

The logo for the Texas Sunset Advisory Commission is a semi-circular emblem with a dark, textured interior. The words "Texas", "Sunset", "Advisory", and "Commission" are stacked vertically in a bold, white, serif font. The emblem is set against a white background and is flanked by two thick, dark horizontal bars.

**Texas
Sunset
Advisory
Commission**

STAFF EVALUATION

The Prosecutor Council

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

1984

PROSECUTOR COUNCIL

Staff Report
to the
Sunset Advisory Commission

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SUMMARY

The Prosecutor Council was established in 1977. In an effort to improve the administration of criminal justice through the professionalization of the prosecuting attorney's office, the agency is responsible for investigating complaints of prosecutor incompetency and misconduct, developing minimum standards for the operation of prosecutors offices, approving courses and providing funding for prosecutor training, and responding to requests for technical assistance from prosecutors. To accomplish these mandates, the agency performs four separate functions: 1) discipline, 2) technical assistance, 3) training, and 4) information/services.

The need for each of the council's functions was analyzed and the review indicated that there is a continued need for state involvement in these areas. The need for the current agency structure was also analyzed and it was determined, as described in the alternative section of the report, that certain benefits could be realized if the functions of the agency were transferred to other state agencies. With regard to current operations, the agency has performed adequately but certain changes should be made in the event the legislature decides to continue the agency. In addition, one issue was identified that could offer potential benefits but would also require major changes in state policy and could involve potential disadvantages.

The changes which should be made if the agency is continued and a discussion of the alternatives and additional policy issue are set out below.

Approaches for Sunset Commission Consideration

I. MAINTAIN THE AGENCY WITH MODIFICATIONS

A. Policy-making Structure

- 1. The statute should be amended to add the attorney general or his designee to the council membership as an ex-officio member.**

Currently, both the Prosecutor Council and the attorney general's office are providing technical assistance to prosecutors. Because no formal method of communication presently exists between the two agencies, a potential for duplication of services exists. The attorney general's participation in council meetings would minimize this overlap.

2. The statute should be amended to limit the membership of the council's advisory committee to eight members.

The council has established an advisory committee to review agency operations and advise it on needed services and programs. Currently, the advisory committee consists of 32 members, four from each of eight prosecutorial regions. This large membership has resulted in excessive travel expenses and has reduced the efficiency of the policy-making process. To streamline the advisory committee, its membership should be limited.

B. Evaluation of Programs

1. Discipline

- a. The statute should be amended to require the council to develop standards and guidelines for disciplinary proceedings.**

The council has never developed a code consisting of specific standards of conduct for prosecutors. Requiring that the council further define unacceptable prosecutorial conduct and incompetency would aid prosecutors in bringing their conduct in line with the established guidelines. These definitions would also give the council specific criteria by which to judge prosecutorial complaints.

2. Technical Assistance

- a. The statute should be amended to require the Prosecutor Council to develop a memorandum of understanding with the attorney general for the provision of technical assistance services to prosecutors.**

Both the council and a division of the attorney general's office currently offer various technical assistance services to prosecutors in the state. No effort has been made to coordinate the services. A greater level of coordination between the technical assistance operation of the agencies should be developed so that requests for assistance are addressed to and handled by the agency which can best provide the service.

- b. The statute should be amended to limit state reimbursement for technical assistance to situations where the prosecutor is unable to provide effective prosecution.**

Currently the council is arranging for an reimbursing technical assistance for prosecutors who claim that because of conflict of interest, the public confidence would be better served if an outside person handled a particular matter. Prosecutors should do what they are paid to do, even in instances where their involvement is personally or professionally uncomfortable. The statute should therefore be amended to require that when state funds are involved, the council's technical assistance should be provided only when a true conflict of interest exists or when a prosecutor lacks the necessary expertise or staff to prosecute a case.

