

The State Board of Dental Examiners (Board) proposes amendments to rule 22 TAC §101.8, pertaining to persons with criminal backgrounds. The amendments, if adopted, update the Board's disciplinary guidelines concerning the imprisonment of a licensee following a felony conviction or deferred adjudication, in accordance with Senate Bill 1080.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this proposed rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the proposed rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does limit an existing regulation by narrowing the grounds for mandatory revocation of a license to comply with state law; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

The Board is requesting public comments on the proposed rule and information related to the cost, benefit, or effect of the proposed rule, including any applicable data, research, or analysis. Any information that is submitted in response to this request must include an explanation of how and why the submitted information is specific to the proposed rule.

Comments on the proposed rule may be submitted to Casey Nichols, Executive Director, 1801 Congress Avenue, Suite 8.600, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register*. To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or e-mailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No other statutes, articles or codes are affected by this proposal.

Legal counsel for the Board has reviewed the proposed rule and has found it to be within the Board's authority to adopt.

<rule>

§101.8. Persons with Criminal Backgrounds.

(a) The purpose of this section is to establish automatic sanctions, mandatory sanctions, recommended sanctions, guidelines and criteria for the disciplinary actions to be taken by the Board against applicants and licensees with criminal backgrounds.

(b) Definitions. In this section, the following terms shall apply:

(1) "Applicant" means a person applying for a license, certificate, registration, permit, or other authorization that is issued by the Board under the Dental Practice Act.

(2) "Conviction" shall mean a conviction under federal law or the law of any state, district, or territory of the United States. A conviction shall be considered "final" upon the imposition of a sentence of imprisonment, parole, probation, community supervision, or other punishment after such conviction. Pursuant to Texas Occupations Code §53.021(e)(1), the Board shall consider placement of a defendant under deferred adjudication community supervision, or a similar deferral of adjudication of guilt under federal or state law, as a final conviction for all licensing and disciplinary purposes under the Texas Occupations Code and Board rules.

(3) "Final Disposition" shall mean the date on which the applicant or licensee completed the imposed sentence after conviction, including any period of parole or probation, or completed the conditions of deferred adjudication community supervision or similar deferral of adjudication of guilt, as shown by the certified records of the court or supervising government authority.

(4) "Health Care Professional" shall have the meaning provided in Texas Occupations Code §108.051.

(5) "License" means a license, certificate, registration, permit, or other authorization that is issued by the Board under the Dental Practice Act.

(6) "Licensee" means the holder of a license, certificate, registration, permit, or other authorization that is issued by the Board under the Dental Practice Act.

(7) "Offense Relating to the Regulation of Dentists, Dental Hygienists or Dental Assistants" means any criminal violation of the Texas Dental Practice Act; any criminal violation of a law related to the billing and payment for dental care services; any criminal violation of a law related to the treatment and care of patients; and any criminal violation of a law related to the preservation and protection of patient records or patient protected health information.

(c) Automatic Denial or Revocation of Dental or Dental Hygiene License. Based upon Chapter 108, Subchapter B, of the Texas Occupations Code, certain convictions shall result in automatic

denial of an application for a dental or dental hygiene license, or revocation of a current dental or dental hygiene license. A person who is denied or a licensee who has their license revoked under this subsection may reapply for the license, or apply for reinstatement of the revoked license, if the conviction or deferred adjudication is reversed, set aside, or vacated on appeal, or after the expiration of the period for which the person is required to register as a sex offender under Chapter 62, Code of Criminal Procedure.

(1) Automatic Denial of Application. The following convictions shall result in automatic denial of an application for licensure as a dentist or dental hygienist submitted on or after September 1, 2019.

(A) Any conviction resulting in the requirement that the applicant register as a sex offender under Chapter 62, Code of Criminal Procedure.

(B) Any previous conviction of or placement on deferred adjudication community supervision for the commission of a felony offense involving the use or threat of force.

(C) Any previous conviction or placement on deferred adjudication community supervision for the commission of an offense under Texas Penal Code §§22.011, 22.02, 22.021, or 22.04, or an offense under the laws of another state or federal law that is equivalent to an offense under one of those sections:

(i) committed when the applicant held a license as a health care professional in this state or another state;

(ii) committed in the course of providing services within the scope of the applicant's health care professional license; and

(iii) in which the victim of the offense was a patient of the applicant.

