

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

November 8, 2018

1. Call to Order/Determination of Quorum. The meeting of the Board of Law Examiners was convened in open session by Al Odom, Chair, on Thursday, November 8, 2018, at 9:08 AM, in the Tom C. Clark Building, 205 W. 14th Street, 1st Floor Conference Room, Austin, Texas.

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

2. 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:

June 14, 2018 Hearings Panel (Zamora)

June 15, 2018 Board Meeting

June 15, 2018 Accommodations Review Committee (Rivera)

September 14, 2018 Hearings Panel (Odom)

September 14, 2018 Hearings Panel (Orr)

3. Consider Communications from the Public. There was not a participant present for the meeting, but a member of the public provided materials to BLE Staff Attorney Allan Cook for distribution. The context of the submission was a response to agenda item 10B, so it was determined that discussion would take place later in the meeting.

4. Report of Accountant.

a. Review Report of Auditors. The Board of Law Examiners annual financial audit has been completed for fiscal year 2018. Adam McCain of Weaver, the Board-approved outside auditor, attended to discuss the audit. He provided two documents to the Board; the audit report and the standard communication letter. The audit report is a clean, unmodified statement of opinion following the standard State of Texas format. The audited financial statements report \$3.9 million in assets with a total fund balance of \$3.3 million. This represents a \$3.2 million net equity as of Aug 31st. McCain confirmed that Weaver followed all ethical and standard practices, as outlined in the cover letter provided with the audit. McCain thanked BLE for its preparedness and transparency. Rivera asked McCain if BLE is following all state procedures and if it is Weaver's opinion that we're meeting "the gold standard." McCain confirmed that BLE does exceed state requirements. He asserted that preparation goes a long way, and that Weaver evaluates internal controls as part of the audit and it's their finding that BLE has excellent control processes in place. Weaver didn't identify any weaknesses or insufficiencies.

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

- c. Financial Reports. Shaheen presented and the Board reviewed the Financial Report for the period ending August 31, 2018, and the Variance Report for the period ending August 31, 2018.

Rivera informed the Board that during a recent meeting with the Texas Supreme Court regarding proposed adoption of the UBE, Justice Phil Johnson brought up the issue of BLE's substantial financial reserves. Justice Johnson posed the question, "How much is too much?" Johnson went further in asking if BLE could use some of its surplus to benefit the legal community. He said this is not a mandate or even suggested action, just a general comment for BLE to consider. Henricks mentioned that BLE must carry a sizeable reserve fund because the agency is not appropriated. Odom confirmed that a surplus is by design, to cover for any emergency situations that may arise. Shaheen said that our current surplus is enough to operate for one year without any outside funding, which has always been the financial objective. Ellis questioned if there will be additional funding needs if and when Texas adopts the Uniform Bar Exam and suggested, if that is the case, that those expenses could be used to justify any perceived surplus to the Supreme Court. Odom asked BLE staff to further discuss the financial well-being and make recommendations to the Board at the next meeting if there are any actions that need to be taken.

5. Discussion of Chemical Dependency Probationary Licensees. Chris Ritter, Director of the Texas Lawyer Assistance Program (TLAP), was invited by Drish to present on chemical dependency recovery and probationary licenses.

Ritter opened his presentation by thanking BLE for the invitation. He expressed gratitude to BLE for having such a great relationship with law schools, as he believes TLAP's inclusion at law school orientations is supported by the BLE. Ritter said he believes firmly that discussion of substance abuse in the legal community is vital from a student's first day in law school. Students must know that sustained abstinence is the first step for substance abusers to figure out the underlying problem that they are masking with addictions.