- c. The statute should be amended to limit the council's reimbursement of technical assistance to 75 percent of the total assistance cost.**

Currently the council does not have guidelines for a minimum dollar amount required from a prosecutor receiving assistance. Each prosecutor negotiates on a case by case basis how much they will contribute to the total cost of the assistance. Requiring a 75 percent limit on council expenditures for technical assistance would assure the proper use of state funds. This limitation would also provide evidence of local support for the assistance and would enable county government officials to be aware of the needs and abilities of their prosecutor's office.

- d. The statute should be amended to prohibit agency staff from providing on-site technical assistance.**

The council is unique in that it both disciplines prosecutors and offers them assistance. During the period under review, in some instances agency staff have tried cases or handled criminal investigations for local prosecutors. This practice creates a potential situation where council staff, through direct participation in prosecutorial duties, could be involved in a disciplinary complaint before the council. Since it is important to maintain

clear separation between the agency's discipline and technical assistance functions, agency staff should be prohibited from participating directly in the provision of on-site technical assistance.

3. Training

- a. The statute should be amended to require prior notification by prosecutors for reimbursement of travel expenses.**

The council currently provides reimbursement to prosecutors for travel expenses incurred when attending approved training courses without prior notification of travel. The council cannot effectively budget travel funds since it does not know the travel plans of prosecutors. To improve control over the use of funds, prosecutors should be required to provide prior notification of travel plans to the council.

- b. Travel reimbursement vouchers should be completed before prosecutors sign them. (management improvement - non-statutory)**

Current reimbursement policy allows prosecutors to submit a signed blank travel vouchers their request for funds. This policy does not allow prosecutors to verify the accuracy of the information on the voucher and makes them liable for a mistake made on the form by council staff. The procedure should be changed so that prosecutors only sign completed travel vouchers.

- c. The statute should be amended to require that travel funds for prosecutors be allocated based on a system which funds 75 percent of the travel expense for each prosecutor office to attend one course per year and distributes the remainder of available travel funds as needed.**

The council provides travel funds to any prosecutor requesting funds. No system has been established to ensure that travel funds are distributed among all prosecutors' offices. Also, despite the joint state/local nature of prosecutors' offices, the council is, in most cases, providing all of the travel funds for training courses. To help ensure that travel funds are better utilized across the state and local support is provided for training, the council should be required to allocate funds based on a system which funds the travel expense of each office to attend one course per year. The remainder of the travel funds could be distributed on an as-needed basis. State reimbursement should be

limited to 75 percent except for the those cases where the council approved funds based on need.

4. Information/Services

- a. The statute should be amended to give the council the responsibility to coordinate the development of a budget request for prosecutors to the legislature.**

Most local prosecutors currently receive a state salary and state funds for a portion of their office operating expenses. Prosecutors do not have a way to submit a budget request and participate in the legislative budget process. The council has the ability to coordinate the development of a budget request for prosecutors to be submitted to the legislature and should be given this responsibility.

II. ALTERNATIVES

- 1. The council could be abolished and the agency's functions could be transferred to other state agencies.**

The council currently performs four separate activities: discipline, technical assistance, training, and information/services. Except for the discipline function, all of the activities are being performed by other state agencies or by private associations. Certain benefits such as cost savings and better coordination could result from the transfer of these functions to other state agencies.

Discipline - Because all prosecutors must be licensed attorneys, the state bar and the council both are responsible for investigating complaints and disciplining attorneys who are prosecutors. While each agency is primarily evaluating the prosecutors conduct against different standards, both agencies conduct similar investigations. A transfer of the council's discipline function to the state bar would reduce overlap and consolidate investigative activities.

Technical Assistance - Both the council and the attorney general's office provide technical assistance to prosecutors. Transferring the council's responsibility in this area to the attorney general's office, would consolidate the activity and streamline the delivery of the service. A disadvantage to this transfer is that such a transfer could be perceived as an erosion of the local prosecutors criminal jurisdiction.

