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Court Sets Deadline for Dental Board Law

A state district judge has given the 74th Legislature until February 8, 1995, to enact a law creating a board to license dentists and dental hygienists in Texas, as required under the Texas Dental Practice Act. The state dental licensing board, the Texas Board of Dental Examiners, ceased licensing operations September 1, 1994. The agency was abolished after the Legislature failed to continue it past an automatic "sunset" date.

The Dental Practice Act, which sets statutory standards for dentistry, continues to authorize only the now-defunct state dental board to license dentists and dental hygienists and to register dental laboratories. The practice act did not expire on the board sunset date.

In the final three days of the 1993 legislative session the conference committee report of a bill to continue the dental board and modify the Dental Practice Act, SB 673 by Moncrief, was adopted by the Senate, but not by the House. House members cited opposition from the Texas Dental Association to allowing the governor, rather than the dental board, to appoint the three members of an advisory committee of dental hygienists.

After the dental board's demise an interim plan was implemented to continue its basic functions other than licensing. The plan was devised by the Governor's Office, with the assistance of legislative leaders, several state agencies and other interested parties. The board renewed current dental licenses before it expired on September 1 so that none would lapse during the licensing hiatus. Agency personnel remain in the former state board office but are paid through other state agencies designated by the governor. The Office of the Attorney General, along with district and county attorneys, has enforcement authority.

In 1994 dental students and dental laboratories filed suit in the 345th State District Court asking the court to find unconstitutional either the Dental Practice Act or the Sunset Act on the grounds that statutory licensing requirements could not be met without a regulatory board. Public health and rights to practice dentistry would be compromised, they claimed.

On August 2, 1994, state District Judge Scott McCown of Austin gave the Legislature until February 8, 1995, to enact legislation solving the licensing problem. Judge McCown found the state's interim measures adequate to regulate dentistry temporarily but said he would find the Dental Practice Act unconstitutional if the Legislature did not meet his deadline. The result would be invalidation of the statutory standards of dentistry and the licenses issued by the board.

In September the Texas Dental Association and the Texas Dental Hygienists' Association, the primary parties in the dispute over the 1993 bill, reached agreement on the composition and authority of the dental hygiene committee and other related issues. Sen. Mike Moncrief plans to incorporate the agreement into legislation recreating the dental board.

BACKGROUND

The State Board of Dental Examiners, created in 1897, is charged with administering licensing examinations, issuing licenses and enforcing the Dental Practice Act (VACS art. 4543, et seq.), which prohibits unlicensed individuals from practicing dentistry or dental hygiene, governs practice standards and establishes regulatory procedures.

The governing board included 10 dentists, two dental hygienists and three public members, who elected a chair among themselves. In fiscal 1993 the agency had 21 full-time employees. The board licensed and monitored the practices of about 11,000 dentists and 7,000 dental hygienists and registered about 1,000 dental labs. As required by law the board appointed an eight-member Dental Hygiene Advisory Committee and a three-member Dental Laboratory Certification Council. Neither group had rulemaking authority.

Dentists must undergo at least four years of training from an accredited program before licensing, and dental hygienists must undergo at least two. Hygienists are authorized to clean teeth, take dental x-rays, topically

apply drugs in the mouth and perform certain duties delegated by dentists. Hygienists must work in a setting supervised by a dentist. The supervising dentist is required to examine a patient within the 12 months before the dental hygiene procedures.

Dental laboratories are settings in which prosthetic or orthodontic dental devices (such as dentures, dental bridges, crowns, etc.) are created or adjusted. In addition to registering with the board, laboratories must prove that a nationally certified dental technician is working on the premises and meet other standards.

In 1993 the dental board was one of 20 health licensing boards that underwent sunset review by the Legislature. The sunset process, established in 1977, requires periodic legislative reviews of state agencies. After the review the Legislature either continues an agency, often with modifications, or allows the agency to expire (Texas Government Code, Chapter 325). The initial review is carried out by the Texas Sunset Advisory Commission, a legislative panel with a staff assigned to study agencies. The law sets a date for automatic expiration of each agency that undergoes sunset review.

The sunset commission had recommended continuing the Board of Dental Examiners until September 1, 2005, and increasing the number of public board members from three to five. The commission had not adopted a staff recommendation to separate the licensing of dental hygienists from that of dentists.

Details of sunset bill

Dental board. The composition and appointment of the dental board and dental hygiene advisory committee were controversial and details varied throughout the sunset process. For example, one Senate version called for reducing the number of dentists on the board from 10 to eight, increasing the number of public members from three to five, leaving the number of hygienists on the board at two, and giving the governor power to appoint the board chair. A House version called for nine dentists, two hygienists, one dental technician and three public members on the board and no governor-appointed chair.

