under guidelines established by the Texas Commission on Human Rights.² In the charts, the flat lines represent the percentages of the statewide civilian labor force that African-Americans, Hispanics, and females comprise in each job category. These percentages provide a yardstick for measuring agencies’ performance in employing persons in each of these groups. The dashed lines represent the agency’s actual employment percentages in each job category from 1998 to 2001. The Board does not employ persons in some job categories – service/maintenance, para-professionals, and protective services. In FY 2001, the Board employed 17.5 FTEs.

State Agency Administration



The agency did not have any Hispanics or African-Americans in agency administration, but exceeded the civilian labor force percentages for females in this category since 1998.

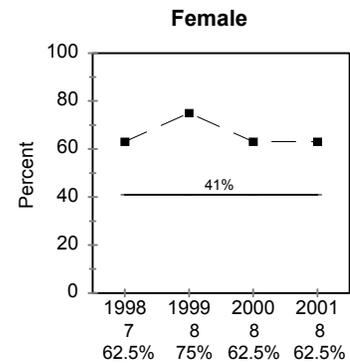
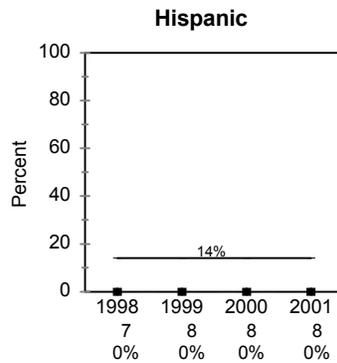
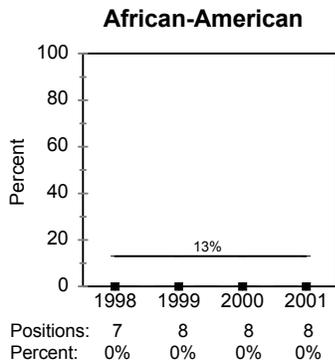
Professional



In the professional category, the agency fell below the civilian labor force percentages for females from 1998 to 2001 and did not have any African-Americans or Hispanics in this category during this time.

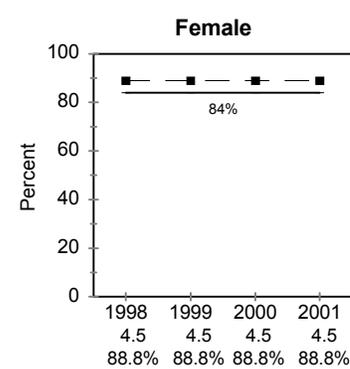
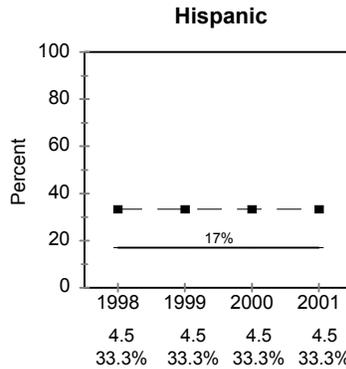
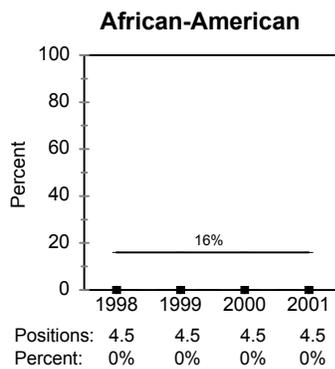
Appendix A

Technical



The agency has consistently exceeded the civilian labor force percentages for females in the technical category from 1998 to 2001 but did not have any Hispanics or African-Americans during this time.

Administrative Support



The agency has consistently exceeded the civilian labor force percentages for females in administrative support from 1998 to 2001. The agency did not have any African-Americans in administrative support, but has employed two Hispanic employees, one full-time and one part-time since 1998, exceeding the civilian labor force percentage in Hispanics in this category

¹ Texas Government Code Ann., ch. 325, sec. 325.011(9)(A).

