

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

March 22, 2019

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 Friday, March 22, 2019, at 9:00 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, Dwaine Massey, Cynthia Orr, and Carlos Soltero.

2. **Approval of Minutes and Certified Agendas.** Upon motion made by McKim and seconded by Rivera, Jr., the Board voted to approve the minutes and/or certified agendas of the following meetings:

January 17, 2019 Hearings Panel (Rivera, Jr.)

January 17, 2019 Hearings Panel (Orr)

January 18, 2019 Board Meeting

January 18, 2019 Uniform Bar Evaluation Committee Meeting

January 18, 2019 Accommodations Review Committee

February 15, 2019 Hearings Panel (McKim)

3. **Consider Communications from the Public.** There were no public communications received for this meeting

4. **Report of the Accountant.**

- a. **Investment Report.** Rod Shaheen presented and the Board reviewed the Investment Report for the period ending 2/28/2019.

- b. **Financial Reports.** Shaheen presented and the Board reviewed the Financial Reports for the period ending 2/28/2019.

5. **Report of the Executive Director.**

- a. **Calendar updates.** Susan Henricks solicited a representative for the Bar Swearing-In Ceremony, scheduled for 5/13/2019. Soltero volunteered to attend.

- b. **General Agency Operations.** The February 2019 Texas Bar Examination went very well. It was one of the largest set-ups for a Texas Bar Examination to date. Some examinees objected to the reversion to the "no personal items" policy that was reinstated, but the examination started on time each day of the testing period. Law schools will be asked to support the policy by not holding examinees' personal items outside the examination room. Odom asked what traveling examinees did with their items. Henricks explained that examinees were advised to make arrangements for luggage storage. The staff did

not find improperly-stored luggage at the site. Henricks explained that found items were stored and that examinees could claim these items but were required to sign a statement acknowledging a rules violation. Some chose to abandon their property rather than sign the statement.

Locker storage was provided for cell phones at a cost of approximately \$1,000 per day paid by BLE. Fewer examinees used the lockers on Wednesday and Thursday, probably because they could not access phones during the lunch hour.

One examinee apparently failed to save and upload her essay answers due to inadequate disk space on her laptop computer. Allan Cook stated that evidence we received from ILG showed that she had less than the stated requirement available when she signed into the exam. Odom asked if we will accept any possible results recovered since the examinee has hired a data recovery team. Cook explained that the examinee has sought to document chain of custody, and that will be decided if the data recovery company is able to locate the essays.

After the February 2019 bar examination, ILG conducted a survey of examinee satisfaction with the Exam360 software. ILG reported an overall satisfaction of 4.6 on a 5 point scale for Texas, while 4.7 out of 5 was the total for all jurisdictions. The most common request to ILG from examinees were for access to spell check and a timer. BLE has not implemented these options based on potential disadvantages to examinees who handwrite.

New desktop computer equipment has been installed for all BLE employees. It is anticipated that these upgraded machines will allow ILG software to run faster.

BLE passed a 2019 State Office of Risk Management audit and the Continuity of Operations Plan was accepted. All staff completed active shooter training, as was recommended during the SORM review.

With regards to adoption of the Uniform Bar Examination (UBE), the proposed rules have been provided to the Supreme Court by Henricks. These rules will be considered during a Supreme Court meeting scheduled for Tuesday, 3/26/2019. BLE drafted rules providing for the state law component modeled on New York as recommended by the Supreme Court Task Force. The Supreme Court may opt for a course that does not include a testing component. Henricks noted that most states that administer the UBE do not have a state law component. Of those that do, most only require completion of a state law course.

Henricks met with Texas law school representatives during a lunch hosted by Chris Ritter of the Texas Lawyers' Assistance Program. She provided information and answered questions about the UBE implementation.

Henricks also attended a UBE preparation meeting for law schools at St. Mary's University School of Law. She heard reports on the law schools' perspective on the Uniform Bar Examination.

Henricks attended a Bar Examination conference hosted by AccessLex that was primarily attended by academic support staff from law schools around the country. Participants at this conference provided insight into bar admission issues from the perspective of law school deans and instructors.

Henricks attended the NCBE Technology Committee in New Orleans. The discussion focused on the importance of sharing information about UBE applicants with other jurisdictions. Other states report that examinees may file concurrent applications in as many as three and four states at one time, creating a need to share information between jurisdictions. This highlights the importance of NCBE registration, which is free and takes only a few minutes to complete. Henricks mentioned that BLE participates in the cross-reference program by uploading a list of all applicants to NCBE, who provides a report of any applicant who has applied in other states. BLE staff then checks that report with information disclosed on the Texas application. Since UBE facilitates portability of scores, BLE must be prepared for applicants who have applied in more than one jurisdiction.