Hygiene committee. The dental hygiene committee would have remained an advisory council in a Senate version, but its composition would have changed from eight hygienists appointed by the board to four hygienists and two public members, all appointed by the governor. The House version would have created a three-member dental hygienist council appointed by the governor that would have some rulemaking authority.

The conference committee report, adopted by the Senate on May 29, would have established a six-member dental

hygiene advisory council with three members appointed by the board and three members appointed by the governor. The board of dental examiners would have been composed of eight dentists, two dental hygienists and five public members, with the chair appointed by the governor.

Appointment by the governor of half the dental hygiene council members was opposed by the Texas Dental Association, and on May 30 the House acceded to a TDA request and refused to adopt the conference report. TDA argued that appointments by the governor might lead to self-regulation by dental hygienists. The association was counting on Senate passage of an alternative bill, HB 2794 by Cain, which would have continued the agency for two years without changes to the board or other parts of the practice act. The Senate did not consider HB 2794, and the Legislature adjourned without continuing the dental board.

Under the sunset provision in the Dental Practice Act, VACS art. 4543(b), the dental board was abolished September 1, 1993. The Sunset Act, in Government Code sec. 325.017, gives an agency one year to conclude its business prior to terminating operation. On September 1, 1994, the agency ceased to exist. The General Appropriations Act, SB 5 by Montford, funded the Board of Dental Examiners for fiscal 1994-95 with a contingency rider ending appropriations September 1, 1994, if the agency were abolished under the Sunset Act.

Interim measures

During fiscal 1994 the agency administered exams, issued licenses and handled complaints. About 95 percent of all current licenses for dentists, dental hygienists and dental labs were renewed before the board was abolished in September, so none would expire before the Legislature convened in January. The other 5 percent of the licenses were not renewed due to licensee address changes, retirement or death.

Most dental students graduate in May, and dental licensing exams were administered in May, June, July and August. Students who passed the exams and who completed necessary licensure application papers by August 25, 1994, were licensed by the agency prior to its shutdown. The end of exam administration primarily affected graduates who had failed the exam and needed to retake it and potential licensees who moved to Texas after the cutoff date.

Under an interim regulatory plan, on August 30 the governor assigned dental board responsibilities and records to the Department of Information Resources, the Health Professions Council and the Attorney General's Office. Appropriations allocated to the dental board for fiscal 1995 were transferred to the designated agencies to carry out newly assigned responsibilities.

Property and records remain at the former agency's offices in Austin. Staff members continue to perform their duties but are paid by the agencies that oversee the duties. The agency is now called the Texas Dental Information Resource Center (DIRC). It maintains the former dental board telephone number: 512/463-6400. The DIRC staff had dropped, mainly through attrition, from 21 to 14 full-time employees by late 1994.

The Department of Information Resources is performing license-information responsibilities, such as license verification, open records requests, other permits and tracking requests. Licensing, however, may not be delegated, since the Dental Practice Act authorizes only the dental board to grant licenses. The Health Professions Council, a state agency created last session, assumed informational and operational duties, such as complaint and inquiry response, daily supervision of employees, revenue and budget responsibilities. The Board of Health also temporarily adopted the Board of Dental Examiners rules relating to the use of radiology and anesthesia by dentists, to preserve and monitor professional practice standards.

The Office of the Attorney General assumed dental practice enforcement activities, including complaint investigation. The Dental Practice Act also authorizes local enforcement of the act. District and county attorneys may file and prosecute civil judicial proceedings in the name of the state against any alleged violator. Upon finding a violation, the district court can suspend or revoke a license or take other action deemed necessary.

Lawsuit against the state

The state was sued by a group seeking to block abolition of the dental board. On August 1 and 2, 1994, 345th District Judge Scott McCown of Austin heard joined class-action lawsuits brought against the state by graduating dental students, out-of-state dentists and members of the dental laboratory industry, who claimed they were being denied equal protection under law. The plaintiffs asked the court to declare either the Dental Practice Act or the Sunset Act unconstitutional.

On August 2 the judge denied the group's requests to appoint a master to oversee dentistry and to find the Sunset Act or the Dental Practices Act unconstitutional. But he said he would declare the practice act unconstitutional if the Texas Legislature failed to pass a law addressing the licensing problem by February 8, 1995. Finding the Dental Practice Act unconstitutional would eliminate statutory licensing and enforcement protections and invalidate the licenses of dentists and dental hygienists and dental lab registrations.

