

SUBJECT: Continuing the State Bar of Texas

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Smithee, Farrar, Gutierrez, Hernandez, Murr, Neave, Rinaldi,
Schofield

1 nay — Laubenberg

SENATE VOTE: On final passage, April 4 — 31 - 0

WITNESSES: *On House companion, HB 2102:*

For — Gloria Leal, Mexican-American Bar Association of Texas; Frank Stevenson, State Bar of Texas; Rich Robins, Texasbarsunset.com; John L. McCraw, Texas Trial Lawyers Association; Jim Parsons; (*Registered, but did not testify*: Kelley Shannon, Freedom of Information Foundation of Texas; George Christian, Texas Association of Defense Counsel; Steve Brensnen, Texas Family Law Foundation; Samuel Houston, Texas Young Lawyers Association; Guy Harrison)

Against — Bobie Townsend, San Jacinto Constitutional Study Group; Bob Bennett; Eddie Craig; Ken Magnuson; Bobie Townsend (*Registered, but did not testify*: Lee Parsley, Texans for Lawsuit Reform; Michael Dorsett)

On — Michelle Hunter, State Bar of Texas; Katharine Teleki, Sunset Advisory Commission; Karen Burgess; Joe. K. Longley; Alan Schoolcraft; (*Registered, but did not testify*: Linda Acevedo, State Bar of Texas)

BACKGROUND: The State Bar of Texas is a judicial agency that operates under the authority and rules of the State Bar Act (Government Code, ch. 81) and the administration of the Texas Supreme Court. Legislative oversight of the state bar occurs through the Sunset review process. The state bar's last Sunset review was in 2003.

Functions. The state bar regulates attorneys and acts as a professional association. As a mandatory, unified bar organization, all licensed attorneys must be members to practice law in Texas. The state bar's key activities include enforcing the legal profession's rules of conduct and administering the attorney discipline system, providing continuing legal education, and encouraging equal access to and understanding of the legal system.

Governing structure. A 60-member board of directors oversees the state bar's executive director and operations. Among the 46 voting members are 30 attorneys elected from the 17 local state bar districts, six public, non-attorney members appointed by the Supreme Court, and four minority members appointed by the state bar president.

To carry out its mission, the state bar uses board committees, standing advisory committees, and sections categorized by legal practice or interest. The Commission for Lawyer Discipline is a standing committee that oversees the attorney discipline system. The chief disciplinary counsel directs the enforcement of the system and reports to the commission, not the state bar. The commission is made up of six attorneys appointed by the state bar president and six public, non-attorney members appointed by the Supreme Court.

Funding. The state bar does not receive legislative appropriations and is funded primarily through membership dues and fees associated with continuing education courses. The State Bar Act requires the state bar to present its annual budget at a public hearing, after which it is approved by the Supreme Court. In fiscal 2014-15, the state bar collected around \$48.1 million in revenue and spent about \$38.4 million. The state bar maintains a reserve fund, which at the end of fiscal 2015 had a balance of about \$9.1 million.

Staffing. The state bar employed 265 staff in fiscal 2014-15.

The State Bar of Texas would be discontinued September 1, 2017, if not continued in statute.

DIGEST: SB 302 would continue the State Bar of Texas until September 1, 2029, and amend several processes related to its functions.

Committee on disciplinary rules and referenda. The bill would create the Committee on Disciplinary Rules and Referenda to regularly review the adequacy of the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure and oversee the initial process for proposing a disciplinary rule. It would have nine members, including attorneys and non-attorney public members appointed by the president of the state bar and the Supreme Court. The initial members of the committee would be appointed by January 1, 2018.

Rulemaking process. The bill would amend the state bar's rulemaking process and repeal provisions related to it. The Committee on Disciplinary Rules and Referenda could initiate the process for proposing a disciplinary rule either on its own or upon a request by the Commission for Lawyer Discipline, the Legislature, a petition signed by at least 20,000 people, of which at least 51 percent must be Texas residents, or those allowed under current law.

The committee would have 60 days to take action on a request. A proposed rule would be withdrawn if it was not published in the Texas Register and the Texas Bar Journal within six months after the process was initiated. If the proposed rule was appropriately published, a 30-day public comment period would be initiated, and the committee would have to hold a public hearing on the proposed rule if requested.

After the public comment period, a proposed rule could not be adopted unless approved by the committee, the board of directors, a majority of state bar members in a referendum, and the Supreme Court within certain time limits established in the bill. The Supreme Court could grant a petition to extend any time limit for no more than 90 days. If a proposed rule was defeated, the rulemaking process could be reinitiated.

Throughout the rulemaking process any deliberations would have to be

made open to the public. The committee, board, and court also would have to use technological solutions to promote financial efficiency and comments from interested persons.

Attorney discipline system. Investigatory and disciplinary hearings could be held by teleconference. During an investigation of a grievance and with approval of the presiding officer of the appropriate district grievance committee, the chief disciplinary counsel could issue a subpoena that related directly to a specific allegation of attorney misconduct.