Odom and Rivera, Jr. were invited to participate in a meeting of the ABA Commission on the Future of Legal Education with Justice Jeff Brown in Austin. Since neither was available, Henricks attended on BLE's behalf. The Commission has been working for 1.5 years, and it is also reviewing the bar examination. Henricks said that some of the Commission members want to consider alternatives to the bar exam but no consensus on any alternative was presented at this meeting.

The Commission is conducting studies intended to evaluate the content validity of bar examinations. Board members discussed that lawyer incompetence may not be a bar exam issue, but rather an experience issue. Students are not required to clerk or serve in clinics, although such experience tends to improve their performance after licensure; the ability to pass the bar exam does not translate to an examinee knowing how to be a lawyer. Rivera mentioned that Justice Brown has said he wants Texas to be on the leading edge of bar admission practices.

Henricks has prepared an article for the Texas Bar Journal that will report on the plan to adopt the UBE, which will be submitted after rules are adopted by the Supreme Court.

- c. Complaint Resolution Report. BLE received only one complaint between 1/1/2019 and 3/13/2019, which was to express concern regarding the quality of feminine hygiene products offered at the February 2019 bar exam administration. Henricks noted that BLE will purchase higher quality products for future examinations. She explained that

examinees are not allowed to bring their own products into the secure area as an examination security practice.

- d. Report on Administratively-Determined Waiver Decisions. For the period 1/1/2019 – 2/28/2019, most administratively-determined waiver requests were fee-based. BLE has now implemented the MPRE waiver policy that was recently approved, which further reduced the number of waivers that had to be decided by the Board. A member questioned if waiver requests to apply fees for an exam could be applied to a future exam if the examinee decides to not take the earlier exam. Henricks confirmed that those fee waivers may be approved if the examinee has withdrawn in a timely manner. Another member asked if Board Members may tell formal review participants to request a waiver to defer their application if the examinee feels unprepared for the upcoming exam. The Board Members agreed that this is worthwhile information to share with examinees but they must also stress to the examinees that they must withdraw from the exam very soon after the formal review so that staff may remove them from the list of examinees.
- e. Articles and Communications of Interest to Board Members. Henricks provided articles pertaining to bar pass rates, law school success rates, ABA's action on tougher bar pass standards for accreditation, and foreign student enrollment rates in U.S. graduate schools.
- f. Update on Swearing-In Ceremony and Bar Admission Forum. The State Bar's New Members Induction Ceremony is scheduled for 5/13/2019. Soltero will attend on behalf of BLE. BLE's Annual Bar Admission Forum is scheduled immediately after the Swearing-In and will take place at the Doubletree Hotel. Lawrence Krieger, a law professor who has researched and written on well-being of law students and lawyers, is currently in talks with BLE to present at the luncheon. He is eager to participate but is not able to attend in person due to time commitments. He has offered to attend remotely or possibly pre-record a presentation. Soltero expressed interest in his presentation by remote connection, rather than doing a recorded session. Massey agreed, suggesting that the venue have a backup connection available to ensure connectivity if BLE opts for a remote presentation. Nahdiah Hoang suggested having law students participate on the panel. Orr agreed that it would be interesting and informative to include law students if the topic focused on law student well-being. McKim suggested contacting Chris Ritter to solicit recommendations for panelists. Allison Drish offered to contact chemical dependency monitors to participate. Henricks will continue developing the program, working with Professor Krieger and others on scheduling.
- g. Report on Bills Filed in the Texas Legislature. Henricks is monitoring bills introduced in the Texas Legislature that may impact attorney licensure, including proposals to admit out of state lawyers who have failed the Texas Bar Examination, admission by examination for applicants who did not graduate from an approved law school, and

creation of a new public law school in the Rio Grande Valley. She will keep the Board posted on updates.

