

The logo for the Texas Sunset Advisory Commission is a dark semi-circle with a white border. Inside the semi-circle, the words "Texas", "Sunset", "Advisory", and "Commission" are stacked vertically in a bold, white, sans-serif font.

**Texas  
Sunset  
Advisory  
Commission**

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**STAFF EVALUATION**

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*Board of Law Examiners*

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**A Staff Report  
to the  
Sunset Advisory Commission**

TEXAS SUNSET ADVISORY COMMISSION

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**BOARD OF LAW EXAMINERS**

**July 1990**

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## **SUMMARY**

## Summary

The Board of Law Examiners is subject to the Sunset Act and will be automatically abolished unless statutorily continued by the 72nd Legislature in 1991. The agency was initially reviewed under the sunset process in 1979 and continued for a 12-year period.

The review of the board included an assessment of the need for continued regulation; benefits that could be gained through transfer of all or part of the agency's functions to another existing agency; and changes needed if the agency was continued using its current organizational structure. The results are summarized below.

### Assessment of Need for Agency Functions

The review concluded that the enabling statute of the Board of Law Examiners should be repealed. Research indicated that the supreme court has the inherent power to regulate the practice of law. Using this power the court can issue orders which overrule or nullify legislative provisions related to the practice of law thus negating the influence of the legislature in regulating attorneys. Repealing the statute will eliminate the legislature's involvement in the admissions process, leaving the court with exclusive jurisdiction over the admission of attorneys to practice law.

### Assessment of Organizational Alternatives

If the decision is made to continue the regulation of admissions by statute, the review determined that the current organizational structure is appropriate and should not be modified. Merging the board with the state bar, which would consolidate attorney regulation into one agency, would not result in increased efficiency or substantial cost savings. The purposes and functions of the two agencies are distinctly different and would need to be maintained in a merged agency. The review concluded that the regulation of attorneys should continue to be administered through two separate agencies.

### Recommendations if Agency is Continued

- The policies affecting the board should be changed to reduce board member compensation to the standard state per diem rate.
- The administration of the agency should be modified by placing the agency's funds in the state treasury subject to the legislative appropriations process.
- The operation of the agency's programs should be improved by:
  - eliminating the use of district committees in the character and fitness process;
  - providing equal access to handicapped persons in the city where exam sites are located; and

- removing provisions which exempt certain legislators from the bar exam's educational requirements.

**FISCAL IMPACT**

Preliminary estimates indicate that the recommendations will produce a net revenue gain of approximately \$160,000 per year. Placing the board's funds in the state treasury would provide an additional fund balance of \$1.2 million annually to the state treasury.



## **BACKGROUND**

## Creation and Powers

The oversight of the legal profession in Texas is carried out through the Supreme Court of Texas, the State Bar of Texas and the Board of Law Examiners. The court has the total responsibility to regulate the legal profession through its power to control the judicial branch of government of which attorneys are part as officers of the court. The Board of Law Examiners governs the admission to practice law while the State Bar of Texas is responsible for regulating attorney discipline. The supreme court oversees the operations of these two agencies and provides rules to govern the issuance and removal of a license to practice law in the state.

The responsibility for regulation of the practice of law has been recognized as a judicial function since 1846. From that time until 1903, admission to local practice was the responsibility of the various district courts and the supreme court was responsible for admitting people to practice at the appellate level. In 1903, the supreme court began centralizing the admissions process by creating a board of law examiners under each of the five existing courts of appeals. In 1919, a statewide admissions process was established with the statutory creation of the Board of Law Examiners under the jurisdiction of the supreme court. The court has maintained statewide jurisdiction over the issuance of licenses since that time. From 1974 through 1979 the court delegated the responsibility for investigation of the Declaration of Intent to Study Law applicants to the state bar, with the help of district committees. In 1979, the court removed all responsibility for admissions from the state bar and delegated the responsibility for character and fitness to the Board of Law Examiners. Throughout all the administrative changes related to character and fitness, the Board of Law Examiners maintained its authority to administer the bar examination.

The supreme court has adopted rules that govern many aspects of the board's activities, including the qualifications for admission, the development and administration of the examination and the issuance of the license. In conjunction with the supreme court's rules, the legislature has enacted a statute that addresses the responsibilities of the board, establishes district committees to assist with character and fitness investigations, and establishes limits on fees collected by the board.

## Policy-making Body

The Board of Law Examiners is composed of nine attorneys who must meet the same qualifications as members of the supreme court. The members must be 35 years of age and have practiced law for 10 years. The supreme court appoints members for two-year terms that expire on September 30 of odd-numbered years. Board members can serve an unrestricted number of terms. The board currently elects its chair from its membership, which, by court rule, occurs if the court does not appoint the chair. The board's responsibilities include:

- ▶ ensuring good moral character and fitness of examinees and out-of-state attorneys seeking admission;

- ▶ ensuring adequate legal study by examination applicants;
- ▶ developing and administering examinations and providing analyses to persons failing the exam; and
- ▶ ensuring that out-of-state attorneys meet the requirements necessary to obtain a license to practice law in Texas.

The part-time board members are not required to meet a specific number of times each year, but historically have met six times each year in Austin. Board members spend a considerable amount of time developing, administering and grading examinations and conducting character and fitness hearings. In 1989, board members estimated that they spent an average of 433 hours per year conducting board business. Board members receive compensation of \$20,000 annually plus actual expenses.