(2) Automatic Revocation of License. The following convictions shall result in automatic proceedings to revoke the license of a dentist or dental hygienist. The Board shall revoke a license and update the Board's records to reflect the revocation immediately on receiving notification pursuant to Texas Occupations Code §108.053(b). If the Board receives notice through another source, the Board shall pursue a revocation action through Texas Occupations Code §263.003.

(A) Any conviction resulting in the requirement that the licensee register as a sex offender under Chapter 62, Code of Criminal Procedure.

(B) Any conviction of or placement on deferred adjudication community supervision for the commission of a felony offense involving the use or threat of force.

(C) Any conviction or placement on deferred adjudication community supervision for the commission of an offense under Texas Penal Code §§22.011, 22.02, 22.021, or 22.04, or an offense under the laws of another state or federal law that is equivalent to an offense under one of those sections:

(i) committed while the licensee held a license as a health care professional in this state or another state;

(ii) committed in the course of providing services within the scope of the licensee's health care professional license; and

(iii) in which the victim of the offense was a patient of the licensee.

(d) Imposition of Mandatory Sanctions for Criminal Convictions. Based upon Texas Occupations Code §263.006 and the interests of public health and safety, the Board shall impose the following mandatory sanctions on licensees for the following offenses. In the event that a sanction from subsection (c) of this section is also applicable to a licensee, the Board shall impose the automatic sanction instead of the sanction under this subsection. The Board may not reinstate or reissue a license suspended or revoked under this section unless an express determination is made that the reinstatement or reissuance of the license is in the best interests of the public and the licensee whose license was suspended or revoked. The Board must base that determination on substantial evidence contained in an investigative report.

(1) Felony Convictions. The Board shall revoke the license of a current licensee who receives a final felony conviction under federal law or the law of any state, district, or territory of the United States.

(2) Assaultive Offenses. The Board shall revoke the license of a current licensee who receives a misdemeanor final conviction under Chapter 22 of the Texas Penal Code, other than a misdemeanor punishable by fine only.

(3) Mandatory Registration as Sex Offender. The Board shall revoke the license of a current licensee who receives a final conviction requiring the licensee register as a sex offender under Chapter 62, Texas Code of Criminal Procedure.

(4) Violation of Certain Court Orders, Protective Orders, or Conditions of Bond. The Board shall revoke the license of a current licensee who receives a Class A or Class B misdemeanor final conviction under Section 25.07 or Section 25.071 of the Texas Penal Code.

(e) Imposition of Recommended Sanctions for Criminal Convictions. Based upon statutory authorization and the interests of public health and safety, the Board shall impose the following recommended sanctions for the following offenses, based on the Board's determination that these offenses relate to the practice of dentistry, and the Board's determination that allowing a licensee to practice dentistry or provide dental services under a license issued by the Board provides an opportunity for further criminal conduct. In the event that a sanction from subsections (c) or (d) of this section is also applicable to a licensee, the Board shall impose the automatic or mandatory sanction instead of the recommended sanction under this subsection. If more than one recommended sanction applies to the conviction of a licensee or applicant, the Board shall apply the highest recommended sanction applicable. The Board may only increase these recommended sanctions upon an affirmative finding that persuasive aggravating factors require elevation of the sanction for the protection of public health and safety. The Board shall reduce the following sanctions only upon an affirmative finding of persuasive mitigating factors presented by the

applicant or licensee, as applicable. The Board shall articulate these aggravating or mitigating factors in any order adopting the sanctions to be imposed on the licensee.

(1) Current Licensees. The Board shall impose the following disciplinary sanctions based upon convictions which occurred after the Board issued a license.

(A) Conviction for Offense Relating to the Regulation of Dentists, Dental Hygienists or Dental Assistants. Pursuant to Texas Occupations Code §263.002(a)(10), the Board shall take disciplinary action for convictions related to the practice of dentistry. The Board has determined that violations of law relating to the practice of dentistry and dental hygiene are directly related to patient safety and care, and holding a license allows for the opportunity to engage in further criminal activity causing harm to the public. As a result, the Board shall impose a five-year probated suspension for a final conviction for an offense relating to the regulation of dentists, dental hygienists or dental assistants.

