

BILL ANALYSIS

Senate Research Center
85R2412 SRS-D

S.B. 302
By: Watson et al.
State Affairs
3/21/2017
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 302 is the Sunset bill for the State Bar of Texas. The state bar is a judicial agency of the state, with statutory authority to discipline attorneys, provide continuing legal education, and aid the courts in the administration of justice. Every person who is licensed to practice law in Texas must join the state bar.

S.B. 302 continues the state bar for the standard 12-year period, moving the agency's Sunset date from September 1, 2017, to September 1, 2029. In addition, S.B. 302 includes a number of changes to make the state bar more efficient and transparent.

For example, S.B. 302 improves the rulemaking process for disciplinary rules because the most recent attempt to revise them took about six years, alienated many attorneys, and resulted in no changes. The improved rulemaking process in S.B. 302 provides specific deadlines, public input requirements, and transparency provisions that are designed to prevent past problems from reoccurring. This new process maintains attorneys' right to vote on proposed disciplinary rules because this safeguard has served the state's legal profession well for decades.

S.B. 302 also strengthens the attorney discipline system by requiring fingerprint-based criminal background checks, reinstating the chief disciplinary counsel's investigatory subpoena power, streamlining the voluntary mediation and dispute resolution procedure, and requiring improved tracking and reporting of disciplinary case outcomes. Finally, S.B. 302 also creates a new independent ombudsman's office to monitor and help the public access the attorney discipline system.

As proposed, S.B. 302 amends current law relating to the continuation and functions of the state bar.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Supreme Court (supreme court) is modified in SECTION 4 (Section 81.024, Government Code) of this bill.

Rulemaking authority is expressly granted to the supreme court in SECTION 8 (Section 81.083, Government Code) and SECTION 14 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 81.003, Government Code, as follows:

Sec. 81.003. SUNSET PROVISION. Provides that the State Bar of Texas (state bar) is subject to Chapter 325 (Texas Sunset Act). Provides that unless continued in existence as provided by that chapter, this chapter expires September 1, 2029, rather than September 1, 2017.

SECTION 2. Amends Section 81.0201, Government Code, by amending Subsection (b) and adding Subsection (c), as follows:

(b) Requires that the training program provide the person with information regarding:

(1) the law governing state bar operations, rather than the legislation that created the state bar and the board of directors of the state bar (board of directors);

(2) to (4) makes no changes to these subdivisions;

(4-a) the scope of and limitations on the rulemaking authority of the state bar;

(5) and (6) makes no changes to these subdivisions;

(7) the requirements of:

(A) laws relating to open meetings, public information, administrative procedure, and the disclosure of conflicts of interest, rather than the open meetings law, Chapter 551 (Open Meetings); the public information law, Chapter 552 (Public Information); and

(B) other laws applicable to members of a state policymaking body in performing their duties, rather than other laws relating to public officials, including conflict-of-interest laws; redesignates existing Paragraph (C) as Paragraph (B); and

(8) makes no change to this subdivision.

(c) Requires the executive director of the state bar (executive director) to create a training manual that includes the information required by Subsection (b). Requires the executive director to distribute a copy of the training manual annually to each member of the board of directors. Requires each member of the board, on receipt of the training manual, to sign and submit to the executive director a statement acknowledging receipt of the training manual.

SECTION 3. Amends Section 81.022, Government Code, by adding Subsection (a-2), as follows:

(a-2) Requires any change in a membership fee or other fee for members of the state bar to be clearly described and included in the supreme court's proposed budget and considered by the supreme court in its deliberations on the budget. Prohibits the budget from being implemented unless approved by the court as part of its budget.

SECTION 4. Amends Sections 81.024(a) and (b), Government Code, as follows:

(a) Requires the supreme court to promulgate the rules governing the state bar. Deletes existing text authorizing the rules to be amended as provided by this section.

(b) Authorizes the supreme court to:

(1) as it considers necessary, rather than either as it considers necessary, pursuant to a resolution of the board of directors of the state bar, or pursuant to a petition signed by at least 10 percent of the registered members of the state bar, prepare, propose, and adopt rules or amendments to rules for the operation, maintenance, and conduct of the state bar; and

(2) in accordance with Subchapter E-1, adopt rules for the discipline of state bar members. Makes a nonsubstantive change.

