

## **MINUTES OF THE MEETING OF THE BOARD OF LAW EXAMINERS**

**June 15, 2018**

1. Call to Order/Determination of Quorum. The meeting of the Board of Law Examiners was convened in open session by Augustin Rivera, Jr., Vice Chair, on Friday, June 15, 2018, at 9:05 AM, in the Tom C. Clark Building, 205 W. 14th Street, 1<sup>st</sup> Floor Conference Room, Austin, Texas.

Members present and constituting a quorum were: Augustin Rivera, Jr., Barbara Ellis, Teresa Ereon Giltner, C. Alfred Mackenzie, Dwaine Massey, Anna McKim, Cynthia Eva Orr, and Sandra Zamora. The absence of Al Odom was excused.

Travis Peeler, a member of the public, was present. As a courtesy to him, agenda item #14 Consider Communications from the Public was moved to the opening of the meeting.

2. Consider Communications from the Public. Travis Peeler requested an opportunity to speak to the Board. Rivera clarified that Peeler would be allowed three minutes to speak. Rivera also explained that since Peeler's presentation was not an agenda item, Peeler could make remarks, staff could provide comments, and Board members could ask questions, but there could be no deliberation; a future agenda item could be created, but no other action could be taken today.

Peeler, a February 2018 examinee, provided handouts regarding the Texas Bar Examination passing rate that has declined since 2014 up to and including the February 2018 Texas Bar Examination. Peeler then stated that on the second day of the examination, during the MBE portion of the exam, he found that question 157 was misprinted in his test booklet and some of the letters were illegible. He complained to the proctors but ultimately decided to continue the examination with his original booklet. He claimed that the proctors took his booklet to examine it. Peeler asked that under Rule 20, the Board consider adjustment of his grade due to venue noise, the misprinted book, and general anxiety over the entire situation.

Director of Eligibility and Examination Nahdiah Hoang provided factual information in response. She said she had spoken with Peeler about this issue, and had investigated it. She found in response to Peeler's complaint that one section proctor wrote an incident report about the situation and there was nothing in that report or interviews with the proctors that corroborates Peeler's claim that his question booklet was taken from him. Hoang personally reviewed question 157 in Peeler's test booklet and agreed there was a printing error, but said it would more accurately be described as a streak. Hoang explained that Peeler had reconstructed the obscured letters in the question and

completed all items on the exam. Hoang's conclusion was that there was no evidence of a grading error that would warrant a grade adjustment. Rivera asked if there were any allowances for post-grade release changes under BLE policy. Hoang replied that after grades are posted, they are final unless in the case of a grading error, and there was no grading error in this situation.

Rivera thanked Peeler for his attendance. Peeler stayed for the rest of the meeting.

3. Approval of Minutes and Certified Agendas. Upon motion made and seconded, the Board voted to approve the minutes and/or certified agendas of the following meetings:

January 11, 2018 Uniform Bar Exam Evaluation Committee (Odom)

February 9, 2018 Board Meeting

February 9, 2018 Hearings Panel (Odom)

March 22, 2018 Hearings Panel (Massey)

March 23, 2018 Board Meeting

April 13, 2018 Hearings Panel (Mackenzie)

April 13, 2018 Hearings Panel (Giltner)

May 14, 2018 Waiver Panel (McKim)

4. Report of Accountant.

a. Investment Report. Rod Shaheen presented and the Board reviewed the Investment Report for the period ending May 31, 2018.

b. Financial Reports. Shaheen presented and the Board reviewed the Financial Report for the period ending May 31, 2018 and the Variance Report for the period ending April 30, 2018.

5. Consider Budget for Fiscal Year 2019.

a. Audit Services Contract. Staff put the audit for fiscal year 2019 out to bid. Weaver was the only respondent, with a bid that was \$2,000 lower than the auditor's 2018 rate. After discussion of best practices regarding changes in auditors and the possibility of expanding the bid solicitation in future years, Ellis motioned to approve a contract with Weaver. Orr seconded. The motion to contract Weaver for the 2019 audit was approved.

- b. Fiscal Year 2019 Proposed Budget. Shaheen's financial models project a modest surplus of \$20K for 2019, compared to an \$8K budgeted shortfall in 2018. Shaheen estimated 2018 will most likely result in a surplus of about \$100K, primarily from late fees and laptop fees. Revenues for 2019 have been budgeted as fairly flat. Expenses have increased, primarily from Board member travel expenses and for employee compensation and benefits. The increase in employee costs stem from group insurance costs incurred to cover retirees. One big-ticket item in the budget is for \$22,500 to replace BLE computers that do not currently have enough RAM to fully utilize the processing software. Postal expenses continue to shrink. Orr asked if BLE has evaluated cost savings estimates in buying our own cables and always holding the unified exam in Austin. Shaheen explained that the biggest cost is for electricians to provide electrical outlets, which is unavoidable. Henricks commented that staff have some ideas on how to reduce bar exam expenses, but these require further technological advances. Hoang mentioned that BLE charges the \$50 laptop fee to offset electrical outlet costs.

