

SUNSET ADVISORY COMMISSION

STAFF REPORT

State Bar of Texas

Board of Law Examiners



2016–2017

85TH LEGISLATURE

SUNSET ADVISORY COMMISSION

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Cover Photo: The iron perimeter fence was installed in the 1890s, a few years after the completion of the Texas State Capitol. The fence surrounds approximately 22 acres of the Capitol Grounds but only on the east, west, and south sides due to the addition of the Capitol Extension to the north in the early 1990s. Photo Credit: Janet Wood

**STATE BAR OF TEXAS
BOARD OF LAW EXAMINERS**

**SUNSET STAFF REPORT
2016-2017
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HOW TO READ SUNSET REPORTS

Each Sunset report is issued *three times*, at each of the three key phases of the Sunset process, to compile all recommendations and action into one, up-to-date document. Only the most recent version is posted to the website. **(The version in bold is the version you are reading.)**

1. SUNSET STAFF EVALUATION PHASE

Sunset staff performs extensive research and analysis to evaluate the need for, performance of, and improvements to the agency under review.

FIRST VERSION: The *Sunset Staff Report* identifies problem areas and makes specific recommendations for positive change, either to the laws governing an agency or in the form of management directives to agency leadership.

2. SUNSET COMMISSION DELIBERATION PHASE

The Sunset Commission conducts a public hearing to take testimony on the staff report and the agency overall. Later, the commission meets again to vote on which changes to recommend to the full Legislature.

SECOND VERSION: The *Sunset Staff Report with Commission Decisions*, issued after the decision meeting, documents the Sunset Commission's decisions on the original staff recommendations and any new issues raised during the hearing, forming the basis of the Sunset bills.

3. LEGISLATIVE ACTION PHASE

The full Legislature considers bills containing the Sunset Commission's recommendations on each agency and makes final determinations.

THIRD VERSION: The *Sunset Staff Report with Final Results*, published after the end of the legislative session, documents the ultimate outcome of the Sunset process for each agency, including the actions taken by the Legislature on each Sunset recommendation and any new provisions added to the Sunset bill.

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**SUMMARY OF SUNSET STAFF
RECOMMENDATIONS**



SUMMARY

The State Bar is an outlier among Texas occupational licensing agencies. Under the authority of the Texas Supreme Court, the agency combines oversight of the legal profession with activities typical of a professional association. Attorneys enjoy the unusual privilege of self-regulation, leading to a certain cynicism about the agency from some of its members, who are compelled to join as a condition of licensure; the general public, who may see it as a closed society focused on protecting its own interests; and even the Legislature, which does not enjoy typical oversight of this judicial agency. As in the last Sunset review of the State Bar in 2003, Sunset staff again weighed these theoretical concerns against the Legislature's clear historical preference for making improvements within the current structure, primarily through the Sunset process. While regulating attorneys through a mandatory bar organization may appear bizarre when compared to other state agencies, Sunset staff concluded this approach is commonplace to how attorneys are regulated nationwide. Given the Legislature's preference, an accepted national structure, and a generally well-functioning organization, this report makes no dramatic recommendations to reorganize the State Bar. Instead, the report builds on the Sunset Commission's historical role to help evolve the State Bar into a more objective and efficient regulatory agency.

Sunset staff focused effort on evaluating the State Bar's public protection mission primarily carried out by the Office of the Chief Disciplinary Counsel, the agency's enforcement arm. Overall, the review found dedicated staff working diligently to respond to the more than 7,000 grievances filed against Texas attorneys each year. However, the review identified significant concerns with the overall rules and procedures governing attorney conduct and the disciplinary process, which constrains the ability of the Office of the Chief Disciplinary Counsel to best meet its public protection responsibilities. The State Bar's archaic rulemaking process requiring individual attorneys to vote whether to approve any changes to the rules governing their own conduct and discipline has obstructed the Supreme Court's ability to make timely rule adjustments. The referendum requirement, out of step with all state and national best practices, has tended to encourage politicization of issues and lengthen the time and cost of updating rules, and has blocked any significant improvements to attorney oversight for more than two decades. This report recommends removing the referendum requirement and replacing it with a more standard rulemaking process with ample opportunity for stakeholder input under the existing authority of the Supreme Court. This change is critical to ensure the public interest is put above the profession's interest.

The archaic process for attorneys to vote on their own regulatory rules obstructs needed changes.

Because the referendum process has so obstructed regular updates of State Bar rules, Sunset staff also spent considerable time identifying best practices the Legislature should consider enacting in law, even though some of the recommendations could technically be adopted through rule. Changes such as reauthorizing investigative subpoenas, better using informal dispute resolution, and allowing for investigatory hearings would help improve efficiency and responsiveness for attorneys and the public. Other changes such as ensuring the State Bar can access criminal records of licensed attorneys would help the Office of the Chief Disciplinary Counsel better do its job to monitor and take action against unethical attorneys.

This report also addresses the Board of Law Examiners. This small agency performs the front-end investigation of candidates for a law license, administers the Texas Bar Examination, and generally flies under the radar compared to its more controversial sister agency the State Bar. Sunset staff questioned the agency's structure separating its licensing and examination of attorneys from the enforcement activities at the State Bar, but found this split approach to attorney regulation is generally standard across the country. More importantly, the agency is performing its duties well, leaving little opportunity for savings or public improvements through organizational change. However, Sunset staff identified several statutory barriers and inconsistencies preventing the board from carrying out its work in the most efficient way. The board also needs to take a renewed focus on developing clear decision-making guidelines for denying licenses or granting waivers to ensure applicants to the legal profession are treated fairly and consistently.

Finally, the review strongly concluded that keeping both agencies under Sunset review is critical, as the Sunset process has been the Legislature's only real mechanism for providing oversight, and has clearly resulted in positive change to ensure a more objective regulatory process for Texas attorneys over time.

The following material summarizes Sunset staff recommendations on the State Bar and the Board of Law Examiners.

Issues and Recommendations

State Bar of Texas

Issue 1

The Rulemaking Process at the State Bar Obstructs Changes Needed to Effectively Regulate Attorneys.

Statute requires the Supreme Court to hold a referendum of licensed attorneys to update the rules that govern the State Bar and its members, such as those that define acceptable attorney conduct. Over the past 25 years, the majority of referenda have failed — meaning no major changes occurred despite significant effort, including the most recent attempt in 2011 to comprehensively update the Texas Disciplinary Rules of Professional Conduct.

By allowing attorneys to vote on their own disciplinary rules, the state risks putting the profession's interest above the public interest. The significant time and resources needed to hold referenda combined with the low success rate contribute to a general sense of burnout among key stakeholders and create a reluctance to pursue needed rule changes. Consequently, Texas' attorney regulation rules are out of step with recent changes in the legal profession and evolving national best practices. No other occupational

licensing agency in Texas, and only one other state bar in the country, uses a referendum for rulemaking. The current setup also does not allow a clear avenue for input from non-licensed members of the general public. Implementing a more standard rulemaking process would ensure consistent opportunities for meaningful stakeholder participation without indefinitely blocking needed improvements.

Key Recommendations

- Repeal requirements for a referendum of State Bar members to approve changes to rules and membership dues, clarifying the Supreme Court's inherent authority to oversee attorney discipline and administration of the State Bar.
- Require the Supreme Court to develop a standard rulemaking process for the State Bar ensuring ample opportunity for State Bar members and other stakeholders to vet changes to attorney regulation rules or membership dues.
- The State Bar should develop a consistent process for collecting membership input on proposed rule changes to inform Supreme Court rulemaking.

Issue 2

Texas' Attorney Discipline System Lacks Best Practices Needed to Ensure Fair, Effective Regulation to Protect the Public.

The Office of the Chief Disciplinary Counsel is the State Bar's attorney discipline division responsible for screening grievances, investigating complaints, and pursuing litigation against licensed attorneys for violations of the Texas Disciplinary Rules of Professional Conduct. The Sunset review took several approaches to evaluating the attorney discipline system, including comparing it to other Texas licensing agencies based on Sunset's long history evaluating regulatory programs, considering national best practices developed by the American Bar Association, and evaluating how well previous significant Sunset recommendations have worked.

The review found the Office of the Chief Disciplinary Counsel lacks several standard tools needed to proactively identify unethical behavior and more effectively investigate and resolve cases. The attorney discipline system also lacks clear sanction guidelines and tracking of decisions needed to promote consistency and transparency in the highly decentralized decision-making structure made up of numerous grievance committees around the state. Finally, the chief disciplinary counsel does not provide enough information to the public about the complex attorney discipline system to ensure the process and decisions are understandable. The following recommendations would bring the Texas attorney discipline system in line with widely adopted state and national best practices and promote fair, effective regulation of licensed attorneys.

Key Recommendations

- Authorize standard tools to better monitor attorneys, including expanded access to criminal history information, discipline imposed in other states, and trust account overdraft notification.
- Promote more efficient case resolution by reinstating investigative subpoena power, requiring a process for conducting investigative hearings, and adjusting time frames.
- Require comprehensive sanction guidelines in the Texas Rules of Disciplinary Procedure and more detailed tracking and reporting of disciplinary case outcomes.

- Direct the State Bar to post more information on its website about attorney disciplinary actions and more proactively provide assistance to complainants in understanding reasons for complaint dismissal.

Issue 3

The State Bar Does Not Maximize Informal Dispute Resolution to Most Effectively Resolve Grievances Against Attorneys.

Many problems between clients and attorneys involve minor disagreements that may not rise to the level of ethical misconduct by attorneys, such as communication breakdowns and fee disputes. Though the State Bar offers informal dispute resolution services to address such issues, the chief disciplinary counsel does not make effective use of these services to resolve low-level grievances early in the process. The current system does not allow for early screening and diversion of a significant number of minor grievances from the formal and lengthy attorney discipline system, with frustrating results for both clients and attorneys. Providing a clear, early referral process for minor grievances to the Client-Attorney Assistance Program would help resolve many issues more quickly and improve overall public satisfaction with the grievance process.

Key Recommendation

- Require a referral process to divert minor issues from the formal grievance system to the Client-Attorney Assistance Program for informal dispute resolution.

Issue 4

Texas Has a Continuing Need for the State Bar.

The State Bar is a judicial agency operating under the authority and rules of the State Bar Act and the Texas Supreme Court. While the state clearly has a continuing interest in regulating attorneys and promoting legal professionalism, Texas' organizational approach to attorney oversight raises persistent concerns, since as a unified bar, the agency has the dual mission to both regulate attorneys and act as a professional association. Ultimately, the Sunset review did not find significant problems resulting from this nationally accepted approach to attorney regulation. Therefore, the State Bar is overall well suited to continue carrying out its unique mission, with the improvements recommended in this report. The review also emphasized the importance of maintaining the Legislature's oversight through the State Bar Act and the Sunset process, since the agency is exempt from many legislative requirements and historically most improvements made to the attorney discipline system have resulted from Sunset recommendations.

Key Recommendation

- Continue the State Bar for 12 years.

Board of Law Examiners

Issue 1

Key Elements of the Board's Statute Do Not Conform to Common Licensing Standards.

Since 1977, Sunset staff has conducted more than 100 occupational licensing agency reviews. In doing so, the staff has identified standards that are common practices throughout state agency statutes, rules, and procedures. The Sunset review compared the board's regulatory framework to these model licensing standards to identify variations. Based on these variations, staff identified several changes needed to bring the board in line with model standards, with a goal to better protect the public and ensure fair, consistent regulation of the legal profession.

Key Recommendations

- Remove an outdated requirement for applicants to attest they do not have a mental health diagnosis.
- Remove the unnecessary requirement that applicants submit a notarized, verified affidavit form.
- Remove specific deadlines from statute and require the Supreme Court to adopt deadlines and a schedule of late fees in rule.
- Require the board to develop guidelines to assist decision making for character and fitness determinations, probationary licenses, and waiver requests.
- Clearly authorize the board to delegate routine matters to the executive director and require related policies.

Issue 2

Texas Has a Continuing Need for the Board of Law Examiners.

The Board of Law Examiners is a small judicial agency operating under the oversight of the Supreme Court. To achieve its mission, the board evaluates whether candidates for a law license possess the present character and fitness needed to practice law; determines whether applicants have completed adequate law study and are eligible to take the bar exam; and administers and grades the bar exam. The Sunset review determined the state has a continuing need to determine eligibility to practice law in Texas, and that the board is well suited to carry out this function under its existing structure. The review considered whether merging the board with the State Bar would improve the agency's effectiveness or offer increased efficiency, but ultimately concluded that having a separate, small attorney licensing board is a common approach across the country and the agency has little actual overlap with the State Bar's functions. However, the board should remain under Sunset review at the same time as the State Bar so that the Legislature can evaluate how the overall system of attorney licensing and regulation is working in the future.

Key Recommendation

- Continue the Board of Law Examiners for 12 years.

Fiscal Implication Summary

Overall, the recommendations in this report would not have a fiscal impact to the state, as both the State Bar and the Board of Law Examiners receive no state funds and operate outside of the appropriations process. Many recommendations are designed to improve internal operations and efficiency at the agencies, but their exact impact would depend on implementation. However, two issues would have a direct fiscal impact to the State Bar or licensed attorneys, as summarized below.

State Bar of Texas

Issue 2 — The recommendation to require trust account overdraft notification would have a negative fiscal impact to the State Bar of about \$114,466 annually for an additional attorney and an administrative support position to process and follow up on the notifications. Also, the recommendation to require fingerprint-based criminal background checks would require many currently licensed attorneys to pay a one-time fee of \$40.

Issue 3 — The recommendation to create a referral process for certain low-level grievances for informal dispute resolution would have a negative fiscal impact to the State Bar's Client-Attorney Assistance Program of about \$37,136 per year to process the additional cases. Referring more low-level grievances for informal dispute resolution would allow the chief disciplinary counsel to focus resources on more high-priority cases, but would not produce a fiscal savings since the reduced caseload would be spread across the state.

STATE BAR AT A GLANCE



STATE BAR AT A GLANCE

The State Bar of Texas is a judicial agency operating under the authority and rules of the State Bar Act and the Texas Supreme Court. The State Bar is one of several entities that assist the Supreme Court in oversight of the legal profession, as shown in Appendix A. The State Bar is a mandatory, unified bar organization, meaning all licensed attorneys must be members to be eligible to practice law in Texas and the agency both regulates attorneys and acts as a professional association.¹ To achieve its mission, the State Bar carries out the following key activities:

- Protects the public by administering the attorney discipline system and enforcing the legal profession's laws and rules
- Promotes legal professionalism, including providing attorneys with continuing legal education courses and facilitating sharing of best practices through committees, sections, and publications
- Encourages access to and understanding of the legal system through pro bono work and other projects to educate the public about the rule of law

Key Facts

- **State Bar Board of Directors.** A 60-member governing body oversees the agency's executive director and operations. Thirty of the 46 voting members are elected from 17 State Bar districts, with the officers running statewide and other members appointed by various entities. All voting members serve staggered, three-year terms. The textbox, *State Bar Board Composition*, describes the board's makeup, and Appendix B lists the current members of the board.

The State Bar uses numerous committees of the board and the overall membership to carry out its mission, including seven committees of board members that oversee areas of agency operations such as the budget; 34 standing committees that function as advisory committees to various State Bar programs; and 47 sections that bring members with similar legal practices or interests together.

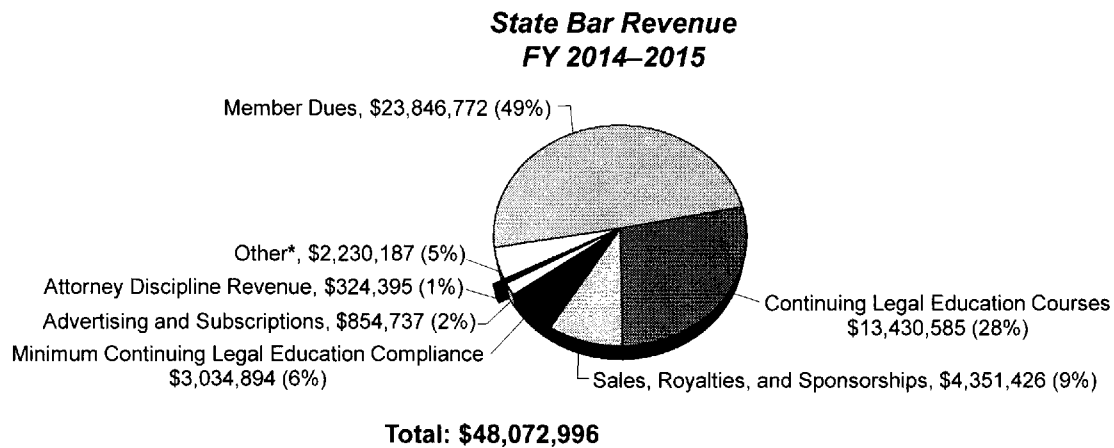
- **Commission for Lawyer Discipline.** A standing committee of the State Bar, the Commission for Lawyer Discipline, oversees the attorney discipline system with budgetary and administrative support from the State Bar. The chief disciplinary counsel directs this enforcement work and reports to the commission, not the State Bar board or executive director. The commission is made up of 12

State Bar Board Composition

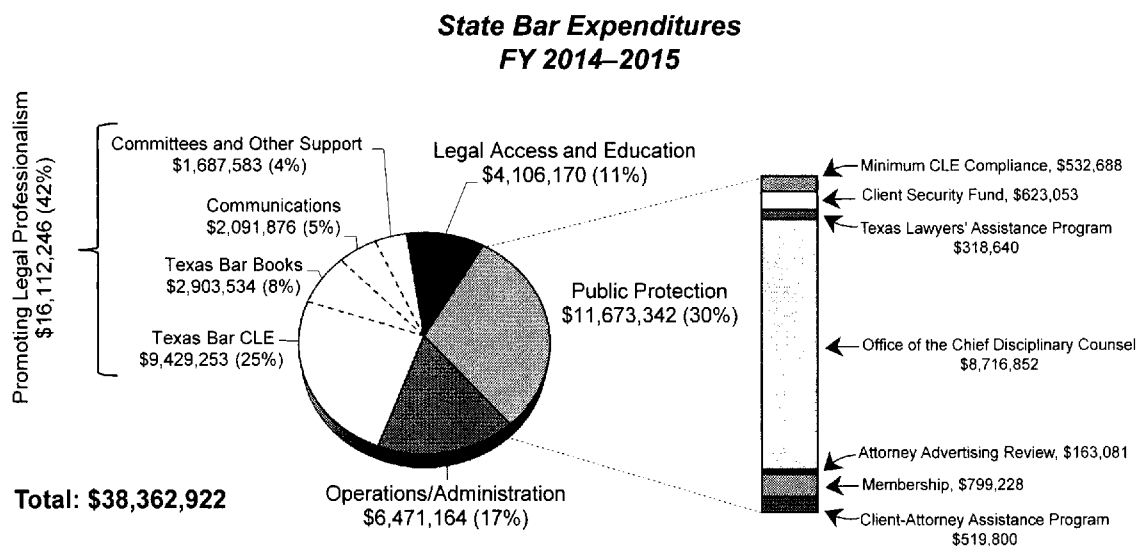
- Three officers, including the president, president-elect, and immediate past president, elected by statewide bar membership
- Thirty attorney members elected by 17 local State Bar districts
- Six public, non-attorney members appointed by the Supreme Court
- Four minority members appointed by the State Bar president defined as a member of the State Bar who is female, African-American, Hispanic, Native American, or Asian-American
- The president, president-elect, and immediate past president of the Texas Young Lawyers Association, elected by the association's membership
- Fourteen non-voting ex officio members including the immediate past chair of the board and liaisons representing the judiciary, State Bar sections, and State Bar staff

members, including six attorney members appointed by the State Bar president, and six non-attorney public members appointed by the Supreme Court. The State Bar president designates the chair of the commission.

- Funding.** The State Bar spent about \$38.4 million in fiscal year 2014–2015.² The agency receives no legislative appropriations and is funded mostly through fees, such as membership dues and continuing education course revenue.³ In fiscal year 2014–2015, the State Bar collected nearly \$48.1 million in revenue. Though the State Bar is not subject to standard legislative appropriations oversight, the Supreme Court reviews and approves the agency’s budget after a public hearing process required by the State Bar Act.⁴ The agency maintains a reserve fund, which had a balance of about \$9.1 million at the end of fiscal year 2014–2015. The pie charts show the types and amounts of revenue the agency collected and how the agency spent that money in fiscal year 2014–2015.



* Includes rental income, investments, grants, and miscellaneous fees.



- **Staffing.** At the end of fiscal year 2014–2015, the State Bar employed 265 staff, mostly at the agency’s headquarters in Austin. Of these, 89 worked for the Office of the Chief Disciplinary Counsel, which administers the attorney discipline system. The chief disciplinary counsel has the only State Bar employees located outside of Austin, including 59 staff at the Dallas, Houston, and San Antonio regional offices. Appendix C compares the State Bar’s workforce composition to the statewide minority civilian workforce over the past three years.