SECTION 5. Amends Subchapter B, Chapter 81, Government Code, by adding Section 81.037, as follows:

Sec. 81.037. CRIMINAL HISTORY RECORD INFORMATION. (a) Requires the state bar to require that each member of the state bar submit a complete and legible set of

fingerprints, on a form prescribed by the state bar, to the state bar or to the Texas Department of Public Safety (DPS) for the purpose of obtaining criminal history record information from DPS and the Federal Bureau of Investigation (FBI). Authorizes the state bar to obtain the information from the Board of Law Examiners (BLE) for a state bar member who has been issued an initial license.

(b) Provides that a state bar member is not required to submit fingerprints under this section if the member has previously submitted fingerprints to BLE and BLE made the information accessible to the state bar or the state bar or DPS for a previous license renewal under this chapter.

(c) Requires the board of directors to conduct a criminal history record check of each member of the state bar using information provided by the state bar member or the BLE under this section or made available to the state bar by DPS, the FBI, and any other criminal justice agency under Chapter 411 (Department of Public Safety of the State of Texas), Government Code.

(d) Authorizes the state bar to enter into an agreement with DPS to administer a criminal history record check required under this section and authorize DPS to collect from each state bar member the costs incurred by DPS in conducting the criminal history record check.

(e) Authorizes the state bar to administratively suspend or refuse to renew the license of a member of the state bar who fails to assist the state bar in obtaining criminal history record information under this section.

SECTION 6. Amends Section 81.054(a), Government Code, as follows:

(a) Requires the supreme court to set membership fees and other fees for members of the state bar during the court's annual budget process under Section 81.022 (Annual Budget; Public Budget Hearing). Requires that the fees, except as provided by Subsection (j) (relating to requiring the supreme court to set an additional legal services fee in an amount of \$65) and those set for associate members, be set in accordance with this section, rather than this section and Section 81.024 (Rules).

SECTION 7. Amends Section 81.072(e), Government Code, as follows:

(e) Requires the state bar to establish a voluntary mediation and dispute resolution procedure to:

(1) attempt to resolve each minor grievance referred to the voluntary mediation and dispute resolution procedure by the chief disciplinary counsel, rather than attempt to resolve each allegation of certain attorney misconduct; deletes existing Paragraphs (A) and (B); and

(2) makes no change to this subdivision.

SECTION 8. Amends Subchapter E, Chapter 81, Government Code, by adding Sections 81.080, 81.081, 81.082, 81.083, 81.084, 81.085, and 81.086, as follows:

Sec. 81.080. ISSUANCE OF SUBPOENA; OBJECTION. (a) Authorizes the chief disciplinary counsel, on approval of the presiding officer of the appropriate district grievance committee, to, during an investigation of a grievance, issue a subpoena that relates directly to a specific allegation of attorney misconduct.

(b) Requires the chief disciplinary counsel to provide a process for a respondent to object to a subpoena issued under this section.

Sec. 81.081. ATTORNEY SELF-REPORTING. Requires the chief disciplinary counsel to develop guidelines and a procedure for an attorney to self-report any criminal offense

committed by the attorney and any disciplinary action taken by another state's bar against the attorney.

Sec. 81.082. PROCESS TO IDENTIFY COMPLAINTS SUITABLE FOR SETTLEMENT OR INVESTIGATORY HEARING. (a) Requires the chief disciplinary counsel to develop a process to identify a complaint that is appropriate for a settlement attempt or an investigatory hearing before a trial is requested or the complaint is placed on a hearing docket.

(b) Authorizes the chief disciplinary counsel to authorize a settlement at any time during the disciplinary process.

Sec. 81.083. SANCTION GUIDELINES. (a) Requires the chief disciplinary counsel to propose and the supreme court to adopt by rule 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 grievances heard by a district grievance committee and grievances heard by a district court.

(b) Requires the chief disciplinary counsel to ensure that interested parties are provided an opportunity to comment on the proposed sanction guidelines.

(c) Provides that the sanction guidelines adopted under this section do not limit the authority of a district grievance committee or of a district judge to make a finding or issue a decision.

Sec. 81.084. GRIEVANCE TRACKING SYSTEM. (a) Requires the chief disciplinary counsel to create and maintain a grievance tracking system for grievances filed and disciplinary decisions issued under this subchapter.

(b) Requires the grievance tracking system to include certain information.