Ritter said that for everyone in the legal community, TLAP helps connect them to resources, such as therapists, treatment programs, counseling, peer support and group support, including 12-step programs. He further explained that TLAP can assist BLE applicants with mental health and chemical dependency concerns. McKim asked Ritter if TLAP has resources available in remote areas. Ritter replied that Lawyers Concerned for Lawyers weekly Friday phone calls are open to all participants. He also suggested referral to a large network of lawyers throughout the state who act as sponsors and monitors. Ritter confirmed that there are some locales in the state where it might be more difficult to make referral, but he has found that assistance can be provided to everyone who seeks it. Ellis asked if TLAP provides free counseling for applicants who have been mandated to attend. Ritter said that TLAP provides up to \$3,000 towards counseling for every law student who does not have insurance, which TLAP has found to be sufficient to provide a substantial number of counseling sessions. Ritter added that applications for assistance are anonymous.

Expanding the discussion to include law school graduates and those currently in the legal profession, Ellis asked if that benefit is available to someone after they've received a J.D. Ritter reiterated if they are pursuing licensure, they're covered. He again mentioned Lawyers Concerned for Lawyers as a group that is not just about substance use, but also to help with emotional distress and other addictions. Ritter said that 12-step programs such as Alcoholics Anonymous are most powerful because when people quit an addiction, they need new tools to deal with stress and they need structure. For himself personally, replacing happy hour with an AA meeting was one of the psychological reasons a 12-step program helped him work through his addiction. Bassinger said that many times applicants will acknowledge their chemical dependency, but assert that AA is not for them. Ritter said that is a very common response, to which he tells people to try a number of different meetings and/or groups. If someone says they've tried AA and it was terrible, he encourages them to explore other options, such as different 12-step programs or SMART Recovery. McKim asked if there is an applicant who is resistant to AA, but the order includes a requirement that s/he attend AA, could a referral to TLAP replace that requirement. Ritter agreed, saying that TLAP would absolutely be able to assist the applicant with a referral to a program.

The discussion turned to applicants who have relapsed. McKenzie asked how much grace is built into the system. Should hearings panels consider a certain number of relapses when hearing cases? Ritter explained that it's a judgement on whether an applicant is giving a good faith effort to stay sober. He stressed that relapse is very common, but if the applicant is meeting most of the order's conditions, then there's an actual likelihood that person can reach significant sobriety. If there is a relapse, but the person has been working their program, the relapse is usually only for a short period. Substance abuse testing eliminates the addict's creative mind on how to cheat, as they know that testing will reveal a relapse, so instead they must rather focus on living without substances. While it does seem daunting, Ritter exclaimed that if someone wants to practice law, that person must change everything about their addiction.

Ellis suggested that BLE and TLAP work together in reviewing and modifying the current Character and Fitness chemical dependency policies. Drish said that is already under way, and the reason Ritter was invited to present, so that the Board would have some background in order to consider any proposed changes to the policies.

6. Report of the Finance Committee. The Finance Committee met the morning of November 8, 2018, and received a report on the audit from Shaheen, with no exceptions noted. The Finance Committee moved that the Board approve Independent Bank as the Board's investment broker should those services be needed during fiscal year 2019. Ellis seconded the motion, and it was approved by the Board. The Finance Committee also moved that BLE continue with its current investment policy, which was seconded by Ellis and approved by the Board.

7. Report of the Executive Director.

a. Recognize Staff for Years of Service. Henricks congratulated Kendelyn Schiller for 5 years of service.

- b. General Agency Operations. BLE has hired two licensure analysts, Julie Garcia and Joy Charles. There has been significant turnover in the licensure analyst position, which has hampered overall agency effectiveness. There have been no missed deadlines, but timely processing of AWOX applications has been affected.

BLE will close at noon on Wednesday, 11/21/18, through end of business on Friday, 11/23,18 for the Thanksgiving holidays. BLE will be closed December 24th – 26th for the Christmas holidays, and December 31st – January 1st for New Year's.

New board member Carlos Soltero has been appointed to by the Supreme Court to replace Sandra Zamora. Carlos is a Yale law graduate and currently a partner with Cleveland-Terrazas in Austin.