The counsel would be required to develop a process to identify a complaint that was appropriate for a settlement attempt or an investigatory hearing before a trial was requested or the complaint was placed on a hearing docket. A settlement could be authorized at any time during the disciplinary process.

The chief disciplinary counsel would have to create and maintain a system to track grievances filed and disciplinary decisions issued. The tracking system would have to collect certain information listed in the bill, including information necessary to track disciplinary trends over time and to evaluate sanction patterns within the disciplinary districts. The counsel would periodically evaluate and report information gathered in the tracking system to the Commission for Lawyer Discipline and district grievance committee members. Information associated with rule violations or instances of ethical misconduct and the disciplinary action taken would be posted on the state bar's website.

The chief disciplinary counsel would regularly search a data bank maintained by the American Bar Association to identify a member of the state bar who was disciplined in another state. The counsel also would develop a procedure for an attorney to self-report any criminal offense committed and any disciplinary action taken by another state's bar.

Sanction guidelines. The Supreme Court would be required to adopt sanction guidelines to associate a specific rule violation or ethical misconduct with a range of appropriate sanctions, provide aggravating and

mitigating factors that justify deviating from the established sanctions, and provide consistency between complaints heard by a district grievance committee and complaints heard by a district court. The chief disciplinary counsel would be required to propose the guidelines and ensure that interested parties were provided an opportunity to comment.

Online attorney profiles. The online profile of each licensed attorney would have to include all public disciplinary sanctions issued by the state bar with a link to the full text of any disciplinary judgment entered by a district grievance committee or district judge and any sanctions issued by an entity in another state, not just those issued within the previous 10 years.

Ombudsman for attorney discipline system. An ombudsman for the attorney discipline system would be selected by and report directly to the Supreme Court, making the position independent of the state bar, the board of directors, the Commission for Lawyer Discipline, and the chief disciplinary counsel.

The ombudsman would review grievances to determine whether the state bar followed the proper procedures, receive and investigate complaints about the system, and answer questions from and assist the public in submitting a lawyer grievance. The ombudsman could not draft a complaint or act as an advocate for a member of the public, reverse or modify a finding or judgment in any disciplinary proceeding, or intervene in any disciplinary matter. The ombudsman would, at least annually, make recommendations to the board of directors and the Supreme Court for improvements to the attorney discipline system.

Dispute resolution. The established voluntary mediation and dispute resolution procedure only would be used to resolve minor grievances referred by the chief disciplinary counsel. The state bar would have to assist the Supreme Court with modifications to the Texas Rules of Disciplinary Procedure to comply with this change, including amending the time for processing grievances and establishing a time limit for resolution through the system or referral to the formal grievance process.

Fingerprint-based criminal history record check. The state bar would be required to conduct a fingerprint-based criminal history record check of each member, who would have to submit a complete and legible set of fingerprints to the state bar or the Department of Public Safety (DPS) to obtain criminal history record information from the department and the FBI. A member would not have to submit fingerprints if he or she had submitted them to the Board of Law Examiners and the board made the information accessible to the state bar, or if the member previously submitted fingerprints to the state bar or DPS.

The chief disciplinary counsel, instead of the general counsel of the state bar, would be entitled to obtain criminal history record information from DPS on any person licensed by the state bar, whether or not involved in an investigation.

The state bar would have to obtain criminal history record information on each member by September 1, 2019, and could administratively suspend the license of a member who failed to assist the efforts. The bill would repeal a provision relating to the destruction of criminal history record information, allowing the state bar to retain it.

Membership fees. The Supreme Court would have to carry out its duty to set membership and any other fees during the state bar's annual budget process. Any change in fees would have to be clearly described and included in the state bar's proposed budget and considered by the court in budget deliberations. A fee increase could not take effect unless a majority of state bar members approved the increase in a referendum. The board of directors could increase a fee without a referendum if the fee increase was not more than 10 percent of the previous fee amount and at least six years had passed since the preceding fee increase.

Training program for board members. The bill would add additional subjects to the training program for members of the board of directors, as listed in the bill. The executive director would be required to distribute a training manual annually, and each member of the board would have to

sign and submit a statement acknowledging receipt of the manual.

Members of the board who completed the training program prior to the effective date of the bill would have to complete additional training on the added subjects and could not vote, deliberate, or be counted in attendance at a meeting held on or after December 1, 2017, until completed.

Implementation. The Supreme Court would have to adopt rules necessary to comply with the bill by March 1, 2018. The chief disciplinary counsel and the state bar would develop and propose rules as necessary to comply with the bill.

Effective date. The bill would take effect September 1, 2017.

SUPPORTERS
SAY:

SB 302 would continue the State Bar of Texas for 12 years, signifying that Texas has a continuing interest in regulating attorneys and promoting legal professionalism. It is important to maintain the Legislature's oversight through the Sunset review process because historically most improvements made to the attorney discipline system have resulted from Sunset recommendations. The bill would make necessary changes to processes essential to the state bar's mission to make the state more efficient and transparent, improve its rulemaking process, and strengthen its disciplinary process.