(c) Requires the chief disciplinary counsel to periodically take certain actions with the information from the grievance tracking system.

Sec. 81.085. REGULAR SEARCH OF NATIONAL LAWYER REGULATORY DATA BANK. Requires the chief disciplinary counsel to establish a process to regularly search the National Lawyer Regulatory Data Bank maintained by the American Bar Association to identify a member of the state bar who is disciplined in another state.

Sec. 81.086. TELECONFERENCE. Authorizes the chief disciplinary counsel to hold investigatory and disciplinary hearings by teleconference.

SECTION 9. Amends Chapter 81, Government Code, by adding Subchapters E-1 and E-2, as follows:

**SUBCHAPTER E-1. COMMITTEE ON DISCIPLINARY RULES AND REFERENDA;
DISCIPLINARY RULE PROPOSAL PROCESS**

Sec. 81.0871. DEFINITION. Defines "committee" as the Committee on Disciplinary Rules and Referenda.

Sec. 81.0872. ESTABLISHMENT OF COMMITTEE. (a) Sets forth the composition of the committee.

(b) Requires the president of the state bar to designate an attorney member of the committee to serve as the presiding officer of the committee for a term of one year.

(c) Provides that committee members serve staggered three-year terms, with one-third of the members' terms expiring each year.

Sec. 81.0873. COMMITTEE DUTIES. Requires the committee to regularly review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, at least annually issue to the supreme court and the board of directors a report on the adequacy of the rules reviewed, and oversee the initial process for proposing a disciplinary rule under Section 81.0875.

Sec. 81.0874. STAFF ATTORNEY. Authorizes the state bar to hire a staff attorney to assist the committee.

Sec. 81.0875. INITIATION OF RULE PROPOSAL PROCESS. (a) Authorizes the committee to initiate the process for proposing a disciplinary rule for the state bar as the committee considers necessary or in conjunction with the review of the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure.

(b) Requires the committee, not later than the 60th day after the date the committee receives a request to initiate the process for proposing a disciplinary rule, to initiate the process or issue a written decision declining to initiate the process and the reasons for declining.

(c) Authorizes a request to initiate the process for proposing a disciplinary rule under Subsection (b) to be made by certain stakeholders.

Sec. 81.0876. RULE PROPOSAL. (a) Requires the committee, on initiation of the process for proposing a disciplinary rule, to study the issue to be addressed by the proposed rule, hold a public hearing on the issue, and draft the proposed rules, which may not address more than one subject.

(b) Requires the committee to publish the proposed disciplinary rule in the Texas Register and the Texas Bar Journal.

(c) Requires the committee to give interested parties at least 30 days from the date the proposed disciplinary rule is published as required to submit comments on the rule to the committee. Requires the committee to make all reasonable efforts to solicit comments from different geographic regions in this state, nonattorney members of the public, and members of the state bar.

(d) Requires the committee to hold a public hearing on the proposed disciplinary rule if, during the comment period, the hearing is requested by at least 25 people, a state agency or political subdivision of this state, or an association with at least 25 members.

(e) Authorizes the committee, on conclusion of the comment period, to amend the proposed disciplinary rule in response to the comments.

(f) Requires the committee to vote on whether to recommend a proposed disciplinary rule to the board of directors not later than the 60th day after the final day of the comment period. Prohibits the committee from recommending a proposed disciplinary rule unless at least five members of the committee favor recommendation.

(g) Requires the committee to submit a proposed disciplinary rule that is recommended by the committee to the board of directors for review and consideration.

(h) Provides that a proposed disciplinary rule is withdrawn six months after the date the rule proposal process is initiated if the committee does not recommend the rule to the board of directors before expiration of that time.

Sec. 81.0877. APPROVAL OF PROPOSED DISCIPLINARY RULE BY BOARD OF DIRECTORS. (a) Requires the board of directors to vote on each proposed disciplinary rule recommended by the committee not later than the 180th day after the date the rule is received from the committee. Requires the board to vote for or against the rule or return the rule to the committee for additional consideration.

(b) Requires the board of directors, if a proposed disciplinary rule is approved by a majority of the directors, to petition the supreme court to order a referendum as provided by Section 81.0878 on the rule by the members of the state bar.