Major Programs

Public Protection

- **Attorney Discipline System.** The Office of the Chief Disciplinary Counsel screens and investigates allegations of professional misconduct and represents the Commission for Lawyer Discipline in litigation against attorneys. The accompanying textbox provides basic statistics on the attorney discipline system, and Appendix D provides a detailed flow chart and glossary of terms describing the grievance process in more detail.

Grievances alleging a violation of the Texas Disciplinary Rules of Professional Conduct may be initiated by the public, judges, other attorneys, or the chief disciplinary counsel. Available sanctions include public and private reprimands, suspensions, disbarments, payment of restitution to injured clients, and recovery of attorneys’ fees. The table, *Disciplinary Actions*, shows the number and types of sanctions imposed through the disciplinary process in fiscal year 2014–2015. The chief disciplinary counsel and Commission for Lawyer Discipline do not investigate complaints regarding unlicensed individuals who engage in the practice of law, and instead refer those cases to the separate Unauthorized Practice of Law Committee overseen by the Supreme Court.

- **Client Security Fund.** The State Bar provides a safety net to reimburse clients who have suffered financially as a result of an attorney’s dishonest conduct, such as failing to refund unearned fees or misappropriating settlement funds. While attorneys may be ordered to pay clients restitution through the disciplinary process, clients may also apply for compensation through the Client Security Fund if the attorney is unable or unwilling to pay. In fiscal year 2014–2015, the State Bar approved 102 applications totaling \$639,581 in compensation. The agency transfers between \$300,000 and \$1.5 million into the fund each year out of its General Fund, and held about \$3.4 million in the fund at the end of fiscal year 2014–2015.
- **Client-Attorney Assistance Program.** The State Bar operates a grievance information helpline and provides informal mediation and dispute resolution services to help attorneys and clients resolve issues that may not rise to the level of professional misconduct and are not well suited for the formal grievance process. Staff also answers general questions about the legal system and the discipline process and makes referrals to other State Bar departments or government agencies that can provide

Attorney Discipline Statistics FY 2014–2015

- Active licensed attorneys: 97,474
- Number of grievances filed: 7,071
- Number dismissed as inquiries: 5,576
- Number of complaints resolved: 416
- Number of disciplinary actions: 318

Disciplinary Actions FY 2014–2015

Type	Number
Private reprimand	65
Public reprimand	32
Suspension	111
Disbarment	28
Resignation in lieu of discipline	19
Grievance referral program	63
Total	318

assistance when appropriate. The program helped 15,139 callers in fiscal year 2014–2015, including 1,045 who received informal dispute resolution services. In 84 percent of the informal dispute resolution cases, State Bar staff is able to successfully resolve the client's issue, which usually involves poor communication from the attorney.

- **Texas Lawyers' Assistance Program.** The State Bar began providing peer assistance to lawyers with mental health or substance abuse issues in 1989 and served 624 individuals with these problems in fiscal year 2014–2015. The program provides 24-hour confidential support and referrals to treatment providers for lawyers, law students, and judges; conducts outreach efforts; and assists with monitoring law students and attorneys whose law licenses are in danger due to substance abuse or mental health issues.
- **Advertising Review.** The State Bar reviews all attorney advertisements to prevent false, misleading, or deceptive advertising. Attorneys must receive approval for most advertisements before disseminating them, and pay an application fee of \$100 for each advertisement submitted for review. In fiscal year 2014–2015, State Bar staff reviewed 3,785 advertisements.
- **Minimum Continuing Legal Education Compliance.** Texas attorneys must complete at least 15 hours of continuing legal education annually, three of which must be ethics-related training. The State Bar reviews courses and training sponsors to ensure courses meet minimum requirements. The State Bar administratively suspended 591 attorneys in fiscal year 2014–2015 for failure to meet continuing legal education requirements, and reinstates licensees as soon as they complete the required hours.

Promoting Legal Professionalism

- **Texas Bar Continuing Legal Education.** The State Bar is the single largest provider of continuing legal education in the state, accounting for about 25 percent of all hours taken by Texas attorneys. The State Bar offers various live courses, online courses, and reference materials, including an online library. In fiscal year 2014–2015, the State Bar registered 66,319 people for its continuing education programs. The program generates significant revenue for the State Bar beyond what it costs to operate. In fiscal year 2014–2015, the agency used \$3.3 million of excess continuing education revenue to fund other budget items.
- **Texas Bar Books.** The State Bar works with its membership to develop specialized publications designed to assist attorneys in practicing law. Current publications include 37 books and two DVDs, which the State Bar sells to its members. Major publications include *Texas Family Law Practice Manual* and *Texas Pattern Jury Charges*.
- **Texas Bar Journal.** The Texas Bar Journal is the publication of record for the State Bar. Under Supreme Court rules, the State Bar must publish all notices of proposed rule changes, sanctions ordered in disciplinary cases, and reports on the agency's annual performance measures in the Bar Journal. All bar members receive the publication monthly, which also includes legal articles and other information of interest for attorneys.
- **Sections.** The State Bar's 47 sections are made up of attorneys who practice in the same legal practice area, such as family law or administrative law, or have similar interests and characteristics, such as Women in the Law or African-American Lawyers. State Bar members may voluntarily join one or more sections and pay separate annual dues to fund section activities, which include studying statute and proposing changes, offering continuing legal education, and providing mentorship and networking opportunities. About 43 percent of State Bar members, or 41,491 attorneys, were members of at

least one section in fiscal year 2014–2015. Each section has its own budget and governing body elected by section members, with agency staff providing administrative support.

- **Local Bar Associations.** State law requires the State Bar to support the formation and activities of local bar associations, which it provides through technical assistance, training, and other resources to local bar leadership. However, all of the approximately 250 current local bar associations across the state are independent of the State Bar, and the agency has no formal authority or oversight over these organizations.

Legal Access and Education

- **Legal Access Division.** The State Bar supports the mission of legal aid organizations, pro bono programs, and volunteer attorneys who help low-income Texans access the legal system. The division provides technical support to legal services providers, such as interpretation services; creates publications and provides training; makes referrals; and supports State Bar members in pro bono or legal aid initiatives. The State Bar also provides administrative support to the Texas Access to Justice Commission, a separate organization created by the Supreme Court working to expand accessibility to and enhance the quality of justice for low-income Texans in civil legal matters.
- **Law-Related Education.** The State Bar develops curriculum and trains teachers on U.S. and Texas government and civics. The program provided training to 7,268 Texas teachers during fiscal year 2014–2015. A nonprofit formed by the State Bar, Law Focused Education, Inc., raises private funds to support the program.
- **Lawyer Referral and Information Service.** Texas law requires lawyer referral services to meet certain standards to protect the public from unscrupulous for-profit services. All lawyer referral services must be nonprofit, have liability insurance, and have a minimum number of attorneys with clean disciplinary files, among other requirements. Several local bar associations provide these types of referral services, which the State Bar oversees to ensure compliance with the law. For areas of the state not covered by a local referral service, the State Bar runs a program on the state level to fill these gaps.
- **Texas Young Lawyers Association.** The association is considered the public service arm of the State Bar because it primarily carries out community and educational projects to help support attorneys and inform the public. The association functions as a department within the State Bar and includes more than 25,000 members. To be a member, an attorney must be 36 years old or younger, or have practiced law less than five years.

1 All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Chapter 81, Texas Government Code.

2 The State Bar operates on a fiscal year beginning June 1 and ending May 31, different from the typical state fiscal year. The agency also names its fiscal years differently, using fiscal year 2014–2015 instead of fiscal year 2015.

3 Because the State Bar does not receive legislative appropriations, its expenditures are not subject to requirements for purchasing from historically underutilized businesses under Chapter 2161, Texas Government Code, and have not been analyzed for compliance with these requirements.

4 Section 81.022, Texas Government Code.

STATE BAR ISSUES



ISSUE 1

The Rulemaking Process at the State Bar Obstructs Changes Needed to Effectively Regulate Attorneys.

Background

The Supreme Court has inherent authority to adopt rules governing the State Bar and its members.¹ The Legislature, through the State Bar Act, directs the Supreme Court to conduct a referendum of the membership on changes to rules concerning the operation, maintenance, and conduct of the State Bar, and the discipline of its members.² Based upon an order from the Supreme Court describing the timing and content of the ballot, the State Bar conducts the referendum. The court can, and sometime does, adopt straightforward administrative rules governing the State Bar without a referendum by exercising its inherent authority. However, it has historically chosen to defer to a vote of State Bar members before making significant changes to the Texas Disciplinary Rules of Professional Conduct governing attorney ethics or the Texas Rules of Disciplinary Procedure governing the attorney discipline process. In addition, the State Bar Act requires referenda to approve changes to State Bar membership dues, which were last increased in 1990.³ As a judicial branch agency, the State Bar's rulemaking process is not subject to standard requirements applying to other state agencies found in the Administrative Procedure Act.⁴ Instead, the textbox, *State Bar Rulemaking Steps*, shows how the process typically occurs for more complex rule changes.

During the last Sunset review of the State Bar in 2003, the Legislature recognized the challenge posed by holding a referendum to change rules. The Sunset bill removed a statutory requirement that 51 percent of all State Bar members participate in a vote for it to be valid, changing the standard to a simple majority of participating voters.⁵ Since that change, the State Bar has held two rule referenda — one in 2004 passed and another in 2011 failed.

The most recent, failed referendum in 2011 was the result of a comprehensive, eight-year review by the State Bar and Supreme Court prompted by the American Bar Association's (ABA) major revisions to its nationally accepted Model Rules of Professional Conduct in 2002.⁶ The resulting complicated and lengthy ballot put before State Bar membership to update Texas' professional conduct standards for attorneys became controversial for a number of reasons, and none of the changes ultimately passed. Since that time, neither the State Bar board nor the Supreme Court has attempted to revisit the changes, and no further referenda have been proposed to the State Bar membership.

State Bar Rulemaking Steps

1. A State Bar committee develops a rule proposal.
2. The State Bar board appoints a subcommittee to review the rule proposal, including a call for public comment, and the committee makes a proposal to the State Bar board.
3. The State Bar board decides whether to approve the rule proposal for consideration by the Supreme Court.
4. The Supreme Court may authorize the rule proposal, make changes, or reject it.
5. If the Supreme Court authorizes the proposal, State Bar membership votes to approve it through a referendum.
6. If the referendum passes, the Supreme Court adopts the rules. If the referendum fails, the Supreme Court takes no action.

Findings

Allowing attorneys to vote on their own disciplinary rules risks putting the profession's interest above the public interest.

Allowing individual members of the licensed profession to so directly control rules that govern their conduct and discipline creates an impediment to making needed changes and compromises the public interest the rules are ultimately designed to protect. No other regulated profession in Texas votes on its own rules. Lawyers enjoy the privileges of self-regulation in proposing and implementing standards of conduct and discipline, subject to approval and oversight by the Supreme Court. With this privilege comes the responsibility to act in the public interest, as shown in the accompanying textbox.⁷

***Excerpt From Preamble to the
Texas Disciplinary Rules of
Professional Conduct***

The legal profession has a responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

As discussed in more detail below, the public interest and the legal profession in Texas have suffered without a measured, objective, and efficient process to vet and move forward on rule changes. The most recent referendum failure in 2011, described throughout this issue, starkly illustrates how the referendum process is not well suited to facilitating compromise and ensuring changes can ultimately pass. Instead, the referendum has tended to encourage politicization of issues, lengthen the time and

cost of passing rules, and ultimately block any significant change for the last two decades. Texas is left with a system for attorney oversight that teeters on the edge of furthering the parochial self-interest of individual bar members above the more noble goals of public protection the profession's own concept of self-regulation demands.

Referenda block needed change more often than facilitate it, wasting time and resources for everyone involved.

- **The most recent 2011 referendum failure exposes a broken process.** The Supreme Court (elected by all Texans) and the State Bar board (elected by State Bar members) extensively reviewed and approved the package of 2011 proposed rule changes before the State Bar membership voted it down. The development of the 2011 rule package spanned eight years and represented attorney interests well, as shown in the textbox on the following page, *Eight-Year Timeline of the 2011 Referendum*. Despite thorough vetting by knowledgeable members of the State Bar and other stakeholders representing diverse perspectives, no updates to Texas' attorney ethics rules resulted from this effort. Since then, all progress in responding to the 2002 ABA model rule changes has indefinitely stalled.

The stakeholders who successfully campaigned against the 2011 package of changes had legitimate, often technical concerns with how some of the proposed rules were drafted and the complexity of how the material was presented. However, the failure of such an extensive effort shows the existing process does not work to ensure Texas attorneys have updated, clear rules governing their profession and disciplinary process.

*Despite an
extensive eight-
year rule review
effort, no changes
occured and all
progress stalled.*

Eight-Year Timeline of the 2011 Referendum

2003 to 2009: A State Bar committee and separate Supreme Court task force independently studied and shared information about the 2002 ABA model rules and other states' rules, and drafted proposed amendments to the Texas rules. The State Bar committee alone met at least 39 times during this period.

October to December 2009: The Supreme Court invited public comment on draft rules published in the Texas Bar Journal.

April 2010: The Supreme Court sent a revised rule proposal to the State Bar board for review.

August to September 2010: The State Bar solicited feedback at nine public hearings around the state, a public State Bar board meeting in Austin, and through its website.

November 2010: The State Bar board sent the Supreme Court its feedback and a petition for referendum on proposed rules, and the Supreme Court approved the rule referendum.

January to February 2011: State Bar membership voted on the proposed rules and the referendum failed.

- **The majority of recent referenda have failed, contributing to a general sense of burnout among key stakeholders.** Over the past 25 years, the State Bar has only conducted five referenda to update rules. Of those, only two resulted in the adoption of new or updated rules by the Supreme Court, as shown in the table, *Outcomes of Referenda Over the Past 25 Years*.

In numerous interviews conducted during the Sunset review with various stakeholders and staff involved in the State Bar's rulemaking process, an overall sense of frustration and burnout with the process was obvious. The impact of preparing for and conducting time-consuming and expensive referenda that fail is significant, with many people involved in the process becoming reluctant to put forth needed rule improvements because they feel the effort will be fruitless. Texas has one of the largest attorney populations in the country and deserves a better process to ensure rules can be updated to adequately protect the public and provide a fair, transparent attorney discipline system.

Only two referenda have passed in the last 25 years.

Outcomes of Referenda Over the Past 25 Years

Year	Content	Outcome
2011	Extensive updates to the Texas Disciplinary Rules of Professional Conduct in response to the revisions in the 2002 ABA Model Rules of Professional Conduct and other changes to the ethical and legal landscape since the rules were last updated in 1990 and 1994.	Failed
2004	Limited changes to the Texas Disciplinary Rules of Professional Conduct regarding referral fees and lawyer advertising.	Passed
1998	Various amendments to the Texas Rules of Disciplinary Procedure, Texas Disciplinary Rules of Professional Conduct, and other State Bar rules.	Failed
1994	Resubmittal of advertising rules not adopted in the 1993 referendum. Various amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure.	Passed
1993	Amendments to the Texas Disciplinary Rules of Professional Conduct regarding lawyer advertising and direct mail solicitation in response to Senate Bill 1227 (73R).	Failed

- **Referenda require considerable resources.** The cost of holding a referendum is significant. The figures in the table, *Recorded Referendum Costs*, include actual costs associated with the voting process, communication of the proposed rule changes, conducting statewide hearings, and travel. These numbers do not account for significant additional costs for State Bar staff time, travel expenses that were absorbed into general budgets, committee meetings and related travel, and those who volunteered their time and donated travel expenses. Were those expenses included, the State Bar estimates the cost for a single referendum could exceed \$500,000. The referendum process also adds an estimated additional year to the time it takes to adopt new rules.

Recorded Referendum Costs*

Year	Cost
2011	\$195,687
2004	\$147,745
1998	\$252,340
1994	\$183,778

* Not inclusive of all expenses.

Source: State Bar

Without an effective rulemaking process, Texas does not have up-to-date standards for attorney regulation to protect the public and provide clear guidance to attorneys.

Texas has not meaningfully revised attorney conduct and discipline rules in more than 20 years due to the difficulty in passing referenda. The goal of the proposed 2011 referendum was to update Texas’ rules of conduct to make them more consistent with the 2002 ABA Model Rules and those of other states.⁸ The failure of that effort means Texas’ current rule language was largely drafted in the mid-1980s and does not reflect changes in the law or evolution of the profession, such as different working relationships among attorneys, improved research and communication technology, and increased geographical diversity.⁹ The last time the State Bar succeeded in passing a referendum to significantly update the rules of conduct or rules of disciplinary procedure was in 1990 and 1994, respectively.

Texas does not prohibit an attorney from having sex with clients.

- **Outdated conduct rules.** Many of the changes in the 2011 referendum would have placed limitations or requirements on attorneys to better protect the public, described in the textbox, *Failed Updates to Attorney Conduct Standards in 2011*.¹⁰ In particular, Texas is in the minority of states without a provision prohibiting an attorney from having sexual relations with a prospective or current client, making it harder to protect clients who are asked for sex in exchange for legal services.¹¹ Also,

Failed Updates to Attorney Conduct Standards in 2011

- Protecting clients from excessive fees
- Updating standards for conflicts of interest and prohibited transactions
- Better protecting clients with diminished capacity
- Prohibiting sexual relations with clients
- Increasing requirements for communication and consent

changes to fee standards would have better protected clients from attorneys charging too much by changing the standard for a prohibited fee to “clearly excessive” instead of “unconscionable,” which is a high threshold to meet in a disciplinary action. Texas is one of only two states that use that high standard.¹²

The lack of updated rules also creates confusion for attorneys. The changes proposed in 2011 would have clarified certain areas of professional regulation causing frequent questions, such as selling a law practice or dealing with a client with diminished capacity. The Ethics

Helpline at the State Bar received 6,200 calls in fiscal year 2014–2015 with questions about the Texas Disciplinary Rules of Professional Conduct.¹³ The profession and the public are better served when attorneys understand the acceptable parameters of their conduct and the agency can effectively update rules to respond to confusion.

- **Outdated disciplinary process rules.** Issues 2 and 3 of this report detail numerous aspects of the attorney discipline process needing adjustment to ensure the State Bar’s Office of the Chief Disciplinary Counsel can effectively do its job to monitor attorney conduct and take fair and consistent enforcement action when needed. Nearly all of the proposed recommendations could be accomplished through rule amendments, but may have to be directed by the Legislature through the Sunset process instead. Because each referendum requires so much time and expense for the State Bar and the track record for passing rules is so poor, the agency has not proposed needed changes that would allow cases to be processed more efficiently. For example, recommendations in Issues 2 and 3 address the chief disciplinary counsel’s lack of authority to issue subpoenas, lack of transparent sanction guidelines, and inflexibility in timelines that prevent efficient complaint investigations. Issues 2 and 3 also address the chief disciplinary counsel’s tendency to adopt changes in policy instead of rule, such as the establishment of the Grievance Referral Program, because succeeding in making rule changes is so unlikely.

The agency has not proposed needed rule changes because success is so unlikely.

All other occupational licensing boards in Texas and all but one other state bar in the country are able to successfully represent stakeholder interests in rulemaking without a referendum process.

- **No other occupational licensing agency uses a referendum.** No other licensed profession in Texas allows license holders to vote on the rules governing their profession or setting their fees. Texas occupational licensing agencies typically have a board with governor-appointed members, including public representatives, that adopt those rules. The agencies must comply with the Administrative Procedure Act requirements for rulemaking, ensuring interested parties have input into the rules at various stages in the process.
- **Only one, much smaller bar in the country uses a referendum.** The only other state bar in the country to use a referendum for rulemaking is Idaho, which has a membership of approximately 5,000 attorneys.¹⁴ In most states with a unified bar, the bar acts as an advisory committee to the state supreme court, which has the authority to adopt rules governing attorneys.¹⁵ In these states, the decision to adopt rules rests with the inherent power of the court over the judicial branch, with input from the state bar. Across the country, courts and bar leadership are usually composed exclusively of attorneys, are often elected, and are well suited to fairly represent the interests of attorneys in the adoption of rules governing the legal profession.

The Supreme Court can adopt rules for admission to the State Bar without a referendum.

- **All other judicial branch rules are adopted without a referendum.** The Supreme Court develops and adopts many complex rules without a referendum, including rules governing Texas courts such as the Texas Rules of Civil Procedure, and other aspects of attorney regulation such as admission to the State Bar through the Board of Law Examiners. Under the Supreme Court's rulemaking process, rule proposals are submitted to the Supreme Court Advisory Committee for consideration.¹⁶ The court may also develop a special task force to study a particular issue and make recommendations. Once the court has developed the rules, it may put them out for comment based on statutory requirements and the complexity of the rule change. Final rules are published in the Texas Bar Journal and posted on the Supreme Court's website.

An updated process for adopting State Bar rules needs standard best practices to ensure consistent opportunities for meaningful participation by members of the bar and the general public.