February 2019 exam applications are being submitted as expected. BLE expects a significant number of reapplications due to the historically low pass rate on the July 2018 exam. As of Tuesday, 11/6, BLE has received 36 formal review requests with 15 confirmed attendees. McKim suggested it would be helpful for formal reviews if board members could share best practices amongst themselves on how to conduct formal reviews. Henricks said that she'd recently corresponded with Justice Jeff Brown on suggestions for an applicant who did not pass the exam. Henricks said she would forward that correspondence to the Board, as it's a distillation of the best practices and advice that's been previously shared.

Henricks congratulated Rivera, Jr., on his recent appointment to the NCBE Board of Directors.

- c. Complaint Resolution Report. Henricks stated that we had very few complaints submitted between June and October, 2018. The majority were related to the July 2018 Houston exam administration, where she was present. Most were venue-related issues, but because of the lack of alternative sites in Houston for the bar exam, the July 2019 examination will be at the NRG Center. BLE staff had a debrief discussion with NRG. BLE was able to obtain some financial concessions because of issues with the July 2018 examination. For future administrations, Director of Character and Fitness Hoang will arrive at NRG on the Sunday prior to the exam date, ensuring that she is on-site Monday morning to oversee preparations. BLE will provide more management oversight at NRG. Of the complaints submitted about the July 2018 exam, three of the five examinees passed.
- d. Report on Administratively-Determined Waiver Decisions. All administratively-determined waivers were fee related. Henricks reiterated that BLE is no longer considering deadline waivers, and that she is following the policy approved by the Board to guide waiver decisions.
- e. Articles and Communications of Interest to Board Members. Henricks mentioned that 33 states are now using the UBE, with Texas potentially being the 34th. She said that Ohio has also adopted UBE and that Indiana is likely to do so as well. She mentioned a profile on

Baylor Law Dean Brad Toben, which was included in the materials. Henricks said she found it encouraging that some of the included articles are related to higher employment rates for lawyers and improvements in numbers of those taking the LSAT and law school applicants, although she believes these articles confirm that next year's bar exam pass rates will be similar to this year's. Henricks also said that because lawyer wellness continues to be a hot discussion topic, she is considering another program on wellness for the 2019 Bar Admission Forum.

- f. Update on Supreme Court Decisions. The Texas Supreme Court issued an Order approving adoption of the UBE beginning in February 2021, subject to public comment. To date, there have been approximately two negative or detracting comments. The majority of comments are actually inquiries, with people wanting to know how soon they may present a UBE score to obtain a license in Texas. BLE has updated its website, including a link to the Court's order, the NCBE web page on the UBE, and the Bar Exam Task Force Report so that applicants may easily access information about the UBE. For those applicants who contact Henricks directly, she explains that BLE doesn't yet have details on implementation, so directs them to please contact the Supreme Court with comments as that is the best way for the Court to be informed of their concerns.

Henricks reminded the Board that the State Bar Annual Meeting is scheduled for June 13th – 14th, 2019, in Austin. She encouraged all Board Members to attend. BLE staff attorneys will be encouraged to attend so that the agency is visible and available to the legal community during the UBE transition period.

- g. Review Question Assignments Based on Appointment of New Board Member. Henricks proposed that Rivera, Jr. be assigned the MPT questions previously assigned to Zamora and that Soltero be assigned the questions currently assigned to Rivera, Jr. Rivera, Jr. agreed. Hoang reminded the Board that BLE has new review teams for drafting of the February 2020 exam questions, so asked that all members please review those assignments.

The Board meeting broke at 10:34 AM, and reconvened at 10:45 AM.

8. Report of the Director of Character and Fitness
 - a. Recommendations of Probationary Licenses to be Converted to Regular Licenses and for Minor Modifications to Probationary Licenses. For the period July 1, 2018, through November 6, 2018, 11 licenses were converted from probationary licenses to regular licenses.
 - b. Year-end Hearing Statistics. During 2018, BLE conducted 61 hearings, a reduction from last year. Significantly more hearing participants were represented by an attorney. The primary hearing issue continues to be dishonesty, with criminal history a close second. For 2018, out of the 61 hearings, 34 received approval of character and fitness, eight were denied, one probationary license was revoked, and one license was recommended for cancellation due to fraud. In all, approvals are up, denials are up, and probationary licenses are down. There

are currently 24 applicants on probationary licenses, but that number in the near past has been closer to between 40 and 50.