Sec. 81.0878. REFERENDUM VOTE BY STATE BAR MEMBERS. (a) Requires the supreme court, on receipt of a petition filed by the board of directors, to distribute a copy of the rule in ballot form to each member of the state bar and order a vote on the rule and publish the rule in the Texas Register and Texas Bar Journal.

(b) Requires the supreme court to give state bar members at least 30 days to consider a proposed disciplinary rule before voting begins and 30 days to vote on the proposed disciplinary rule following the period for considering the proposed rule.

(c) Requires the state bar to provide proponents and opponents of the proposed disciplinary rule an equal opportunity to present their views at any bar sponsored forum at which the rule referendum is discussed.

(d) Authorizes one or more proposed disciplinary rules to appear on a single referendum ballot. Requires state bar members to vote for or against each rule. Provides that if a majority of the members who vote on the proposed rule vote in favor of the rule, the rule is approved by the members of the state bar.

Sec. 81.0879. SUPREME COURT APPROVAL OR REJECTION. Authorizes the supreme court by majority vote to approve or reject a proposed disciplinary rule in its entirety, but may not approve or reject only part of the rule. Provides that if the supreme court does not vote on the rule on or before the 60th day after the date the rule is approved by bar members under Section 81.0878, the rule is considered approved by the supreme court.

Sec. 81.08791. RULE DELIBERATIONS. (a) Requires the committee, the board of directors, or the supreme court to provide notice of any deliberation on a proposed disciplinary rule, and the deliberation to be open to the public.

(b) Requires the board of directors and the supreme court to record and make public each vote for or against a proposed disciplinary rule.

Sec. 81.08792. PROPOSED DISCIPLINARY RULE APPROVAL REQUIRED BEFORE ADOPTION. Prohibits a proposed disciplinary rule from being adopted by the supreme court unless the rule is approved by the committee, the board of directors, the members of the state bar, and the supreme court.

Sec. 81.08793. USE OF TECHNOLOGY. Requires the supreme court, the committee, and the state bar to use technological solutions throughout the disciplinary rule proposal process to promote financial efficiency and comments from interested persons.

SUBCHAPTER E-2. OMBUDSMAN FOR ATTORNEY DISCIPLINE SYSTEM

Sec. 81.0881. DEFINITIONS. Defines "ombudsman" and "system."

Sec. 81.0882. OMBUDSMAN FOR ATTORNEY DISCIPLINE SYSTEM. (a) Requires the state bar to fund one full-time equivalent position of ombudsman for the attorney discipline system.

(b) Provides that the ombudsman is selected by the members of the supreme court and is independent of the state bar, the board of directors, the Commission for Lawyer Discipline (commission), and the chief disciplinary counsel.

(c) Requires the ombudsman to report directly to the supreme court.

Sec. 81.0883. POWERS AND DUTIES OF OMBUDSMAN. (a) Requires the ombudsman to perform certain duties.

(b) Prohibits the ombudsman from performing certain actions.

Sec. 81.0884. ACCESS TO INFORMATION. Requires the chief disciplinary counsel, a district grievance committee, the board of directors, the commission, and state bar members to share with the ombudsman requested information that is necessary to determine whether the state bar followed procedural rules related to a particular grievance or evaluate the system's efficacy and adequacy.

Sec. 81.0885. CONFIDENTIAL INFORMATION; PRIVILEGED COMMUNICATIONS. (a) Provides that all types of information, proceedings, hearing transcripts, and statements presented to the ombudsman are confidential and may not be disclosed to any person other than the chief disciplinary counsel unless disclosure is ordered by a court.

(b) Prohibits the ombudsman from accessing privileged communications and information shared between the chief disciplinary counsel and the commission.

SECTION 10. Amends Section 81.115(b), Government Code, as follows:

(b) Requires that a profile contain the following information on each attorney:

(1) to (4) makes no changes to these subdivisions;

(5) any public disciplinary sanctions issued by the state bar against the attorney, including a link on the attorney's online profile to the full text of the disciplinary judgment entered by a district grievance committee or district judge, rather than during at least the 10-year period preceding the date of the profile; and

(6) makes a conforming change.

SECTION 11. Amends Section 411.100, Government Code, as follows:

Sec. 411.100. New heading: ACCESS TO CRIMINAL HISTORY RECORD INFORMATION: BOARD OF LAW EXAMINERS AND STATE BAR OF TEXAS. (a) Makes no change to this subsection.