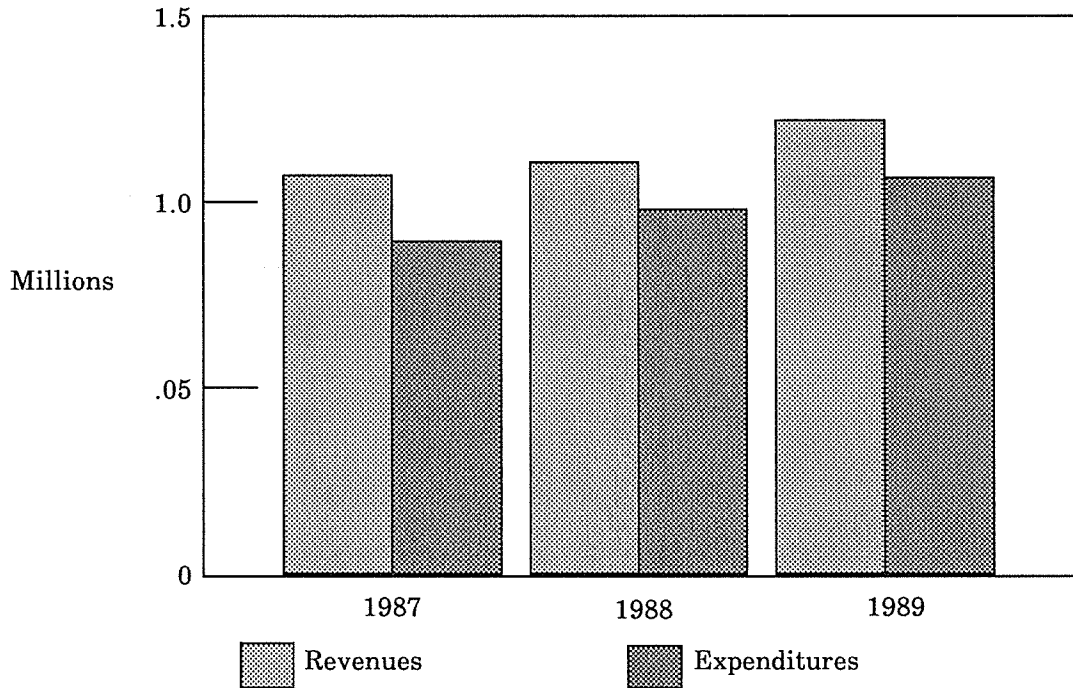
The board is also supported by 17 district committees which assist the board in the character and fitness investigations. Each district committee has at least 15 members, three of whom must be public members, three must law students if a law school is located in the district and the balance must be attorneys. The supreme court appoints the members and the chair of each committee. In addition, the court appoints a supreme court liaison to facilitate the flow of information between the board and the court.

## **Funding and Organization**

The statute and supreme court rules both address some aspect of the board's funding patterns. The statute imposes upper limits on the fees but designates the supreme court as the entity responsible for setting fees. The statute also requires the fees to be set at a rate that is sufficient to cover the costs associated with administering the board's responsibilities.

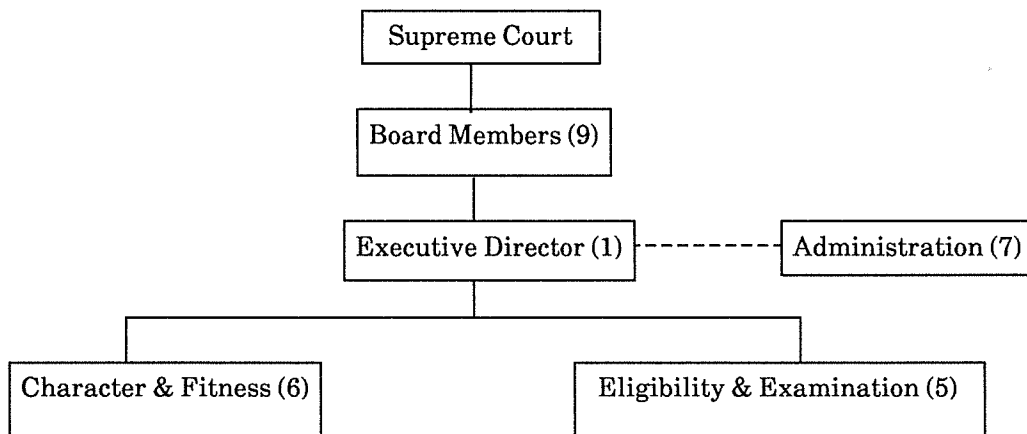
The Board of Law Examiners is not subject to the oversight of the legislature in the appropriation process, and the funds are kept outside the state treasury in several local Austin banks which are approved by the board. The supreme court sets fees and approves the annual operating budget of the board. The board staff prepares and submits a proposed budget to the board at the June board meeting. The board subsequently approves a recommended budget for presentation to the court which typically approves the budget in September. The board's fiscal year begins September 1 and ends August 31. In fiscal year 1989, the board received \$1.2 million in revenues and expended just over \$1 million. Exhibit A shows the board's revenues and expenditures for the last three years. As indicated by the exhibit, revenues consistently exceed expenditures.

### Exhibit A Revenues and Expenditures



In fiscal year 1990, the board currently has 17 full-time equivalent employees. All board employees work in the board offices in Austin. Exhibit B shows the organizational structure of the board.

### Exhibit B Board of Law Examiners Organizational Structure



## Programs and Functions

### Administration

The administration division provides support to the board members and the other two divisions and includes executive, legal, accounting, personnel, data processing and printing activities all under the supervision of the executive director. The executive director's responsibilities include overseeing the board's operations and informing the supreme court liaison of the board's activities. In addition to the director, this division is staffed with five employees and expended \$524,400 in fiscal year 1989.

### Character and Fitness

The character and fitness division is responsible for conducting in-depth background investigations on all applicants seeking admission to the bar examination. Investigations are conducted on applicants who are filing a declaration of intent to study law and those who are filing an application for admission. The investigations determine the present moral character and fitness as defined in supreme court rules.

Each applicant provides personal background information including letters of verification to former employees, educational institutions, and references. Criminal checks are conducted through the Department of Public Safety and the Federal Bureau of Investigation.

Texas law students file a declaration of intent to study law, approximately four months after entering law school. The agency staff then conducts a character and fitness investigation. The applicant's files are sometimes forwarded to the district committee if a potential character and fitness problem is identified by board staff. The district committees review the files and conduct any additional investigation needed. If an unfavorable recommendation is being considered, the committee must give the applicant an opportunity for an interview with five members of the committee. The committee then makes its recommendation which is forwarded to the board who makes the final determination on the status of the applicant. Applicants that are given an unfavorable recommendation by the board staff are afforded an opportunity for a formal hearing before the board. An adverse decision by the board may be appealed to district courts in Travis County or the applicant may reapply at a future date in an effort to demonstrate rehabilitation in the problem area. Before taking the exam these students are required to submit an application for admission, which includes an update on character information previously submitted through the declaration. To take the exam, declarants must have had their declaration on file no less than 270 days.