9. Report of Director of Eligibility and Examination.

- a. Question Editing Timeline. Hoang provided the Board Members with a chart establishing the question editing timeline. She noted that the State Bar Swearing-In date was listed incorrectly, as it is scheduled for 11/19/18. Ellis confirmed she will attend on behalf of BLE.
- b. Report on November Grade Release. Hoang noted that the November 2018 grade release was completed early, and in a two-part manner. Specifically, scores were released to examinees privately through ATLAS on Monday, 10/29/18, and then BLE released the pass list and overall statistics on Wed, 10/31/18. Justice Brown was aware of this plan, posting to his official Twitter account on Sunday, 10/28/18, of the grade release. He did a follow up Tweet explaining why BLE did a two-part release and received positive comments on the new system. Examinees expressed their appreciation of the initial privacy. McKim suggested that Justice Brown and/or BLE may want to include a notation publicly that the results do not all go out at 12:01 AM (or any set time) so that examinees who do not immediately receive results don't feel anxiety about delayed receipt. Rivera, Jr., asked if there is a practical reason for the two-part deployment of results. Hoang explained that it 1) helps avoid a website crash and 2) BLE has the results so it makes sense to provide them to examinees as soon as is feasible. Henricks further explained that a graduated release reduces staff overtime work and that the delay between private and public releases allows BLE a few extra days to find and correct any potential errors.
- c. Year-end Statistical Report on Accommodations. Overall, BLE had a decrease in Non-Standard Testing Accommodations (NTA) applications for 2018, but the 85% approval rate was significantly higher. Cook attributes this to a slight difference in the way BLE's contracted experts are reviewing applications. Cook had a conversation with John Ranseen, one of BLE's experts, and Ranseen confirmed he is taking a broader approach, in that he is more inclined as a default to recommend time and a half, rather than some other solution. Ellis asked if BLE has statistics on pass rates for examinees with accommodations. Cook said that from an anecdotal perspective the pass rate is the same as for non-NTA test takes. Henricks said that NCBE staff have studied the issue and assert that granting accommodations does not increase likelihood of passing.

Cook explained that NTA denials typically occur because the submitted materials are inadequate and don't prove need for an NTA. The vast majority of those who are approved have received similar accommodations from before law school. Cook stated that BLE has developed a review system that includes review of applications by national experts, so Cook is confident that the NTA decisions are appropriate and legally defensible.

- d. Texas Southern University Houston LL.M. in Immigration Law and Naturalization Law. In 2014, the court liberalized rules for foreign trained applicants to take the Texas Bar Exam. Applicants with an LL.M. must satisfy certain requirements in order to qualify. TSU created

a program that doesn't meet these requirements, but they then created a modified curriculum that does meet the requirements. BLE received a complaint from an anonymous member of TSU's faculty that expressed concern over the non-modified curriculum not meeting the requirements set forth by the court. Hoang has spoken to Texas Southern's Dean of Law Dannye Holley regarding the concern, and has been assured that TSU modified curriculum meets the requirements for foreign trained applicants.

- e. Consider Waiver Policy for Licensed Attorney Applicants with Undocumented MPRE Scores. The Board previously developed a policy for attorneys who apply for admission without examination (AWOX), but who do not have an MPRE score because it was not required at time of their initial licensure. That policy is to grant them AWOX without an MPRE score if three specific conditions are satisfied: 1) the applicant was not required to take the MPRE when licensed, 2) the applicant has never taken and scored less than an 85 on the MPRE, and 3) there is no disciplinary history. This current waiver policy allows BLE staff to handle requests from applicants with undocumented MPRE scores. Hoang asked the Board if they would like to revisit this policy or allow staff to continue making these determinations. Mackenzie motioned that staff continue to grant MPRE waivers for licensed attorneys seeking admission without examination. Rivera, Jr. seconded. The motion passed unanimously.