The Supreme Court is not subject to the Administrative Procedure Act, giving it more flexibility in how it develops and adopts rules, and applying such detailed requirements to the judicial branch would be unworkable. However, the act includes provisions designed to ensure transparency, accountability, and public participation in rulemaking, which are good practices for any organization involved in the development and adoption of rules. The current system used by the Supreme Court to adopt rules for the State Bar lacks some of these key elements.

- **No clear opportunity for rule proposals.** Under the State Bar Act, the Supreme Court, State Bar board, or bar membership may propose rules or amendments to rules regarding the State Bar and member discipline.¹⁷ An interested person who is not a licensed attorney in Texas does not have the clear ability to propose a rule change. Also, the statute does not require the Supreme Court to respond to rule proposals. A process to accept and respond to proposals from any interested party would make the Supreme Court more accountable to attorneys and the public.
- **Lack of public representation in rule development.** For previous referenda, the Supreme Court has convened task forces to study rule proposals, which have included representatives from the State Bar, different courts, and various legal practice areas. Public representation in these groups has been limited. Interest groups representing the public monitor the legal profession and could provide meaningful input and perspective into the rules. The Supreme Court should consider including interested public members on these committees.
- **No required comment period.** Past referenda have included a public comment period, but no specific requirement exists in statute. Having a specified comment period would guarantee State Bar membership and the public an opportunity to provide feedback on rule changes. In addition,

no process exists for an interested person to request a hearing on the rules. The State Bar conducts public hearings and educational meetings by choice, but the agency is not required to do so. Creating an avenue for the public to request a hearing with the Supreme Court could increase public involvement and ensure transparency in the overall process.

- **No requirement to respond to public comment.** Once comments are submitted to the Supreme Court, the court reviews them and may revise the rules accordingly; however, the court does not give any summary of the comments received or why it disagreed with a submission. The process would be more transparent and accountable to the public if the Supreme Court provided a response explaining its position.

Recommendations

Change in Statute

1.1 Repeal requirements for a referendum of State Bar members to approve changes to rules and membership dues, clarifying the Supreme Court's inherent authority to oversee attorney discipline and administration of the State Bar.

This recommendation would eliminate provisions in the State Bar Act requiring a vote of all licensed attorneys to approve rules governing lawyer discipline and other procedures of the agency such as membership dues. Eliminating these requirements would ensure the Texas Supreme Court, like courts in nearly all other states, can exercise its existing authority to update State Bar rules through a more efficient process. A more standard rulemaking procedure, with the improvements outlined in Recommendation 1.2, would ensure consideration of stakeholder input without bogging down needed change or creating unnecessary costs.

1.2 Require the Supreme Court to develop a standard rulemaking process for the State Bar ensuring ample opportunity for State Bar members and other stakeholders to vet changes to attorney regulation rules or membership dues.

This recommendation would require the Supreme Court to establish a transparent, standard rulemaking process related to the operation, maintenance, and conduct of the State Bar and discipline of its members, including changes to membership dues. Statute would require the new process to include the following elements to ensure all interested stakeholders, including State Bar members, have a clear role in the development of State Bar rules:

- Procedures for receiving proposals for rule changes and comments on proposed rules, including from the general public, and requiring a response from the court
- A description of when the court will use advisory committees or task forces to consider more complex changes to rules, and provisions for including public members in these groups
- Procedures outlining mandatory public comment periods, including the option for interested parties to request a hearing
- Procedures for posting both proposed and adopted rules in the Texas Bar Journal and on public websites, and providing other electronic notifications of rule changes to interested parties, as practicable

- Reasonable opportunity and time for the State Bar board to officially review and comment on proposed rules affecting its members
- Specific provisions for considering changes and receiving input regarding State Bar membership dues linking any increases in dues to specific budgetary needs identified through the existing State Bar budget process required in law¹⁸

Establishing these elements of the process, modeled in part on standards followed by all other occupational licensing agencies in Texas, would help ensure transparency in State Bar rulemaking and increase opportunities for public participation. However, specific implementation details would be left to the Supreme Court's discretion as the overseer of the judicial branch.

Management Action

1.3 The State Bar should develop a consistent process for collecting membership input on proposed rule changes to inform Supreme Court rulemaking.

Under this recommendation, leadership of the State Bar should still facilitate input from State Bar membership on any proposed rules the Supreme Court may consider under the process described in Recommendation 1.2. For example, the State Bar could conduct online polls of members, request member comments through its existing publications, or conduct its own meetings around the state to solicit member input. Establishing such protocols would ensure bar membership has the opportunity to provide meaningful input to the State Bar board on rules affecting the agency or attorney discipline before the board provides official feedback representing membership opinions to the Supreme Court. This recommendation would not preclude any individual State Bar member from also expressing opinions or comments on rule proposals directly to the Supreme Court as described in Recommendation 1.2.

Fiscal Implication

These recommendations would not have a fiscal impact to the state, as the State Bar receives no state funds and operates outside of the appropriations process.

Overall, Recommendation 1.1 would have a positive fiscal impact to the State Bar because the agency would no longer have to spend time and resources on conducting referenda, including the printing and postage to mail ballots and election vendor services. These savings could be significant, as referenda have typically cost the State Bar about \$200,000 each, but do not occur frequently enough to estimate an annual impact. The State Bar could incur costs to collect input as directed in Recommendation 1.3, but the agency would have flexibility to design efficient procedures and would be able to accomplish the goals of the recommendation within existing resources. Similarly, the Supreme Court would be able to develop a standard rulemaking process and adopt State Bar rules as required under Recommendation 1.2 within its current resources, since it already has dedicated staff and resources for adopting rules for the State Bar and many other aspects of the judicial system in Texas.

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- 1 See *In re State Bar of Texas*, 113 S.W.3d 730, 732 (Tex. 2003) (citing *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-399 (Tex. 1979)).
 - 2 All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Section 81.024, Texas Government Code.
 - 3 Section 81.054(a), Texas Government Code.
 - 4 Section 2001.003(7)(C), Texas Government Code.
 - 5 Section 6, Chapter 227 (H.B. 599), Acts of the 78th Texas Legislature, Regular Session, 2003.
 - 6 American Bar Association Model Rules of Professional Conduct (2002).
 - 7 Supreme Court of Texas, *Texas Disciplinary Rules of Professional Conduct*, Preamble: A Lawyer's Responsibilities, 8, accessed April 20, 2016, <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271>.
 - 8 Members of the State Bar Committee on the Texas Disciplinary Rules of Professional Conduct, "Five Benefits of the Proposed Rules," *Texas Bar Journal* (January 2011), 58.
 - 9 Ibid.
 - 10 Ibid., 59.
 - 11 American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 1.8(j)*, May 13, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8j.authcheckdam.pdf.
 - 12 American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct, Rule 1.5: Fees*, March 28, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.authcheckdam.pdf.
 - 13 State Bar of Texas, *Commission for Lawyer Discipline Annual Report*, August 31, 2015, <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemwithanAttorney/GrievanceEthicsInfo1/CommissionforLawyerDisciplineAnnualReport.pdf>.
 - 14 Idaho State Bar, *2015 Annual Report*, 2, accessed April 3, 2016, http://isb.idaho.gov/pdf/general/isb_annual_report.pdf.
 - 15 American Bar Association Center for Professional Responsibility Policy Implementation Committee, *State Procedures for Adoption/Amendment of Rules of Professional Conduct*, January 26, 2016.
 - 16 Texas Judicial Branch, Rules and Forms, *Texas Court Rules: History and Process*, accessed April 3, 2016, <http://www.txcourts.gov/rules-forms/rules-standards/texas-court-rules-history-process.aspx>.
 - 17 Section 81.024(b), Texas Government Code.
 - 18 Section 81.022, Texas Government Code.

ISSUE 2

Texas' Attorney Discipline System Lacks Best Practices Needed to Ensure Fair, Effective Regulation to Protect the Public.

Background

Texas regulates attorneys through a complex system operating under the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct adopted by the Supreme Court.¹ Appendix A shows the oversight structure of the legal profession in Texas, and Appendix D contains a flowchart, timeline, and glossary explaining the disciplinary process in more detail. The Office of the Chief Disciplinary Counsel is the attorney discipline division of the State Bar responsible for screening grievances, investigating complaints, and pursuing litigation against licensed attorneys for violations of the professional conduct rules. The Commission for Lawyer Discipline oversees the work of the chief disciplinary counsel and makes decisions on how to prosecute individual cases. Local grievance committees conduct hearings and decide cases brought forth by the chief disciplinary counsel and the Commission for Lawyer Discipline. Each of the State Bar's 17 districts has a separate grievance committee to decide cases originating in that district.

In State Bar fiscal year 2014–2015, the chief disciplinary counsel screened 7,071 grievances and conducted 1,692 investigations into cases alleging a violation of the professional conduct rules. That year, the chief disciplinary counsel resolved 416 complaints that resulted in 318 disciplinary actions against licensed attorneys.² These actions ranged from private reprimands for minor misconduct, such as failing to properly communicate with a client, to disbarments for very serious issues, such as prosecutorial misconduct resulting in a wrongful conviction. Often, attorneys must also pay restitution to financially harmed clients and attorneys' fees to the Office of the Chief Disciplinary Counsel for the costs of pursuing the case.

Sunset staff used several approaches in evaluating this unique system and making the resulting recommendations. First, staff relied on Sunset's long history of reviewing Texas occupational licensing agencies and identified best practices that could help the Office of the Chief Disciplinary Counsel more effectively do its job. Second, since attorney regulation is a judicial function under the Supreme Court's authority different than most executive-branch agencies, Sunset staff also considered national best practices specific to attorney regulation developed by the American Bar Association. Staff also evaluated how well previous Sunset recommendations have been working, and in some cases suggest refinements to the major changes enacted through Sunset in 2003, shown in the accompanying textbox. Finally, in making statutory recommendations, Sunset staff considered the Supreme Court's difficulty in making needed adjustments to procedural rules without clear legislative direction, described in more detail in Issue 1.

Key Changes to the Attorney Discipline System — 2003 Sunset Review

- Eliminated a requirement to hold hearings on every complaint, promoting efficiency and aligning the system with statewide best practices
- Created a process to review staff-level decisions to dismiss grievances
- Required time limits for processing grievances to ensure cases do not linger in the system
- Established an overall statutory framework for the discipline system, and required the Supreme Court to revise related rules

Findings

The chief disciplinary counsel does not have access to regular criminal history information on licensed attorneys, preventing consistent monitoring and enforcement of existing rules.

The Office of the Chief Disciplinary Counsel lacks two monitoring tools standard to most Texas occupational licensing agencies: fingerprint-based criminal background checks and licensee self-reporting. These tools provide a systematic way for agencies to keep track of criminal activity and take action to protect the public when a licensee’s criminal behavior relates to their ability to competently and honestly practice their profession.

Fingerprint-based checks allow automatic notice of licensee arrests.

Many agencies conducting background checks use the Department of Public Safety’s (DPS) fingerprint-based system because it allows for more accurate and complete initial criminal history than a simple name-based check, including initial out-of-state criminal history. Fingerprint-based checks also allow DPS to provide automatic notice of a licensee’s subsequent arrests in Texas to the licensing agency. For arrests occurring out of state after initial licensing, many agencies continue to rely on mandatory self-reporting by licensees because the federal automated notification system is not yet fully implemented by the FBI.

- **No authority to use existing background check information.** Attorneys already receive fingerprint-based background checks during the Board of Law Examiners’ initial licensure process, but the State Bar cannot use this information to monitor attorney criminal activity once attorneys begin practicing and transfer to the oversight of the chief disciplinary counsel.³ Instead, the State Bar’s authority to conduct background checks on licensed attorneys only allows the checks in very limited circumstances, such as for an attorney already accused of misconduct.⁴ This limitation prevents the chief disciplinary counsel from having full awareness of all the attorneys it is responsible for monitoring.

Examples of Compulsory Disciplinary Action FY 2014–2015

- Child pornography and child sexual abuse – suspension pending criminal appeal
- Wire fraud – disbarment
- Conspiracy to commit health care fraud – suspension pending criminal appeal
- Tampering with a government record – suspension pending appeal
- Racketeering and extortion – voluntary resignation from the practice of law
- Conspiracy to commit bribery, extortion, and conspiracy to commit money laundering – disbarment

Source: Board of Disciplinary Appeals 2014–2015 Annual Report

The Texas Rules of Disciplinary Procedure already require the chief disciplinary counsel to take action against an attorney based on criminal activity, referred to as “compulsory discipline.”⁵ The accompanying textbox provides examples of the types of crimes for which attorneys were disciplined in this manner during the last State Bar fiscal year.⁶ However, the lack of regular access to information on criminal history prevents the chief disciplinary counsel from fully enforcing these existing rules. Staff learned of the attorney’s criminal conviction through the news media in half of the 18 compulsory discipline actions taken in fiscal year 2014–2015. In the other nine cases, staff found out through a mix of other methods, such as notification by

local authorities. These methods are no substitute for the comprehensive and automatic monitoring background checks allow.

- **No required self-reporting of criminal activity.** Attorneys are not required to report criminal activity to the Office of the Chief Disciplinary Counsel. As stated above, the limitations of the federal background check system make a self-reporting requirement important so the chief disciplinary counsel can better identify criminal convictions in other states that may require disciplinary action to protect Texas citizens.

The chief disciplinary counsel lacks common monitoring tools to know when other states take disciplinary action against a Texas attorney.

Increasingly, Texas attorneys also hold law licenses in other states. As such, the Texas Rules of Disciplinary Procedure provide a “reciprocal discipline” process for imposing sanctions on an attorney disciplined in another state to protect the public in Texas.⁷ However, the chief disciplinary counsel lacks two monitoring tools common to Texas licensing agencies and other states’ attorney discipline agencies, as described below.

- **No required self-reporting of discipline in other states.** The Texas Rules of Disciplinary Procedure do not require attorneys to report to the chief disciplinary counsel when another jurisdiction sanctions them. Many other states’ attorney discipline agencies require attorneys to report this information if they are licensed to practice in more than one state, since such a requirement is recommended as a best practice by the American Bar Association.⁸
- **Underuse of national disciplinary database.** Licensing agencies should make use of enforcement information shared with national or federal data banks. Almost all attorney discipline agencies in the country, including the Office of the Chief Disciplinary Counsel, report disciplinary data to the National Lawyer Regulatory Data Bank maintained by the American Bar Association. The chief disciplinary counsel can query the database without charge for actions taken against Texas-licensed attorneys by other states, but does not currently do so as part of its attorney oversight efforts. The chief disciplinary counsel recently obtained user credentials for the data bank, but has not implemented a process for ongoing, periodic searches to better fulfill its obligation to identify and take reciprocal enforcement action when needed.

Checking a free national database would help identify Texas attorneys disciplined in other states.

The chief disciplinary counsel does not receive notification about overdrawn attorney trust accounts, missing a nationally accepted best practice that could help protect clients from financial harm.

Safeguarding client funds such as prepaid legal fees and settlement awards is one of the most critical responsibilities attorneys have to their clients. Since many

Trust Account Basics

- Required to separate and protect client funds from an attorney’s other accounts
- Offered by 442 Texas financial institutions on a voluntary basis
- Governed by Supreme Court rules
- Administered by the Texas Access to Justice Foundation, a nonprofit affiliated with the State Bar
- Funds legal aid services from interest earned on the accounts

serious disciplinary cases involve theft or mismanagement of client funds, the rules of conduct require attorneys to keep this money separate and carefully protected from other business and personal accounts.⁹ Attorneys hold client funds in Interest on Lawyer Trust Accounts (commonly known as IOLTA accounts or trust accounts), described in the accompanying textbox.

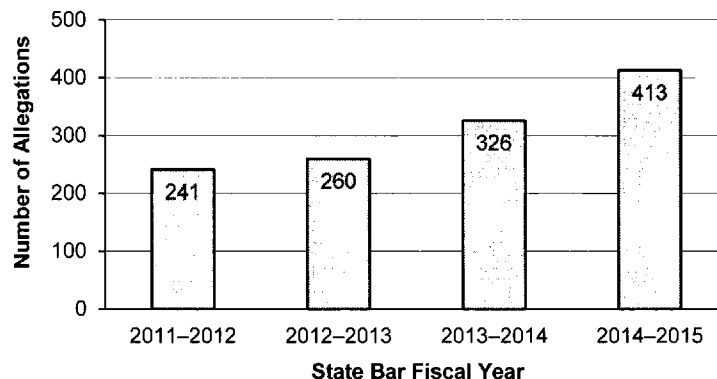
The Supreme Court’s rules governing these trust accounts do not require participating financial institutions to notify the chief disciplinary counsel when overdrafts occur, though this is a successful best practice in most states and could help Texas address a growing problem, as described below.

Overdrafts can be an early warning sign of potential serious ethical misconduct needing immediate action, or can result from a lack of understanding of how to properly handle client funds and indicate a need for additional outreach and training. Adopting trust account overdraft notification would help the chief disciplinary counsel proactively identify attorneys who need more education on how to properly manage their trust accounts; deter potential funds mismanagement; and detect serious misuse of client funds. While participating financial institutions would have to change their practices, many already routinely provide overdraft notifications to account holders, so the additional administrative burden for most should be minimal. Further, the Supreme Court’s rulemaking process would allow for input by financial institutions to best facilitate implementation.

- **Mishandling of client funds an increasing concern.** Over the last four State Bar fiscal years, allegations of attorneys mishandling client funds increased 71 percent, as shown in the graph below. According to the chief disciplinary counsel, a number of funds mismanagement cases involve attorneys who have overdrawn trust accounts, but the chief disciplinary counsel only learns about these problems after the fact, through financial records obtained during litigation.

Allegations of attorneys mishandling client funds increased 71 percent over the last four fiscal years.

Allegations of Attorney Mishandling of Client Funds



Source: State Bar

The State Bar often ends up compensating clients on the back end for issues that go undetected until clients suffer severe financial harm and the attorney no longer has funds to compensate them. In fiscal year 2014–2015, the State Bar approved \$639,581 in payments from the Client Security Fund, created as a last resort to compensate clients in such cases. Some of these cases could be avoided if the chief disciplinary counsel received the early warning that trust account overdraft notification can provide.

- **Overdraft notification widely adopted with positive impact in other states.** Texas is one of just four states that has not adopted the American Bar Association’s 1985 recommendation for attorney trust fund overdraft notification.¹⁰ Beyond merely being a widely adopted best practice, actual experience suggests these notifications are effective in other states, the logical result of increased education and targeted efforts to ensure attorneys have the knowledge and tools to properly manage client funds. For example, Missouri, whose attorney discipline agency implemented overdraft notification in 2010, experienced a nearly 50 percent decline in the number of notifications received over five years. Similarly, Wisconsin experienced a 20 percent reduction in the number of notifications received from 2004 to 2005, and another 20 percent reduction from 2005 to 2006, the first two years following implementation.¹¹

The chief disciplinary counsel lacks standard authority needed to conduct effective investigations and resolve cases earlier to avoid litigation when appropriate.

Occupational licensing agencies should have tools and processes at their disposal to speed resolution of complaints. They should also have alternative ways of dealing with minor misconduct by offering remedial plans or non-disciplinary orders requiring a licensee to correct a minor issue under certain limited criteria. The chief disciplinary counsel lacks the following tools standard to Texas occupational licensing agencies and attorney discipline agencies in other states.

- **Lack of subpoena power prevents thorough investigations.** Many occupational licensing agencies in Texas, such as the Texas Medical Board and the Texas State Board of Pharmacy, have statutory authority to subpoena information relevant to a pending investigation.¹² The American Bar Association has also adopted investigative subpoena power as a nationwide best practice for attorney discipline agencies.¹³

The chief disciplinary counsel’s subpoena authority is currently limited to only the litigation phase of the disciplinary process. The inability to subpoena records earlier, during investigations, can lead staff to either dismiss complaints that may be valid, or move forward on complaints that may prove baseless. Also, third parties commonly refuse to cooperate with disciplinary investigations without a subpoena, seriously constraining the chief disciplinary counsel’s ability to perform thorough investigations.

Texas is one of just four states that has not adopted trust account overdraft notification.

Without a subpoena, third parties commonly refuse to cooperate with investigations.

The textbox, *Examples of Records Needed to Properly Investigate Cases*, lists examples of specific investigations impeded by the agency's lack of subpoena power.

Examples of Records Needed to Properly Investigate Cases

- **Jail logs** to confirm whether an attorney had visited a client in a complaint alleging the attorney failed to communicate with the client
- **Cell phone records** to verify an accident victim had been in contact with middlemen in an improper client solicitation case, also known as barratry
- **Bank statements and other records** to validate misuse of client funds, such as keeping unearned fees, comingling client and personal funds, or theft of settlement funds
- **Insurance company records** to verify disbursement of settlement funds in a case alleging an attorney had settled personal injury cases without client knowledge and stolen the money
- **State Bar records** to verify an attorney was notified about being administratively suspended for failing to meet continuing legal education requirements in a case of practicing law while suspended

Source: State Bar

Previously, the procedural rules adopted by the Supreme Court authorized the chief disciplinary counsel to issue subpoenas during the investigation phase, but extensive changes to rules made after passage of the 2003 Sunset bill inadvertently eliminated this power. Due to the general difficulty of amending the rules, as described in Issue 1, the chief disciplinary counsel has operated without investigative subpoena power since that time.