Non-Texas law students or attorneys applying from other jurisdictions are investigated for character and fitness when they file an application for admission. This application must be filed at least 180 days prior to the date of the exam. The board relies on the National Conference of Bar Examiners to assist with the investigation process by providing the board with background information on out-of-state students and attorneys. Once the character and fitness investigation is completed, unless problems exist, the applicant is eligible to take the exam. As with in-state declarants, applicants who have a potential character and fitness problem

are given an opportunity to appear before the board for a formal hearing with adverse decisions by the board appealable to district court.

A fee of \$125 is charged for the investigation. Out-of-state applicants pay an additional fee of \$175 for the services of the National Conference of Bar Examiners. In 1989, the board conducted over 3,100 investigations, 2,377 from declarations and 788 from out-of-state applicants. In addition, the board conducted 227 supplemental investigations, which are required to be submitted by applicants who have been out of law school more than one year. This division is staffed with six employees and expended \$194,722 in fiscal year 1989.

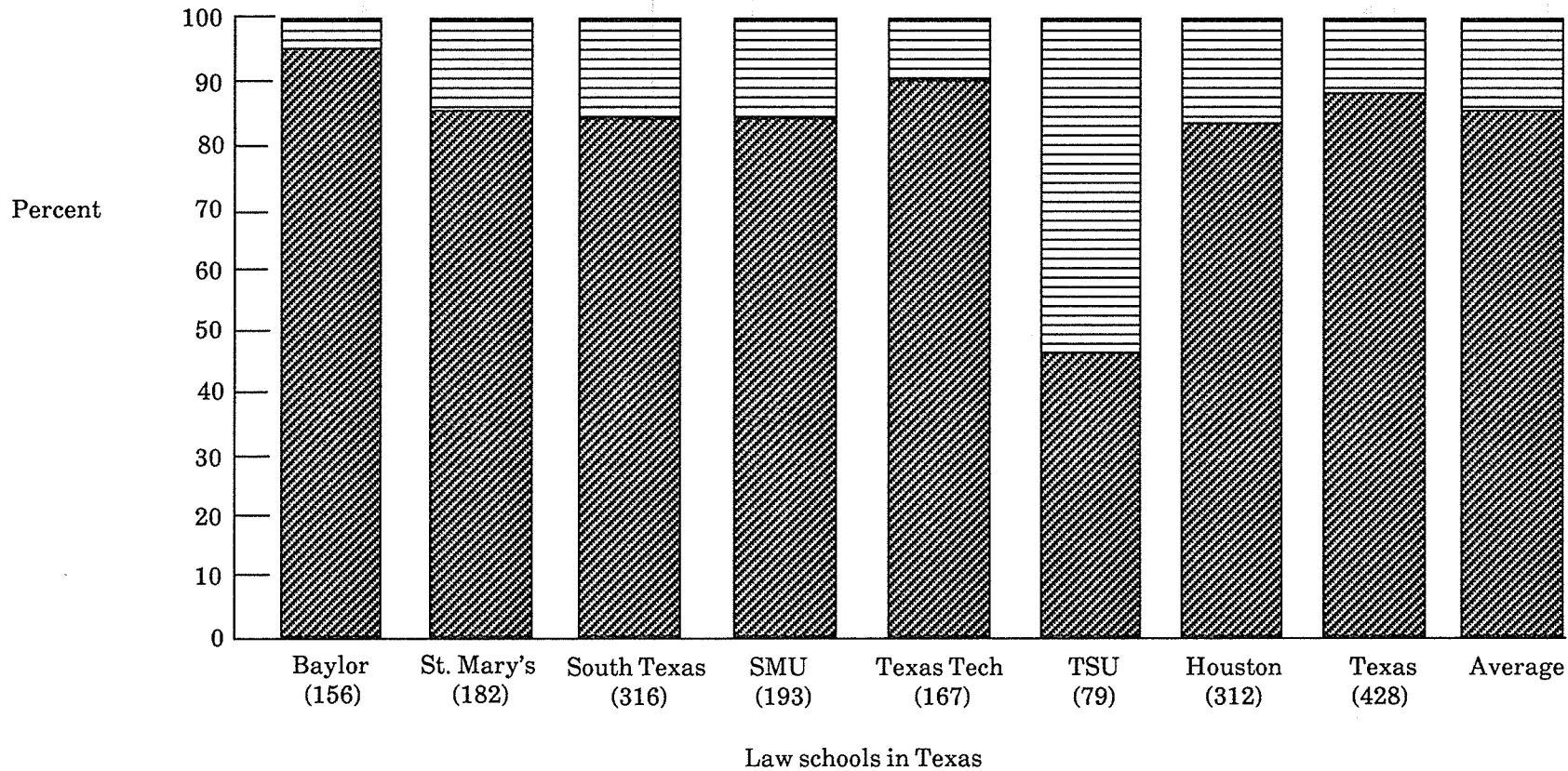
### Eligibility and Examination

The eligibility and examination division determines if applicants for admission meet the requirements established by the supreme court rules governing admission to the bar examination. Applicants must be 18 years of age with citizenship or permanent residence status and have completed adequate legal education through an American Bar Association approved law school. A follow-up character and fitness investigation is also required sometimes. This division is also responsible for all aspects of the bar examination including arranging for examination sites, preparation of examination materials, assisting in administration of examinations, and compilation of examination results and release of grades. This division has five employees and operated on a budget of \$347,205 in fiscal year 1989.


The examination is administered twice a year, in February and July in six cities throughout the state. The exam is administered in two parts which require two and one half days of testing. Part I consists of the Multistate Bar Exam (MBE) and the Texas Essay Examination. The MBE is a 200 question multiple choice exam prepared and scored by the National Conference of Bar Examiners. The Texas Essay Examination consists of 12 questions in six different subject areas. Part II of the examination consists of short answer and multiple choice questions related to civil and criminal evidence and procedure. The Texas Essay Examination of Part I and Part II of the examination are prepared by board members and are graded under their supervision. Exhibit C demonstrates the passage rates of examinees from Texas law schools and the cumulative passage rate of Texas examinees who took the exam in 1989. From a historical perspective, the passage rates have remained relatively consistent by school as well as statewide. Examinees that do not pass the Bar exam are eligible for a review of their exam with a board member. Individuals are eligible to take the exam eight times.


