

EXECUTIVE SUMMARY

State Bar of Texas Board of Law Examiners

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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

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

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.

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.