

## **Comments on the Sunset Commission Report on the Texas Real Estate Commission**

### **Stan Harbuck**

#### **Preface**

*Sunset Licensing Standards and Across the Board Standards are Excellent Reference Tools.* I have attended the TREC, IAC and the Inspector Education Subcommittee of the IAC meetings on and off for many years. From my experience, I would like to make some recommendations. I will use the Sunset Commission Standards for these recommendations, as these are the standards that state regulatory boards in Texas should/must comply with. These standards consist of the Texas Sunset Licensing and Regulation Model Standards (Standards) and the Across-the-Board Policies (ATB's). I thank the Texas Sunset Commission for providing one of the best guides available in the United States for evaluating licensing requirements.

*As the Providers Go, So go the Licensees – Our Analogized/Modified “Standards”.* While the Standards obviously refer to specific occupational licenses, etc., I believe license requirements and processes for trainers/providers (providers) should also be seen as occupational licenses, and so I believe the Standards should also apply to the provider-licensees that train home inspectors. As a result, I show my analogized/modified Sunset Standards (analogized standards) and ask that they be treated as applicable to providers by showing underlining for new text and strike-out for removed text for the license, etc. process. In fact, I believe that as the providers go, so go the licensees. If the requirements for providers are overly and unnecessarily restrictive, then the number and types of training programs available for licensees are more limited, which will affect the opportunities for individuals to become licensed as home inspectors in Texas.

#### **Summary of Recommendations**

1. Prohibit circuitous live-instruction-only requirements for home inspector licensure.  
To provide the “minimum necessary to ensure competency” in (Standard 28) and avoid “unduly limiting entry” into the home inspection profession (Standard 34), keep the option for fewer hours to be required for the circuitous live, in-person ride-along and allow video as an option for the ride-along. If not, then statutorily eliminate the authorization for the ride-along requirement and any other circuitous live, in-person instruction requirement to comply with the Standards.
2. Offer alternative dispute resolution in the form of private mediation at the staff decision-making level on staff interpretations and course and provider applications to improve the availability of training for prospective licensees and to allow TREC more engagement in the policymaking process.
3. Potential Anticompetitive Behavior and Special Exemptions
  - A. Close scrutiny for potential anticompetitive behavior by the IAC should be provided. ESAC, and IAC members should go through Sunset Commission Licensing Model Standards and Across the Board principle training as policymakers because so many of their proposals, despite public challenges, are approved unfettered through the rulemaking process.
  - B. IAC members should not be conducting reviews of course applications as this creates an opportunity for anti-competitive behavior against courses that may allow easier access to the profession (analogized from Standard 54 relating to a complaint process Standard). Instead, objective, consistent criteria for approval of a course should be used, such as whether the course is consistent with Texas Home Inspector Standards of Practice (one of the cores of the public health and safety function of regulating home inspectors). Staff should follow through with checks to see which courses satisfy that objective criteria (analogized from Standard 55 relating to the complaint process). Only when the IAC has provided specific interpretations of the Home Inspector Standards in a public setting need the application go beyond the Home Inspector Standards to include interpretations. If the IAC is unwilling to provide guidance on the Home Inspector Standards in terms

of open, public interpretations of the Home Inspector Standards, then staff should be able to provide the review of video courses based solely on the Home Inspector Standards.

C. Close scrutiny should also be made for conflict of interest issues as suggested by Standard 10 (see Appendix) especially when trainers serve on the IAC.

D. Care should be taken to avoid favoring home inspector trade associations as some of the Standards caution against giving “exemption to an agency’s education and program approval should not be permitted.” This is especially true for home inspector trade associations because quite a few home inspection providers around the country have set up nonprofit “Trade Associations” that have no elected officers and are basically run like a business by the provider with at least a portion, if not a large portion, of the proceeds going to the founder/president/”owner”. Thus, special exemptions should not be given to trade associations in the application process.