- f. Report on NCBE/CBAA Conferences. Hoang recently attended the CBAA Conference in Denver. While there, she participated in an ExamSoft conference to determine if they have product(s) available which may be a better fit for BLE than its current provider ILG. Hoang determined that the current ExamSoft product does not meet BLE's specifications.

Henricks has been named chair of CBAA's Technology Committee for CBAA. That committee discussed the need to eliminate storage of examinee's prohibited items at examination sites, while allowing access to cell phones for practical reasons. BLE is currently investigating a company that provides a neoprene bag to secure examinees' phones, and the phone, now unusable, stays with the examinee. However, the quote provided by provider YONDR was \$70,000 for the February and July 2019 exams. This figure seemed excessive, so BLE staff explored a more frugal option in which examinees would have their cell phones heat-sealed into a thick dark plastic bag. This was a much more cost-effective option. However, upon further investigation, an even easier solution may be to provide mobile lockers at the testing venue. BLE received an estimate of \$3,500 total for the February 2019 bar exam, so that will most likely be the option utilized for that examination. Henricks reminded board members that BLE is banning personal belonging, such as backpacks, purses, study materials, and all other items not listed as permitted. Hoang said that all applicants received a message through ATLAS that personal belongings found in the venue will be thrown away. It is a security measure and will be strictly enforced.

- g. Present Psychometric Reports. BLE commissioned Dr. Roger Bolus to prepare a technical report on the Texas Bar Exams for period 2013 – 17. This report was emailed to the board previously. That report confirmed that the Texas Bar Exam is psychometrically sound and

that exams were scored properly. BLE provided raw score data and Dr. Bolus rechecked all figures to confirmed the accuracy of the grade calculations. BLE would like to include the report on its website, with the Board's approval. Henricks reiterated that this report also confirms the Texas Bar Examination is considered to have high reliability. Rivera, Jr. and Odom agreed that the report should be posted, so asked staff to update BLE's website to include the materials. Odom asked that law school deans be notified of the availability of the report.

10. Report of Staff Attorneys.

a. Litigation Report.

- i. The Glueck is suit has been finally dismissed. The court earlier granted the BLE's motion to dismiss and has also granted NCBE's motion for summary judgement. Gluecke filed a motion to alter or amend to change his name, but that motion was denied. He did not timely final his appeal, so the case is finally dismissed. The Board asked for a copy of the Court's decision finding that Glueck does not qualify for accommodations as a person with a disability, which Cook said he would provide via email to all board members.
- ii. The Edward Malone appeal remains stagnant. No action has been taken by either the Plaintiff or the Attorney General on behalf of the BLE. The case is expected to be dismissed for lack of prosecution.
- iii. Albert Block has filed suit against BLE. Mr. Block is a physically disabled attorney from Louisiana who seeks admission to Texas. Block claims he has been unable to work since 2002 due to a multitude of health problems. He took and failed July 2015 and February 2016 Texas Bar Examinations and subsequently submitted a request for a waiver of practice requirements to be admitted under Rule 13. That waiver was denied. Block filed suit in May 2018, and the BLE was served in July 2018. The BLE has a motion to dismiss pending before Judge Yeakel. The basis for BLE's motion is lack of jurisdiction under Title II of the ADA based on sovereign immunity. Specifically, the argument is that Congress did not abrogate Texas' sovereign immunity by enacting Title II. Fifth Circuit precedent supports this defense for the BLE.

b. Notice to Counsel for Applicants Regarding Exchange of Exhibits and Witness Designation.