- **Lack of early hearings to encourage settlement.** Most occupational licensing agencies use informal settlement conferences to resolve enforcement cases at the conclusion of an investigation when evidence suggests a licensee has committed a violation. The agency brings together the parties and typically makes a settlement offer to the respondent. If the respondent and the agency cannot agree to a settlement, the case will usually go to a formal hearing for resolution. By contrast, the chief disciplinary counsel has no process under the current procedural rules to attempt early settlement and avoid lengthy litigation. While 72 percent of disciplinary cases settled before trial in fiscal year 2014–2015, many of these cases settled quite late in the litigation process. Providing a standard opportunity for an informal hearing before reaching litigation would allow the parties to agree to a settlement sooner, and could also increase the overall percentage of cases settled before trial.

While 72 percent of cases settle before trial, many settle quite late in the process.

In the past, the chief disciplinary counsel conducted hearings for all complaints early in the investigation before staff had evaluated the merits of each case. The Sunset Commission's 2003 recommendations eliminated these universally required hearings because many were not needed and wasted considerable resources.¹⁴ However, this change also unintentionally

eliminated a useful tool to resolve complaints *after* investigation, when the facts of the case are known and a hearing can help achieve settlement. Reinstating a more targeted process similar to other regulatory agencies would ensure the chief disciplinary counsel can use settlement hearings after the basic facts of the case are known and resolution is more likely.

- **Inflexible investigation time limits.** A licensing agency should set deadlines for completing investigations to balance the need to quickly dispose of complaints with allowing sufficient time to gather information. For example, investigations at the Texas Medical Board and the Texas State Board of Pharmacy are typically limited to 180 days.¹⁵ The 2003 Sunset review of the State Bar required the Supreme Court to set time limits in rule for different stages of the disciplinary process to ensure cases do not linger too long in the system without resolution.¹⁶

While clear time frames should remain in place to ensure predictable case resolution, the current 60-day limit to investigate cases is too short and inflexible to allow for optimal resolution of some cases. Some investigations may require more time on the front-end to allow for quicker final resolution of the case overall. For example, obtaining subpoenaed records and allowing for objections to a subpoena by the respondent attorney typically take longer than the current 60-day limit allows, often 90 days or more. Additional time may also be needed if early settlement hearings occur before the official close of an investigation. If the chief disciplinary counsel cannot gather the information needed during the investigation because of time constraints, staff may not be able to verify allegations of misconduct until the litigation phase, needlessly lengthening resolution of some cases.

- **Limited authority to use diversion program.** In accordance with American Bar Association best practices, the Office of the Chief Disciplinary Counsel uses the Grievance Referral Program to resolve minor misconduct cases without imposing a disciplinary sanction.¹⁷ The chief disciplinary counsel works with eligible attorneys to develop specific plans to resolve issues and prevent recidivism, some of which are described in the accompanying textbox.

While the program is clearly in line with national best practices, it is established only in internal policies, not in the procedural rules, and can only be used after a full investigation is concluded.¹⁸ Given its important role in the attorney discipline process, the program should be clearly included in the rules of procedure. Also, flexibility on the timing of the program's use could help resolve more cases sooner, particularly when the facts are known early and the respondent wants to participate.

**Grievance Referral Program
Example Plan Elements**

- Substance abuse treatment
- Mental health services
- Continuing legal education, including self-study
- Law practice management audit and technical assistance

The current 60-day time limit is too short to allow optimal resolution of some cases.

The attorney discipline system lacks clear sanction guidelines and tracking of decisions needed to promote consistency and transparency in a highly decentralized structure.

Occupational licensing agencies should adopt detailed and publicly available guidelines for the use of sanctions against licensees based on the type and severity of a violation. Guidelines should clearly connect the type of violation with the generally appropriate sanction, while providing for flexibility in the event of aggravating or mitigating factors in individual cases. Agencies should also collect and regularly evaluate enforcement decisions to analyze trends and consistency in decision making. The attorney discipline system falls short of these standards, as described below.

- **Current guidelines too general.** The accompanying textbox lists, almost verbatim, the sanction guidelines currently available in the Texas Rules of Disciplinary Procedure for cases heard by grievance committees and in district court.¹⁹ These guidelines are general factors to consider when

<p>Current Sanction Guidelines</p> <ul style="list-style-type: none"> • Nature and degree of misconduct • Seriousness and circumstances surrounding the misconduct • Loss or damage to clients • Damage to the profession • Potential of harm to future clients • Profit to the attorney • Avoidance of repetition • Deterrent effect on others • Maintenance of respect for the legal profession • Conduct of attorney during the course of the disciplinary proceeding • Respondent’s past disciplinary record <p><i>Source: Texas Rules of Disciplinary Procedure</i></p>
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determining a sanction, but do not provide enough specificity for actual decision making. For example, the current suggestion to consider past disciplinary history does not explain *how* to appropriately strengthen a sanction in repeat cases to deter future misconduct, even though about 70 percent of disciplinary cases resulting in a sanction involve attorneys with prior disciplinary history.²⁰ Rather, rules could suggest a suspension instead of a reprimand for an attorney who has committed the same minor rule violation multiple times. A better-defined approach to handling these and other cases would help guide sanction decisions and better deter future misconduct.

The 17 local grievance committees are composed of volunteer members who may hear a small number of cases each year, and do not have clear enough standards on which to base their

decisions. Further, with such a decentralized decision-making structure, the need for more detailed guidelines is even greater than for a typical licensing agency where all decisions are made by a single board. Finally, without publicly available guidelines, sanction decisions largely remain a mystery to the public and the licensed attorney population.

The Texas Medical Board has much more detailed guidelines in rule linking types of violations with specific ranges of sanctions, and allowing for aggravating and mitigating factors.²¹ In addition, other attorney discipline agencies, such as in Florida, California, and Oregon, have adopted more specific disciplinary sanction guidelines, in line with the American Bar Association’s recommended best practice.²² These guidelines help promote

consistency and transparency for how decisions are made, but do not tie the hands of decision makers, who always maintain the authority to respond to a case's specific facts.

- **Poor tracking and analysis of case outcome data.** The chief disciplinary counsel does not collect sufficient data to report detailed case outcome information that could show how different rule violations translate into sanction decisions made by the local grievance committees on a statewide basis. Current tracking is limited to whether a sanction decided by a local grievance committee or district court falls within the range initially recommended by the chief disciplinary counsel. More detailed data could help formulate sanction guidelines and assist the local grievance committee members in making decisions. With implementation of a new, robust information system in 2013, the chief disciplinary counsel can now better track and analyze case outcomes and should make a dedicated effort to do so.

Little data exist to show how rule violations translate into statewide sanction decisions.

The chief disciplinary counsel does not provide enough information to the public, reducing transparency of the complex attorney discipline system.

An occupational licensing agency should provide complete information on its website regarding the disciplinary history of its licensees, and proactively assist the public in understanding the grievance process, including the reasons for complaint dismissal. These practices help promote public confidence in the system and in the regulated profession overall. The Office of the Chief Disciplinary Counsel does not fully meet these criteria, described as follows.

- **Incomplete disciplinary history of licensed attorneys.** Making complete disciplinary histories of individual Texas attorneys more accessible would help improve transparency by eliminating barriers to information that is already public under the law. Disciplinary history provided on the State Bar website is limited to the last ten years instead of an attorney's full history, and does not explain details of why an attorney was sanctioned. A person interested in the details of a public sanction has to separately call the Office of the Chief Disciplinary Counsel and pay \$15 for a copy of this information. Other regulatory agencies, such as Texas Medical Board, Texas Department of Licensing and Regulation, and Texas State Board of Pharmacy provide more complete and detailed enforcement history, including the reasons for enforcement actions, and often post the full enforcement order. Attorney discipline agencies in other states, such as Florida and New York, similarly post enforcement orders on their websites, making them easily accessible to the public.²³
- **Insufficient information and assistance provided to complainants.** While the Office of the Chief Disciplinary Counsel has recently improved its written communications to complainants to provide a wider range of standard reasons for dismissal, the information could still be more tailored to the individual case. Of all grievances dismissed by the chief disciplinary counsel at initial screening, nearly 80 percent allege conduct that, even if true,

A person has to pay \$15 to get public information on why an attorney was sanctioned.

would not violate the rules of conduct. Dismissal letters to complainants could provide additional explanation of *how* the alleged conduct does not violate the rules. For example, an attorney's work may be poor quality, but such conduct is not a violation of the rules, which make a distinction between unethical conduct and malpractice.

The chief disciplinary counsel could also include more information in letters to complainants about how the complex disciplinary process works overall and how to ask specific follow-up questions about the case. For example, in letters to complainants communicating dismissal after an investigation, the chief disciplinary counsel could better explain the process for evaluating and dismissing complaints once an investigation is complete. Also, staff involved in classifying and investigating grievances are willing and able to discuss cases with complainants over the phone to explain the decision to dismiss, but written communications with complainants do not include a specific contact name or phone number to make this option easy and obvious.

Recommendations

Change in Statute

2.1 For new and recently licensed attorneys, authorize the State Bar to access criminal background information obtained by the Board of Law Examiners during initial licensure.

This recommendation would authorize the State Bar to access the ongoing and up-to-date fingerprint-based criminal history information the Board of Law Examiners initially obtains as part of every attorney's licensing process. For new and recently licensed attorneys with information still on file with the board, the chief disciplinary counsel could seamlessly receive updates from DPS' criminal history information system if any subsequent criminal activity occurs after initial licensure. The State Bar should consult with DPS to determine the extent to which existing fingerprint information on file with the board could be used to implement this requirement to minimize impact on attorneys. This recommendation would ensure the chief disciplinary counsel can effectively fulfill its responsibility to monitor attorney criminal conduct and take disciplinary action when warranted, similar to how most occupational licensing agencies in Texas operate.

2.2 For currently licensed attorneys without information on file with the Board of Law Examiners, require the State Bar to obtain new fingerprint-based criminal background checks, phased in over a two-year period.

This recommendation would ensure the Office of the Chief Disciplinary Counsel can access criminal history information for all currently licensed attorneys, not only the new or recently licensed attorneys with information still on file with the Board of Law Examiners addressed in Recommendation 2.1. As a consequence of this recommendation, many currently licensed attorneys would have to obtain and pay for new fingerprint-based checks, at a one-time cost of about \$40 each. Due to the large number of attorneys licensed in Texas and the need to educate them about the new requirement, the recommendation would allow for a two-year, staggered implementation time frame which must be complete by September 1, 2019. To ensure compliance, the State Bar would be authorized to administratively suspend an attorney's

license for failing to comply with the background check requirement. Obtaining up-to-date criminal history on all attorneys would ensure the State Bar has the ability to comprehensively and consistently monitor criminal activity and take action as appropriate to protect the public, in line with most other licensing agencies in the state.

2.3 Require licensed attorneys to report criminal activity and discipline imposed by other jurisdictions to the Office of the Chief Disciplinary Counsel.

This recommendation would require the chief disciplinary counsel to develop a process and guidelines for attorneys to self-report criminal activity and disciplinary action taken by other states. The State Bar, in conjunction with the Office of the Chief Disciplinary Counsel, could use the existing dues statements attorneys fill out every year to ask pertinent questions, or develop a separate process as appropriate. The Supreme Court should amend applicable rules as needed to implement this recommendation no later than March 1, 2018. Requiring self-reporting would provide an additional tool to ensure the chief disciplinary counsel has complete information about criminal activity and disciplinary action that may require a response to protect Texans.

2.4 Require overdraft notifications for attorney trust accounts so that the chief disciplinary counsel has an early warning system for possible misuse of client funds.

The Supreme Court would be required to amend the rules governing attorney trust accounts to implement a trust account overdraft notification process in consultation with stakeholders to work out implementation details. In addition, the Supreme Court would be required to adopt rules directing how the chief disciplinary counsel should respond to the notices, such as defining the type of intervention needed depending on the severity of each situation and whether there is a pattern of repeated behavior. The Supreme Court should adopt the rules required by this recommendation no later than March 1, 2018. These changes would allow the chief disciplinary counsel to prevent financial harm to clients by better detecting situations of potential risk. Most financial institutions, particularly multistate institutions, already send overdraft notices and should have minimal implementation difficulties.

2.5 Reinstate the chief disciplinary counsel's subpoena power during the investigative phase of the attorney discipline process.

This recommendation would correct the inadvertent elimination of this authority after passage of the 2003 Sunset bill. The authority would be limited to subpoenas directly relating to specific allegations of attorney misconduct, and issued during a pending investigation. Use of subpoenas would generally follow procedures currently in place for the chief disciplinary counsel's existing authority during litigation, including requiring the chair of a local grievance committee to approve the subpoena and providing a process for the respondent to object. As part of this recommendation, the Supreme Court would need to adopt updated rules no later than March 1, 2018, to account for the reinstated authority and related changes to the process.

This recommendation would ensure the chief disciplinary counsel has timely access to information needed to effectively investigate allegations and make appropriate decisions on whether to proceed, instead of waiting until litigation to validate or disprove claims made. This change would also bring the chief disciplinary counsel's authority in line with most other occupational licensing agencies in Texas and other attorney discipline agencies around the country.

2.6 Require a process and criteria for conducting investigatory hearings to attempt earlier resolution for certain cases.

This recommendation would require the Office of the Chief Disciplinary Counsel to develop a process for identifying cases in which early hearings are appropriate to attempt settlement before proceeding to the litigation phase. The chief disciplinary counsel would develop rule changes needed to implement this process for Supreme Court review and adoption no later than March 1, 2018. To limit costs, the rules should authorize the chief disciplinary counsel to conduct hearings by teleconference. This change would ensure the disciplinary process includes opportunities for early, informal resolution of cases, avoiding litigation when possible. This change would also put the Texas attorney discipline process in line with other Texas occupational licensing agencies that have successful early case resolution processes.

2.7 Require a re-evaluation and adjustment of time frames governing the grievance process to ensure workability.

This recommendation would require the Office of the Chief Disciplinary Counsel to develop and propose rule amendments to the Supreme Court to adjust various timelines governing the grievance process in the Texas Rules of Disciplinary Procedure. These adjustments are important to ensure the other changes to the disciplinary process in this report are workable, and the overall goal for a more efficient process is achieved. The changes could simply allow for good-cause exceptions to the current investigation timeline of 60 days, or could extend the current timelines to allow for the earlier subpoena authority and hearings described in Recommendations 2.5 and 2.6. In adopting the rule changes, the Supreme Court should balance providing flexibility with preserving timely resolution of disciplinary cases. The rules should be adopted by March 1, 2018.

2.8 Clearly establish the Grievance Referral Program in rule, and expand its use to any point in the attorney discipline process.

Under this recommendation, the chief disciplinary counsel would develop proposed rules formally establishing the Grievance Referral Program in the Texas Rules of Disciplinary Procedure. The rules should include criteria for attorney participation, currently only described in internal policy, and should authorize use of the program at any point in the attorney discipline process. The Supreme Court should evaluate and adopt the rules no later than March 1, 2018. This recommendation would formalize use of the Grievance Referral Program and provide flexibility for using this non-disciplinary approach for case resolution in a wider range of circumstances when appropriate.

2.9 Require comprehensive sanction guidelines in the Texas Rules of Disciplinary Procedure.

Under this recommendation, the chief disciplinary counsel would be required to propose more detailed sanction guidelines to the Supreme Court linking specific types of rule violations and ethical misconduct to a clear range of appropriate sanctions. The rules would also detail aggravating and mitigating factors that could be used as justification for deviating from the established standards. The updated sanction guidelines would provide guidance to help make sanction decisions in the decentralized attorney grievance system, but would not create limitations on the decision-making authority of any judge or panel. To develop the guidelines, the chief disciplinary counsel should coordinate this effort and use a stakeholder input process to inform recommendations to the Supreme Court, and ensure guidelines for cases heard by grievance committees are consistent with guidelines for cases heard in district court. The Supreme

Court should adopt final rules no later than March 1, 2018. Implementing this recommendation would promote consistent statewide application of sanctions for similar types of misconduct and would increase transparency into decision making.

Management Action

2.10 Direct the Office of the Chief Disciplinary Counsel to query the national disciplinary database at regular intervals.

The chief disciplinary counsel should adopt a process to regularly query the National Lawyer Regulatory Data Bank to identify any Texas attorneys disciplined in other states. This process would allow the chief disciplinary counsel to better protect the public and would serve as a periodic check on attorney self-reporting required under Recommendation 2.3.

2.11 Direct the chief disciplinary counsel to track and report disciplinary case outcomes in greater detail.

The Office of the Chief Disciplinary Counsel should make adjustments to its data tracking system to ensure it captures more detail on the outcomes of disciplinary cases to track and evaluate trends over time. The chief disciplinary counsel should evaluate and periodically report this information to the Commission for Lawyer Discipline and grievance committee members, and should also provide summary information to the public through the State Bar website. When establishing this improved tracking system, the chief disciplinary counsel should consider the following factors:

- Linking rule violations with the sanction imposed, including cases diverted to the Grievance Referral Program
- Tracking aggravating and mitigating factors used in developing sanction recommendations
- Tracking how often sanction decisions align with the sanction guidelines adopted under Recommendation 2.9
- Tracking sanctions by grievance committee district to assist in evaluating regional patterns and facilitate future training efforts of grievance committee volunteers

Collecting, analyzing, and reporting trend data on sanction outcomes would help evaluate consistency throughout the state, and help decision makers adjust approaches as needed in imposing sanctions. This data would also provide greater transparency to the public and policymakers about how the discipline system functions overall.

2.12 Direct the State Bar to post more information on its website about attorney disciplinary actions.

This recommendation would increase transparency and improve the ability of people to make informed decisions about attorneys they may hire by providing better access to information that is already public. The State Bar would post more detailed information regarding attorney disciplinary history on its website, as follows:

- All disciplinary action taken against attorneys should be listed and generally described as part of the attorney's profile, removing the current 10-year time limit.

- The full text of disciplinary judgments entered by local grievance committees or district courts that are already public records should be provided as a link from attorney profiles.

In implementing this recommendation, the State Bar should aim to post as much historical information as practical.

2.13 Direct the Office of the Chief Disciplinary Counsel to more proactively provide assistance to complainants in understanding reasons for complaint dismissal.

The chief disciplinary counsel should revise its current form letters to include both an explanation of how the grievance system works and more specific reasoning for grievance dismissals, when applicable. As part of this recommendation, the chief disciplinary counsel should include language offering to assist complainants over the phone to help understand reasons for dismissal, and list a specific contact person and phone number. This recommendation would help complainants understand the discipline system and improve public satisfaction with the process overall.

Fiscal Implication

These recommendations would not have a fiscal impact to the state, as the State Bar receives no state funds and operates outside of the appropriations process.

Recommendation 2.2 would not have a fiscal impact to the agency, but would require many licensed attorneys to pay about \$40 for a fingerprint background check through DPS. The chief disciplinary counsel could handle any related increased workload within current resources.

Recommendation 2.4 would have a fiscal impact to the State Bar of about \$114,466 annually. The Office of the Chief Disciplinary Counsel would need an additional attorney and an administrative support position to process the trust account overdraft notifications received from financial institutions and conduct the appropriate follow-up actions needed.

Recommendation 2.6 could have a fiscal impact to the State Bar, but the exact amount would depend on implementation and could not be estimated. Hearings to resolve disciplinary cases sooner would require reimbursement of travel costs for grievance committee members and chief disciplinary counsel staff. However, these costs could be offset if these hearings are successful in resolving more cases sooner and avoiding lengthy and expensive litigation. The chief disciplinary counsel could also mitigate these costs by use of teleconference when appropriate.

Querying the National Lawyer Regulatory Data Bank as directed by Recommendation 2.10 is free of charge to the State Bar, but could result in the need to take additional disciplinary action against attorneys sanctioned in other states. However, the chief disciplinary counsel indicates staff could handle any workload increase within current resources.

¹ Supreme Court of Texas, *Texas Disciplinary Rules of Professional Conduct*, accessed March 12, 2016, https://www.texasbar.com/AM/Template.cfm?Section=Lawyers_Home&Template=/CM/ContentDisplay.cfm&ContentID=27271; Supreme Court of Texas, *Texas Rules of Disciplinary Procedure*, January 15, 2015, <https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=25766&Template=/CM/ContentDisplay.cfm>.

² State Bar of Texas, *Commission for Lawyer Discipline Annual Report*, 17, August 31, 2015, <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemwithanAttorney/GrievanceEthicsInfo1/CommissionforLawyerDisciplineAnnualReport.pdf>.