## **Detailed Recommendations**

### **1. Prohibit circuitous live-instruction-only requirements for home inspector licensure.**

**To provide the “minimum necessary to ensure competency” in (Standard 28) and avoid “unduly limiting entry” into the home inspection profession (Standard 34), keep the option for fewer hours to be required for the circuitous live, in-person ride-along and allow video as an option for the ride-along. If not, then statutorily eliminate the authorization for the ride-along requirement and any other circuitous live, in-person instruction requirement to comply with the Sunset Standards.**

#### *General Statement.*

The ride along requirement for home inspectors is a much more onerous rule requirement than the 330 hours because it requires a circuitous live, in person training experience for applicants. If a new rule is finalized at the next TREC meeting, the IAC and TREC will have taken advantage of the maximum hours allowed under the statute for the ride along without other alternatives. No argument can be made to justify prohibiting video to serve the same person purpose as a circuitous live, in person ride-along requirement.

#### *Background Information.*

The Sunset Committee Report suggested that The Texas Real Estate Commission (TREC) rules put up barriers to becoming a home inspector in Texas. The report stressed the large number of hours needed to get an inspector license. I believe the number of hours is not necessarily the most significant burden since 330 of those hours can even be done at home. The real burden is the in-person requirement of “ride-alongs,” allowed by statute since 2013, which was recommended by the Inspector Advisory Committee (IAC) and adopted by TREC.

#### *Maximum of 40 Hour Ride Along Requirement Previously Allowed By Statute*

The 2013 Legislature change to the statute on home inspection allowed, but did not require, a maximum of 40 hours of the circuitous live, in-person ride along to be required by rule for those that receive the rest of their training through correspondence. As a result of the rulemaking that has followed, close to, if not more, than 90% of the license applicants now must complete a circuitous live, in-person, ride along before they can become licensed. In fact, if a rule is finalized at the next TREC meeting, all applicants will have soon have to complete the full 40 hour ride along requirement without any other lower hour options for the ride-along.

This requirement states that an applicant has to “ride-along” with a licensed inspector for a certain number of hours. The typical ride-along applicant is approved by having had a license for at least 5 years and having conducted a minimum of 200 inspections. Most of these are not traditional providers as a good number of them have admitted openly they only obtained their ride-along instructor status to allow a relative or friend to become licensed after the rule became final. Thus, an applicant has to potentially depend on a traditional

competitor to become a home inspector in Texas, depending upon whether they live near a ride-along instructor that is an established provider or not. If they don't, they must go to a potential competitor, at greater cost go to a traditional provider, or not get licensed. Since there are only about 60 approved ride along inspectors total in the entire state, some providers currently offer courses where up to 10 people can "ride-along" with an approved inspector.

*Recent IAC Action.*

After receiving the Sunset Report, the IAC met and voted recently to finalize the following two recommendations. As seen, these recommendations actually make getting a Texas home inspector license even more difficult.

1. For the experience requirement, current rules state the a trainee has a choice of 40 hours of ride-along and 24 hours of other training (total of 64 hours), or 16 hours of ride-along and 60 hours of other training (total of 76 hours). At the meeting, the committee voted to eliminate the 16/60-hour option, thus making the new minimum for the live, in-person ride-along training 40 hours. While at first glance it looks like they are eliminating the option with the most hours – 64 versus 76 hours – they are actually increasing the minimum number of hours that must be involved in the far more circuitous live, in-person ride-along training – 40 hours vs. 16 hours – by eliminating that option. This change makes it even harder to get a license. The IAC is going in the wrong direction from what the Sunset Commission recommended by increasing the minimum number of hours of the most unnecessarily circuitous barrier to entry.
2. The IAC also voted to finalize their recommendation of limiting the number of trainees who can go on a ride-along from 10 to 2. By decreasing the number from 10 to 2, the price of these courses will raise significantly, thus making entry into the profession even more difficult.