Out-of-state attorneys may be admitted to practice law in Texas through one of two ways. Through a process referred to as "admission on motion," they may be admitted without examination if they are licensed and have practiced for three years in a jurisdiction that the board considers equivalent. In 1989, the board admitted 254 attorneys on motion. Equivalency is determined primarily on two factors, whether the jurisdiction licenses persons without examination or admits persons to take the examination that are not graduates of an ABA approved law school. If the applicant is from a non-equivalent jurisdiction or has not been in practice the required length of time, the applicant must, as determined by the board, take the full bar exam or a short form exam. The short form exam is a short answer test which covers the Texas Constitution, Texas statutes, and Texas rules of procedure and evidence. In fiscal year 1989, 65 out-of-state attorneys took the short form exam with 56 examinees passing on the first attempt and nine passing the exam on the second attempt.

### Exhibit C Percent passage by school in 1989



( ) indicates total number of examinees

 Passing

 Failing

## **RESULTS OF REVIEW**



## **Overall Approach to the Review**

## Overall Approach to the Review

The Sunset Act requires an assessment of several factors as part of an agency's review. These factors include: a determination of the continued need for the functions performed by the agency; a determination if those functions could be better performed by another agency; whether functions performed by another agency could be better performed by the agency under review; and finally, a determination of the need for any changes in the agency's statute. If there has been a prior sunset review, the assessment draws on the experience gained in that review.

### Prior Sunset Review

The Board of Law Examiners was reviewed by the sunset commission in 1979. As part of the current review, the staff examined the previous staff report, the recommendations adopted by the sunset commission and the resulting statutory changes made by the legislature.

The previous staff review concluded that the board should be continued to carry out the admissions process. The review also suggested consideration of the following:

- adding public members to the board;
- limiting the compensation received by board members;
- allowing credit for passage of parts of the bar exam;
- providing a review to applicants of failed exam sections;
- allowing immigrants (out of state attorneys) and convicted felons access to the exam; and
- subjecting the board to the requirements of the open meetings, open records and conflict-of-interest laws.

The sunset commission adopted all the staff recommendations on the board except the recommendation allowing felons access to the exam and the recommendation allowing credit for passage of parts of the bar exam. The commission also recommended that the board adopt a policy of endorsement for out of state attorneys. Also, only one moral character and fitness investigation should be conducted within a defined time frame in accordance with specified criteria that relate directly to the practice of law. Finally, the fees charged by the board should be placed in the state treasury subject to legislative appropriations.

The sunset bill finally passed by the 66th Legislature in 1979 contained some of the sunset commission's recommendations. Changes adopted included limiting board member compensation, providing failed applicants with a review of their exam, allowing endorsement of out of state attorneys, requiring criteria to guide the character and fitness process and subjecting the board to the open meetings, open records and conflict-of-interest laws.

## Approach to Current Review

In accordance with the Sunset Act, the review of the Board of Law Examiners included an assessment of the need to continue legislative regulation of the functions performed by the board; whether benefits would be gained by combining the functions of the board with those of another organization; and finally, if regulation of the functions is continued in its present form, whether changes are needed to improve the efficiency and effectiveness of the board.

With the Board of Law Examiners, the need for the regulation focused on whether continued legislative involvement in the admissions process for attorneys was necessary in light of the supreme court's "inherent power" to regulate the practice of law. The review then examined, if legislative involvement is determined to be necessary, whether benefits would result from merging the board with the state bar to consolidate the regulation of attorneys into one agency. The remainder of the report details changes needed if the current board structure is maintained.

To make determinations in each of the review areas the staff performed a number of activities. These included:

- review of agency documents, legislative reports, other states' reports, legal treatises, law review articles, court cases, and literature containing background resource material;
- interviews with board members, board staff and district committee members;
- attendance at the February, 1990 bar examination;
- attendance at board meetings which included character and fitness hearings;
- phone interviews with law school deans, national bar organizations, local minority bar associations, and other states including New York, California, Florida, and Illinois; and
- interviews with groups affected by board activities and policies including groups representing the interests of handicapped persons.

The principal findings and conclusions resulting from the review are set out in three sections of the report: 1) Assessment of Need for Agency Functions; 2) Assessment of Organizational Alternatives; and 3) Recommendations if the Agency is Continued.

## **Assessment of Need for Agency Functions**

## Assessment of Need for Agency Functions

**ISSUE 1:** The board's enabling statute should be repealed and the examination function should be administered by the supreme court through its inherent powers.

### BACKGROUND

The practice of law is regulated in all 50 states. With few exceptions, the state's supreme courts have assumed the ultimate responsibility for regulation. In Texas, admission to practice law is currently governed by the Board of Law Examiners and the supreme court. The board's enabling statute establishes general admissions requirements and procedures and the responsibilities of the board including determination of eligibility of applicants and administration of the bar examination. The board is under the oversight of the supreme court. The court, through rules, defines specific admission eligibility requirements and examination procedures and content.

The supreme court's involvement in the admissions process is part of its effort to regulate the practice of law. The court derives its power to regulate the practice of law from the Texas Constitution. While the constitution does not explicitly grant the court authority over the regulation of attorneys, it states that the supreme court shall exercise the judicial power of the state. This power in concert with the constitutional requirement for the separation of powers, has been used to support the argument that the supreme court has the ultimate power to regulate the practice of law. This power is recognized in the State Bar Act which states, "Rules governing the admission to the practice of law are within the exclusive jurisdiction of the Supreme Court."

The review of the current regulatory structure governing admissions to practice law indicated the following:

- ▶ **Texas courts, in numerous instances, have recognized their inherent powers to regulate the practice of law.**
  - In Eichelberger v. Eichelberger, 582 S.W. 2d 395 (Texas 1979), the supreme court pointed out a number of cases in which Texas courts have recognized or used their inherent powers to regulate the practice of law. These include, among others, State v. Pounds, 525 S.W. 2d 547 (Texas Civ. App., 1975) and Grievance Committee, State Bar of Texas, Twenty-First Congressional Dist. v. Dean, 190 S.W. 2d 126 (Texas Civ. App. 1945).
  - In Banales v. Jackson, 601 S.W. 2d 508 (Texas Civ. App. 1980) the court cited the Eichelberger case above and the supreme court's June 11, 1979 order (adoption of State Bar Act) as examples of the existence of the inherent power in the supreme court to regulate the practice of law.