- 3 All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Section 411.100, Texas Government Code.
- 4 Section 411.1005, Texas Government Code.
- 5 *Texas Rules of Disciplinary Procedure*, Part VIII Compulsory Discipline; Section 81.078, Texas Government Code.
- 6 Board of Disciplinary Appeals, *Report 2015*, 8–9, August 31, 2015, http://txboda.org/sites/default/files/PDFs/Report2015_0.pdf.
- 7 *Texas Rules of Disciplinary Procedure*, Part IX Reciprocal Discipline.
- 8 American Bar Association, “Rule 22, Model Rules for Lawyer Disciplinary Enforcement,” accessed March 7, 2016, http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_22.html.
- 9 *Texas Disciplinary Rules of Professional Conduct*, Rule 1.14, Safekeeping Property.
- 10 American Bar Association, “Rule 2, Model Rules for Trust Account Overdraft Notification,” accessed March 12, 2016, http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/orule2.html; American Bar Association, “Jurisdictions with Trust Account Overdraft Notification Rules,” December 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/trust_chart.authcheckdam.pdf.
- 11 Wisconsin Court System, *Trust Account Annual Report*, accessed March 8, 2016, <https://www.wicourts.gov/services/attorney/docs/trustannualreport.pdf>.
- 12 Examples include Texas Medical Board (Section 153.007, Texas Occupations Code), Texas State Board of Pharmacy (Section 565.058, Texas Occupations Code), and Texas Department of Licensing and Regulation (Section 51.3512, Texas Occupations Code).
- 13 American Bar Association, “Rule 14, Model Rules for Lawyer Disciplinary Enforcement,” accessed March 12, 2016, http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_14.html.
- 14 Sunset Advisory Commission, *State Bar of Texas Staff Report*, March 2002, 23, <https://www.sunset.texas.gov/public/uploads/files/reports/State%20Bar%20of%20Texas%20Staff%20Report%202003%2078%20leg.pdf>.
- 15 22 T.A.C. Section 179.6.
- 16 Section 81.0753, Texas Government Code.
- 17 American Bar Association, “Rule 11, Model Rules for Lawyer Disciplinary Enforcement,” accessed March 9, 2016, http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_11.html.
- 18 State Bar of Texas, *State Bar Board Policy Manual*, 6.09 Grievance Referral Program.
- 19 *Texas Rules of Disciplinary Procedure*, Rule 2.18 and Rule 3.10 Imposition of Sanctions. Rule 3.10 is nearly identical to Rule 2.18, but lists two additional factors district courts are required to use in determining appropriate sanctions.
- 20 223 out of 318 sanctions imposed in fiscal year 2014–2015 involved attorneys with prior disciplinary history.
- 21 Title 22 T.A.C. Chapter 190.
- 22 Florida Bar, *Florida’s Standards for Imposing Lawyer Sanctions*, updated May 2015, [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/\\$FILE/Standards%20for%20Lawyer%20Sanctions.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/$FILE/Standards%20for%20Lawyer%20Sanctions.pdf?OpenElement); State Bar of California, *Rules of Procedure of the State Bar of California, Title IV Standards for Attorney Sanctions for Professional Misconduct*, January 1, 2016, http://rules.calbar.ca.gov/portals/10/documents/Rules_Title5_Procedure.pdf; American Bar Association, *Standards for Imposing Lawyer Sanctions*, February 1992, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf.
- 23 New York State Unified Court System, “Departmental Disciplinary Committee,” accessed March 16, 2016, <http://www.nycourts.gov/courts/ad1/committees&programs/ddc/index.shtml>; Florida Bar, “How to find public record attorney discipline information at floridabar.org: user-friendly instructions for the public and the media,” accessed March 16, 2016, <http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/1515ea541926b86c85257af0005f673a!OpenDocument>.

ISSUE 3

The State Bar Does Not Maximize Informal Dispute Resolution to Most Effectively Resolve Grievances Against Attorneys.

Background

Many problems between clients and attorneys involve minor disputes, such as communication breakdowns, that may not rise to the level of ethical misconduct by attorneys. To help with these lower-level cases, the State Bar created the Client-Attorney Assistance Program to resolve problems that are not well suited to the formal grievance process. Some of these lower-level grievances are described in the textbox, *Typical Disputes Addressed by the Client-Attorney Assistance Program*.¹ Though these types of disagreements are minor, when left unresolved, they can easily end up as formal grievances filed against an attorney.

Client-Attorney Assistance Program staff answers a helpline to assist callers in understanding the grievance system and provides informal dispute resolution services. These services can be as simple as staff making phone calls or writing letters on the client's behalf, often producing positive results. In State Bar fiscal year 2014–2015, the program received 22,137 inquiries from the public and closed 1,103 informal dispute resolution cases. Program staff successfully restored communication between clients and their attorneys in 84 percent of those cases.²

The Office of the Chief Disciplinary Counsel and the Client-Attorney Assistance Program have complimentary roles in addressing the broad spectrum of issues clients may have with their attorneys. The chief disciplinary counsel is the State Bar's enforcement arm, responsible for investigating allegations of ethical misconduct by licensed attorneys, such as mishandling client funds or failing to disclose conflicts of interest. Appendix D and Issue 2 describe the attorney discipline system in more depth, including the chief disciplinary counsel's role in evaluating grievances, investigating allegations of misconduct, and pursuing litigation against attorneys when appropriate. In contrast, the Client-Attorney Assistance Program focuses on helping the public resolve less serious concerns stemming from customer service problems that are unlikely to proceed far in the formal disciplinary process, and have a better chance of being resolved through informal means.

Typical Disputes Addressed by the Client-Attorney Assistance Program

- Poor client-attorney communication, such as failure to return phone calls
- Lack of attention to and preparation for a client's case
- Attorney not keeping appointments with client
- Attorney not providing documents or files when requested
- Fee disputes

Source: Commission for Lawyer Discipline Annual Report, 2013–2014

Findings

The Office of the Chief Disciplinary Counsel does not make effective use of early informal dispute resolution to resolve low-level grievances.

The State Bar's current approach does not optimize the use of the Client-Attorney Assistance Program to divert low-level issues from the formal attorney discipline system, as described on the following page.

About 10 percent of formal grievances could be resolved through informal dispute resolution instead.

- **Ineffective referral process.** The current system does not allow for early screening and diversion of a significant number of minor grievances from the formal and lengthy attorney discipline system, with frustrating results. The chief disciplinary counsel estimates about 10 percent of formal grievances filed each year, or 700 to 800 individual cases, could likely be resolved through early intervention by the Client-Attorney Assistance Program's informal dispute resolution services.

When an individual files a formal grievance that could clearly benefit from an attempt at early informal dispute resolution, the chief disciplinary counsel has no option to refer these issues to the Client-Attorney Assistance Program. Instead, the chief disciplinary counsel must proceed down the lengthy formal grievance process, designed to ensure allegations of serious ethical misconduct receive thorough investigation and provide attorneys with ample due process to respond before any action is taken against their license. Processing low-level problems in this way can take up to 14 months from investigation to resolution. Often, the chief disciplinary counsel dismisses these more minor grievances because they do not meet criteria for a rule violation. Even if these types of grievances do qualify as minor misconduct and proceed past the investigation phase, they may involve issues such as an attorney failing to return a client's file, which the client and attorney could have resolved much earlier and more easily.

Statute does require one type of referral to the Client-Attorney Assistance Program, but only at an ineffectually late date *after* the chief disciplinary counsel has fully evaluated and dismissed a grievance through the formal process.³ Attempting voluntary mediation after a formal dismissal is not as effective as screening and referring low-level cases early in the grievance process because the attorney has little incentive to participate. In fiscal year 2014–2015, only 16 out of 40 referrals of dismissed grievances for voluntary mediation resulted in restored communication. This success rate of 40 percent is much less than the program's typical 80 percent rate for issues handled on the front end.

Current rules make it nearly impossible to refer minor issues for informal resolution.

- **Procedural barriers.** The Texas Rules of Disciplinary Procedure, which govern the grievance process, do not specifically contemplate a clear link between the formal attorney discipline system and the informal dispute resolution offered by the Client-Attorney Assistance Program. While State Bar staff has internally identified a need to develop clear procedures to better use informal dispute resolution, they have not attempted to adjust these rules because of the cumbersome referendum process, as described in Issue 1. Current rules set time limits for processing grievances that make it nearly impossible for the chief disciplinary counsel to refer minor issues to the Client-Attorney Assistance Program for an initial attempt at informal resolution.⁴ Further, confidentiality provisions in the procedural rules strictly prevent sharing of grievance information outside the attorney discipline system, including with the Client-Attorney Assistance Program.⁵ The Grievance Oversight Committee, an advisory group which assists

the Supreme Court in evaluating the attorney discipline system, has also suggested creating more avenues for early, informal resolution of grievances, such as through a referral system. However, the committee acknowledged that the current procedural rules present a barrier to implementing such improvements.⁶

Other states' attorney discipline systems more clearly provide for early informal resolution of minor grievances.

Sunset staff identified several states in which an office similar to the Client-Attorney Assistance Program has a role in attempting early, informal resolution of certain low-level grievances before they proceed. For example, Florida, Arizona, Oregon, Utah, Missouri, and Massachusetts all have informal dispute resolution as a clear step in the attorney discipline system.⁷ Texas could benefit from similarly creating such a clear link and referral process.

Recommendations

Change in Statute

3.1 Require a referral process to divert minor issues from the formal grievance system to the Client-Attorney Assistance Program for informal dispute resolution.

This recommendation would require a formal link between the grievance process and the Client-Attorney Assistance Program, clearly authorizing the chief disciplinary counsel to refer minor grievances to early informal dispute resolution. To implement this recommendation, the State Bar should work with the Supreme Court on needed rule modifications, such as changes to the Texas Rules of Disciplinary Procedure. Rule changes should include the following elements:

- General criteria to define the types of grievances the Office of the Chief Disciplinary Counsel may refer to the Client-Attorney Assistance Program
- Modifications to current timelines for processing grievances to accommodate cases referred for informal resolution, including a time limit by which a grievance must be resolved through informal dispute resolution or be referred back to the formal grievance process for further action
- Amendments to the current confidentiality rules to allow the chief disciplinary counsel and the Client-Attorney Assistance Program to share information as appropriate for referred cases

The State Bar and Office of the Chief Disciplinary Counsel should also modify other internal policies and procedures as necessary to implement these changes. This recommendation would help resolve a significant number of client-attorney issues more quickly, improve overall public satisfaction with the grievance process, and provide a clear incentive for attorneys to participate to avoid returning to the formal grievance process for further action.

3.2 Repeal the requirement to refer dismissed grievances to the Client-Attorney Assistance Program.

This recommendation, in combination with Recommendation 3.1, would help refocus efforts on resolving low-level grievances early through informal dispute resolution instead of after dismissal, when success

is less likely. Eliminating this requirement would help the Office of the Chief Disciplinary Counsel and Client-Attorney Assistance Program better focus resources and avoid frustration with a process that occurs too late to be effective.

Fiscal Implication

These recommendations would not have a fiscal impact to the state, since the State Bar does not receive state funds and is not subject to the appropriations process.

The State Bar estimates that Recommendation 3.1 would have an annual fiscal impact to the State Bar's General Fund of about \$37,136 per year to support one additional staff person for the Client-Attorney Assistance Program to process the additional dispute resolution cases the chief disciplinary counsel would likely refer. While Recommendation 3.2 would eliminate dismissed grievances the chief disciplinary counsel refers to the Client-Attorney Assistance Program under current law, the reduction would not be enough to significantly offset the added work created by Recommendation 3.1.

Referring more low-level grievances for informal dispute resolution would allow the chief disciplinary counsel to focus resources on more high-priority cases, but would not produce a fiscal savings. Intake and classification staff would still process and evaluate grievances to determine if they are appropriate for referral to the Client-Attorney Assistance Program and the limited investigative savings would be spread across the state. Ultimately, the changes would make the process more efficient by resolving minor issues more quickly, but not at a lower overall cost.

¹ State Bar of Texas, *Commission for Lawyer Discipline Annual Report*, 27, August 31, 2014, https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information2&Template=/CM/ContentDisplay.cfm&ContentID=19926.

² State Bar of Texas, *Commission for Lawyer Discipline Annual Report*, 27, August 31, 2015, <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemwithanAttorney/GrievanceEthicsInfo1/CommissionforLawyerDisciplineAnnualReport.pdf>.

³ All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Section 81.072(e)(1), Texas Government Code.

⁴ Supreme Court of Texas, *Texas Rules of Disciplinary Procedure*, January 14, 2015, <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=25766>.

⁵ *Texas Rules of Disciplinary Procedure*, Rule 2.16.

⁶ Grievance Oversight Committee, *Report 2008*, accessed February 24, 2016, http://www.txgoc.com/Reports/Final_2008_GOC_Rept.pdf; Grievance Oversight Committee, *Report 2007*, accessed February 24, 2016, http://www.txgoc.com/Reports/GOC_Final_07_Report.pdf.

⁷ "Rules Governing the Missouri Bar and the Judiciary" Missouri Supreme Court, accessed February 25, 2016, <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/bc06c245b5bbdab886256ca6005211c6?OpenDocument>; "How do I Complain Against an Attorney?" Utah State Bar, accessed February 25, 2016, <http://www.utahbar.org/cap-request-form/>; "If You Have Problem With a Lawyer" Oregon State Bar, last modified September 2011, <https://www.osbar.org/cao/>; "Attorney and Consumer Assistance Program" Office of the Bar Counsel, last modified 2006, <http://www.mass.gov/obcbbo/acap.htm>; "Attorney Discipline Information" Florida Bar, last modified February 23, 2016, <http://www.floridabar.org/tfb/TFBConsum.nsf/0a92a6dc28e76ae58525700a005d0d53/dbac6623cf5c015f85257a3f0060b781!OpenDocument#FileComplaintAgainstLawyer>; "Attorney/Consumer Assistance Program" State Bar of Arizona, accessed February 25, 2016, <http://www.azbar.org/lawyerconcerns/disciplineprocess/acap/>.

ISSUE 4

Texas Has a Continuing Need for the State Bar.

Background

The State Bar of Texas is a judicial agency that regulates and promotes the legal profession under the authority and rules of the State Bar Act and the Texas Supreme Court. The State Bar is one of several entities that make up the Supreme Court's oversight of the legal profession, as shown in Appendix A. The agency is a mandatory, unified bar, meaning Texas' approximately 100,000 licensed attorneys must join the organization to be eligible to practice law.¹ To achieve its dual mission to both regulate attorneys and act as a professional association, the State Bar oversees the attorney discipline system in conjunction with the Commission for Lawyer Discipline; promotes legal professionalism through educational and networking opportunities for its members; and encourages access to and understanding of the legal system through pro bono work and other projects.

The Supreme Court oversees administration of the State Bar, including adopting the agency's rules and approving its budget, which is not subject to the state appropriations process. In fiscal year 2014–2015, the State Bar spent \$38.4 million, using mostly revenue from membership dues and fees charged for various member services and programs, such as continuing legal education. That year, the State Bar's Office of the Chief Disciplinary Counsel processed more than 7,000 grievances against attorneys, including 1,692 allegations of misconduct that ultimately resulted in 318 disciplinary actions. The State Bar also provided informal dispute resolution services to more than 1,000 people with less serious problems with their attorneys, and registered more than 66,000 attorneys for its continuing legal education programs.

Findings

The state has a continuing interest in regulating attorneys and promoting attorney professionalism.

All states regulate attorneys and encourage the development of bar associations, reflecting the important role the legal profession plays in the United States. Civil society entrusts attorneys with navigating some of the most critical, and vulnerable, events in a person's life, including child custody disputes, divorces, estates, lawsuits, and criminal defense. In their role as officers of the court, attorneys also help uphold the rule of law and ensure a fair and accessible justice system overall. As evidenced by recent high-profile prosecutorial misconduct cases, an attorney operating outside the bounds of professional ethics damages not only the individual lives involved, but also the fundamental trust in the legal system upon which any democracy depends.²

Texas clearly has an interest in ensuring the legal profession is held to high standards by a strong and objective attorney discipline system that can effectively deal with wrongful acts to protect the public interest. The public also benefits from a statewide association capable of providing attorneys with opportunities and information needed to implement the latest professional best practices, many of which, such as how to manage the business aspects of a law practice,

Civil society entrusts attorneys to navigate critical life events and ensure a fair justice system.

are not typically taught in law school. While this report identifies needed improvements to ensure the State Bar can effectively carry out these goals, overall, the agency is well suited to continue to play this role in Texas.

While Texas' organizational approach to attorney oversight raises persistent concerns, previous improvements made through Sunset have addressed underlying issues.

Concerns about the State Bar's unified structure are nothing new and were vigorously discussed in the three previous Sunset reviews of the agency in 1979, 1991, and 2003. The state's approach to regulating attorneys is unique among all other occupations in Texas, combining required membership in a professional association with regulatory duties usually entrusted to a more objective agency held at arm's length from the profession itself. This approach may cause outside observers to question whether the structure is accountable to the public and fair to the profession. However, the Sunset Commission and the Legislature have repeatedly opted to address these concerns by making improvements within the current structure and have clearly and consistently rejected proposals to dismantle the unified bar approach over the years. The current Sunset review did not identify major new issues that have not already been raised and addressed in the past. Instead, the current review continues the approach of recommending significant improvements within the current structure, as outlined in Issues 1 through 3 of this report.

The history of the State Bar's Sunset reviews also emphasizes the importance of maintaining the Legislature's oversight of the agency through the State Bar Act and the Sunset process. As a judicial branch agency not included in the appropriations process, the State Bar is exempt from many basic requirements common to most state agencies. While the Supreme Court has the inherent power and responsibility to oversee the legal profession, including overseeing the State Bar's budget and rules, the Legislature has also played a key role in shaping the agency into a more objective regulatory body. In fact, the only significant changes made to the attorney discipline system have resulted from the Sunset process, as shown in the table on the following page, *Key State Bar Improvements Enacted Through the Sunset Process*.

Sunset staff observed the positive impact of this legislative oversight over time. Today's State Bar board, directly accountable to the State Bar's attorney members through elections, focuses almost exclusively on promoting professionalism and the general rule of law. By contrast, the separate Commission for Lawyer Discipline, created as a result of Sunset's 1991 recommendation, is the more independent overseer of the attorney discipline system and the day-to-day work of the Office of the Chief Disciplinary Counsel. As recommended by Sunset, the commission includes non-attorney representatives of the general public in that direct oversight. These and other changes enacted through Sunset have helped keep the association aspects of the organization from unduly influencing the regulatory side. Sunset review has also focused the State Bar on budgetary, strategic planning, and efficiency measures that otherwise could be lost due to the agency's position outside of traditional legislative oversight mechanisms.

The Sunset Commission and Legislature have clearly rejected past proposals to dismantle the State Bar.

Changes enacted through Sunset have helped keep the State Bar's association role from unduly influencing regulation.

Key State Bar Improvements Enacted Through the Sunset Process

1979 Sunset Review (Senate Bill 287 by Meier)	
<ul style="list-style-type: none"> • Centralized parts of the attorney grievance process to promote consistency and fairness • Added six public members to the State Bar board, appointed by the Supreme Court • Subjected the State Bar board to the Open Meetings Act 	
1991 Sunset Review (House Bill 1186 by Hury)	
<ul style="list-style-type: none"> • Separated the State Bar's disciplinary functions from its professional association functions by establishing the Commission for Lawyer Discipline to oversee the attorney discipline system • Included 50 percent non-attorney public members on the Commission for Lawyer Discipline, appointed by the Supreme Court • Required the State Bar to establish a voluntary mediation and dispute resolution program (now the Client-Attorney Assistance Program) • Made minority members of the State Bar board full voting members 	
2003 Sunset Review (House Bill 599 by Chisum et al.)	
<ul style="list-style-type: none"> • Required the State Bar to adopt a strategic planning and performance budgeting process, including public hearings • Overhauled the attorney grievance system to make it more efficient • Removed the requirement for 51 percent of State Bar members to vote in a referendum in order to pass needed rule changes 	

The majority of states regulate the practice of law through unified bars similar to Texas serving as both professional associations and regulatory agencies.

Though the state's approach to attorney regulation differs greatly from other occupations in Texas, it is commonplace when compared nationally. As described in the accompanying table, 32 states including Texas use a similar unified bar structure, while a fewer number separate the regulatory function from a voluntary professional association.

Unified Versus Voluntary State Bars

32 Unified (Mandatory) Bars	
<ul style="list-style-type: none"> • Combine regulatory and association functions in one organization under the authority of the state supreme court and/or state law • Bar membership required to practice law 	Alabama, Alaska, Arizona, California, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas , Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming
18 Voluntary Bars	
<ul style="list-style-type: none"> • Operate as private, voluntary professional organizations • Attorney regulation/discipline handled separately, usually through the state supreme court 	Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont

All of the State Bar's reporting requirements continue to be useful.