Not only does a requirement to do circuitous live in-person instruction, compared to video instruction, virtually completely physically block active military (who have no control over their schedule), those working full time jobs, some rural Texans, etc., these two changes (that could become final rules at the next commission meeting) almost triple the number of ride-along hours required and decreases the number of students that can be on a ride-along to 1/5<sup>th</sup> of what they currently are. Some groups may be able to take advantage of live coursework, such as retired individuals, those currently without a job, etc. However, groups like these often have a limited income and so are not as likely to take advantage of the opportunities to change their career. Groups like these can also just as easily take advantage of video training as those with limited schedules so that video training should be allowed to offer a broader coverage of access to becoming a home inspector in Texas.

Finally, the passage of these two final proposals at the next TREC meeting will make the live, in-person ride-along even more difficult even for those who are in a position to accommodate live instruction: roughly 15 times more difficult and/or costly than it already is.

*Video Training as a Better Substitute for Circuitous/Onerous Live. In-person Ride-Along Training:*

*Health and Safety Core.* The foundation and core of the home inspector regulation to protect the public health and safety is found in the home inspector standards that inspectors are required to follow. Home inspections are defined in the rules as "a limited visual survey and basic performance evaluation of the systems and components of a building using normal controls that provides information regarding the general condition of a residence at the time of inspection." (TAC Title 22, 535.227(a)(3)(A))

*Visual/Video Training is Acceptable.* Thus, the training requirements should focus on **visual**

**training.** Showing how to operate controls, such as a thermostat, can be done through video and need not occur in a live course setting. Furthermore, video-based training eliminates the unnecessary and unreasonable restrictions of a live course, i.e. video does not require matching the schedules of instructor and students, it has the flexibility of allowing the student to access the training at anytime, there is no need for a facility or home to shadow an inspector, it does not require travelling to a distant city to find an approved ride-along provider, etc. Requiring live, in-person instruction is a particularly burdensome requirement for rural Texans, active military (who have no control over their schedule), those working full time jobs, etc. At the same time, requiring live, in-person training is only accessible for those that can easily schedule it – retired individuals, those currently without a job, etc., who typically have a limited income and so are not as likely to take advantage of the opportunities to change their career. Groups like these can also just as easily take advantage of video training as those with limited schedules so that video training should be allowed to offer a broader coverage of access to becoming a home inspector in Texas.

Another advantage of visual training is uniformity of training. The ride-along requires a student to follow an inspector. The inspector also reviews the applicable home inspector standards and departure provisions, something a video can do as well. With video training, actual instruction can be given that is consistent with the home inspector standards for every student that uses a video. In other words, once evaluated for course approval to be consistent with the home inspector standards, consistency between students is assured. In the case of live, in-person ride-along training on-site, there is no specific review for each ride-along to see if the instructor covered the applicable provisions of the home inspector standards. Also, the student has the opportunity to review something they did not understand as often as they want, including reviewing the video again before taking the state test.

*Likely response by staff and the IAC:*

- A) They will say that they are reducing the total number of hours by eliminating the option that requires less live, in-person instruction. As already discussed, while it is true that there is a minor reduction in hours through the elimination of the 16/60 option, the result is that it increases the minimum of the more circuitous live, in-person hours required by almost 3 times.
- B) They will say that there is nothing like having a live instructor. For some students that may be true by preference because that option can still be used. However, there are many other students whose learning style is better with video.
- C) They will also claim that there are parts of a home inspection that can't be taught on video, for instance hearing or smelling things. However, video comes with audio so the viewer can always hear the exact same things the inspector hears. Even though many applicants will know the smell of gas, for those few who do not, or physically cannot, they could use a gas detector like the ones home inspectors and fire departments use when investigating a gas leak, to avoid any risk to themselves, homeowners, and homebuyers. Techniques can be shown on the video for how to use this gas-testing equipment.
- D) Although they will suggest 60 or so approved inspectors offer plenty of coverage around the state, typically in or around large cities in Texas, a recent report from one of the larger providers in Texas at the August 13 TREC meeting suggested that they had only been able to find about 10 reliable ride-along inspectors of this type throughout the state. They will claim that this in-person, live training is critical to providing good quality home inspectors and home inspections in Texas. However, in a digital world, student questions can be answered in a reasonable amount of time - just as they are allowed to be answered with the rest of the instruction hours required for licensure (the other 330 hours).