Training - The council currently conducts and contracts for training courses, provides funds for travel expenses to attend courses, and develops

training manuals for prosecutors. The state bar is also involved in providing professional development for attorneys. A transfer of the council's training responsibilities to the state bar would reduce overlap and assist in centralizing training efforts in the legal area. One drawback to this transfer is that the cost of training to prosecutors could increase.

Information/Services - The council provides information such as newsletters, advisory bulletins and brochures to prosecutors to keep them and the public informed on issues affecting prosecution. Other state agencies, such as the attorney general's office and the state bar, along with private associations already make similar information available. By eliminating the council's activities in this area, duplication of services could be minimized.

III. OTHER POLICY CONSIDERATIONS

1. Should the council's disciplinary responsibility for elected prosecutors be expanded to include assistant prosecutors.

The council's current responsibility to discipline prosecutors for incompetency or misconduct is limited to only elected prosecutors. Assistant prosecutors who are the employees of elected prosecutors are subject to discipline by the elected prosecutors. If the council's authority in disciplinary matters were expanded to include assistant prosecutors, it would be limited to the imposition of public and private reprimands only. Proponents to increasing the council's responsibility argue that it would make prosecutors more accountable for their actions. Opponents to this shift of responsibility basically argue that the existing system works well and that such a shift would only increase the council's workload.

AGENCY EVALUATION

The review of the current operations of an agency is based on several criteria contained in the Sunset Act. The analysis made under these criteria is intended to give answers to the following basic questions:

1. Does the policy-making structure of the agency fairly reflect the interests served by the agency?
2. Does the agency operate efficiently?
3. Has the agency been effective in meeting its statutory requirements?
4. Do the agency's programs overlap or duplicate programs of other agencies to a degree that presents serious problems?
5. Is the agency carrying out only those programs authorized by the legislature?
6. If the agency is abolished, could the state reasonably expect federal intervention or a substantial loss of federal funds?