- ▶ **The supreme courts of 47 of the 50 states concur that regulation of the legal profession is inherently part of the judicial power of government, to be exercised by the supreme court as the head of that branch of government.**
- ▶ **In an overwhelming majority of states, the inherent power to regulate the practice of law extends to all aspects of the legal profession including admissions.**
  - In eight states, the state's constitution grants express authority to the supreme court to regulate the admission of attorneys.
  - The courts have, through court cases, established the inherent power of the judicial branch to regulate the admission of attorneys. For example, in an Alabama case In re Board of Commissioners of the Alabama State Bar v. State ex rel. Baxley, 324 So. 2d 256 (Ala. 1976) the court considered the question whether regulation of admission to the bar was an inherent power of the judiciary. The court reviewed cases from every state and then concluded, "In every state of the union the judiciary exercises regulatory control in admissions to the bar."
  - The Mississippi Supreme Court established its inherent authority to regulate admissions in In re the Matter of Mississippi State Bar, 361 S.2d 503 (Miss. 1978). "[The Mississippi Code]... recognizes that the judicial branch of government has the inherent power to determine the qualifications of those to be admitted to the practice of law in this state..."
- ▶ **Courts in Texas and other states have determined that to the extent any legislative enactment conflicts with the rules of the court, the rules must take precedence and the conflicting statutory language is without force or effect.**
  - In Application of Kaufmann, 69 Idaho 297, 206 P.2d 528 (1949) the Idaho Supreme Court considered legislative enactments concerning the admission to the practice of law. The court stated, "The legislature... may not require the court to admit on standards other than as accepted or established by the courts, and that any legislation which attempts to do so is an invasion of the judicial power and violative of the constitutional provisions establishing the separate branches of government and prohibiting the legislature from invading the judiciary."
  - In Banales v. Jackson, 601 S.W. 2d 508 (Texas Civ. App., 1980) the court said "... when a provision of the State Bar Act conflicts with orders of the Supreme Court regarding attorney conduct as to fees or other related matters, the statutory provisions must yield to the court's rules, ... because the Supreme Court does not share the power to regulate the practice of law with the Legislature. The ultimate constitutional power lies solely within the jurisdiction of the Supreme Court."

The review concluded that the supreme court has the inherent power to regulate the practice of law. The court can issue court orders which overrule or nullify legislative provisions related to the practice of law thus negating the influence of the legislature in regulating attorneys. Legislative efforts are therefore futile because they ultimately have no force or effect.

### **RECOMMENDATION**

- **The statute creating the Board of Law Examiners should be repealed and the examination function should be administered by the supreme court through its inherent powers.**

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Repeal of the board's enabling statute will completely eliminate legislative involvement in the admissions process. The supreme court will have exclusive jurisdiction over admission of attorneys to practice law as part of its inherent power to regulate attorneys. The court could continue current admission procedures through court order. Current authorization for the board to receive criminal information for character and fitness investigations would need to be transferred to the supreme court's statute.

### **FISCAL IMPACT**

Some savings would result from eliminating legislative involvement with the board; however, specific savings cannot be estimated.





## **Assessment of Organizational Alternatives**

## Organizational Alternatives

**ISSUE 2:** If the legislature continues to control the admissions process through statute, the Board of Law Examiners should be continued as a separate agency with its current functions.

### BACKGROUND

As a part of a sunset review, an analysis is made which examines any benefits that might occur from combining an agency's duties and functions with another state agency. Combining activities of different agencies can result in benefits such as eliminating administrative duplication, cost reduction, and increasing the quality of services that are provided to the community or professionals being regulated.

Currently, the regulation of the legal profession is conducted by three different entities, the Supreme Court of Texas, the Board of Law Examiners and the State Bar of Texas. The Board of Law Examiners is responsible for determining eligibility to practice law through a character and fitness investigation and examination of eligible applicants. The state bar maintains the license of an attorney and is responsible for discipline of attorneys. The supreme court oversees the activities of both agencies and has the ultimate responsibility to regulate the practice of law.

The activities of the Board of Law Examiners and the state bar are completely separate. Each agency has its own policy board, staff and funding processes. The common thread between the two organizations is that both are involved in the regulation of attorneys and are directly accountable to the supreme court.

An examination of the potential benefits and drawbacks of merging all aspects of attorney regulation into one agency indicated the following:

- ▶ **Although exact numbers were not available, discussions with staff of the National Conference of Bar Examiners and the American Bar Association indicated that, with few exceptions, most states are structured like Texas with attorney admissions and regulation administered by separate agencies.**
- ▶ **Merging the board and the state bar wouldn't provide an increase in efficiency or substantial cost savings.**
  - The purposes and functions of the two agencies are distinct and separate and would need to be maintained in a merged agency. The board's functions include character and fitness investigations, developing parts of the bar exam and actually administering and grading the exam. The state bar's functions include maintaining bar membership, conducting continuing legal education, a lawyer discipline process and numerous association type activities.

The review did not identify any program functions that could be merged in a combined agency.

- Administrative activities are, by their nature, duplicative. Similar functions include oversight of activities by an executive director, financial administration, personnel management and print shop activities. While these activities could be merged in a combined agency, the minimal cost savings in this area would not justify a consolidation.
- ▶ **The functions of the board could not be assumed by an existing committee of the state bar and a merger would not eliminate the need for an examination board.**
- The state bar has 58 committees that are used to conduct much of the state bar's business. These members serve on a volunteer basis without compensation and meet an average of three to four times a year.
- Members of the board spend an average of 54 days annually conducting board business, including developing and grading exams, conducting hearings, administration of exams, and providing exam reviews to failed examinees.

### RECOMMENDATION

- **If the legislature continues to control the admissions process through statute, the Board of Law Examiners should be maintained as a separate agency.**

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This recommendation would maintain admissions and other aspects of attorney regulation in two separate agencies under the oversight of the supreme court. Combination would not increase efficiency because the functions of the two agencies are distinct and separate. Cost savings from combining administrative activities would be minimal and would not justify consolidation.

### FISCAL IMPACT

If the admissions function is continued using the existing board structure, the board's annual budget of approximately \$1 million would need to be continued. Since the board's funds are outside the state treasury and expenditures are fully supported by application and examination fees, no fiscal impact to the state would result from this recommendation.