Once again, the important thing is that there is no argument that can be made that justifies the prohibition on video to serve the same purpose as a live, in person requirement.

**Conclusion: 1. Prohibit circuitous live-instruction-only requirements for home inspector licensure.**

**To provide the “minimum necessary to ensure competency” in (Standard 28) and avoid “unduly limiting entry” into the home inspection profession (Standard 34), keep the option for fewer hours to be required for the circuitous live, in-person ride-along and allow video as an option for the ride-along. If not, then statutorily eliminate the authorization for the ride-along requirement and any other circuitous live, in-person instruction requirement to comply with the Sunset standards.**

#### *References*

*Applicable Sunset Standards:* Standard 2 (“least stringent level of regulation … should be implemented”), Standard 28 (“educational requirements should be the minimum necessary to ensure competency of an entry level professional”), and Standard 34 (“experience requirements should not unduly limit entry to the profession”). (See the Appendix for these standards.)

*Current Professional Home Inspector Ride-along Requirement Options:* TAC Title 22, Sections 535.212(g)(1)(B)(i) and (ii), the “40/24” and “16/60” rules respectively

*Current ride-along instructor list:*

<https://www.trec.texas.gov/education/approved-ride-along-course-instructors-0>

**2. Offer alternative dispute resolution in the form of private mediation at the staff decision-making level on staff interpretations and course and provider applications to improve the availability of training for prospective licensees and to allow TREC more engagement in the policymaking process.**

#### *General Statement.*

Challenges have been experienced with course and provider applications that offer no recourse except to appeal under the cumbersome and expensive administrative rules. The result is that the opportunities for prospective licensees become limited because of the delays and unavailability of courses in the process. If appropriate private mediation were allowed, appropriate training could be better made available for prospective licensees given the likely shorter, and more certain, time frame for resolution of course application decisions.

#### *Background Information.*

TREC currently allows for private mediation by phone of complaints against licensees under certain circumstances. However there are no similar provisions for review of staff decisions on provider and course applications. While some of the Standards referenced in this section relate to the complaint process, I analogize to them providing an appropriate mediation process for provider and course applications that would be consistent with ATB 9 and Standards 14, 54, 55 and 61 by encouraging ADR processes, supporting the express policy of avoiding the risk of improper delegation of authority, supporting an express policy of a fair process (unbiased assignment, confidentiality, timelines, avoidance of conflicts of interest, etc.), avoiding the risk of going against an express policy against improper delegation of board authority, and would support an express policy to ensure the board’s knowledge of staff decisions and appropriate oversight of staff operations.

*Private Mediation In the Provider and Course Application Process Can Improve Training Program Availability for Prospective Licensees, Better Engage TREC In Its Policy Making Role, and Represent Recognition of the Importance of the Availability of Training in the TREC Processes*

Allow private mediation to avoid harm that could result to providers (and the licensees they serve) from significant staff interpretations and decisions on provider and course applications. Private mediation can also avoid overburdening the Commission’s time in resolving issues. I also recommend that unresolved mediations be appealable to TREC to provide a significant breakthrough for the interpretation of rules, the processing of course and provider approvals for providers and more engagement of TREC in the policy making process. Private mediation is currently authorized in cases involving licensee complaints but apparently not in the provider or course application process. Private mediation would not represent a

significant burden on the staff or the TREC on issues that can have a major impact on the access to the profession across the State of Texas (without providers no one can be licensed) as TREC and staff currently devote far more resources to issues that typically involve enforcement or complaints with one licensee and only a few individuals or entities when they deal with licensee violations under the traditional administrative law system. I also recommend that TREC staff otherwise refer interpretations to the full TREC during an open meeting, not relying on one or a few Commissioners interpretations (analogized to the express policy in Standard 55). Similarly, I recommend that they would also be handled much like the complaints are currently handled, with TREC hearing both sides in Executive Session and then formalizing their decision in an open TREC meeting to ensure the board's knowledge of staff decisions and appropriate oversight of staff operations (analogized to the express policy in Standard 61). Some of the Standards emphasize that staff should not take a policy-making role (analogized to the express policy in Standard 14).