Bassinger explained that this topic relates to BLE's Rule of Procedure on exchange of documentary evidence and designation of witnesses. She stated that the drafting of this letter was caused by defense counsel repeatedly disclosing evidence well past the eight day deadline. The Executive Director's letter confirms the expectation that evidence and witnesses offered at character and fitness hearings must be disclosed in a timely manner, otherwise, staff attorneys may object to the evidence or request to continue the hearing. Staff attorneys are expected to consider timely requests by defense counsel to extend the deadline where it is necessary and defense counsel are striving to comply with rules of procedure.

Ellis asked if the Board wished to consider comments provided from the written public comment from Robert S. Bennett received today at the meeting. Henricks assured the Board that staff would always consider any proposed stipulations as suggested by Mr. Bennett. Mackenzie indicated that BLE needs to ensure that applicants and opposing counsel all understand that evidence should be provided to staff attorneys as soon as possible. Odom agreed that the letter BLE sent was a good reminder, reiterating that BLE has rules that need to be followed. Massey agreed that BLE needs to take the stance that it will no longer accommodate or tolerate untimely filings. Odom said that BLE must ensure that applicants and lawyers understand that when they come to character and fitness hearings that there are procedures in place and the expectation is that they will be strictly followed. He believes the correspondence sent out helps reiterate that stance.

11. Consider Approval of Character and Fitness Probationary License Guidelines and Report by Ad Hoc Committee. At the June 2018 Board meeting, the Board reviewed a draft of proposed Character and Fitness and probationary license guidelines prepared by staff. The Chair appointed an ad hoc committee to further review the proposed guidelines. The staff revised the format to be similar to the disciplinary guidelines recently adopted by the State Bar. Hoang suggested no Roman numerals. Mackenzie suggested that on page 146F, add “lack of respect for the law or failure to maintain integrity”. He also suggested on page 148A, rewording it from applicant “strict” compliance to “successful”. Odom said that “strict” compliance still gives the Board discretion, so he was in favor of that wording. Ellis moved to approve as written and allow staff to develop changes as discussed before distributing to Sunset Commission. Rivera, Jr. seconded. The motion passed unanimously.

12. Consider Approval of Social Media Policy. Henricks said that having a social media policy is a good management tool to control messaging although the agency doesn’t have any social media accounts. However, BLE would like to control communication to the public about agency activities. The proposed policy, borrowed from DIR, requires that staff and board members refrain from posting messages about the BLE on social media. Massey motioned to approve. McKim seconded. The motion passed unanimously.

13. Consider Approval of 2019 Board of Law Examiners Calendar. The draft calendar was previously presented at the June 2018 meeting. Edits that were submitted to BLE staff were incorporated and the new calendar was distributed prior to the November 2018 Board meeting. Not included on that most recent draft is a proposed board planning retreat on transition to the UBE, which is not yet scheduled. Massey motioned to approve the calendar. Mackenzie seconded. The proposed 2019 calendar was approved unanimously.

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.

The Board broke at 12:22 PM for lunch.

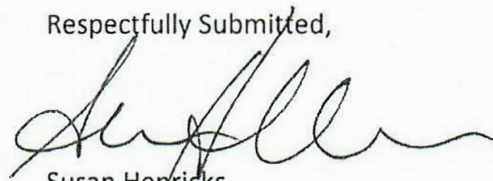
The Board reconvened at 12:40 PM.

15. Discuss Grading, Regrading, Scoring Keys, Raw Scores, and Final Grades for the July 2018 Texas Bar Examination. Pursuant to Texas Government Code 82.003(b), Odom called a closed session, whereupon the Board proceeded to meet in executive session to review the Board's work on grading, regrading and scoring of answers on the July 2018 Texas Bar Examination.

16. Conduct Review of Questions to be Used for Future Texas Bar Examinations. Pursuant to Texas Government Code 82.003(b), Odom called a closed session, whereupon the Board proceeded to meet in executive session for the purpose of drafting questions for future Texas Bar Examinations.

17. Adjournment. There being no further business, the meeting of the Board of Law Examiners was adjourned upon completion of question review at 2:30 PM.

Respectfully Submitted,



Susan Henricks,
Executive Director

Approved:



Al Odom,
Chair