

SUBJECT: Continuing the State Bar of Texas

COMMITTEE: Licensing and Administrative Procedures — committee substitute recommended

VOTE: 8 ayes — Flores, Hamilton, Raymond, Eissler, Goolsby, Homer, D. Jones, Wise
0 nays
1 absent — Driver

WITNESSES: For — Pamela Brown; Scott Rozzell, Commission for Lawyer Discipline
Against — Ray E. Dittmar, Texas Justice Coalition and Texas Court Watchers Network for Justice; Lance Flores; Randall D. Kelton; Ken Magnuson; Barbara Wood
On — Guy Harrison, Broadus A. Spivey, and Gib Walton, State Bar of Texas

BACKGROUND: The State Bar was founded in 1882. In 1939, the Legislature established the bar as a public corporation and required that all attorneys licensed to practice law in Texas be members of the State Bar. In 1979, the Legislature reenacted the statute and required seating of public members on the board of directors and grievance committees. In 1985, the State Bar implemented a program requiring each member to obtain 15 hours of continuing legal education each year. In 1990, the Commission for Lawyer Discipline was established to administer the disciplinary system. In 2001, the Texas Access to Justice Commission was created to integrate civil legal services, and the State Bar reorganized its management structure.

Since its inception, the State Bar has evolved into a quasi-governmental agency of the judicial branch that sets and enforces standards of professional conduct. It also functions like a professional association in that all lawyers licensed to practice law in Texas (nearly 70,000) are members. The bar's major functions include enhancing the quality of legal services to the public, helping courts administer justice, maintaining professional rules of conduct

and a disciplinary system, and providing law-related educational programs and lawyer referral services.

The State Bar's annual budget is about \$26 million. It receives no state appropriations and is funded primarily by membership dues and professional development program fees. The Texas Supreme Court and the State Bar's board of directors approve the budget.

The board of directors includes 46 members and 15 liaisons. Most board members are elected by lawyers from the 15 State Bar districts, but three are elected by the statewide membership. The agency has a staff of almost 300, most of whom work in Austin, though they are not state employees. The board oversees 17 board committees, 35 standing committees, and seven special committees.

Grievances filed with the State Bar are reviewed by staff. If the staff finds a likelihood of a rule violation, the grievance is elevated to a complaint, and an investigatory hearing is set for the attorney in front of a bar panel. Otherwise, the grievance is considered an inquiry, and the grievance is dismissed. An attorney who chooses to appeal the decision rendered at an investigatory hearing may request an administrative evidentiary hearing in front of a jury or may appeal the case to a district court. In either instance, the case is heard *de novo*, from the beginning, without regard to what occurred in the investigatory hearing. During fiscal 2000-01, the bar received 8,962 grievances, of which 31 percent were pursued as complaints. Of the complaints investigated, 530 resulted in sanctions against attorneys, with 30 percent resulting in private reprimands and 35 percent resulting in suspensions.

The bar's public assistance programs include the Client-Attorney Assistance Program, the Client Security Fund, and the Texas Equal Access to Justice Foundation (TEAJF). In fiscal 2000-01, the bar awarded \$492,190 to clients who had suffered losses due to attorney misconduct. The TEAJF administers the Interest on Lawyers' Trust Accounts (IOLTA) program and the Basic Civil Legal Services program, which raise about \$8.7 million annually to support legal services for low-income Texans.

Lawyers must keep clients' funds in IOLTA accounts before distribution. Interest on these accounts goes into a fund that is distributed among Texas'

legal aid programs. IOLTA funds have earned a median of about \$6 million per year over the past 10 years. The U.S. Supreme Court last month upheld the constitutionality of the use of interest for this purpose.

Attorneys may choose to pay an optional fee of \$65 in addition to their basic State Bar membership fee to help pay for legal services to the poor.

Under Texas Supreme Court rules, to adopt new rules proposed by the court, at least 51 percent of State Bar members must vote in a referendum on the rules, and approval by a simple majority of votes ratifies the rule.

The State Bar will be abolished September 1, 2003, unless continued by the Legislature.

DIGEST:

CSHB 599 would continue the State Bar until September 1, 2015. It would establish an executive committee comprising the president, president-elect, and immediate past president of the bar, the board chairman, the president of the Texas Young Lawyers Association, and additional members appointed by the president. On recommendation of the president, the executive committee would have to approve the creation of additional standing and special committees and would have to review those committees at least biennially to determine the continuing need for them.

CSHB 599 would repeal the provision under which an election on a proposed rule is valid only if 51 percent of bar members vote in the referendum. The bill would allow the bar, with the Supreme Court's approval, to use electronic transmission of ballot and related election materials.

The Supreme Court would have to set an additional civil legal services fee of at least \$65 per year for each active bar member. Money from this fee could be used only to provide basic civil legal services to the indigent. The court would have to review the fee amount at least biennially and could modify the amount but could not increase the fee by more than 20 percent per year. This fee would not be subject to approval by referendum.

The bill would establish specific grievance procedures in statute. State Bar staff would have to review each grievance and classify it as a complaint or as an inquiry. Inquiries would be referred to voluntary mediation and dispute

resolution. The chief disciplinary counsel would have to review each grievance categorized as a complaint. If the counsel found just cause for the complaint, the attorney could request a trial in district court or a closed hearing by a panel of the district grievance committee. The attorney could appeal a finding of a grievance panel only to the Board of Disciplinary Appeals and could appeal the board's finding only to the Supreme Court. The Texas Supreme Court would have to adopt rules regarding changes in the grievance system by January 1, 2004.