Thus I recommend that the Sunset Commission recommend:

- A) An opportunity for private mediation (not through TREC staff or SOAH) to course, provider etc. applications, not just complaints
- B) Tolling of deadlines with mediation and TREC review processes to avoid unfairly prejudicing the opportunity to go through the traditional hearing process
- C) Mediation be allowed by phone
- D) The mediator should not be subject to TREC staff, TREC ADR administrator, or TREC
- E) Mediation should not need to be approved by TREC - should be applicant option, applicant choice of mediator, etc.
- F) That if no agreement under mediator, can appeal to TREC in Executive Session, etc.

#### *Good Example Of A Good Private Mediation Process*

A good example of how well mediation can work is in a tax code mediation provision that allows in applicant/appellant to request, and be given, an opportunity for mediation to occur upon request. This is a mediation system that is used in significant ways in the Austin area and provided for through some of the local mediation programs and offices. While I am not sure the same would apply to this recommendation should it be adopted, our understanding is that it has a high (99%) rate of success in reaching agreement.

**Conclusion: Offer alternative dispute resolution in the form of private mediation at the staff decision-making level on staff interpretations and course and provider applications to improve the availability of training for prospective licensees and to allow TREC more engagement in the policymaking process.**

#### *References.*

Across the Board Policy 9, and analogies to the express policies found in Standards 14, 54, 55, and 61 (See Appendix).

TREC Complaint ADR processes: TAC Title 22, Sections 533.20 to 533.37

Tax Mediation Provision and Offices: Tax Code Section 42.226 and Dispute Resolution Services, Austin, TX

### **3. Potential Anticompetitive Behavior and Special Exemptions**

**A. “Close scrutiny for potential anticompetitive behavior” by the IAC should be provided. ESAC, and IAC members should go through Sunset Commission Licensing Model Standards and Across the Board principle training as policymakers because so many of their proposals, despite public challenges, are approved unfettered through the rulemaking process.**

**B. IAC members should not be conducting reviews of course applications as this creates an opportunity for “anti-competitive behavior”{ against courses that may allow easier access to the profession (analogized from Standard 54 relating to a complaint process Standard). Instead, objective, consistent criteria for approval of a course should be used, such as whether the course is consistent with home inspector standards (one of the cores of the public health and safety function of regulating home inspectors). Staff should follow through with checks to see which courses satisfy that objective criteria**

**(analogized from Standard 55 relating to the complaint process). Only when the IAC has provided specific interpretations of the home inspector standards in a public setting need the application go beyond the home inspector standards to include interpretations. If the IAC is unwilling to provide guidance on the home inspector standards in terms of open, public interpretations of the home inspector standards then staff should be able to provide the review of video courses based solely on the home inspector standards.**

**C. Close scrutiny should also be made for “conflict of interest” issues as suggested by Standard 10 (see Appendix)**

**D. Care should be taken to avoid favoring home inspector trade associations as some of the Standards caution against giving “exemption to an agency’s education and program approval should not be permitted.” This is especially true for home inspector trade associations because quite a few home inspection providers around the country have set up nonprofit “Trade Associations” that have no elected officers and are basically run like a business by the provider with at least a portion, if not a large portion, of the proceeds going to the founder/president/”owner”. Thus, special exemptions should not be given to trade associations in the application process.**

*Background Information.*

IAC licensed inspector members have been recruited in the past by staff to help review course applications. This creates the risk and appearance of potential anti-competitive behavior on the part of those members of the IAC. Also, a large percentage of the rules proposed by staff to the IAC are passed through the IAC with little, or in some cases, any modification in the process. They then also often go to through TREC with little, if any changes. The combination of these notes suggest that the IAC should be considered a policymaking body and should go through training similar to that expected of TREC regarding anti-competitive behavior. It also suggests that TREC should review rules changes with close scrutiny for potential anti-competitive behavior. Reducing the potential risk of anti-competitive behavior may increase the number and type of courses that may be available to prospective licensees to learn from, thus allowing more opportunity for those in varying circumstances.