BACKGROUND

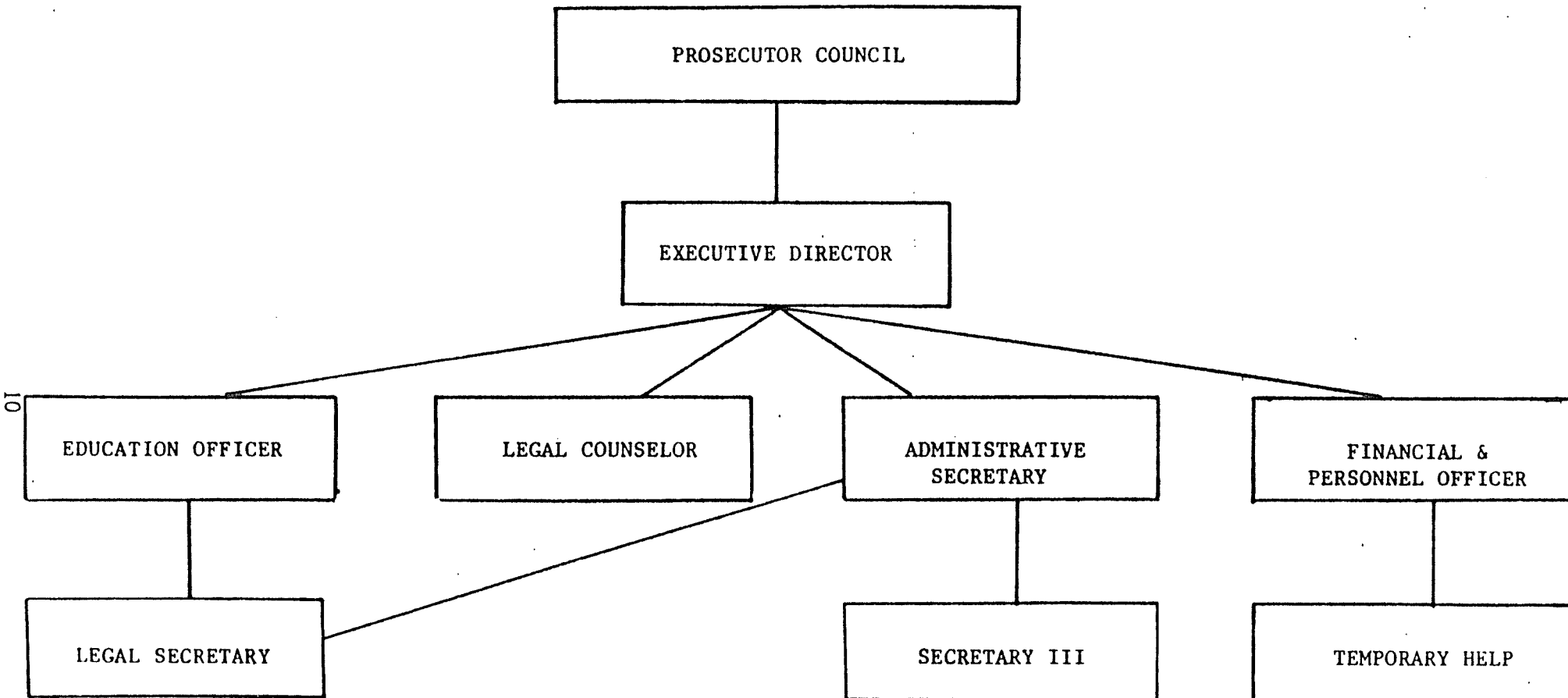
Organization and Objectives

The Prosecutor Council was created in 1977 and is currently active. The council is composed of nine members who serve staggered six-year terms. Four members are appointed by the governor with the advice and consent of the senate and must be citizens of Texas who are not licensed to practice law. Five council members are incumbent elected prosecuting attorneys. These five must include at least one county attorney, one district attorney, and one criminal district attorney. The Texas Supreme Court has the statutory responsibility for promulgating the rules for electing prosecutors to the council. In fiscal year 1984, the agency has a staff of seven and a budget of \$627,266. The funds come from general revenue (\$250,906) and criminal justice planning funds (\$376,360). The agency's organizational structure is displayed in Exhibit 1.

Texas is one of the few states where prosecutors are locally elected officials. In many states, the attorney general selects the district attorneys. While Texas' system of prosecutorial selection allows for independent local prosecution of crimes, several studies which preceded the establishment of the Prosecutor Council cited problems with the existing system and made recommendations to increase the level of coordination, professionalism, trial assistance, and uniformity of prosecution throughout the state. The legislature created the Prosecutor Council to meet the need of providing technical, educational, and professional development services to approximately 300 elected Texas prosecutors and their staff. In addition, the council is the designated agency to receive and act on complaints of prosecutorial misconduct. Except for amendments to the council's enabling statute in 1981 to clarify the council's authority to remove prosecutors from office, the overall responsibilities of the agency have remained relatively constant.

The council's statutory duties are accomplished through four organizational divisions: 1) discipline; 2) technical assistance; 3) training; and 4) information/services. The review of the Prosecutor Council indicated the council has been generally effective in carrying out its responsibilities. Several areas were identified where modifications would increase the efficiency and effectiveness of the agency's activities. Results of the evaluation follow.

Exhibit 1
FUNCTIONAL ORGANIZATION CHART
THE PROSECUTOR COUNCIL



REVIEW OF OPERATIONS

The evaluation of the operations of the council is divided into general areas which deal with: 1) a review and analysis of the policy-making body to determine if it is structured so that it fairly reflects the interests served by the agency; and 2) a review and analysis of the activities of the agency to determine if there are areas where the efficiency and effectiveness can be improved both in terms of the overall administration of the agency and in the operations of specific agency programs.

Policy-making Structure

The evaluation of the policy-making structure was designed to determine if the current statutory structure contains provisions that ensure adequate executive and legislative control over the organization of the body; competency of members to perform required duties; proper balance of interests within the composition; and effective means of selection and removal of members.