(a-1) Provides that the state bar is entitled to obtain from DPS, criminal history record information maintained by DPS that relates to a person who is a member of the state bar, or from BLE, criminal history record information.

(b) Prohibits criminal history record information obtained under Subsection (a) or (a-1) from being released or disclosed to any person, except on court order or with consent of the applicant. Makes a nonsubstantive change.

(c) Requires the board, immediately following the decision of BLE, rather than the board's decision, on recommending an applicant, to collect and make

accessible to the state bar, rather than seal, all criminal history record information obtained by the board that relates to the applicant.

SECTION 12. Amends Section 411.1005(a), Government Code, as follows:

(a) Provides that the general counsel of the state bar is entitled to obtain from DPS criminal history record information maintained by DPS that relates to a person who is:

- (1) and (2) makes nonsubstantive changes;
- (3) redesignates existing Subdivision (2) as Subdivision (3); or
- (4) redesignates existing Subdivision (3) as Subdivision (4).

SECTION 13. Repealer: Sections 81.024(c) (relating to requiring the court, when the supreme court has prepared and proposed rules or amendments to rules, to distribute a copy of each rule or amendment in ballot form), (d) (relating to requiring the court to count the returned ballots at the end of the 30-day period), (e) (relating to requiring the supreme court to promulgate each rule and amendment that receives a majority of the votes cast in an election), (f) (relating to requiring the vote to be open to inspection), and (g) (relating to prohibiting a rule from being promulgated unless it has been approved by the members of the state bar), Government Code.

Repealer: Section 411.1005(c) (relating to requiring the state bar to destroy criminal history record information promptly after a final determination is made), Government Code.

SECTION 14. (a) Requires the state bar to obtain criminal history record information on each person who is a member of the state bar on the effective date of this Act as authorized by Section 81.037, Government Code, as added by this Act, not later than September 1, 2019.

(b) Requires the president of the state bar and the supreme court, as soon as practicable after the effective date of this Act, but no later than January 1, 2018, to appoint the initial members of the committee as follows:

- (1) the state bar president shall appoint two people to terms expiring in 2018;
- (2) the supreme court shall appoint one person to a term expiring in 2018;
- (3) the state bar president shall appoint two people to terms expiring in 2019;
- (4) the supreme court shall appoint one person to a term expiring in 2019;
- (5) the state bar president shall appoint two people to terms expiring in 2020; and
- (6) the supreme court shall appoint one person to a term expiring in 2020.

(c) Requires the supreme court, notwithstanding Subchapter E-1, Government Code, as added by this Act, not later than March 1, 2018, to adopt certain necessary rules.

(d) Requires the chief disciplinary counsel to develop proposed changes to the disciplinary rules regarding the time for conducting an investigation of a grievance or issuing a subpoena related to an investigation or attempting a settlement in an investigatory hearing under Section 81.082, Government Code, as added by this Act, propose rules necessary to implement the settlement process described by Section 81.082, Government Code, as added by this Act, and propose rules to establish a grievance referral program under the Texas Rules of Disciplinary Procedure, including criteria for attorney participation and authorization for use of the program at any point in the attorney disciplinary process.

(e) Requires the state bar to assist the supreme court on certain rule modifications to the Texas Rules of Disciplinary Procedure that are necessary to address Section 81.792(e)(1), Government Code, as amended by this Act.

(f) Requires the state bar to include on attorneys' online profiles any historical information on public disciplinary sanctions as is practicable under Section 81.115(b), Government Code, as amended by this Act. Requires that a public disciplinary action issued on or after the effective date of this Act be included on the attorney's online profile as required by Section 81.115(b), Government Code, as amended by this Act.

SECTION 15. (a) Provides that except as provided by Subsection (b) of this section, Section 81.0201, Government Code, as amended by this Act, applies to a member of the board of directors appointed before, on, or after the effective date of this Act.

(b) Requires a member of the board of directors who, before the effective date of this Act, completed the training program required by Section 81.0201, Government Code, as that law existed before the effective date of this Act, to complete additional training only on subjects added by this Act to the training program as required by Section 81.0201, Government Code, as amended by this Act. Prohibits a board member described by this subsection from voting, deliberating, or being counted as a member in attendance at a meeting of the board held on or after December 1, 2017, until the member completes the additional training.

SECTION 16. Effective date: September 1, 2017.