- h. State Bar Annual Meeting. BLE will host a booth at the State Bar Annual Meeting, scheduled in Austin at the JW Marriott for 6/13 – 6/14/2019. The BLE booth will be manned by BLE staff to provide information on transition to the UBE. Henricks encouraged all Board Members to attend. Henricks asked staff and Board Members who are planning to attend to please inform Laurie Gonzales.
 - i. Consider Proposed Standard Probationary License Requirement of Active Practice. Henricks reported that most regulatory agencies that license professionals require engagement in the profession to fulfill a period of probation. She proposed that BLE include a practice requirement in all probationary license orders. She does not believe most applicants will have an issue with this since they are seeking a probationary license to practice law. One member said that the Board needs to further clarify what is required. Another said that the admission without examination requirements establish what constitutes substantial practice and that could be used for probationary license orders as well. Henricks said that the Board could waive the practice requirement on an individual basis. Soltero moved to adopt the proposed language with these revisions: change chambers to chamber, use “or similar law-related setting,” add “or JD” to “Periods of unemployment or of employment that do not require the use of a Texas State Bar License will not apply to this period...” Massey seconded. The motion passed unanimously.
 - j. Board Group Photo. Henricks reminded the Board of a group photo in the 5th floor conference room at 2:00 PM.
6. Report of the Director of Character and Fitness. Drish relayed to the Board that she and Cook will work on a list of standard conditions for probationary licenses and will add the new practice requirement language to create a checklist for hearing panels. She will provide those as soon as they have been developed.
- a. Recommendations of Probationary Licenses to be Converted to Regular Licenses. From 1/1/2019 through 3/4/2019, three probationary licenses were converted to regular licenses.
 - b. Consider Proposed Rules for Character and Fitness Hearings. Members discussed the use of “chairperson” rather than “chairman;” a concern about item 4, which staff confirmed was erroneously included, so would be removed from the final draft; that in item 5C, “shall” be changed to “may;” adding “Except for good cause shown, ...” at the beginning of item 5; if C is the most important component of section 5, it should be moved to 5A; removing 5.A and 5.B altogether, leaving only 5.C, as the Board is qualified to determine expert witness credibility. One member had questions about expert witness designation. Bassinger explained that this information is needed to investigate

and prepare to examine expert witnesses. The Board agreed that the panel chair should be the arbiter of the expert designation.

Rivera, Jr. questioned allowing joint hearings. He expressed concerns about confidentiality. Henricks explained that confidentiality is not compromised when the issues are the same and the facts are already known to all applicants involved.

Rivera, Jr. moved to adopt proposed rule "5.C." The motion was seconded by Massey. The motion passed unanimously.

Ellis motioned to adopt proposed rule "1." The motion was seconded by Rivera, Jr. The motion passed unanimously.

7. **Report of the Director of Eligibility and Examinations.**
 - a. **Report on February 2019 Consolidated Bar Examination.** Hoang reiterated Henricks' earlier statements regarding the success of the February 2019 exam administration.
 - b. **Consider Approval of the Proposed Policy on LLM Waivers.** Hoang stated that this agenda item will be considered at a future Board Meeting.

8. **Report of the General Counsel.**
 - a. **Litigation Report.** Cook reported that the Malone case is status quo. The Block case has been dismissed by the trial court and the time to appeal is near expiration.

9. **Consider Appointment of a Uniform Bar Exam Implementation Committee.** Mackenzie suggested the current UBE committee continue to work on rule changes, and that a new committee be named to develop the Texas Law Course. He identified the ongoing tasks related to UBE to be potential rule changes and the need to develop a Texas Law Course, including securing speakers, obtaining written materials, creating videos, and developing the test, if any. Further discussion of a UBE Implementation Committee was tabled until the Supreme Court approves rules on the UBE and Texas Law Component.

10. **Consider Approval of the Completion of Investigations Policy Directive.** In 2015, the Sunset Commission recommended removing investigation deadlines in the BLE licensing statute as it did not specifically address out of state applicants who do not submit a Declaration of Intent to Study Law. Henricks requests approval of a policy directing compliance with Supreme Court rules on investigation deadlines that currently provide for a 270-day investigation period for all applicants who do not timely file a Declaration of Intention to Study Law. The proposed policy affirms that as a judicial agency, BLE will comply with Supreme Court directives. Odom asked if there is any consequence or remedy for an applicant whose investigation is delayed. Henricks confirmed that no consequence is provided under either Supreme Court rules or any statute. Ellis motioned to approve the proposed policy with staff given the authority to edit for grammar, punctuation, and formatting. Soltero seconded the motion. The motion passed unanimously.

11. Consider Issues Arising from Reports of the Executive Director, Director of Character and Fitness, Director of Eligibility and Examinations, and General Counsel. For future Executive Director Calendar Updates, Rivera, Jr. will include a brief presentation on NCBE activities.
12. Election of New Board Officers. This item was tabled for a future meeting.
13. Discuss Creation and Implementation of the Texas Law Course. After brief discussion, the Board agreed the item did not require an executive session. Henricks provided a list of suggested topics for the Texas Law Course for consideration by the Board. Information included a comparison of what is currently covered on the Texas Bar Examination with the topics covered on the UBE. The staff also provided a survey of topics covered for UBE states that requires a separate state law course or examination.

Henricks suggested the course should be appropriate for attorneys who are going to practice solo or in a small firm. She said that attorneys hired by large firms will usually receive intensive training on a specialty area, so the topics should focus on basic knowledge. She envisions this component as an overview of the basics of law that new attorneys might encounter in any practice setting.