The Prosecutor Council is composed of nine members serving overlapping six-year terms. Four members are appointed by the governor and must be citizens of the state who are not licensed to practice law. Five of the members must be incumbent elected prosecutors, including at least one county attorney, one district attorney, and one criminal district attorney. The prosecutor members of the council are elected by prosecutors throughout the state according to rules promulgated by the Texas Supreme Court. These rules generally establish a nomination process followed by an election conducted through written ballots. The council chairman must be a prosecutor member and the vice-chairman must be a public member, both being elected by the council membership.

In addition, the council has appointed an advisory committee to provide advice on needed new programs and on improvements to present services. The advisory committee is made up of 32 prosecutors selected from eight different geographic regions of the state. To consider special areas of council activity, the advisory committee has established five standing subcommittees dealing with agency services, agency operations and management, technical assistance, ethics, and education.

While the review indicated that the existing policy-making structure appears to be organized in a manner that provides appropriate expertise for policy decisions, certain changes in that structure and in the advisory committee

structure should be made to improve the coordination of services offered prosecutors and the efficiency with which the decision process operates.

The council's membership should be expanded to include the attorney general as an ex-officio member.

Currently, two state agencies are conducting programs to provide technical assistance upon request to local prosecutors and grand juries. In addition to the Prosecutor Council, the Prosecutor's Assistance Section of the attorney general's office also provides on-site assistance to prosecutors when those prosecutors lack the necessary expertise to prosecute a difficult case, lack the staff or funds for a large scale investigation or trial, or have a conflict of interest which prohibits their personal involvement. Both agencies are essentially providing the same service, although they each approach it differently. A more detailed description and analysis of the types and methods of providing technical assistance by these two agencies is included in the Technical Assistance portion of this report's Evaluation of Programs section.

Generally, when two state agencies are providing similar services to the same recipients, some type of coordination should exist between the agencies to ensure that overlap and duplication are minimized. Currently, no formal method of communication exists between the council and the attorney general's office with regard to technical assistance for prosecutors. One method commonly used to effect this coordination is ex-officio representation in one of the agency's organizational structures. In this situation, making the attorney general or his designee an ex-officio member of the Prosecutor Council could provide the necessary communication to minimize overlap and duplication. The statute should be amended to include the attorney general or his designee as an ex-officio member of the council.

The membership of the advisory committee should be reduced.

The council created an advisory committee as a means of getting better communication with the prosecutors and their staffs and to get advice on council programs. This committee is made up of 32 prosecutors selected from each of eight different geographic regions of the state. On an average, the advisory committee meets two or three times a year.

The advisory committee has five standing sub-committees that meet as needed. The Services Committee reviews the agency's service program, which

includes activities such as news releases and makes recommendations for improvement. The Operations and Management Committee studies the financial and operational needs of prosecutors offices and formulates a biennial questionnaire to prosecutors. The Technical Assistance Committee advises the council on how it should meet its responsibilities in the area of technical assistance. An Ethics Committee and an Education Committee have also been appointed.

In general, advisory committees can be very useful to state boards and agencies by providing a policy reviewing mechanism to supplement agency efforts. This is especially important when the composition of the board is not structured to provide the necessary expertise or representation to make informed decisions. While the Prosecutor Council advisory committee serves an important function in expanding the representation for policy formulation and in encouraging prosecutors' acceptance of council activities, a committee with a smaller membership could perform more efficiently. Currently, the advisory committee is composed of 32 members, resulting in an advisory committee that includes more than 10 percent of the prosecutors it is designed to represent. During the review, two concerns related to the large membership of the advisory committee were identified.

First, the large membership results in the expenditure of large amounts of travel funds. During fiscal year 1984, \$12,571 were expended for advisory committee member travel. This amount is more than half of the amount of travel funds expended for council member and staff travel for that same period. Second, the large membership results in a policy making process which makes decisions by consensus. All staff recommendations, operations and activities are constantly being reviewed and evaluated by these advisory committees.