The Sunset Act establishes a process for the Sunset Commission to consider if reporting requirements of agencies under review need to be continued or abolished.³ The Sunset Commission has interpreted these provisions to apply to reports that are specific to the agency and not general reporting requirements that extend well beyond the scope of the agency under review. Reporting requirements with deadlines or that have expiration dates are not included, nor are routine notifications or notices, or posting requirements. Appendix E summarizes the State Bar's reporting requirements, all of which Sunset staff determined still serve a useful purpose to increase transparency into the State Bar's operations, especially since the agency is not subject to much of the standard oversight required of other state agencies.

Recommendation

Change in Statute

4.1 Continue the State Bar for 12 years.

This recommendation would extend the State Bar and the State Bar Act for the standard 12-year period, allowing for the Legislature's continued periodic oversight of attorney regulation through the Sunset process. As part of this recommendation, all of the State Bar's reporting requirements would also continue, since they serve a useful purpose to promote transparency into the agency's operations.

Fiscal Implication

Continuing the State Bar would not have a fiscal impact to the state, since the agency receives no state funds and operates outside of the appropriations process. The Supreme Court would continue to monitor and approve the State Bar's budget according to requirements in the State Bar Act, which totaled about \$38.4 million in fiscal year 2014–2015.⁴

¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Chapter 81, Texas Government Code.

² *William Allen Schultz v. Commission for Lawyer Discipline*, 2015 WL 9855916 (Texas Bd. Disp. App. 55649, December 17, 2015); *Charles J. Sebesta v. Commission for Lawyer Discipline*, 2016 WL 827324 (Texas Bd. Disp. App. 56406, February 8, 2016); *In the Matter of Ken Anderson*, Supreme Court of Texas Order, Misc. Docket No. 13-9155 (November 19, 2013).

³ Sections 325.0075, 325.011(13), and 325.012(a)(4), Texas Government Code.

⁴ Section 81.022, Texas Government Code.

BOARD AT A GLANCE



BOARD AT A GLANCE

The Board of Law Examiners is a judicial agency created by the Legislature in 1919 to qualify applicants for admission to the State Bar of Texas under rules adopted by the Texas Supreme Court. The board is one of several entities through which the Supreme Court oversees the legal profession, as shown in Appendix A. Only the Supreme Court can issue a license to practice law in Texas, and once licensed, an attorney is subject to oversight by the State Bar, a separate agency. The board performs the following key activities to achieve its mission:

- Ensures all candidates for a Texas law license meet the requirements to practice law in Texas, including standards for adequate law education
- Evaluates whether each candidate for a Texas law license possesses the present character and fitness needed to practice law
- Examines each eligible candidate by administering the Texas Bar Examination¹

Key Facts

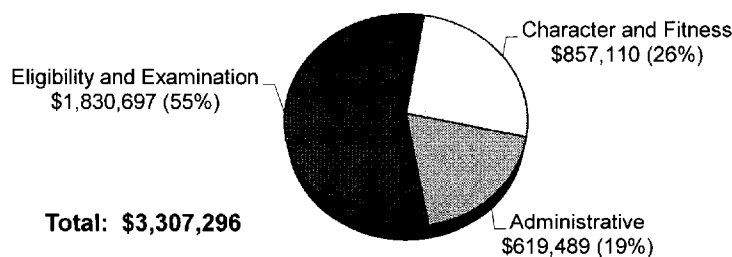
- **Board Members.** The Supreme Court appoints nine Texas attorneys as members of the board to serve staggered six-year terms. The table, *Board of Law Examiners*, shows the board's current composition. Attorneys serving on the board must be U.S. citizens, more than 35 years of age, licensed to practice law in Texas, and have practiced law for at least ten years. Board members are compensated \$30,000 a year due to their extensive duties, including attending four to six board meetings a year; developing, administering, and grading bar examinations; serving on character and fitness hearing panels; and reviewing a failing candidate's performance on the bar exam upon request.

Board of Law Examiners

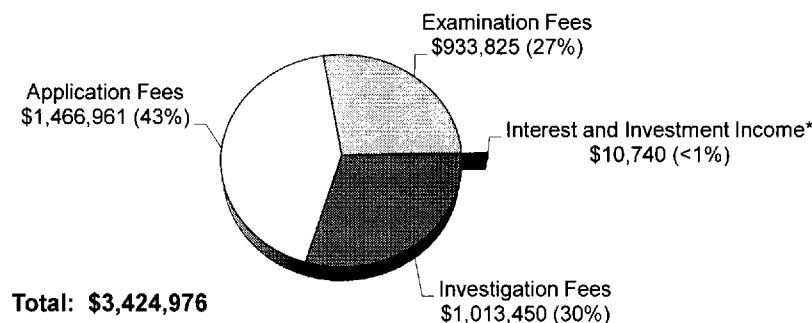
Name	Term Expiration	City
Sandra Zamora, Chair	2019	Dallas
Harold A. "Al" Odom, Vice Chair	2021	Houston
John H. Cayce, Jr.	2019	Fort Worth
Barbara Ellis	2019	Austin
Teresa Ereon Giltner	2017	Dallas
C. Alfred Mackenzie	2017	Waco
Anna M. McKim	2021	Lubbock
Cynthia Hujar Orr	2021	San Antonio
Augustin "Augie" Rivera, Jr.	2017	Corpus Christi

- Funding.** The board spent about \$3.3 million in fiscal year 2015, as shown in the pie chart, *Board of Law Examiners Expenditures*. The board receives no legislative appropriations, is not subject to legislative appropriations oversight, and holds its funds outside the state treasury.² Instead, the Supreme Court approves the board’s budget and fees. The board’s primary source of revenue is from fees charged for applications, investigations, and examinations of applicants. In fiscal year 2015, the board collected just over \$3.4 million in fee revenue and investment and interest income, as shown in the pie chart, *Board of Law Examiners Revenue*. The board deposits excess revenue in a reserve fund, which had a balance of just under \$3 million at the end of fiscal year 2015.

**Board of Law Examiners Expenditures
FY 2015**



**Board of Law Examiners Revenue
FY 2015**



* The board maintains a reserve fund which had \$2,964,363 at the end of FY 2015.

- Staffing.** In fiscal year 2015, the board employed 18 people, all located in Austin. Appendix F compares the board’s workforce composition to the percentage of minorities in the statewide civilian labor force for the past three fiscal years.
- Eligibility for the State Bar.** To earn admission to the State Bar, applicants must generally have earned a juris doctor degree from an American Bar Association-approved law school, show good present character and fitness, pass the bar examination and the Multistate Professional Responsibility Examination, and pay the required fees. Applicants who are authorized to practice law in another state or foreign country may be exempt from the legal education requirement or the bar exam if they meet certain criteria.

- **Character and Fitness Investigations.** Board staff investigates the background of every applicant to determine whether an individual has engaged in conduct that could adversely affect the responsibilities an attorney owes to the public, the courts, or a client. Texas law students typically begin this process during the first year of law school by submitting a declaration of intention to study law to the board, followed by an updated, final application to take the bar exam in the last year of law school. In fiscal year 2015, the board received 1,955 declarations and 5,564 applications, and the Supreme Court licensed 3,448 applicants certified by the board.³ When board staff identifies an area of concern regarding an applicant's character or fitness, the board must notify the applicant and provide an opportunity for an evidentiary hearing before a three-member panel of the board. Examples of common issues identified include criminal history, dishonesty on the application, defaults on substantial debts, and chemical dependency issues. In fiscal year 2015, the board conducted 49 full hearings which resulted in 24 license approvals, 17 probationary licenses, and eight license denials.
- **The Bar Examination.** The board conducts the bar exam twice a year, in February and July, to judge minimum competency for admission to the State Bar. The examination lasts two and a half days and consists of several components, including both national and Texas-specific tests. The board purchases the Multistate Bar Examination (40 percent of the total bar exam score) and the Multistate Performance Test (10 percent) from the National Conference of Bar Examiners. Board members develop the Texas essay questions (40 percent) and the Texas procedure and evidence questions (10 percent). The agency administers the bar examination, and board members supervise the grading of the exam, including grading tests themselves and reviewing failed exams with applicants upon request. In fiscal year 2015, more than 4,000 applicants sat for the bar exam, which had a 70 percent passage rate for first-time test takers. Assuming all other requirements are met, once individuals pass the bar exam, they may pay a fee to the Supreme Court and dues to the State Bar, and become licensed to practice law in Texas.

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¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Chapter 82, Texas Government Code.

² Because the board does not receive legislative appropriations, its expenditures are not subject to requirements for purchasing from historically underutilized businesses under Chapter 2161, Texas Government Code, and have not been analyzed for compliance with these requirements.

³ The board approves applicants who meet character and fitness qualifications, but applicants may not become licensed by the Supreme Court in the same fiscal year for several reasons, including if they do not pass the bar exam or pass the bar exam in a different fiscal year than that in which they applied.

BOARD ISSUES



ISSUE 1

Key Elements of the Board's Statute Do Not Conform to Common Licensing Standards.

Background

The Board of Law Examiners qualifies applicants for admission to the State Bar of Texas. Under statute and rules adopted by the Texas Supreme Court, the board ensures candidates meet the eligibility requirements for admission to the State Bar, investigates all applicants to certify they possess the present character and fitness needed to practice law, and administers the Texas Bar Examination. In fiscal year 2015, the Supreme Court licensed 3,448 new attorneys certified by the board.

The Sunset Advisory Commission has a historic role in evaluating licensing agencies, as the increase of occupational licensing programs served as an impetus for the creation of the commission in 1977. Since then, the Sunset Commission has completed more than 100 licensing agency reviews. Sunset staff has documented standards in reviewing licensing programs to guide future reviews of licensing agencies. While these standards provide a guide for evaluating a licensing program's structure, they are not intended for blanket application. The following material highlights areas where the board's statute and rules differ from these model standards, and describes the potential benefits of conforming to standard practices.

Findings

Outdated statutory licensing provisions could affect the fair treatment of licensees and unnecessarily limit the board's efficiency.

- **Outdated, irrelevant qualifications.** Qualifications for licensure should be limited to ensuring an applicant is presently fit to practice, and as such, should be related only to current conditions and conduct, especially in regard to mental health diagnoses. The board's statute contains outdated language requiring candidates to attest they do not have a mental health diagnosis as part of the application process.¹ Further, the rules require students to provide any history of mental illness on the declaration of intention to study law and define fitness to practice law in terms of a condition, not conduct.² According to the Department of Justice, the Americans with Disabilities Act requires applicants with mental health diagnoses to have equal opportunity to practice law, and any qualifications relating to mental illness to focus on current conduct, not the diagnosis itself.³ While the board has adjusted its practices to comply with this guidance, removing the obsolete language would clarify that qualifications pertain only to current conditions and conduct relating directly to an applicant's fitness to practice law. The change would also ensure the board is not perceived as violating the Americans with Disabilities Act.

Qualifications relating to mental health must focus on conduct, not just a diagnosis.

Requiring a notarized form impedes online applications.

- **Unnecessary application requirement.** Licensure processes should not overburden applicants or prevent efficient administration such as online application submittal. The board requires bar exam applicants to submit a verified affidavit attesting no new character and fitness issues have occurred since their initial declaration of intention to study law.⁴ The form must be notarized, creating an unnecessary burden that provides no added value to the application process, since state law already prohibits a person from knowingly making a false entry in a government record.⁵ Additionally, requiring the notarized, hard-copy form impedes the board from accepting this information electronically. Removing the verified affidavit requirement would reduce administrative burden without limiting the board's ability to determine applicants' eligibility to enter the legal profession.
- **Inconsistent and inefficient statutory deadlines.** An agency's enabling legislation should be consistent with the agency's actual operations and promote clear and efficient application procedures. Deadlines in the board's statute for filing applications and completing investigations are inconsistent with board rules and practice, creating unnecessary complexity for applicants and the board.

Declaration of intention to study law deadlines. First-year Texas law students who plan to apply for licensure in Texas must submit a declaration of intention to study law, which begins the board's character and fitness investigation process. Statute gives specific time frames for the board to complete investigations depending on when the declaration is filed.⁶ These statutory time frames conflict with Supreme Court rules, which set clearer filing deadlines and allow the board greater flexibility to prioritize and complete investigations as long as they do not take longer than 270 days.⁷ Removing the specific investigation time frames from statute and allowing the Supreme Court to set them in rule would clarify current practice and ensure clear expectations for applicants. Such a change would also give the court more flexibility to make future adjustments as the agency is able to make more effective use of technology.

Bar exam application filing deadline. Statute requires applicants to submit their bar exam application at least 180 days before the exam, but allows applicants who show good cause to file no later than 120 days before the exam if they pay a related \$150 fee set in law.⁸ However, the Supreme Court has adopted slightly different deadlines in rule, allowing applicants to timely file between specified calendar dates depending on the exam. In practice, the board routinely accepts applications filed between 180 and 120 days before the exam date with no showing of good cause and receives many requests to waive the statutory late filing deadline of 120 days for good cause. In fiscal year 2015, out of 3,391 first-time applicants to take the exam, 1,157 filed late and 23 applicants requested a waiver to file even later. The bar exam is only offered twice a year and requires a significant investment of time and resources. Denying late applications

Out of 3,391 bar exam applicants, 1,157 filed late in fiscal year 2015.

outright would cause a six-month delay in an applicant's ability to start working as a licensed attorney. A number of other states offer two late filing deadlines without any requirement to show good cause, and Missouri and Pennsylvania have a third late deadline. With new technology, the board is able to process applications in less time, making it possible to receive applications closer to the exam date. Removing the application deadlines and related late fees from statute and allowing the Supreme Court to set them in rule would eliminate inconsistency between the statute and agency practice, and would give flexibility to make adjustments in the future to accommodate more efficient processes.

Other states offer two late filing deadlines without showing good cause.

- **Lack of clear guidelines for agency decision making.** Licensing agencies should have detailed guidelines in place to ensure decisions relating to an individual's ability to practice are applied fairly and scaled to the nature of the situation. As a best practice, guidelines should clearly connect the type of violation with the generally appropriate licensing action, while providing for flexibility in the event of aggravating or mitigating factors in individual cases.

The board makes fundamental decisions that affect an individual's ability to practice law. In three-member panels, the board hears cases to determine whether applicants have the present character and fitness to carry out the responsibilities of an attorney. In fiscal year 2015, the board held 49 full hearings, approving 24 applicants, denying eight, and recommending 17 initial or amended probationary licenses. The board panels also hear frequent requests to waive certain rule requirements for good cause shown, including fees, deadlines, number of times allowed to take the bar exam, and number of years of practice required for exemption from the bar exam. In fiscal year 2015, the board decided approximately 130 waiver requests.

Without guidelines, the board cannot ensure fairness and consistency in deciding character and fitness issues or waiver requests. Various panels hear cases with similar issues and fact patterns, so the board cannot ensure its decisions are consistent over time or among the different panels. Board members also lack guidance as to how to weigh different issues or mitigating and aggravating factors. New board members who lack experience deciding character and fitness cases are especially at a disadvantage without guidance. Finally, to the extent the board does not maintain guidelines, the information is lost if an experienced employee with institutional knowledge leaves.

The board did not fully implement 2003 Sunset recommendations to develop guidelines.

As part of the board's last Sunset review in 2003, the Sunset Commission recommended the board develop guidelines to assist in deciding character and fitness issues and waiver requests. In response, the board developed a chart of hearing results that fails to provide the detail needed to provide meaningful guidance to board members. The board did not develop any guidelines for waiver requests even though such guidelines were also required by the recommendation. Putting a requirement for guidelines in law would ensure the board's new leadership implements this important best practice.

- **No delegation policy.** As a matter of good government, statute requires the board and most other agencies to develop clear policies separating the policymaking duties of the board from the management functions of the executive director and staff.⁹ As a related best practice, a board should consider delegating routine matters to the executive director to increase efficiency.

The board should delegate routine matters to the executive director to increase efficiency.

Supreme Court rules permit the board to make such delegations, with the exception of its authority to make a final determination that an applicant lacks the requisite good character and fitness for admission.¹⁰ However, the board has not developed comprehensive policies to use this authority, such as pertaining to waiver requests, and the board's statute is silent on the subject. The board receives more than 100 waiver requests a year, many relating to extending application deadlines or waiving fees. Though many of these cases are routine matters, they cannot be resolved until the next board panel meets, unnecessarily slowing down the application process. The board has many statutory duties not typical of most governing boards, including developing the content for and grading the bar exam, in addition to making important decisions relating to the character and fitness of individual applicants. Authorizing the board to delegate decisions on routine matters such as waiver requests would allow the board to focus on more pressing matters and enable quicker resolution of commonplace issues.

Recommendations

Change in Statute

1.1 Remove an outdated requirement for applicants to attest they do not have a mental health diagnosis.

This recommendation would remove outdated language in statute asking about an applicant's history of mental illness and also require the Supreme Court to make related updates in rule. This change would bring the board's governing laws in line with the board's current practice and the Americans with Disabilities Act, ensuring decisions about an applicant's fitness to practice law are based on present conditions and conduct, and not on a mental health diagnosis alone.

1.2 Remove the unnecessary requirement that applicants submit a notarized, verified affidavit form.

This recommendation would remove the requirement that applicants submit a verified affidavit attesting that no new character and fitness issues have occurred between the time of the applicant's initial declaration of intention to study law and the application to take the bar examination. Rather than submitting this information via a notarized form, applicants could submit the same information online with an electronic signature, certifying that the information provided is true and correct. This recommendation would ensure the application process is not overly burdensome while still allowing the board access to information needed to properly investigate applicants.

1.3 Remove specific deadlines from statute and require the Supreme Court to adopt deadlines and a schedule of late fees in rule.

This recommendation would remove statutory deadlines for completing character and fitness investigations and applying to take the bar exam, and instead require the Supreme Court to adopt these procedures in rule. The Supreme Court would also be able to adjust related late fees in rule, but not change statutorily capped fees for other aspects of the application process. These changes would eliminate inconsistencies between statute and rule and allow more flexibility to make adjustments in the future that would benefit both applicants and the board.

1.4 Require the board to develop guidelines to assist decision making for character and fitness determinations, probationary licenses, and waiver requests.

This recommendation would require the board to adopt specific guidelines to help in deciding character and fitness determinations, overseeing probationary licensees, and deciding waiver requests. The board would generally base these guidelines on its record of past decisions, but could include any criteria determined necessary. For example, the board could include factors to help it evaluate the seriousness of a case and how to adjust a decision based on aggravating or mitigating factors. This recommendation would not require specific action by board members on the basis of the guidelines, but rather simply provide additional information to help make consistent and fair decisions. This recommendation would implement a common best practice for licensing agencies and promote fairness and consistency in decisions impacting a person's ability to practice law.

1.5 Clearly authorize the board to delegate routine matters to the executive director and require related policies.

This recommendation would allow the board to focus on higher-priority issues by delegating more routine matters such as certain waiver requests to the executive director, as is common practice for state licensing agencies. Statute would clearly authorize the board to delegate routine decisions to the executive director, subject to Supreme Court rules, and require the board to adopt related policies clearly delineating its policymaking role from the day-to-day management duties of staff. This recommendation would reduce the time an applicant has to wait for routine decisions, and would improve the agency's overall efficiency.

Fiscal Implication

Overall, these recommendations would not have a fiscal impact to the state since the board receives no state funds and is not subject to the appropriations process.

Allowing the Supreme Court to establish an updated schedule of deadlines and related late fees could impact the board's revenue, but could not be estimated because it would depend on the content of the final rules and the behavior of future applicants. The other recommendations either clarify current practice or change procedures to allow the board to operate more efficiently. These changes would help the board shift resources to higher priority activities, but would not produce specific savings.

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¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Section 82.027(b)(2), Texas Government Code.

² Supreme Court of Texas, *Rules Governing Admission to the Bar of Texas*, Rule IV(c), Rule VI(a)(1)(D).

³ Department of Justice Office of Public Affairs, "Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities," news release, August 15, 2014, <https://www.justice.gov/opa/pr/departments-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates>.

⁴ Section 82.027(b), Texas Government Code.

⁵ Section 37.10, Texas Penal Code.

⁶ Section 82.023(c), Texas Government Code.

⁷ *Rules Governing Admission to the Bar of Texas*, Rule VI(b).

⁸ Sections 82.027(a) and (c), Texas Government Code.

⁹ Section 82.0073, Texas Government Code.

¹⁰ *Rules Governing Admission to the Bar of Texas*, Rule XX(g).

ISSUE 2

Texas Has a Continuing Need for the Board of Law Examiners.

Background

The Board of Law Examiners is a judicial agency responsible for evaluating candidates for a law license under the oversight of the Texas Supreme Court. The board is one of several entities through which the Supreme Court oversees the legal profession, as shown in Appendix A. Only the Supreme Court can issue a license to practice law in Texas, and once licensed, an attorney is subject to oversight by the State Bar, a separate judicial branch agency.¹ The Supreme Court appoints board members, adopts the agency's rules, and approves its budget, which is not subject to the state appropriations process.²

To achieve its mission, the board evaluates whether candidates for a law license possess the present character and fitness needed to practice law; determines whether applicants have completed adequate law study and are eligible to take the bar exam; and administers and grades the bar exam. The board spent about \$3.3 million in fiscal year 2015, funded almost entirely from fees. That year, the Supreme Court granted law licenses to 3,448 applicants certified by the board.