Committee on disciplinary rules and referenda. State bar members are the best informed resource regarding the complexities of the law. Therefore, appointing attorneys to the Committee on Disciplinary Rules and Referenda would ensure that necessary regulatory measures were implemented to guide attorneys and protect the public.

Rulemaking process. Concerns have been raised that the state bar's current rulemaking process has not permitted any meaningful updates in two decades and is ill-suited to the rapidly evolving practice of law. Further, it lacks transparency, accountability, and public participation, which impact the state bar's duty to protect the public and provide sound, ethical guidance to lawyers. The bill would improve the rulemaking

process and ensure that all interested stakeholders, including the general public, had a clear role in the development of rules. The public would have avenues for participation through rule proposals, a required public comment period, and public hearings.

Although some have noted that the referendum process is inefficient, by preserving the voting right of attorneys to approve all disciplinary rule changes, the bill would maintain judicial review over rulemaking. Judicial review is seen as the model by which other occupational licensing agencies balance authority and interests.

Attorney discipline system. The bill would ensure that the chief disciplinary counsel had the authority necessary to conduct effective investigations and resolve cases earlier to avoid litigation when appropriate. Currently, the chief disciplinary counsel's subpoena authority is limited to the litigation phase of the disciplinary process, resulting in staff either dismissing complaints that may be valid or moving forward on complaints that may prove baseless. Aligning with the American Bar Association's nationwide best practice for attorney discipline agencies, the chief disciplinary counsel would have investigatory subpoena power, which would ensure timely access to information needed to properly investigate grievances.

Fingerprint-based criminal history record check. Requiring fingerprint-based criminal history record checks on all of its members would allow the state bar to more effectively monitor relevant criminal activity warranting disciplinary action. To alleviate administrative burden, the bill would implement a two-year phase-in period for current attorneys and information sharing with the Board of Law Examiners. Further, occupational licensing agencies for most other professions already continually monitor their licensees so the bill simply would align the state bar with identified best practices for occupational licensing agencies.

OPPONENTS
SAY:

Committee on disciplinary rules and referenda. If the purpose of the disciplinary system is to protect the public, the state bar president should not be tasked with appointing members to the Committee on Disciplinary

Rules and Referenda created under the bill, as this would signal to the public that lawyers are self-regulating. This appointment process also could result in the placement of biased selections on the committee.

Criminal lawyers should be considered for appointment to the committee as they historically have been excluded from such discussions. Criminal lawyers have unique needs and important perspectives on many ethical issues.

Rulemaking process. The bill would not go far enough to fix the state bar's rulemaking process and would preserve the untenable conflict between the state bar's mission of protecting the public and self-regulation of attorneys. For interested parties of the public to initiate the process for proposing a disciplinary rule, a petition with at least 20,000 signatures would be required.

The referendum procedure for rulemaking is expensive and lethargic and should be replaced with a process overseen by the Supreme Court. The court's rulemaking process, with appropriate statutory guidance, would be more efficient and provide the public with greater confidence in the integrity of the profession's self-regulation.

In addition to publication requirements in the Texas Register and the Texas Bar Journal, the bill should include means for state bar members to receive electronic communication advising them of proposed disciplinary changes. In the current technological climate, not all members read the printed publications.

Attorney discipline system. The powers of the disciplinary process with regard to investigative subpoena power should not be expanded without judicial oversight.

Fingerprint-based criminal history record check. SB 302 would add new, onerous requirements to the state bar in the form of mandatory fingerprinting and background checks. This is unnecessary, especially because fingerprints are nearing the end of utility. However, if the state

bar were going to require this, there should be a way to counterbalance new government mandates on licensees by reducing other licensure requirements.

The bill would allow the state bar to keep these fingerprint-based criminal history records on file forever, which could amount to a government monitoring system imposed through occupational licensing. The bill also would not provide for any constraints on the state bar's use of this information, which could result in it being used unfairly in a punitive manner.

In any case, the implementation timeline for the fingerprint-based criminal history record check should be long enough to ensure that the state bar could fully comply. The phase-in period proposed by the bill could be problematic for attorneys licensed in Texas but residing out of state, those in rural areas, or attorneys who were active duty members of the armed forces.

OTHER
OPPONENTS
SAY:

Some have raised concerns that the State Bar of Texas violates the Texas Constitution and thus should not be continued in statute.

NOTES:

According to the Legislative Budget Board's fiscal note, the bill would generate an estimated revenue gain of \$1.7 million to the Department of Public Safety in fiscal 2018-19 from fingerprint-based criminal background check fees.

The companion bill, HB 2102 by S. Thompson, was left pending after a public hearing in the House Committee on Judiciary and Civil Jurisprudence on March 21.