Based on discussion, the agreed topics for inclusion, and the Board members who may be responsible for those topics were identified as follows:

- Texas Legal Ethics, Professionalism, Civility – Creed, TDRPC, TRDP, applicability of TX rules in Federal court, UPL, access to justice, IOLTA (Rivera)
- Real Property – Homestead, non-judicial foreclosure, liens (Giltner)
- Oil and Gas – Mineral rights, leases, surface rights, defensive clauses (Giltner)
- Administrative Law – Immigration, open government, APA, collateral consequences (Orr, Soltero)
- Employment Law – non-competes, at will, Payday Act (Soltero)
- Criminal Law and Procedure – Statutes of limitation, expunction, nondisclosures, Texas Constitution, collateral consequences, discovery, bail, search and seizure, right to counsel, unusual sentencing, state jail felonies, deferred adjudications, preservation of error, jury exemptions, jury shuffling, venue, Fair Defense Act, specialty courts (Orr)
- Wills, Trusts, and Guardianships – intestate succession, will requirements, will contests, non-probate transfers, small estate administration, application to probate will (Mackenzie)
- Texas Court Structure – Jurisdiction, criminal/civil split, open courts, local rules, eFile (Ellis, Massey, Orr)
- Family Law and Marital Property – Common law marriage, premarital agreements, property rights and characterization, liabilities/debts, grounds for divorce, basic claims/causes, SAPCR rights, duties, remedies, modifications, protective orders, enforcement, jurisdiction (McKim)
- Consumer – DTPA, DCPA, Insurance code, Home solicitation, Securities Act, Finance Code (Massey)

- Civil Procedure – Rule 91a, anti SLAPP, discovery, experts, attorney fees, extraordinary remedies, pleading, venue, forum contests, limitations, CPRC and civil remedies (Odom, Ellis)

Topics to Exclude were:

- Evidence (already tested on UBE, no substantive difference from Federal rules)
- Business Orgs
- UCC
- Maritime

Mackenzie reminded the Board that the currently proposed UBE rules provide that the Texas Law Course may be completed up to one year before and two years after passing the bar examination.

Henricks mentioned that discussion with the State Bar regarding the Texas Law Course has been fruitful. Executive Director Trey Apfel said the Bar sees that the course falls within their mission, so they are willing to assist. They have offered to host the course on their website.

Odom asked the Board to consider UBE next steps. Henricks said providing the topics list is imperative and that beginning discussions on faculty and curriculum are the next important step. She said the UBE Committee might want to meet with State Bar staff. Orr suggested the Board determine how much time should be allocated to each topic. Mackenzie suggested using the State Bar library to find available resources from which BLE could build the course materials. Soltero suggested that BLE use practitioners for faculty. Giltner felt BLE should wait until the Supreme Court establishes rules before the Board pursues next steps. Soltero agreed. Henricks explained she had asked the Supreme Court if BLE should await Supreme Court guidance but was told that the Board should proceed with identifying suggested course topics. Giltner expressed concerns that without guidance from the Supreme Court, BLE risks putting in more topics and content than the Supreme Court is considering. Henricks said she would contact Justice Brown after the Supreme Court meets on 3/26/2019 to discuss specific details, which should allow the Board to move forward with course development.


Going back to topics and curriculum, Odom stressed that the course content should not be so specific that every law change requires amendments to the videos and materials. Henricks agreed that checking for updates would be an ongoing project and edits will be needed periodically, but she concurred that the content should be basic enough that it is not likely to require frequent amendments.

Soltero asked about the funding component for the Texas Law Course. Henricks replied that the only real expense may be related to the software needed to administer the course, and that ILG has already proposed to administer and grade the exam for \$20 per person. The course will most likely be free to examinees. Henricks said it is her assumption that the State Bar will cover expenses, which should be nominal as instructors and participants would most likely volunteer to participate. BLE will cover expenses incurred by the State Bar.

Henricks closed by offering a proposed timeline. This included securing faculty and presenters by May 2019. If it is decided to hire an editor, she would like to have that completed by summer 2019. The deadline for submission of course materials would be set for the end of summer or early fall 2019, so that all materials could be compiled into videos in October/November 2019. Henricks said that if UBE transfers start as scheduled in December 2019, the course needs to be available by March or April of 2020. If the Supreme Court decides to include a test that is embedded with the course, it would be developed and deployed at the same time as the Texas Law Course videos. If the test is set to be stand-alone, Henricks said she was thinking the first test administration would be in May or June 2020.


14. Adjourn. The meeting adjourned at 1:55 PM.

Respectfully Submitted,



Susan Henricks,
Executive Director

Approved:



Al Odom,
Chair