THE PROPOSAL

In September the Texas Dental Hygienists' Association and the Texas Dental Association reached agreement on the composition and appointment of the dental examiner board and the dental hygiene advisory committee. The board would be expanded from 15 to 18 members, all appointed by the governor, and the number of public members raised from three to six. The board would continue to include 10 dentists and two hygienists. The board chair would be elected by the board members, as under previous law. The agreement specifies that the chair must be a dentist.

The dental hygiene advisory committee would be composed of three hygienists, two public members and one dentist. The board would appoint the dentist, and the governor would appoint the other members. The committee could elect its own chair and develop and recommend rules establishing dental hygienist licensure qualification and educational requirements. The dental board would have final rulemaking authority but would have to state reasons for rejecting advisory committee recommendations and return the recommendations to the committee for further development. The dental board would be prohibited from abolishing the advisory committee within the next four years and prior to legislative review of the committee.

The Texas Dental Hygienists' Association further agreed not to pursue or support legislation or rules seeking self-regulation, independent practice or regulatory transfer to another state agency for a period of three years from the effective date of the statute reinstating the board and implementing the agreement. The Texas Dental Association also agreed for the same time period not to pursue or support legislation or rules allowing persons completing nonaccredited education programs to be licensed or registered as dental hygienists.

The compromise also would automatically reestablish existing rules of the dental board when the board is reinstated. Sen. Moncrief, sponsor of the Board of Dental Examiners bill last session, in late 1994 announced plans to file legislation reflecting the agreement. He said he anticipated that the board would resume normal operations within a month of the bill's enactment.

The 1995 legislative session begins January 10, and the court's deadline for a dental board bill is February 8. To consider a bill within the first 30 days of a legislative session, the bill must be labeled an emergency by the governor or both houses must suspend the constitutional "order-of-business" provision (Art. 3, sec. 5), by a four-fifths majority vote. A law would have to pass by a two-thirds majority in both houses to take effect immediately.

In every session since the order-of-business provision was adopted in 1930, with the exception of 1981 and 1983, the House has suspended the provision. Senate rules traditionally require a separate vote of four-fifths of the membership to suspend the limitation for each bill considered during the first 60 days, except for emergency and local bills.

THE DEBATE

Before reaching their recent agreement, dental hygienists and dentists debated various points in the proposed dental-board law. These points are summarized below.

Hygienists said. The dentist-dominated dental board and dental hygiene committee created conflicts of interest and suppressed the growth and maturation of the dental hygiene profession. Issues affecting hygienists were given insufficient consideration. The dental board's power to appoint the dental hygienists on the dental hygiene advisory committee was inhibiting. An open records request filed by the dental hygienists in 1992 failed to turn up any record of written recommendations by the committee to proposed board rules.

Texas traditionally respects professional expertise and allows professions to regulate themselves. Doctors control the practice setting for nurses, but the nursing professions are regulated by their own boards. One group of licensees should not regulate another group. Dentists control dental hygienist activities in the workplace and also control the boards and committees regulating hygienists, eroding the system of checks and balances.

Many dentists want to delegate dental hygienist duties to individuals without accredited dental hygiene training, which could erode the quality of care. Current licensing standards require two to four years of education and

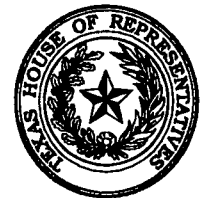
training from a state-approved program, making most dental hygienists better qualified than dentists in dental hygiene procedures. Less rigorous standards, such as allowing on-the-job training, are inappropriate in a growing profession with no labor shortage.

An autonomous or semi-autonomous board regulating hygienists would eliminate potential conflicts of interest and would provide a publicly recognized access point for questions relating to dental hygiene and hygienists. Alternately, dental hygienists need to be given a greater voice and autonomy through measures such as governor appointments to the advisory committee and a more formalized advisory role to the dental board.

Dentists said. An autonomous dental hygienist board would inappropriately elevate the authority of dental hygienists and lead to pressure for laws allowing independent practice by dental hygienists. This would splinter the delivery of dental services. Dental hygienists have less training than dentists, who serve as quarterbacks in a dental care team that includes dental hygienists and dental assistants. Dental hygienists are not allowed to practice independently and should not regulate their profession independently.

A governor-appointed dental hygiene committee would have been a step toward self-regulation. An autonomous or semi-autonomous dental hygiene board would create too much bureaucracy; only one board should regulate all dental procedures. Dental hygienists have misunderstood the nontraditional training ideas of dentists who want to respond to a slight shortage of dental hygienists by opening up dental hygiene education to individuals who may not be able to go to school full time.

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