Ellis motioned to approve the 2019 budget. Massey seconded the motion. The motion passed.

6. Report on Task Force Committee. Mackenzie stated that the Task Force has submitted its final report to the Court. Mackenzie explained that two years ago the task force was appointed and initially given until May 31, 2017 to submit a report on evaluation of the Texas bar examination. The Chair of the Task Force previously requested a one-year extension of the May 31, 2017 deadline, which was approved. The Task Force submitted an interim report in December 2017, and the final report was given in May 2018. The final report unanimously recommends adoption of the UBE or, alternatively, adopting the recommendations made in a report given to the court by Henricks and Hoang that would reduce the number of essays from twelve to six for a two-day exam. The task force recommended that Texas, like a few other states that have adopted the UBE, add a state-specific law component. The Task Force report discussed two models: New York and Alabama. New York's state law examination requires completion of an online course and a multi-choice online examination that is offered four times per year, either before or after the UBE exam. The Alabama state law component is much like a driver's education online course, as an example of another option. Mackenzie said that there had been a slight preference among Task Force members for the New York model. The Task Force also recommended that the Board take steps to reduce the amount of time between the examination and grade release. The Supreme Court met on May 29, 2018, at which time the Justices asked for report appendices. Mackenzie said he believes the Court will not act until its August conference, at the earliest.

Ellis and Zamora asked if the Task Force addressed concerns raised in the past by some law schools regarding non-transparency of NCBE. Giltner pointed out that the

MBE is created entirely by the NCBE. Mackenzie confirmed that the Task Force unanimously recommended adoption of the UBE. Henricks noted that the UBE is good for any law graduate, as it opens a wider job market.

McKim asked how implementation of the UBE would impact the grading process. Henricks said that process is not yet defined, but that work will be needed to implement changes in grading and create the state law component. The Task Force recommendation acknowledges that moving to the UBE requires lead time, and does not anticipate giving the UBE before 2020.

Orr congratulated the Task Force on its hard work, especially Mackenzie and Rivera. Rivera further recognized Mackenzie, saying that the Task Force could not have completed its charge without Mackenzie's work on the final report.

7. Report of the Executive Director.

- a. Calendar Update. Henricks asked for a volunteer to attend the November 19, 2018, Swearing In Ceremony. Ellis volunteered to attend.

Henricks presented the 2019 draft calendar. She explained that staff left the UBE committee meetings on the calendar for 2019 in case additional meetings are needed for implementation. Board members were asked to contact Laurie Gonzales regarding any calendar changes or clarification.

- b. Bar Admission Forum. Henricks congratulated the Board on a successful event, including great attendance and a well-received speaker. Texas Lawyer Assistance Program's Bree Buchanan spoke on the ABA commission on lawyer well-being. Rivera encouraged everyone to read the ABA report, as it provides further information about Buchanan's speech.

- c. Sunset Review. The Board reviewed proposed guidelines for decision-making on Character and Fitness and probationary licenses during the March 2018 Board meeting. Mackenzie had submitted suggested edits. Ellis submitted a few questions, but they were inadvertently overlooked. Ellis said she had questions about the good moral character designation. Orr suggested it be defined. Mackenzie recommended a committee, so Rivera appointed an ad hoc committee to be chaired by Mackenzie, with Giltner and Ellis acting as members.

The recommended guidelines of the ad hoc committee will be submitted for approval at the November board meeting, in order to comply with SB.303.

Sunset Review legislation also requires creation of a training manual. Staff is developing the manual, which will be loaded to the Board's portal. Staff will

send an email notifying Board Members that the materials have been loaded. Board Members must reply to that email to signify receipt, as is required by SB.303.