(B) Conviction of Misdemeanor Involving Fraud. Pursuant to Texas Occupations Code §263.002(a)(2), the Board shall take disciplinary action for misdemeanor convictions involving fraud. The Board has determined that holding a license allows access to sensitive patient records and information, which requires the licensee to demonstrate the ability and capacity required to perform the duties and discharge the responsibilities of a licensee acting in the best interests of the public. As a result, the Board shall impose a one-year probated suspension for a final conviction of a misdemeanor under Chapter 32 of the Texas Penal Code, or an equivalent section of federal law or the law of any state, district, or territory of the United States.

(C) Offenses under the Texas Controlled Substances Act, Texas Dangerous Drugs Act and Related Offenses. The Board has determined that holding a license allows access to controlled substances, dangerous drugs and other substances that represent the potential for abuse and drug diversion, which requires the licensee to demonstrate the ability and capacity required to perform the duties and discharge the responsibilities of a licensee acting in the best interests of the public. As a result, the Board shall impose a one-year probated suspension on a current licensee who receives a Class A misdemeanor final conviction under Chapter 481, 483, or 485, Texas Health and Safety Code. The Board may impose a Reprimand for a Class B misdemeanor final conviction pursuant to subsection (e)(1)(D) of this section.

(D) Other Class A and B Misdemeanor Offenses. The Board shall not automatically impose a disciplinary sanction, but may impose a disciplinary sanction after weighing the considerations required by Texas Occupations Code Chapters 53 and 263, and as listed in subsections (g) - (i) of this section.

(2) License Applicants. The Board shall impose the following disciplinary sanctions based upon convictions that occurred prior to the submission of an application for a license.

(A) Felony Convictions. The Board has determined that holding a license allows access to confidential patient records and information, controlled substances and dangerous drugs, and patients in sensitive and compromised physical conditions, which requires the applicant to demonstrate the ability and capacity required to perform the duties and discharge the

responsibilities of a licensee acting in the best interests of the public. Pursuant to Texas Occupations Code §263.001(a)(5), the Board shall deny an applicant who received a final felony conviction under federal law or the law of any state, district, or territory of the United States that is still pending final disposition. The Board shall impose a five-year probated suspension on an applicant with a final conviction for a felony that is less than five years from the date of final disposition. From five to ten years after the date of final disposition, the Board shall impose a one-year probated suspension. After ten years from the date of final disposition, the Board shall take no action.

(B) Conviction for Offense Relating to the Regulation of Dentists, Dental Hygienists or Dental Assistants. The Board has determined that violations of Texas law relating to the practice of dentistry are directly related to patient safety and care, and holding a license allows for the opportunity to engage in further criminal activity causing harm to the public. Pursuant to Texas Occupations Code §263.001(a)(4) and (a)(6), the Board shall deny an applicant who received a final conviction for an offense relating to the regulation of dentists, dental hygienists or dental assistants within the twelve months preceding the date the applicant filed an application for a license. The Board shall impose a five-year probated suspension on an applicant who received a final conviction for an offense relating to the regulation of dentists, dental hygienists or dental assistants that is still pending final disposition, but which occurred prior to the twelve months preceding the date the applicant filed an application for a license. The Board shall impose a one-year probated suspension on an applicant with a final conviction for an offense relating to the regulation of dentists, dental hygienists or dental assistants that is less than five years from the date of final disposition. After five years from the date of final disposition, the Board shall take no action.

(C) Mandatory Registration as Sex Offender. The Board has determined that holding a license allows access to controlled substances and dangerous drugs, and patients in sensitive and compromised physical conditions, including minor patients and patients with mental and physical disabilities, which requires the ability and capacity required to perform the duties and discharge the responsibilities of a licensee acting in the best interests of the public. As a result, if the applicant is not subject to Texas Occupations Code §108.052, the Board shall deny an applicant who received a final conviction requiring the applicant register as a sex offender under Chapter 62, Texas Code of Criminal Procedure.

(D) Assaultive Offenses. The Board has determined that holding a license allows access to patients in sensitive and compromised physical conditions, which requires the applicant to demonstrate the ability and capacity required to perform the duties and discharge the responsibilities of a licensee acting in the best interests of the public. As a result, if the applicant is not subject to Texas Occupations Code §108.052, the Board shall deny an applicant who received a misdemeanor final conviction under Chapter 22 of the Texas Penal Code, other than a misdemeanor punishable by fine only, within the twelve months preceding the date the applicant filed an application for a license. The Board shall impose a five-year probated suspension on an applicant who received a final conviction for an assaultive offense, other than a misdemeanor

punishable by fine only, that is less than five years from the date of final disposition. After five years from the date of final disposition, the Board shall take no action.