## **Recommendations if Agency is Continued**

**ISSUE 3: The annual compensation received by board members should be reduced.**

## **BACKGROUND**

Members of the Board of Law Examiners receive \$20,000 annually as compensation for their services. Before the board's sunset review in 1979, board member compensation consisted of equal shares of the agency's excess revenues collected for the year. Under this policy board members received \$22,500 in salary in 1977 for approximately 750 hours of board service. The statutory changes made in 1979 limited compensation to \$20,000 annually. The agency estimates that each board member currently averages 433 hours of annual board work.

State statutes provide that members of state boards or commissions are entitled to a per diem as defined by the General Appropriations Act. The General Appropriations Act, in Article V-58 defines the per diem as \$30 per day. This standard applies only to executive branch agencies and does not include the board which is an agency of the judiciary.

A comparison of the current level of compensation for members of the Board of Law Examiners with the state standard for compensation of board or commission members indicated the following:

- ▶ **The Board of Law Examiners is the highest paid part-time licensing board in the state. A check of several other licensing boards in Texas found no other board that receives a comparable level of compensation. Board members of the Board of Medical Examiners, the Board of Pharmacy, the Board of Dental Examiners, the Board of Public Accountancy and the Board of Registration for Professional Engineers all receive the standard per diem prescribed by the appropriations bill, \$30 per day.**
- ▶ **Members of the Board of Law Examiners do not work a substantially greater number of hours than do other licensing boards.**
  - The average number of hours worked by the members of the Board of Law Examiners is 433 hours annually or 54 days per year based on an eight hour work day. Primary efforts include character and fitness hearings, developing examination questions, assisting with the administration of the examination and reviewing exams with failed applicants.
  - Members of the dental board worked over 58 days in the last fiscal year, the medical board reported that its members worked about 30 days, the pharmacy board members logged approximately 26 days and the accountancy board members averaged 38 days of work

during fiscal year 1989. These board's efforts primarily involve enforcement hearings and disciplinary actions.

- ▶ **Most states rely on board members to contribute considerable time to board activities with little or no compensation.**
  - Forty-four states, including Texas, use their board members in the development and grading of essay exams.
  - A survey of the top 15 states in terms of numbers of examinees (Texas is included in the top 15) found 13 that compensate their board members at a rate lower than Texas. Five of these states only pay board members expenses or a per diem rate (\$50-100) instead of a set amount like Texas.
- ▶ **Members of the Texas board receive a higher level of compensation than even those states with a similar workload.**
  - Texas board members processed just over 3,200 exams and conducted 37 character and fitness hearings in 1989 and received \$20,000 in salary.
  - In Florida, board members processed approximately 2,700 exams and conducted 20 formal character and fitness hearings in 1989 and the board members received no compensation.

## **PROBLEM**

Members of the Board of Law Examiners receive a higher level of compensation than other licensing agencies in the state and law examining board's in most other states.

## **RECOMMENDATION**

- **The statute should be amended to remove the current authorization for compensation of \$20,000 for board members and replace it with authorization to receive the standard per diem for board members authorized in the appropriations bill.**

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This recommendation would reduce the board member compensation from an unusually high level of \$20,000 to the standard per diem set by the appropriations bill, currently \$30 per day, plus expenses.

## **FISCAL IMPACT**

This recommendation will save approximately \$165,000 annually from the reduction in compensation.

**ISSUE 4: The board's funds should be placed in the state treasury subject to the legislative appropriations process.**

## **BACKGROUND**

The Board of Law Examiners operated with an annual budget of \$1.06 million in fiscal year 1989, outside the state treasury and not subject to the legislative appropriations process. The supreme court is responsible for the oversight of the financial operations of the agency. An annual budget is developed by agency staff and submitted to the board for approval. The supreme court provides final approval. The supreme court rules authorize the board to maintain its own funds which are currently deposited in several Austin banks.

Most state agencies are subject to substantially different oversight measures. Most agencies receive a biennial appropriation through the legislative appropriations process even if the agency is self-supporting through fees, such as the Board of Law Examiners. Funds are typically deposited in the state treasury for management and investment. Expenditures are subject to the oversight and approval of the state comptroller's office.

A comparison of the board's budget process and the oversight of its expenditures with the extensive standard state budget process indicated the following:

- ▶ **The board's budget approval process and oversight of its expenditures does not provide the same level of accountability as the standard state process.**
  - The state's budget process provides a number of external check points such as the Legislative Budget Board, the governor's budget office, house and senate budget committees, the full membership of the house and the senate and ultimately, a review by the governor. The board process has only the supreme court acting as an external check point.
  - Once agencies receive an appropriation, expenditures are subject to the oversight and approval of the state comptroller's office and audited by the state auditor. In contrast, with the exception of an audit by the state auditor, the board has only the internal oversight of the board itself. While the supreme court provides a potential external check point the oversight is not mandatory and varies depending on the court's level of interest.
- ▶ **The board's current budget process differs from that of most other judicial branch agencies.**
  - The Board of Law Examiners and the state bar are the only judicial branch agencies not subject to the legislative appropriations process.

- All other judicial entities including the supreme court, the court of criminal appeals, the 14 courts of district appeals, the State Law Library, the Texas Judicial Council, the Court Reporters Certification Board and the State Commission on Judicial Conduct are subject to legislative appropriations.
- ▶ **A number of other states' examining boards are funded through a legislative appropriations process. For example, law examining boards in New York, California, Pennsylvania, Maryland, Massachusetts, Virginia, and Michigan receive funding through the legislature.**

### **PROBLEM**

The funding and expenditures of the board are not subject to the same accountability as agencies subject to the state's standard budget and oversight process.

### **RECOMMENDATION**

- **The statute should be changed to require the board to deposit its funds in the state treasury subject to the legislative appropriations process.**

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This recommendation requires the board to deposit its funds in the state treasury subject to the legislative appropriations process with oversight of expenditures by the state comptroller. The legislature will determine the level of funding necessary to operate the board as it does for most other state agencies.

### **FISCAL IMPACT**

Under this recommendation approximately \$1.2 million generated by the board would be placed in the general revenue fund in the state treasury available for appropriation by the legislature.



**ISSUE 5: The use of district committees to investigate character and fitness of applicants is unnecessary and should be eliminated.**

## BACKGROUND

The board's enabling statute and supreme court rules require the creation of 17 district committees, one in each state bar district, appointed by the supreme court, to assist the board with character and fitness investigations. Each committee must be composed of at least 15 members, three of whom must be public members. If there is a law school in the district, three law students must be appointed to the committee as well. The remaining membership consists of attorneys from within the district.