- d. Agency Operations. BLE has experienced some turnover, but all positions are currently filled, including a recently vacated analyst position. Applications for the July 2018 exam are in line with expectations. BLE anticipates a budget surplus for FY 2018.
- e. Articles and Communications of Interest. Henricks mentioned articles included in the Board book related to a study of bar passage correlation with LSAT scores, an increase in law school applications, federally-backed student loans and how that impacts access to law school, and a Texas Lawyer report on the Bar Examination Task Force. Orr asked if there are any published materials on factors impacting bar passage rates. Henricks replied that Dr. Bolus has received information on the qualifications of California law students and will do a study on the correlation of qualifications and performance. It is expected within the next year.
- f. Report on NCBE Conference. Henricks said BLE had excellent representation at the event, including Allan Cook and Dwaine Massey who were both attending their first NCBE annual meeting. Justice Jeff Brown was able to attend a portion of the event. He will also attend the annual meeting in San Francisco in 2019. Rivera announced that he was asked in March if he would be interested in serving as a board member for the NCBE. Rivera is excited that Texas may have representation at NCBE.
- g. Complaint Resolution Report. In addition to Peeler, there was only one other written complaint about administration of the February 2018 exam. One examinee who passed in November complained because she was not listed in the spring Swearing In Ceremony.
- h. Administratively Determined Waiver Decisions. Out of all waivers submitted, thirteen were denied, two were withdrawn, and thirty were granted. These were mostly fee waiver requests. BLE no longer considers deadline waivers due to the recent changes in the *Rules*.
- i. Response to the Texas Law School Deans Requesting Modification of Rule 2(a)(5). Henricks was asked to prepare a proposed response stating that BLE will consider individual requests to waive Rule 2(a)(5) as the Board has general authority to waive any requirement. The draft letter to Texas law school deans was provided to the Board. Mackenzie moved to approve the letter. The motion was seconded by Orr. The motion was approved.

- j. Update on the Technical Reporting on Psychometric Characteristics Contract. Henricks has been working with Dr. Roger Bolus regarding a report on psychometric characteristics of the Texas Bar Examination. Bolus has worked for numerous jurisdictions analyzing psychometric characteristics of their exam. The BLE has contracted with Bolus to provide this information for the last five years of the Texas Bar Exam. He will include a correlation of results from one section to the next and overall reliability of the exam. Henricks expects the report any day. Henricks shared that Bolus is working on the projected effect of adopting a 2-day exam and the projected effect of offering the UBE. He was asked to consider two different weighing schemes; (1) MBE 40%, essays 40%, and the other 2 components 10% each, and (2) MBE 50%, essays 40% and the other 2 at 5% each. Rivera complimented Henricks and BLE staff for staying ahead of the curve on the psychometric reliability of the Texas Bar Examination.
- k. Social Media Policy. Henricks proposed adoption of a BLE social media policy and provided a proposal based on a template provided by Texas DIR. BLE staff adapted the DIR policy, although some provisions are not currently relevant, but would be considered prophylactic. Specifically, Henricks said that BLE does not use social media for Board activities, but may want to do so in the future. She explained that Section 4 of the proposed policy would be currently applicable, which is to control what is perceived to be official activities of BLE as posted in social media. That could impact Board and staff who discuss agency information in social media. Massey asked what social media presence BLE currently maintains. Henricks said none, but that individuals do post about BLE. Ellis clarified that the policy is essentially telling Board and staff who use social media of the need to keep their affiliations with BLE out of their personal social media account. Rivera stated concern about item 3 on page 147 as being too vague and subject to varying interpretation. Henricks reiterated that the policy is advisory. She said if the Board felt it was too vague, it could be removed. Rivera agreed that it is important for BLE to have a social media policy. He asked that Board members review the policy and revisit it during the November 2018 meeting.

The Board meeting broke at 10:45 AM, and reconvened at 10:55 AM.

8. Director of Character and Fitness. Allison Drish stated that four probationary licenses were converted to regular licenses. She told the Board that in September of 2017 the Court and the Legislature removed the requirement that individuals be evaluated at particular treatment facilities, and that BLE has now expanded its roster of mental health professionals to meet that change. BLE had as few as three, but has

increased the roster to fourteen providers. BLE will continue to add new providers to the list.