Standard 6 requires close scrutiny for anti-competitive behavior. I suggest that the practice of having inspector members of the IAC review course applications be discontinued. Objective general principles for having the staff review courses should be used rather than referral to the licensed inspectors on the IAC. In other words, once objective guidelines for staff review of courses have been established, there should be no need for IAC review with specific course applications. If staff does not feel expert at applying the home inspector standards generally or to specific course applications, use of appropriate out-of-state reviewers who are not licensed in Texas should be used to check applicability of the home inspector standards to a given video of a home inspection to avoid even the risk or appearance of anti-competitive behavior. The review of video coursework by IAC members is a special concern since no documentation for appropriateness is required of how each live, in-person ride-along instructor documents the applicable home inspector standards and departure provisions for each home they take ride-along trainees out on. Here I am also going to analogize to an investigation of complaints Standard to course approval by representatives from the IAC. By analogy, Standard 55 could be used to suggest that prior review by IAC members should be avoided.

I believe the TREC board and advisory committees would appreciate receiving initial training (and updated training every years):

**A. TREC board and advisory committees - To become aware of the Standards and ATB’s for avoiding unduly restrictive rules and regulations and become more aware of how those principles are applied in the rulemaking process, including reviewing examples of how to avoid creating unduly restrictive rules, how to avoid conflicts of interest, etc.**

B. TREC - On how to select ESAC advisory and IAC committee members from a broader base (such as including an appropriate share of correspondence course providers as well as online providers)

Concerning Standard 29: A) Exemption should not be made to special groups with regard to provider approval, course approval, etc. For instance, quite a few home inspection providers around the country have set up nonprofit “Trade associations” that have no elected officers and are basically run like a business by the provider with at least a portion, if not a large portion, of the proceeds going to the founder/president/”owner”. Thus, special exemptions should not be given to trade associations in the application process.

Conclusion: **A. Close scrutiny for potential anticompetitive behavior by the IAC should be provided. ESAC, and IAC members should go through Sunset Commission Licensing Model Standards and Across the Board principle training as policymakers because so many of their proposals, despite public challenges, are approved unfettered through the rulemaking process.**

**B. IAC members should not be conducting reviews of course applications as this creates an opportunity for anti-competitive behavior against courses that may allow easier access to the profession (analogized from Standard 54 relating to a complaint process Standard). Instead, objective, consistent criteria for approval of a course should be used, such as whether the course is consistent with home inspector standards (one of the cores of the public health and safety function of regulating home inspectors). Staff should follow through with checks to see which courses satisfy that objective criteria (analogized from Standard 55 relating to the complaint process). Only when the IAC has provided specific interpretations of the home inspector standards in a public setting need the application go beyond the home inspector standards to include interpretations. If the IAC is unwilling to provide guidance on the home inspector standards in terms of open, public interpretations of the home inspector standards then staff should be able to provide the review of video courses based solely on the home inspector standards.**

**C. Close scrutiny should also be made for conflict of interest issues as suggested by Standard 10 (see Appendix)**

**D. Care should be taken to avoid favoring home inspector trade associations as some of the Standards caution against giving “exemption to an agency’s education and program approval should not be permitted.” This is especially true for home inspector trade associations because quite a few home inspection providers around the country have set up nonprofit “Trade Associations” that have no elected officers and are basically run like a business by the provider with at least a portion, if not a large portion, of the proceeds going to the founder/president/”owner”. Thus, special exemptions should not be given to trade associations in the application process.**

#### References:

Across the Board Policy 5, Standard 6, 10, 24, 54, 55 (See the Appendix)

#### Other Sunset Commission Recommendations

I also agree with virtually all of the rest of the Sunset Commission report recommendations but also specifically with Recommendations 4.1 (Board Training)