² Texas Labor Code Ann., ch. 21, sec. 21.501

Appendix B

Board of Law Examiners Fees – FY 2001			
Fee	Approximate Number of Persons or Entities Paying Fees	Fee Revenue	Current Fee/ Statutory Maximum
Investigation Fees			
Applicants	4,284	\$493,200	\$75/\$150
Declarants	2,052	\$307,800	\$150
Supplemental Investigation Fees	47	\$7,050	\$150
Late Fees (Related to declarants)	591	\$88,650	\$150
Non-sufficient Fund Fees (Related to Declarants)	0	\$0	\$25
Bar Exam Fees			
Application Deposit	586	\$17,585	\$30
Typing Fee	68	\$3,400	\$50
Incomplete Fee	10	\$750	\$75
Attorney Application	223	\$156,010	\$700
Exam Deposit	6	\$175	\$30
Instate Law School Student	1,993	\$298,920	\$150
Out of State Law School Student	562	\$84,370	\$150
Exam Fees	2,787	\$232,670	\$75/150
Retakers	1,188	\$178,170	\$150
Attorney Reinstatement	0	\$0	\$150
Late Fees Related to Texas Bar Examination	777	\$116,650	\$150
Non-sufficient Fund Service Charge	55	\$1,380	\$25
Attorney Without Exam (AWOX) Fees/Short Form Exam (SFX) Fees			
SFX Late Fee (application fee)	0	\$0	\$150
Short Form (application fee)	1	\$700	\$700
No Exam (AWOX) (application fee)	263	\$184,260	\$700
Short Form (exam fee)	1	\$150	\$150
Retakers Short Form (exam fee)	0	\$0	\$150
Miscellaneous	n/a	\$9,145	n/a
Foreign Legal Fees			
Foreign National Attorney Inquiry Fee	9	\$900	\$100
Renew Foreign Legal Consultant	3	\$450	\$150
Foreign Legal Consultant	0	\$0	\$700
Other Fees			
Other Fees	n/a	\$3,460	n/a
	TOTAL	\$2,185,845	

Appendix C

Diagnostic & Statistical Manual, Fourth Edition (DSM-IV) Substance Use Disorders

Criteria for Substance Dependence

A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period:

- tolerance, as defined by either of the following:
 - a need for markedly increased amounts of the substance to achieve intoxication or desired effect
 - markedly diminished effect with continued use of the same amount of the substance
- withdrawal, as manifested by either of the following:
 - the characteristic withdrawal syndrome for the substance (refer to Criteria A and B of the criteria sets for withdrawal from specific substances)
 - the same (or closely related) substance is taken to relieve or avoid withdrawal symptoms
- the substance is often taken in larger amounts over a longer period than was intended
- there is a persistent desire or unsuccessful efforts to cut down or control substance use
- a great deal of time is spent in activities necessary to obtain the substance (e.g., visiting multiple doctors or driving long distances), use the substance (e.g., chain-smoking), or recover from its effects
- important social, occupational, or recreational activities are given up or reduced because of substance use
- the substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance (e.g., current cocaine use despite recognition of cocaine-induced depression, or continued drinking despite recognition that an ulcer was made worse by alcohol consumption)

Criteria for Substance Abuse

A maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:

- recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)
- recurrent substance use while in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)
- recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)
- continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)

Appendix D

Staff Review Activities

The Sunset staff engaged in the following activities during the review of the Board of Law Examiners.

- Worked extensively with Board executive management and staff at the Austin headquarters.
- Attended Board meetings and public hearings on character and fitness cases and determinations of waiver requests.
- Met individually with Board members in San Antonio and Fort Worth.
- Met with the Supreme Court Justice liaison to the Board.
- Met with a Board district committee chair.
- Solicited written comments through surveys from law school deans in Texas, participants of agency hearings, and the National Conference of Bar Examiners regarding their ideas and opinions about the State's bar admission role.
- Attended a conference hosted by the Council on Bar Admission Administrators.
- Researched and surveyed other states for information on their bar examiner agencies.
- Reviewed agency documents and reports, rules, state statute, and information available on the Internet.
- Reviewed results of a previous Sunset review.

**SUNSET REVIEW OF THE
BOARD OF LAW EXAMINERS**

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