9. **Report of the Director of Eligibility and Examination.**
  - a. **Pretest of Exam Questions.** Hoang indicated she had nothing to report on the pretest of exam questions.
  - b. **MPRE Score Waiver Guidelines.** Hoang indicated she had nothing to report on MPRE score waiver guidelines.
  - c. **February 2019 Exam Site.** The February 2019 exam will be held at the Austin Convention Center. Subject to availability, this will be BLE's preferred site for all future February consolidated exams.
  - d. **Board Members' Confirmation of Graders, Questions Assignments, Shipping Address, and Delivery Date for iPads.** Hoang said that each Board Member would receive a question review notebook, including a sheet to assign July 2018 graders to questions. She asked that Board members complete and return the sheet by the end of the day. Giltner asked if bar exam coverage needed to be assigned to Board members. Rivera and Orr offered to attend in San Antonio. Giltner and Zamora offered to attend in Arlington. Ellis offered to cover in Austin. Either Odom or Massey will cover Houston, but Massey will confirm with Hoang closer to the exam date.
10. **Report of Staff Attorneys.**
  - a. **Litigation Report.**
    - i. **Glueck.** This ADA accommodation case was dismissed against BLE early in 2018. NCBE has yet to file a motion in the case, which is still pending.
    - ii. **Malone.** The case is at status quo. BLE filed an answer to his complaint, but nothing additional has happened.
    - iii. **Paxton.** The AG entered a settlement agreement that treated as confidential certain information about BLE's Board and graders. The order was entered on April 17, 2018, and the court's judgement became final on May 17, 2018. This case will come off the list for the next Board meeting.
    - iv. BLE has not yet been served, but is aware of another suit filed recently. BLE filed a request for representation with the Attorney General and has been assigned a lawyer. The person making the complaint is licensed in another state. He moved to Texas, and claims

that since he could not work due to illness or disability, he cannot meet the practice requirement to be admitted without examination under Rule 13.

- b. New Board Order Style Guidelines. Bassinger reminded Board members that the staff proposal on how to handle hearing documents and Board orders was presented during a previous Board meeting. She reiterated that Board members should leave hearing materials in the BLE office to be shredded, but that BLE staff would load any requested exhibit materials to the portal. That discussion led to the request for a style guideline for Board orders. Staff developed a proposed style guide, which was circulated to Board members for input. After that input was incorporated, the final version was provided in the Board meeting book and via email to Board members.

11. Consider Adoption of Policy to Limit the Number of Applicants or Declarants Represented by the Same Counsel. Bassinger proposed that BLE adopt a Board policy limiting the number of cases on a hearing docket with the same defense counsel so that we can better manage hearings panels. Bassinger recommended the maximum be set at three per panel, and anything more than three could be moved to the next available docket. Zamora stated that judges do not prohibit lawyers from representing clients based on time. Orr said that clients should have the right to the counsel of their choice. Bassinger agreed with those principles, but said BLE should be able to reschedule to avoid unnecessary delay in the hearings. Massey suggested that this should be more aspirational, not necessarily a policy. Rivera said he is comfortable with BLE staff scheduling effectively, and noted that staff already have the authority to reschedule based on time constraints. Rivera agreed that rescheduling may be necessary when an attorney's representation of multiple applicants results in substantial delay. Rivera then concluded that no action is needed on this item.

12. Staff Recommendations Related to the March 2018 Communication from the Public. Hoang reminded Board members that during the March 2018 Board meeting, representatives from Concord Law School, which is unaccredited by ABA and unaccredited in California, asked that BLE consider a policy to waive Rule 13(2)(b) to allow Concord graduates to sit for the Texas bar exam. Hoang referred the Board to the written materials in the meeting book. Hoang said that Concord's dean gave an impressive presentation during the March meeting, but his argument fell apart when he said that Concord's California bar exam pass rate is around 30%. Hoang stated that there is nothing unique about Concord's program that provides good cause for a blanket approach to waivers for the school's graduates. Hoang recommend the Board take no action, and that it continue to consider waivers of the law study requirement on a case-by-case basis. Orr, Mackenzie, and Zamora voiced agreement with Hoang. Mackenzie asked if a motion needed to be made. Rivera said no motion was required to take no action.



13. Annual Evaluation of Executive Director. Under Texas Government Code 551.074(a)(1), Rivera called for a closed session at 11:20 AM, whereupon the Board proceeded to meet in executive session for the purpose of evaluating the annual work performance of Executive Director Henricks.

The Board meeting returned to open session at 12:03 PM and voted to give the Executive Director a 3% raise for FY2019 and a \$6,000 bonus for 2018.

14. Consider Issues Arising from Reports of the Executive Director, Director of Character and Fitness, Director of Eligibility and Examination, and Staff Attorneys. No action was taken.

15. The Chair recognized Peeler, who then provided an additional handout to the Board.

The Board broke at 12:10 PM for lunch.

The Board reconvened at 12:30 PM.

16. Conduct Review of questions to be used for future Texas Bar Examinations. Pursuant to Texas Government Code 82.003(b), Rivera called for a closed session, whereupon the Board proceeded to meet in executive session for the purpose of reviewing and editing questions to be used on future bar examinations.

17. Adjournment/Formal Reviews. There being no further business, the meeting of the Board of Law Examiners was adjourned upon completion of question review at 2:16 PM.

Respectfully Submitted,

Susan Henricks,  
Executive Director

Approved:

  
~~Al Odom, Chair~~  
Agie Rivera, Acting Chair