Findings

The state has a continuing need to determine eligibility to practice law in Texas.

The board's purpose — to ensure individuals seeking a law license are able to serve the public in an ethical and competent manner — continues to be important to protect the citizens of Texas. Improperly vetted candidates pose the risk of doing substantial harm, financial or otherwise, to a client of legal services. For example, clients place great trust in their attorney and often must pay large sums in advance for services or rely on the attorney to handle settlement funds, creating a risk for fraud. Beyond protecting individual clients, ensuring minimum standards of competence for attorneys benefits civil society overall, which depends on the profession to uphold the rule of law while acting as officers of the court.

The board takes its job seriously, processing more than 7,500 declarations of intention to study law and applications to take the bar exam in fiscal year 2015, each requiring investigation before approval. This process helps determine whether an individual engages in conduct that could adversely affect the responsibilities an attorney owes to the public, the courts, or a client. In fiscal year 2015, the board conducted 49 hearings to evaluate licensees with issues such as criminal history, dishonesty on an application, debt defaults, or chemical dependency problems. As a result, the board issued 17 probationary licenses and denied eight applicants from licensure. The board also administers the bar exam and spends considerable time developing the Texas-specific essay questions, grading tests, and reviewing failing tests with applicants upon request. In fiscal year 2015, more than 4,000 applicants sat for the bar exam, which had a 70 percent passage rate for first-time test takers.

More than 4,000 applicants sat for the bar exam in fiscal year 2015.

No substantial benefits would result from merging the board with the State Bar or another agency at this time.

The board is a small agency with only 18 staff, and shares a similar mission as the State Bar to ensure the legal profession is appropriately regulated. Therefore, the Sunset review considered whether merging the board with the State Bar or consolidating administrative functions some other way would improve the agency's effectiveness or offer increased efficiency. Ultimately, the review concluded that concerns about the board's structure are more theoretical than practical and changing its organization offers no significant benefits that would justify such a change. However, since the board is exempt from many basic requirements common to most state agencies, it should continue to be subject to regular Sunset review, allowing for the Legislature to provide important periodic oversight of its structure and performance in the future.

Concerns about the board's structure are more theoretical than practical.

- **Limited overlap.** The licensing and examination functions the board performs are separate and distinct from the attorney discipline system overseen by the State Bar and Commission for Lawyer Discipline. Even if the functions were combined into a single agency, the activities of each agency would need to be maintained, including the time-consuming duties of the members of the Board of Law Examiners in conducting hearings, developing bar exam questions, and grading exams. Also, because neither agency receives state appropriations, any minimal efficiency that could be gained through consolidation would have no impact on state revenue.

The Sunset review identified one concern due to the split-agency structure regarding the State Bar's inability to access background check information initially collected by the board. This problem can be addressed through the statutory fix recommended in State Bar Issue 2. The review also closely examined the only real area of overlap between the two agencies — oversight of the approximately 40 probationary licensees monitored by the board each year. Since probationary licensees can fully practice law, they also fall under the State Bar's oversight. However, the Sunset review determined the board is able to adequately monitor these individuals under the terms of their probation, which are more tied to the board's initial licensing standards than the State Bar's rules for attorney conduct. Therefore, Sunset staff determined that transferring this function to the State Bar would cause more upheaval than benefit.

- **Administrative support through the Office of Court Administration.** The board is located in the Supreme Court building, separate from the State Bar but in the same building as the Office of Court Administration. Historically, the board, like most small agencies, has struggled to fully support information technology services for its small staff. However, the agency has recently taken steps to partner with the Office of Court Administration to provide services such as network support, server maintenance, equipment, and a help desk. This arrangement will allow the board to take advantage of the Office of Court Administration's information technology expertise and economies of scale within the judiciary without fundamentally changing the board's location or organizational structure.

The majority of states, including Texas, maintain separate boards that certify qualified law applicants to the state supreme court.

While splitting the licensing and enforcement functions for an occupation between two separate agencies is highly unusual within Texas government, approaching attorney regulation in this way is the norm when compared to other states. As described in the table, *State Structures for Licensing Attorneys*, 45 states including Texas have separate boards for licensing attorneys, while very few combine the licensing and enforcement functions in one agency.

State Structures for Licensing Attorneys

45 states with attorney licensing boards separate from enforcement agencies	
<ul style="list-style-type: none"> • Determine character and fitness and administer bar exam • Certify qualified applicants to the state supreme court • Function separately from the state bar, which regulates attorneys after being licensed 	Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas , Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming
Five states with combined attorney licensing and enforcement agencies	
<ul style="list-style-type: none"> • Licensing and regulatory functions operate within same agency 	Alabama, Alaska, California, Idaho, and Utah

The board's single reporting requirement continues to be useful.

The Sunset Act establishes a process for the Sunset Commission to consider if reporting requirements of agencies under review need to be continued or abolished.³ The Sunset Commission has interpreted these provisions to apply to reports that are specific to the agency and not general reporting requirements that extend well beyond the scope of the agency under review. Reporting requirements with deadlines or that have expiration dates are not included, nor are routine notifications or notices, or posting requirements. Sunset staff determined the board's only reporting requirement, an annual financial report, serves a useful purpose to increase transparency into the board's operations, especially since the agency is not subject to much of the standard oversight required of other state agencies.⁴

An annual financial report helps increase transparency.

Recommendation

Change in Statute

2.1 Continue the Board of Law Examiners for 12 years.

This recommendation would continue the Board of Law Examiners for the standard 12-year period, allowing the Legislature to review the board through the Sunset process simultaneously with the State Bar of Texas in the future. The board's required annual financial report would also continue, since it helps promote transparency into the agency's operations.

Fiscal Implication

Continuing the board would have no fiscal impact to the state, since the agency receives no state funds and operates outside of the appropriations process. The Supreme Court would continue to monitor and approve the board's budget, which totaled about \$3.3 million in fiscal year 2015.

¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Section 82.021, Texas Government Code.

² Sections 82.001, 82.022, and 82.034, Texas Government Code.

³ Sections 325.0075, 325.011(13), and 325.012(a)(4), Texas Government Code.

⁴ Section 82.035, Texas Government Code.

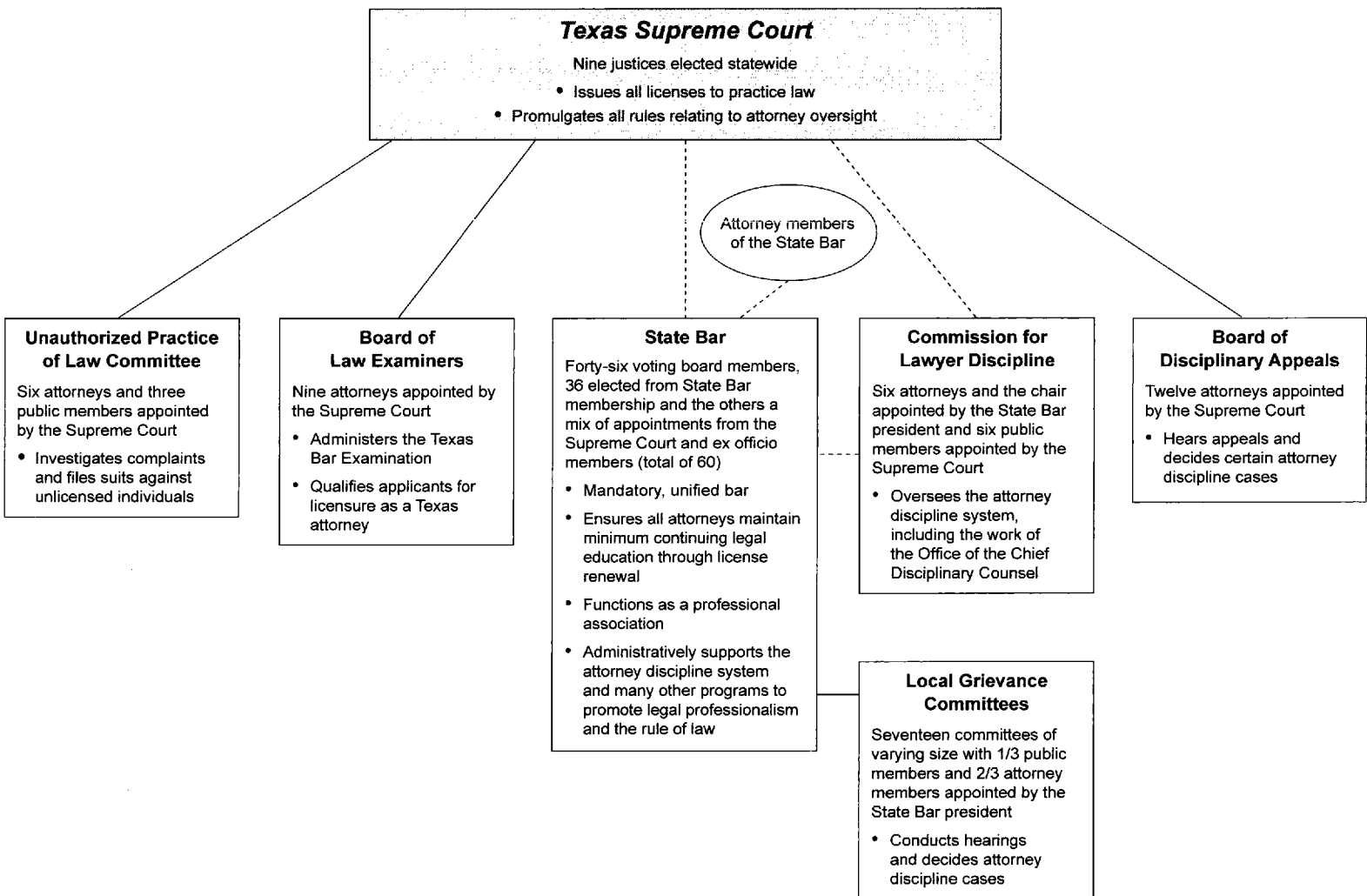
APPENDICES



APPENDIX A

Oversight of the Legal Profession in Texas

The Supreme Court is ultimately responsible for overseeing the legal profession in Texas. Several agencies, boards, and commissions share responsibility for different aspects of the attorney oversight system, as shown below. Advisory committees and task forces without decision-making authority are not depicted.



APPENDIX B

State Bar of Texas 2015–2016 Board of Directors

Officers

Elected by statewide bar membership

Allan K. Dubois, President (San Antonio)
Frank Stevenson, President-elect (Dallas)
Trey Appfel, Immediate Past President (League City)

Elected Directors of the Board

Elected by district bar membership

J. Benjamin Barlow, District 7 (Fort Worth)	John Jansonius, District 6 (Dallas)
Micah Belden, District 1 (Sherman)	Andy Kerr, District 10 (San Antonio)
Brent Benoit, District 4 (Houston)	Mary Abbott Martin, District 4 (Houston)
Amy Bryan, District 14 (Stephenville)	Brian C. Miller, District 11 (Corpus Christi)
H. Alan Carmichael, District 16 (Sweetwater)	Susan I. Nelson, District 8 (Waco)
Frank Carroll, District 6 (Dallas)	Gary Nickelson, District 7 (Fort Worth)
E. Leon Carter, District 6 (Dallas)	Florentino "Tino" Ramirez, Jr., District 6 (Dallas)
David Chamberlain, Chair of the Board, District 9 (Austin)	Ruben Robles, District 17 (El Paso)
Curry Cooksey, District 3 (The Woodlands)	Lance Sharp, District 9 (Austin)
M. Carter Crow, District 4 (Houston)	Scott Sherwood, District 13 (Panhandle)
Diane DeVasto, District 2 (Tyler)	Rebecca Simmons, District 10 (San Antonio)
Richard Elliott, District 15 (Fredericksburg)	Scott P. Stolley, District 6 (Dallas)
Jose "Joe" Escobedo, Jr., District 12 (McAllen)	Andrew Tolchin, District 5 (Angleton)
Ann Greenberg, District 9 (Austin)	Travis Torrence, District 4 (Houston)
Joseph Indelicato, Jr., District 4 (Houston)	Michael J. Wynne, District 4 (Houston)

Public Members of the Board

Appointed by Supreme Court

Barbara Bass (Tyler)
Ricky G. Gonzalez, R.Ph. (San Antonio)
August W. Harris, III (Austin)
Joe "Rice" Horkey, Jr. (Lubbock)
Gail Plummer (Plano)
A. Ford Sasser, III (McAllen)

Minority Members of the Board

Appointed by State Bar president

Rehan Alimohammad (Sugar Land)
Sylvia Borunda Firth (El Paso)
Annapoorni "Anna" Sankaran (Houston)
Andrew Wallace (North Richland Hills)

Appendix B

**Texas Young Lawyers Association
Members of the Board**

Elected by TYLA membership

- C. Barrett Thomas, TYLA President (Waco)
- Sam Houston, TYLA President-elect (San Antonio)
- Rebekah Steely Brooker, TYLA Immediate Past President (Dallas)

**Ex Officio
(Nonvoting)**

- Roger A. Key, Immediate Past Chair of the Board (Lubbock)
- Michelle Hunter, Executive Director (Austin)
- Linda Acevedo, Chief Disciplinary Counsel (Austin)

**Liaisons to the Board
(Nonvoting)**

- The Honorable Fred Biery, Federal Judicial Liaison (San Antonio)
- The Honorable Phil Johnson, Supreme Court Liaison (Austin)
- The Honorable Michael E. Keasler, Court of Criminal Appeals Liaison (Austin)
- Timothy W. Mountz*, Out-of-State Lawyer Liaison (Washington, D.C.)
- The Honorable Patrick A. Pirtle, Judicial Section Liaison (Amarillo)

* Appointed by the State Bar president

**Section Representative/Committee Members
Elected by State Bar Council of Chairs
(Nonvoting)**

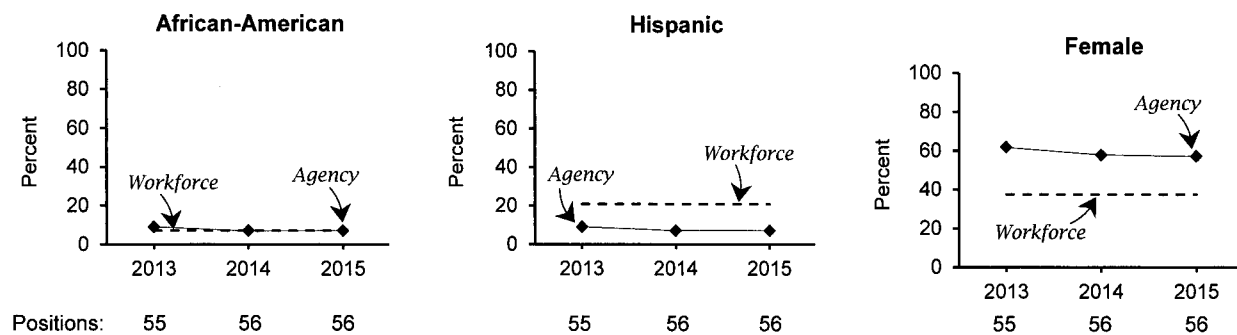
- Alison Colvin, Medium-sized Sections (Brownsville)
- Philip Mack Furlow, Large-sized Sections (Denton)
- Tina Green, Medium-sized Sections (Texarkana)
- Pat Maher, Large-sized Sections (Fort Worth)
- Audrey F. Moorehead, Small-sized Sections (Dallas)
- Grant Scheiner, Large-sized Sections (Houston)

APPENDIX C

State Bar of Texas Equal Employment Opportunity Statistics 2013 to 2015

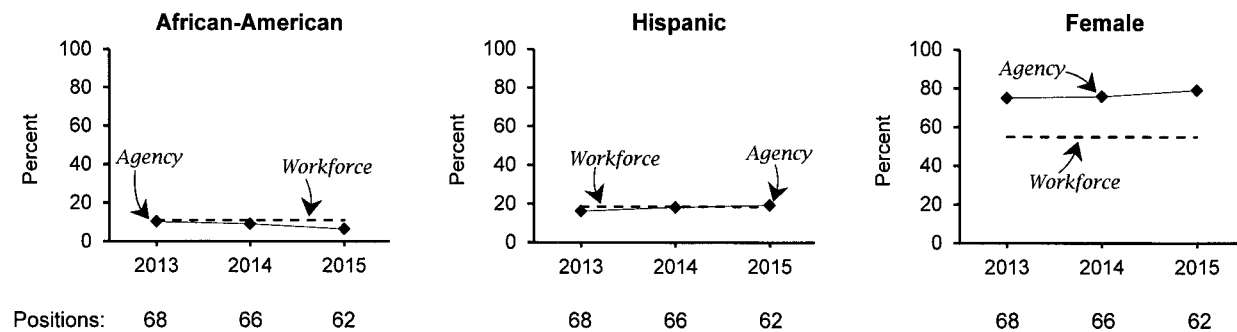
In accordance with the requirements of the Sunset Act, the following material shows trend information for the employment of minorities and females in all applicable categories by the State Bar of Texas.¹ The agency maintains and reports this information under guidelines established by the Texas Workforce Commission.² In the charts, the dashed lines represent the percentages of the statewide civilian workforce for African-Americans, Hispanics, and females in each job category.³ These percentages provide a yardstick for measuring agencies' performance in employing persons in each of these groups. The diamond lines represent the agency's actual employment percentages in each job category from 2013 to 2015. The State Bar met or exceeded statewide civilian workforce percentages in many categories for fiscal years 2013 to 2015, but fell short on its employment of minorities and females in some positions.

Administration



The State Bar met or exceeded the statewide civilian workforce percentage for females and African-Americans in administration, but did not meet the statewide civilian workforce percentage for Hispanics.

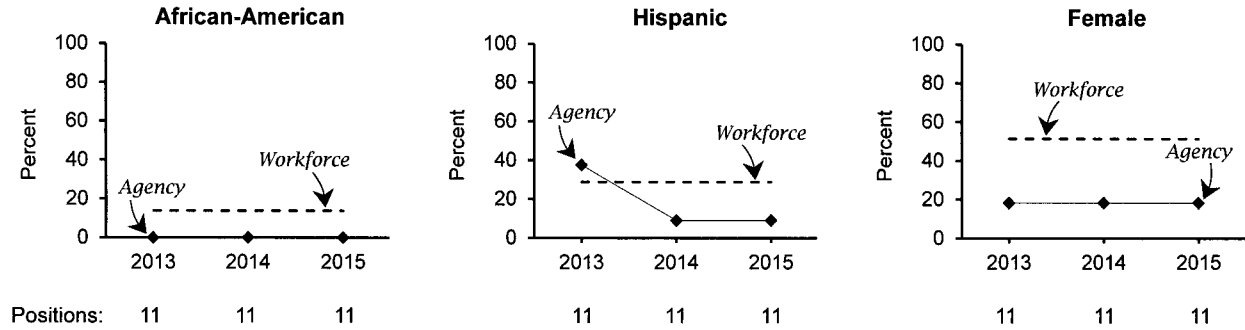
Professional



The State Bar generally met or exceeded the statewide civilian workforce percentage for Hispanics and females in professional positions, but fell a few points below the statewide civilian workforce percentage for African-Americans in professional positions.

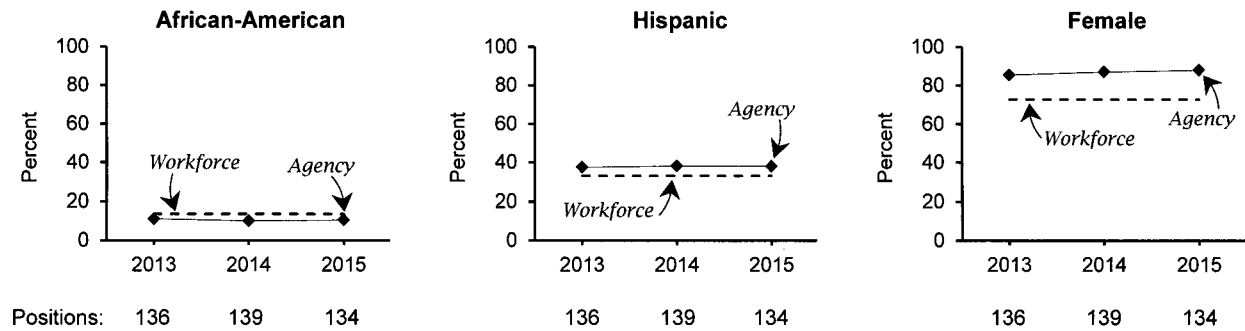
Appendix C

Technical



The State Bar generally did not meet the statewide civilian workforce percentage for minorities or females in technical positions in fiscal years 2013 through 2015.