All applicants to the bar exam are subject to a character and fitness investigation. Applicants that are attending law school in Texas are investigated when the declaration of intent to study law is filed with the agency. All other applicants are investigated when the application for admission to the exam is filed. The investigations are instrumental in determining the present moral character and fitness of an applicant as defined in supreme court rules. In 1989, board staff conducted 2,377 investigations on Texas law student who intend to seek admission to the bar.

The district committees' only defined responsibility is to assist the board with character and fitness investigations on students filing a declaration of intent to study law. After an investigation by the character and fitness staff, files are sent to district committees if further review is needed. Files are assigned to a district committee based on the student's legal residence at the time of entrance into law school. At one time, the board sent all applicant files to the district committees for review, but now sends only files that contain information that needs further investigation. In 1989, the agency indicated that 296 applicant files were sent to the district committees for further review.

After review, the district committee makes a character and fitness recommendation to the board. If the district committee intends to make an unfavorable recommendation to the board, the student, according to statute, is entitled to a personal interview with a quorum of the district committee. Following review and a recommendation, district committees return the files to the board. At this point the board determines if a hearing is warranted on certain applicants whose character and fitness remains in question and ultimately makes the final determination of eligibility for all applicants.

A review of the stated role of the district committees and the actual role and impact of the district committees in the character and fitness process found the following:

- ▶ **The Board of Law Examiners is the only licensing agency in Texas that uses a local committee system for assessing the fitness of potential licensees.**

- ▶ **Reviews by the district committees add limited benefit to the character and fitness process beyond the investigation already conducted by the agency staff.**
  - The district committees are involved in the character and fitness process only in those cases where the staff has a question as to the applicant's character and fitness. In 1989, the board sought the assistance of the committees in only 12 percent of the cases (296).
  - The follow-up investigations conducted in the 296 cases by the district committees resulted in only four negative recommendations to the board. The board agreed with the committee's recommendation, and denied an applicant in two of the four cases.

### **PROBLEM**

The use of committees in the determination of an applicant's character and fitness is unique among licensing agencies in Texas. The committees' efforts add little benefit to the character and fitness process as few problems are actually found by the committees during their investigative process.

### **RECOMMENDATION**

- **The statute should be amended to eliminate the use of district committees in determining the character and fitness of bar exam applicants.**

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This recommendation would eliminate a layer of review that adds little benefit to final character and fitness decisions.

### **FISCAL IMPACT**

This recommendation would save approximately \$3,500 - \$5,000 per year by eliminating the expenses associated with the district committees. Current expenses relate primarily to member travel and office materials.

**ISSUE 6: The board should provide equal access to handicapped persons in the cities where the exam sites are located.**

## **BACKGROUND**

The Board of Law Examiners administers the bar exam twice a year in six cities in as many as nine locations. Unless an exam site is overbooked, all examination applicants, except handicapped applicants, are eligible to take the exam at the site of their choice. To accommodate large numbers of examinees, and secure a location for the exam, reservations must be made and deposits posted six months in advance of the exam date. Exams are held in February and July in all states.

With few exceptions, handicapped applicants that require special accommodations are currently required to come to Austin to take the exam in the board offices. This includes any applicant that needs additional time on the exam due to illness or injury, or blind applicants that need a court reporter and additional time for reading. Handicapped applicants that are wheelchair bound are generally accommodated at the normal exam sites. The board recently adopted a new policy which allows the board to pay for additional administrative expenses such as a court reporter but the policy doesn't address additional expenses for the applicant's travel to Austin.

In 1987, eight handicapped applicants that needed special accommodations came to Austin to take the exam, seven in 1988 and in 1989, 13 handicapped applicants needed special accommodations to take the exam.

A comparison of the board's policy, which requires certain handicapped applicants to take the bar exam in Austin, to the concept of access as well as the various accommodations made by other licensing agencies in the state and other states indicated the following:

- ▶ A review of states having the most bar exam applicants indicated that access for handicapped applicants is typically provided at the standard exam sites. Of the five jurisdictions identified that provide multiple exam locations, three of these jurisdictions, New York, California, and New Jersey, provide accommodations for handicapped applicants in all cities where exam sites are located.
- ▶ Other licensing agencies in Texas, such as the Board of Vocational Nurse Examiners and the State Board of Registration for Professional Engineers, give exams at multiple sites and provide access to all applicants at all sites.
- ▶ The handicapped community has objected to the board's current policy on providing access to handicapped applicants taking the bar exam. Discussions with persons representing disabled persons and their interests pointed out that:

- Current practices act to exaggerate the differences of handicapped persons instead of minimize those differences; and
- Current practices place an undue burden on the handicapped examinee by compelling the examinee, at his or her own expense, to come to Austin to take the exam.
- ▶ **Handicapped applicants have incurred higher costs than their non-handicapped counterparts.**
  - Handicapped applicants almost always encounter the expense of traveling to Austin to take the exam. A handicapped applicant that has to travel to Austin spends approximately \$250 on hotel and meals.
  - Non-handicapped applicants don't often encounter the expense or inconvenience of traveling to an exam site, since exams are offered in each of the six cities where a law school is located.

## **PROBLEM**

The current board policy on accommodating handicapped examinees does not provide the same opportunities for handicapped and non-handicapped persons taking the bar exam because handicapped applicants must take the exam in Austin while non-handicapped applicants may choose from multiple sites.

## **RECOMMENDATION**

- **The statute should require the board to provide equal access to handicapped applicants in the city where the exam sites are located.**

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This recommendation requires the board to provide accessibility to all applicants at all exam sites, regardless of handicap, ensuring equal access to the examination. Some applicants may need special attention which may not be available at the standard exam site and the board may be required to administer the exam to that applicant at a separate location. However, this recommendation will ensure that handicapped applicants are able to take the exam in the same city as the regular exam sites. The board has indicated that approximately 20 handicapped applicants apply for the bar exam annually.

## **FISCAL IMPACT**

This recommendation would result in an estimated cost to the board of \$8,520 annually. Expenses relate to testing facilities and exam proctors for an anticipated 20 applicants per year.