(E) Violation of Certain Court Orders, Protective Orders, or Conditions of Bond. The Board has determined that holding a license allows access to confidential patient records and information, and patients in sensitive and compromised physical conditions, which requires the applicant to demonstrate the ability and capacity required to perform the duties and discharge the responsibilities of a licensee acting in the best interests of the public. As a result, the Board shall deny an applicant who received a Class A or Class B misdemeanor final conviction under Section 25.07 or Section 25.071 of the Texas Penal Code, within the twelve months preceding the date the applicant filed an application for a license. The Board shall impose a five-year probated suspension on an applicant who received a final conviction under Section 25.07 or Section 25.071 of the Texas Penal Code that is less than five years from the date of final disposition. After five years from the date of final disposition, the Board shall take no action.

(F) Offenses under the Texas Controlled Substances Act, Texas Dangerous Drugs Act and Related Offenses. The Board has determined that holding a license allows access to confidential patient records and information, controlled substances, and dangerous drugs, which requires the applicant to demonstrate the ability and capacity required to perform the duties and discharge the responsibilities of a licensee acting in the best interests of the public. As a result, the Board shall impose a one-year probated suspension on an applicant who received a Class A misdemeanor final conviction under Chapter 481, 483, or 485, Texas Health and Safety Code that is less than five years from the date of final disposition. The Board may impose a Reprimand for a Class B misdemeanor final conviction that is less than five years from the date of final disposition, pursuant to subsection (e)(2)(G) of this section. After five years from the date of final disposition, the Board shall take no action.

(G) Other Class A and B Misdemeanor Offenses. The Board shall not automatically impose a disciplinary sanction, but may impose a disciplinary sanction after weighing the considerations required by Texas Occupations Code Chapters 53 and 263, and as listed in subsections (g) - (i) of this section.

(f) Pursuant to Texas Occupations Code §53.021(b), the Board shall revoke a license upon the imprisonment of the licensee following a: ~~[felony conviction or deferred adjudication, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.]~~

(1) felony conviction or deferred adjudication for:

(A) an offense that directly relates to the duties and responsibilities of a licensee;

(B) an offense listed in Article 42A.054, Code of Criminal Procedure; or

(C) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure;

(2) felony community supervision revocation;

(3) revocation of parole; or

(4) revocation of mandatory supervision.

(g) The Board may impose any authorized disciplinary action on an applicant or licensee because of a person's conviction of a crime, other than a Class C misdemeanor, that:

(1) serves as a ground for discipline under the Dental Practice Act or other Texas law applicable to the applicant or licensee; or

(2) the Board has determined directly relates to the duties and responsibilities of a licensee, after consideration of each of the following factors:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requiring a license;

(C) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the applicant or licensee previously had been involved;

(D) the relationship of the crime to the ability and capacity required to perform the duties and discharge the responsibilities of the license; and

(E) any correlation between the elements of the crime and the duties and responsibilities of the license.

(h) In determining the appropriate disciplinary action to take where the Board is not mandated to take a certain disciplinary action, the Board shall consider the following factors listed in paragraphs (1) - (7) of this subsection when determining whether to impose any authorized discipline:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person when the crime was committed;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person before and after the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and

(7) other evidence of the person's fitness, including letters of recommendation.

(i) The applicant or licensee has the responsibility, to the extent possible, to obtain and provide to the Board the recommendations described by subsection (h)(7) of this section.

(j) An applicant or licensee shall disclose in writing to the Board any arrest, conviction or deferred adjudication against him or her at the time of initial application and renewal.

Additionally, an applicant or licensee shall provide information regarding any arrest, conviction

or deferred adjudication to the Board within 30 days of a Board request. An application shall be deemed withdrawn if the applicant has failed to respond to a request for information or to a proposal for denial of eligibility or conditional eligibility within 30 days. Pursuant to Texas Government Code §2005.052, making a false statement or material misrepresentation when applying or renewing a license, refusing to provide requested information to the Board, or failing to provide all of the criminal history requested by the Board represents grounds for denial of the application or suspension or revocation of the license.

(k) Notice of Pending Denial of License. Prior to denying a license application for prior criminal convictions as permitted by Texas Occupations Code Chapter 53, the Board shall provide written notice to the person of the reason for the intended denial and allow the person not less than 30 days to submit any relevant information to the Board, as required by Texas Occupations Code §53.0231.