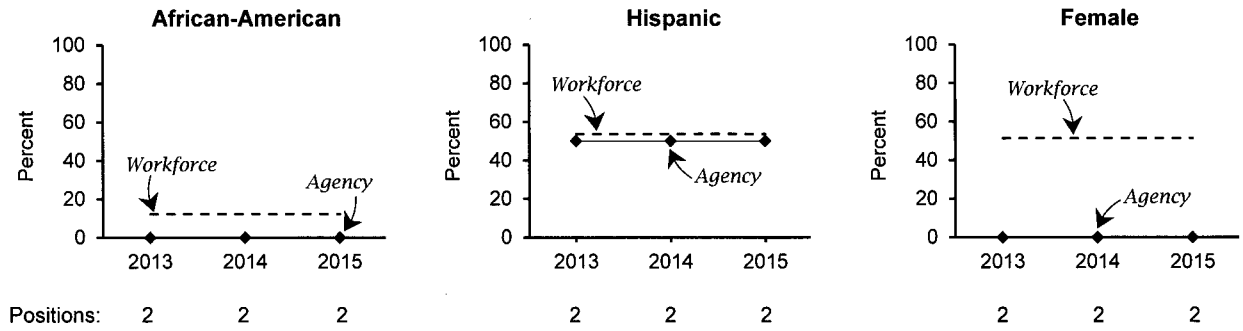
Administrative Support



The State Bar exceeded the statewide civilian workforce percentage for females and Hispanics in administrative support positions in fiscal years 2013 through 2015, but missed the statewide percentage for African-Americans in administrative support positions by a few percentage points.

Appendix C

Service/Maintenance



The State Bar did not meet the statewide civilian workforce percentage for African-Americans, Hispanics, or females in their two service and maintenance positions.

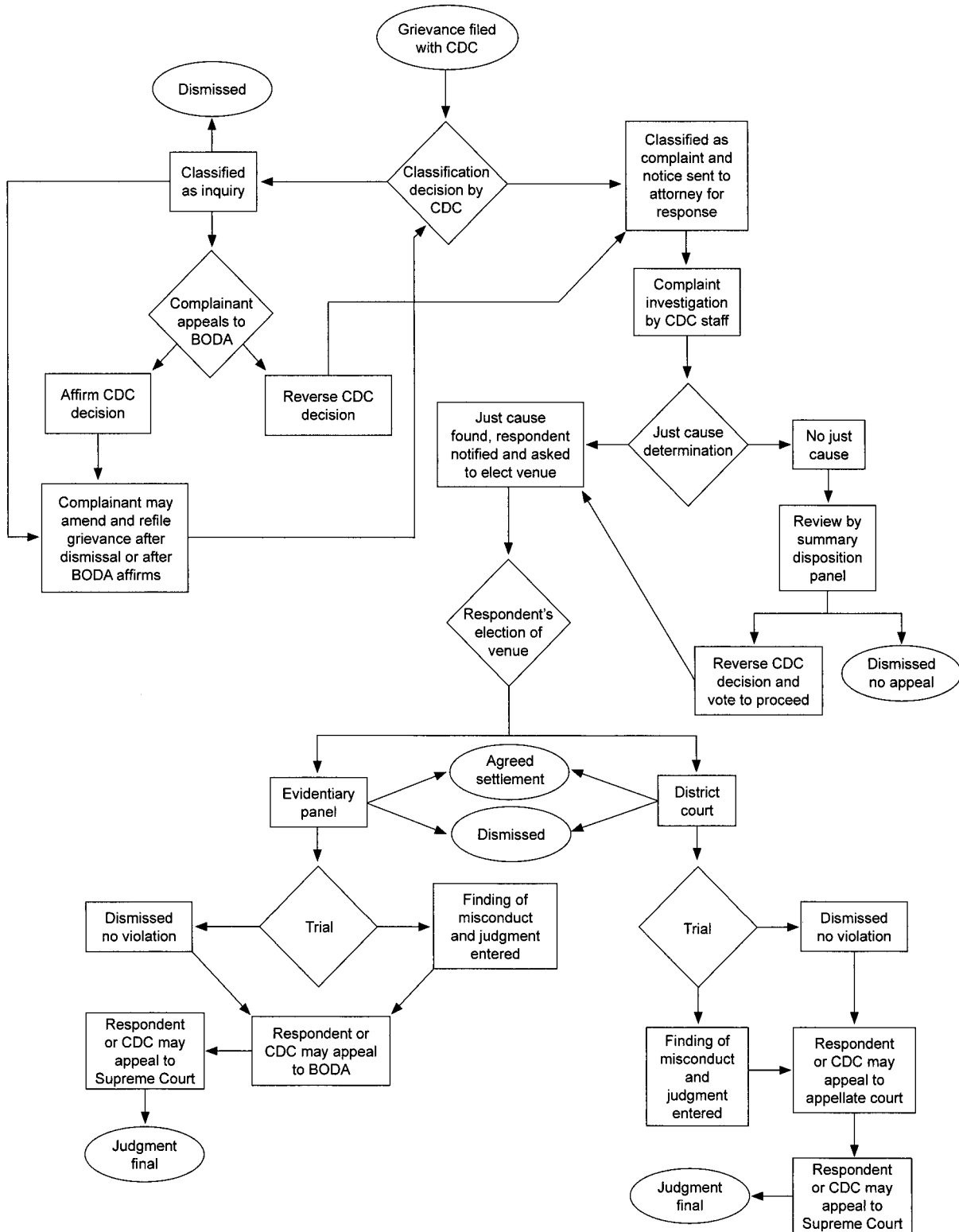
¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Section 325.011(9)(A), Texas Government Code.

² Section 21.501, Texas Labor Code.

³ Based on the most recent statewide civilian workforce percentages published by the Texas Workforce Commission.

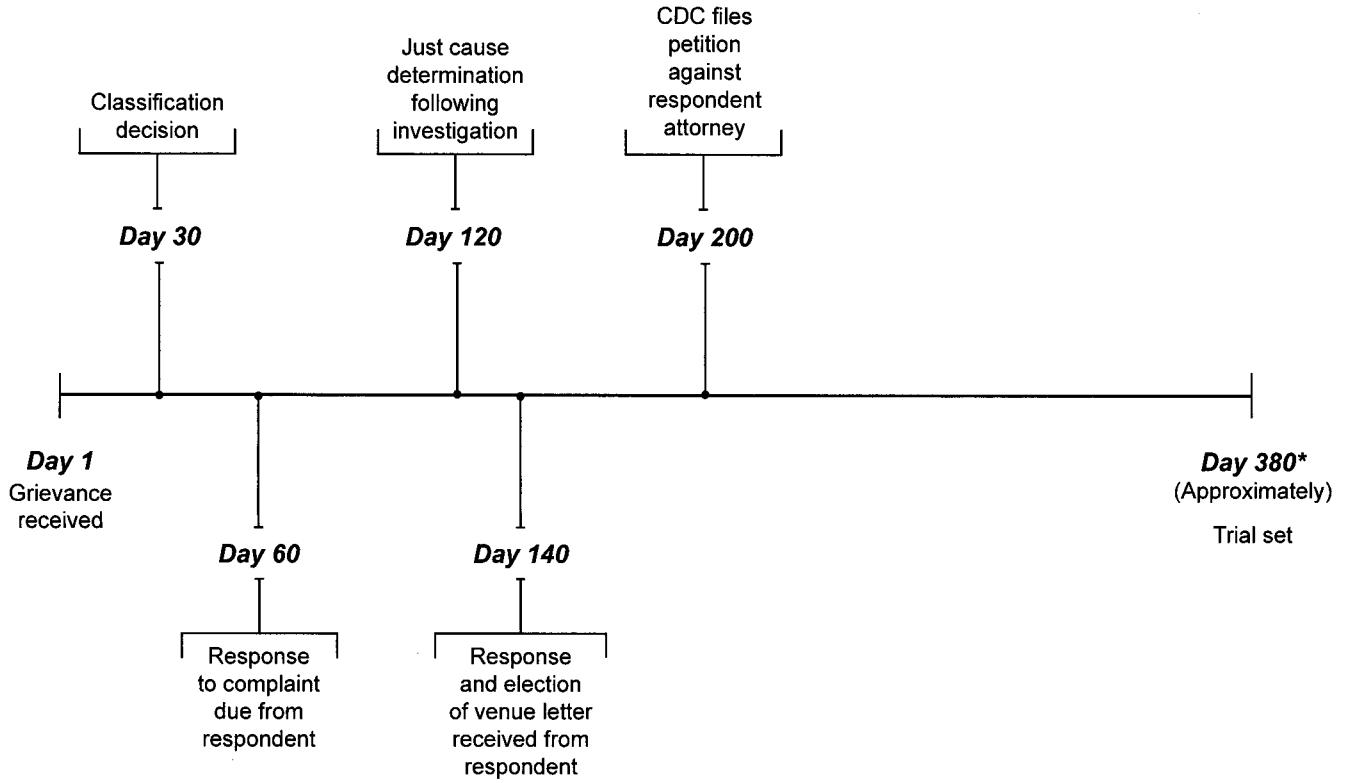
APPENDIX D

Attorney Discipline Process, Timeline, and Glossary of Terms



Appendix D

Attorney Discipline Process Timeline



* The trial is set 180 days after the respondent answers CDC's petition, which varies due to the timing of service of the petition.

Appendix D

Glossary of Terms

Board of Disciplinary Appeals (BODA) — A 12-member body of attorneys appointed by the Texas Supreme Court, which functions as both an appellate and trial court for various matters relating to the attorney discipline system. The board considers appeals of classification decisions and judgments entered by an evidentiary panel. The board also functions in a trial capacity by deciding cases of compulsory discipline, reciprocal discipline, and disability (defined below). The board also decides cases in which the chief disciplinary counsel seeks to revoke the probation of an attorney. Such a revocation might be needed if an attorney violates the terms of a probated suspension, which allows an attorney to practice but only if they meet certain conditions. Conditions might include taking additional continuing legal education or receiving substance abuse treatment.

Classification — Process by which staff of the Office of the Chief Disciplinary Counsel analyzes a grievance to determine whether it alleges a violation of the rules governing attorney conduct. Staff must make this determination within 30 days of the receipt of a grievance and notify the complainant and the attorney in question.

Commission for Lawyer Discipline — Oversight committee for the attorney discipline system. The 12-member commission includes six attorney members appointed by the State Bar president and six non-attorney public members appointed by the Texas Supreme Court. The commission supervises the work of the chief disciplinary counsel and as the client body in disciplinary litigation decides the staff's direction in pursuing litigation, such as approving a range of sanctions to seek in each case.

Complaint — Grievance deemed by staff to allege professional misconduct under the Texas Disciplinary Rules of Professional Conduct. Complaints move forward in the process and staff investigates them to evaluate their validity.

Compulsory Discipline — Discipline imposed when an attorney has committed certain crimes, such as barratry, which is the improper solicitation of a client, or a financial crime, such as misapplication of fiduciary funds. The Board of Disciplinary Appeals hears and decides these cases.

Disability Proceeding — Type of case in which evidence indicates an attorney has an impairment that affects his or her ability to practice law, such as mental health or substance abuse issues. Attorneys deemed to have a disability are suspended from practicing until they can demonstrate they are no longer impaired. The Board of Disciplinary Appeals hears and decides these cases.

Evidentiary Panel — Panel composed of a subset of grievance committee members that determines whether an attorney has committed professional misconduct and if so, assesses a sanction. A panel must mirror the overall grievance committee composition and be composed of two-thirds attorney members and one-third public members.

Grievance — Broad term for allegations of attorney wrongdoing received by the Office of the Chief Disciplinary Counsel. Staff attorneys review grievances and make a classification decision as to whether the grievance constitutes an allegation of professional misconduct under the Texas Disciplinary Rules of Professional Conduct.

Appendix D

Inquiry — Grievance deemed by staff not to allege a violation of the Texas Disciplinary Rules of Professional Conduct. For example, some grievances involve clients unsatisfied with the outcome of their cases, but these matters often do not rise to the level of professional misconduct. The Office of the Chief Disciplinary Counsel dismisses these grievances, but complainants can appeal this decision to the Board of Disciplinary Appeals.

Judgment — Written statement of an evidentiary panel's findings in a disciplinary case, including the sanction the panel deems appropriate.

Just Cause — Decision made at the conclusion of an investigation about whether there is a reasonable belief the attorney committed misconduct based on the information gathered. If the investigation results in a finding of just cause, the matter proceeds to disciplinary litigation.

Local Grievance Committee — A committee with at least nine volunteer members appointed by the State Bar president to decide disciplinary cases. Each of the 17 State Bar districts has a local grievance committee. Each committee is composed of two-thirds attorney members and one-third non-attorney public members.

Office of the Chief Disciplinary Counsel (CDC) — Division of the State Bar responsible for administering the attorney discipline system under the direction of the Commission for Lawyer Discipline. The chief disciplinary counsel, commonly referred to as the CDC, screens grievances received from the public, investigates claims of attorney misconduct, and represents the Commission for Lawyer Discipline in disciplinary cases against licensed attorneys.

Reciprocal Discipline — Discipline imposed when an attorney has been sanctioned in another state. For example, if an attorney who is licensed in both Texas and another state commits ethical misconduct and is sanctioned by the other jurisdiction, the attorney may be sanctioned in Texas as well. The Board of Disciplinary Appeals hears and decides these cases.

Summary Disposition Panel — Panel that reviews cases in which staff determines there is not a reasonable belief the attorney committed misconduct based on the information gathered. The panel either votes to dismiss the complaint or to proceed with the complaint. Panel decisions cannot be appealed. A panel is composed of a subset of grievance committee members, and must mirror the overall grievance committee composition and be composed of two-thirds attorney members and one-third public members.

APPENDIX E

State Bar of Texas Reporting Requirements

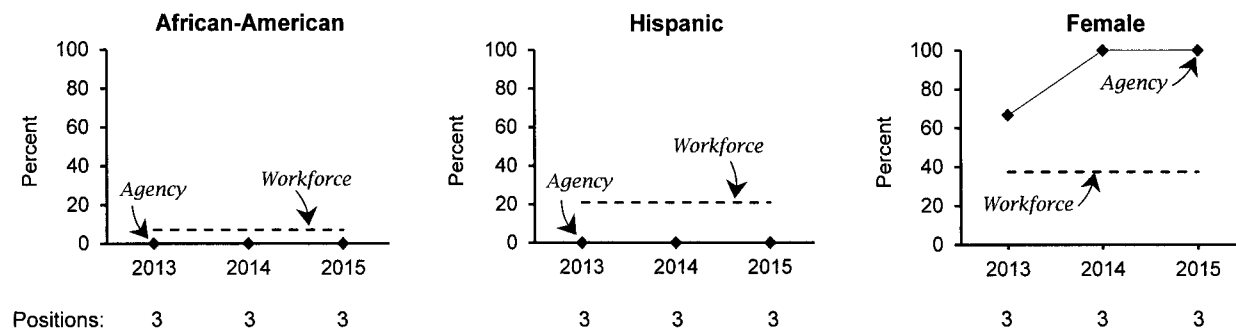
Report Title	Legal Authority	Description	Recipient	Sunset Evaluation
1. Report on Elections	Section 81.0242, Texas Government Code	Requires the State Bar to report statistics regarding the participation of State Bar members in elections under the State Bar Act.	Supreme Court and publish in Texas Bar Journal	Continue
2. Annual Financial Report	Sections 81.023 and 2101.011, Texas Government Code	Requires the State Bar to prepare an Annual Financial Report following standards for executive branch agencies, and to submit the report to additional recipients, including the Supreme Court.	Governor, Comptroller, Legislative Reference Library, State Auditor, Legislative Budget Board, Supreme Court, and presiding officer of each house of the Legislature	Continue
3. Strategic Plan and Performance Measures Report	Section 81.0215, Texas Government Code	Requires the State Bar to develop and biennially update a comprehensive, five-year strategic plan including measurable goals and performance measures. Requires the State Bar to annually report on the performance measures.	Supreme Court and publish in Texas Bar Journal	Continue
4. Commission for Lawyer Discipline Annual Report	Section 81.076(h), Texas Government Code	Requires the Commission for Lawyer Discipline to report on the state of the attorney discipline system and make recommendations to refine and improve the system.	Supreme Court, State Bar board, and the Legislature	Continue

APPENDIX F

Board of Law Examiners Equal Employment Opportunity Statistics 2013 to 2015

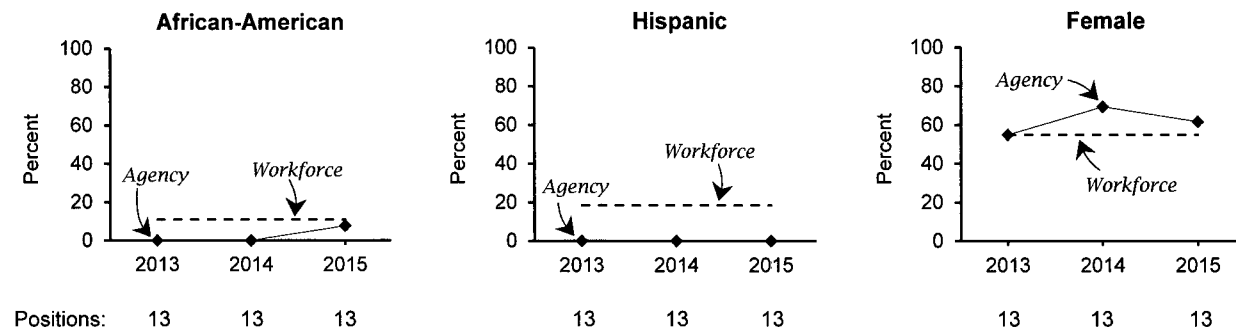
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Administration



The board exceeded the statewide civilian workforce percentage for females in the administration category. While the board did not meet the statewide percentage for African-Americans or Hispanics, such goals may not be attainable with only three positions.

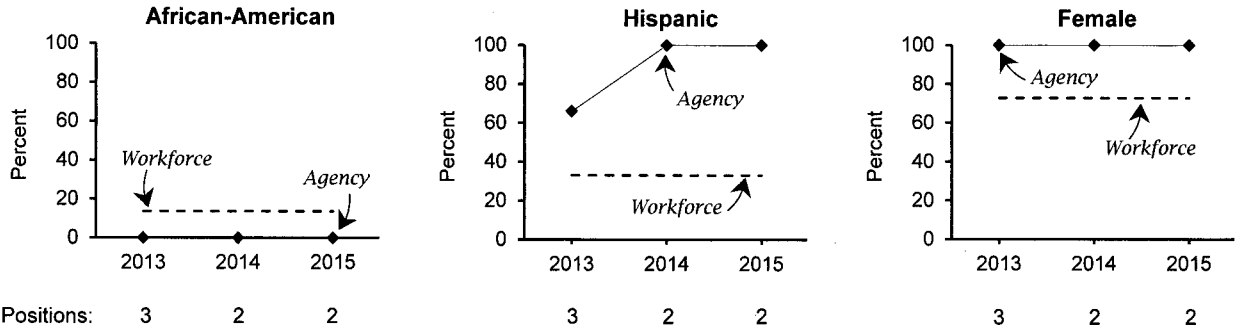
Professional



The board met or exceeded the statewide civilian workforce percentage for females in the professional category, but did not meet the statewide percentage for African-Americans or Hispanics.

Appendix F

Administrative Support



The board exceeded the statewide civilian workforce percentage for Hispanics and females in administrative support positions. While the board fell below the statewide workforce percentage for African-Americans, such goals may not be attainable with so few positions.

1 All citations to Texas statutes are as they appear on <http://www.statutes.legis.state.tx.us/>. Section 325.011(9)(A), Texas Government Code.
 2 Section 21.501, Texas Labor Code.
 3 Based on the most recent statewide civilian workforce percentages published by the Texas Workforce Commission.

APPENDIX G

Staff Review Activities

During the review of the State Bar of Texas and the Board of Law Examiners, Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with agency personnel; conducted interviews and solicited written comments from other state agencies, interest groups, and the public; reviewed agency documents and reports, state statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar agencies in other states; and performed background and comparative research.

In addition, Sunset staff also performed the following activities unique to these agencies:

- Attended meetings of the State Bar board; Board of Law Examiners; Disciplinary Rules of Professional Conduct Committee; Commission for Lawyer Discipline; and Board of Disciplinary Appeals
- Visited a field office of the Office of the Chief Disciplinary Counsel and met with staff investigators and attorneys
- Attended a Texas Court of Appeals hearing on a contested State Bar matter
- Observed a summary disposition panel decide attorney discipline cases
- Observed character and fitness, probationary license, and accommodation hearings; and determinations of waiver requests at the Board of Law Examiners
- Observed the Board of Law Examiners deliberate the content of bar exam questions
- Met with representatives of judicial branch agencies and committees involved in oversight of the legal profession
- Worked with staff of the American Bar Association to identify national best practices for attorney regulation
- Conducted a stakeholder survey to gather feedback on each agency's performance, and evaluated the 577 responses

Sunset Staff Review of the
State Bar of Texas
Board of Law Examiners

————— *Report Prepared By* —————

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