**ISSUE 7: Provisions which exempt certain legislators from the bar exam's educational requirements should be removed.****BACKGROUND**

Applicants for an initial to practice law in Texas must meet several conditions. The applicant must demonstrate good moral character and fitness, possess a degree from an ABA approved law school and subsequently score a passing grade on the Texas bar exam. In the past, the statute and rules have allowed exceptions to the current practice. Before 1937, graduates of certain law schools were admitted to the bar upon presentation of a diploma, a process known as "the diploma privilege." Until 1981, applicants to the exam were allowed to substitute years of law office study for law school requirements. These exceptions have since been removed and the last remaining exception to the legal education requirements involves admitting certain members of the legislature to take the bar exam without a degree from an ABA approved law school.

Section 82.025 of the statute establishes certain criteria that legislators must meet to be eligible to take the exam without a degree. The criteria are as follows:

- 1) legislative membership for 12 consecutive years;
- 2) legislative membership for eight years and a BA or its equivalent;
- 3) legislative membership for four years and a BA or its equivalent and two years of study at an approved law school; or
- 4) membership in both houses and a master's degree or its equivalent.

These exemptions may only be used by persons that were members of the legislature before the convening of the 64th session, January 1975.

A comparison of admissions policies in Texas with those in other states indicated the following:

- ▶ Every state establishes its own admission requirements for applicants seeking to take the bar exam. However, in most states, the admissions standards apply uniformly to all applicants and may be used by all applicants rather than just a subgroup of individuals.
- ▶ Texas is the only state that allows legislators to take the bar exam without fulfilling the law school educational requirements. Discussions with staff of the National Conference of Bar Examiners indicated that Indiana had a similar provision which was repealed in 1933, making this type of exemption unique to Texas.

- ▶ **Most states have removed exceptions to the standard eligibility requirements.**
  - At one time many states allowed use of "the diploma privilege" which permitted persons who graduated from certain law schools to be licensed without taking the bar exam. All states, including Texas, except one has since removed this provision.
  - Another common exception to the standard requirements permitted law office study to be substituted for portions of law school education. Currently, only eight states still except some form of law office study as a substitute for law school education. The practice was eliminated in Texas in 1981.
- ▶ **The current exemptions are not frequently used by eligible legislators.**
  - In the last 10 years, six legislators or former legislators have taken the exam using these exemptions.
  - Only two of those six examinees passed the exam, one in 1980 and another in 1988.

## **PROBLEM**

Exempting legislators from the bar exam's standard educational requirements is not allowed in other states. All other exemptions have been removed in Texas as well as most other states. The exemptions are rarely used by eligible legislators.

## **RECOMMENDATION**

- **The statute should be changed to remove provisions exempting certain legislators from the bar exam's educational requirements.**

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This recommendation ensures that all persons taking the examination meet the same educational requirements.

## **FISCAL IMPACT**

No fiscal impact will occur as a result of this recommendation.

## **Across-the-Board Recommendations**

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From its inception, the sunset commission identified common agency problems. These problems have been addressed through standard statutory provisions incorporated into the legislation developed for agencies undergoing sunset review. Since these provisions are routinely applied to all agencies under review, the specific language is not repeated throughout the reports. The application to particular agencies is denoted in abbreviated chart form.

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<b>Board of Law Examiners</b>			
<b>Applied</b>	<b>Modified</b>	<b>Not Applied</b>	<b>Across-the-Board Recommendations</b>
			<b>A. GENERAL</b>
		x	1. Require public membership on boards and commissions.
		*	2. Require specific provisions relating to conflicts of interest.
		*	3. Provide that a person registered as a lobbyist under Article 6252-9c, V.A.C.S., may not act as general counsel to the board or serve as a member of the board.
		*	4. Require that appointment to the board shall be made without regard to race, color, handicap, sex, religion, age, or national origin of the appointee.
	x		5. Specify grounds for removal of a board member.
	x		6. Require the board to make annual written reports to the governor and the legislature accounting for all receipts and disbursements made under its statute.
x			7. Require the board to establish skill-oriented career ladders.
x			8. Require a system of merit pay based on documented employee performance.
	x		9. Provide for notification and information to the public concerning board activities.
See Issue #4			10. Place agency funds in the treasury to ensure legislative review of agency expenditures through the appropriation process.
		x	11. Require files to be maintained on complaints.
		x	12. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
	x		13. Require development of an E.E.O. policy.
x			14. Require the agency to provide information on standards of conduct to board members and employees.
	x		15. Provide for public testimony at agency meetings.
x			16. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.
	x		17. Require development of accessibility plan.

\* Already in law -- no statutory change needed.

\*\* Already in law -- requires updating to reflect standard ATB language.

<b>Board of Law Examiners</b> (cont.)			
<b>Applied</b>	<b>Modified</b>	<b>Not Applied</b>	<b>Across-the-Board Recommendations</b>
			<b>B. LICENSING</b>
		x	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
		x	2. Provide for notice to a person taking an examination of the results of the exam within a reasonable time of the testing date.
		*	3. Provide an analysis, on request, to individuals failing the examination.
		*	4. Require licensing disqualifications to be: 1) easily determined, and 2) related to currently existing conditions.
		*	5. (a) Provide for licensing by endorsement rather than reciprocity. (b) Provide for licensing by reciprocity rather than endorsement.
		x	6. Authorize the staggered renewal of licenses.
		x	7. Authorize agencies to use a full range of penalties.
		x	8. Specify board hearing requirements.
		x	9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
		x	10. Authorize the board to adopt a system of voluntary continuing education.

\* Already in law -- no statutory change needed.

\*\* Already in law -- requires updating to reflect standard ATB language.

## **Minor Statutory Modifications**

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Discussions with agency personnel concerning the agency and its statute indicated a need to make minor statutory changes. The changes are non-substantive in nature and are made to comply with federal requirements or to remove outdated references. The following material provides a description of the needed changes and the rationale for each.

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**Minor Modifications to the  
Board of Law Examiners  
(Title 2, Chapter 82(A))**

<b>Change</b>	<b>Reason</b>	<b>Location in Statute</b>
Delete language pertaining to requirements for out-of-jurisdiction attorneys.	To eliminate obsolete language that conflicts with current provisions for out-of-jurisdiction attorneys.	Section 82.026
Change the expiration of board member terms of office to August 31 instead of September 30.	To align the reappointment process with the fiscal year.	Section 82.001

**Texas Board of Law Examiners**

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