The bill would require the State Bar to participate in strategic planning and performance-based budgeting. It would update other standard sunset provisions in regard to removal of board members, conflict of interest, equal employment opportunity, information on complaints, use of technology, and the State Employee Incentive Program.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

Mandatory \$65 fee. By mandating the \$65 fee for legal services to the poor, CSHB 599 would further the State Bar's mission to provide equal access to justice, ensuring that low-income Texans could receive the legal services they need. Many low-income Texans need legal aid to secure basic needs, such as protection from abuse, access to health care and subsistence income, and child support. In 2001, Texas' legal aid programs secured about 4,300 protective orders for victims of domestic violence, \$45 million in child-support orders, and \$22 million in federal benefits for disabled and elderly Texans. Although thousands of victims of domestic violence, including children, receive legal assistance from these programs each year, many thousands more need such assistance. Currently, the state has one legal aid attorney for every 15,000 eligible clients. Needs are increasing daily while funding declines. Dedicating half of the funds generated by the mandatory fee to providing legal services to victims of domestic violence would make it possible to assist about 4,700 additional families each year.

Although the U.S. Supreme Court has upheld the constitutionality of the IOLTA, the fund's interest earnings have fallen steadily, dramatically reducing the amount of funding for legal services to the poor. That, combined with a reduction in contributions for those services due to the economic slowdown and reduced federal funding, has resulted in massive cuts to legal

aid services. Legal aid programs have been forced to lay off staff members and attorneys, thereby reducing the number of needy clients they can serve. The mandatory \$65 fee would generate an additional \$4.5 million to ensure equal access to justice for low-income Texans.

The burden of the bar's mission has fallen disproportionately on the shoulders of legal aid programs and attorneys who perform *pro bono* work. A law license is a privilege that carries a special responsibility to serve the public. It is important that all members of the bar advance this basic mission by serving poor clients. Texas lawyers earn fees averaging \$150 an hour. A fee of \$65 a year would be a nominal payment by each active bar member in return for the privilege of practicing law in Texas. It is unlikely that fewer lawyers would donate money to legal services or take *pro bono* cases.

The mandatory fee would not expose the State Bar to lawsuits in regard to violations of constitutional rights, because the funds would be used to promote the bar's mission statement. When lawyers are sworn in, they are made aware of this statement and must swear to abide by it. Using these funds to promote a mission that lawyers clearly have agreed to would not be unconstitutional.

Appeals of complaints. CSHB 599 would preserve the same options for appealing complaints that attorneys have had since the State Bar Act was enacted in 1939. In complex cases involving an attorney's duties to a client, attorneys should have the right to choose whether to have their grievances heard by a jury whose members are predominately other attorneys, as in an administrative hearing, or lay people, as in district court.

OPPONENTS
SAY:

Mandatory \$65 fee. The mandatory additional fee proposed by CSHB 599 would not be fair to attorneys. Many attorneys already go above and beyond their duty to ensure equal access to justice. In 2002, 41 percent of State Bar members reported that they performed *pro bono* work. These attorneys rendered more than 1 million hours of free legal assistance, plus 700,000 hours of work at substantially reduced fees, and \$5 million of out-of-pocket expenses on behalf of their clients. Many of these attorneys might look at the mandatory \$65 fee and decide not to take any more *pro bono* cases.

Voluntary donations have proved successful in the past. The Access to Justice Commission (AJC), comprising attorneys, judges, and representatives of the

Senate, House, and Governor's Office appointed by the Supreme Court, twice has voted against a mandatory fee for this purpose, most recently in February 2003. The AJC determined that a mandatory fee would be counterproductive. The AJC is working on other ways to increase funding for this purpose, such as charging out-of-state attorneys who are not licensed in Texas for the privilege of practicing law in Texas, a common practice in other states.

U.S. Supreme Court Justice Anthony Kennedy, dissenting in the IOLTA case (*Brown v. Legal Foundation of Washington*, 538 U.S. ___ (2003)), wrote that a mandatory fee would be ill-advised. Use of such a fee for a purpose over which attorneys had no control could be considered a violation of their rights to free speech. The proposed mandatory fee on all active attorneys could expose the State Bar to litigation over this issue.

Appeals of complaints. The bill should eliminate the option for attorneys to appeal grievance decisions to district court, as recommended by the Sunset Advisory Commission, to streamline the appeals process, thereby saving money and promoting efficiency.

NOTES:

The committee substitute would change HB 599 as filed by:

- allowing the State Bar to receive and distribute election ballots electronically, rather than using paper ballots;
- requiring the Texas Supreme Court to set a fee of up to \$65 per year to fund basic civil legal services for the indigent, and stipulating that the fee would not be subject to a referendum vote;
- restoring the option for trial in district court on an appeal of a complaint, which the original bill would have eliminated; and
- requiring the Supreme Court to adopt rules regarding changes in the grievance system by January 1, 2004.

The companion bill, SB 272 by Jackson, was reported favorably, as substituted, by the Senate Government Organization Committee on April 8.