To improve the efficiency of the policy making process, the statute should be amended to limit the size of the advisory committee to eight members, one member from each of the eight prosecutorial regions.

Overall Administration

The evaluation of the agency's overall administration was designed to determine whether the management policies and procedures, the monitoring of management practices and the reporting requirements of the agency were consistent with the general practices used for the internal management of time, personnel, and funds. The review indicated that the agency has established a reasonable administrative structure and no significant problems were identified.

Evaluation of Programs

The activities of the agency were divided into four areas for purposes of evaluation: discipline, technical assistance, training, and information/services. A description of each of these activities as well as any significant problems identified during the review are covered in the following material.

Discipline

One of the major duties of the Prosecutor Council is to accept and investigate complaints of prosecuting attorney incompetency and misconduct. The council's enabling statute outlines the procedures by which a prosecuting attorney may be reprimanded, disqualified, or removed from office. All elected prosecutors in the state are subject to disciplinary action by the council.

Before explaining the system used by the council to discipline prosecutors, it is useful to understand the Texas system of prosecution. The Texas Constitution establishes the pattern for prosecution in creating the offices of county attorney and criminal district attorney to represent the state in all district and inferior courts. In addition, the constitution allows the legislature to create the office of district attorney. This constitutional mandate, followed by a series of legislative enactments, has established a complex system of prosecution in Texas which is composed of four basic types of prosecutors: district attorneys, criminal district attorneys, county attorneys with felony responsibility, and county attorneys. These four types of prosecutors are all locally elected. The following table shows the current number of prosecutors by type in Texas as of August 31, 1984.

TEXAS PROSECUTORS

District Attorneys	79
Criminal District Attorneys	35
County Attorneys with felony responsibility	25
County Attorneys	<u>194</u>
TOTAL	333

The office of district attorney is created by statute. As of August 31, 1984, there were 79 locally elected district attorneys in Texas. These prosecutors are authorized to prosecute cases in particular judicial district which may consist of one or more counties. District attorneys represent the state primarily in felony cases (with the exception of the District Attorney of Harris County who handles all prosecutorial duties in the county).

Criminal district attorneys represent the state in all criminal cases, both felony and misdemeanor, in all courts of the county. The legislature has, through the years, created the office of criminal district attorney in 35 Texas counties. When the office of criminal district attorney is created, the office of county attorney is abolished for that county. A criminal district attorney serves one county and when created, is the only elected prosecutor for that county.

A third type of prosecutor, county attorney with felony responsibility, is an elected office in 25 Texas counties. Like criminal district attorneys, county attorneys with felony responsibility represent the state in all courts in a county and are the only elected prosecutors in that county. The main difference between criminal district attorneys and county attorneys with felony responsibility is the method of appointment in the case of a vacancy. Replacements for county attorneys with felony responsibility are appointed by that county's commissioners court, while vacancies in the office of criminal district attorney are filled by the governor.

Finally, there are 182 county attorneys in Texas. A county attorney generally represents the state in courts below the grade of district court and they are mainly responsible for prosecuting misdemeanor cases. A county attorney has no jurisdiction beyond the bounds of his county. While the description of prosecutors presented here focuses on duties related to criminal law, studies conducted by the Prosecutor Council show that a significant amount of prosecutor's time is spent in civil and other non-criminal matters. A map depicting the location of the different types of prosecutors is displayed in Exhibit 2.

Prosecutors in Texas are funded by both local and state government. The state pays salaries and certain general expenses for prosecutors with felony responsibilities. In the case of county attorneys with no felony responsibility, all expenses of that prosecutor's office are paid by the county. In addition to the state salary, felony prosecutors are allowed to have a private law practice unless they have chosen to go under the Professional Prosecutors Act, which was passed in 1979. If they are under this Act, they cannot have a private practice but are given a higher state salary. Ninety of the 135 felony prosecutors are currently paid under this Act.

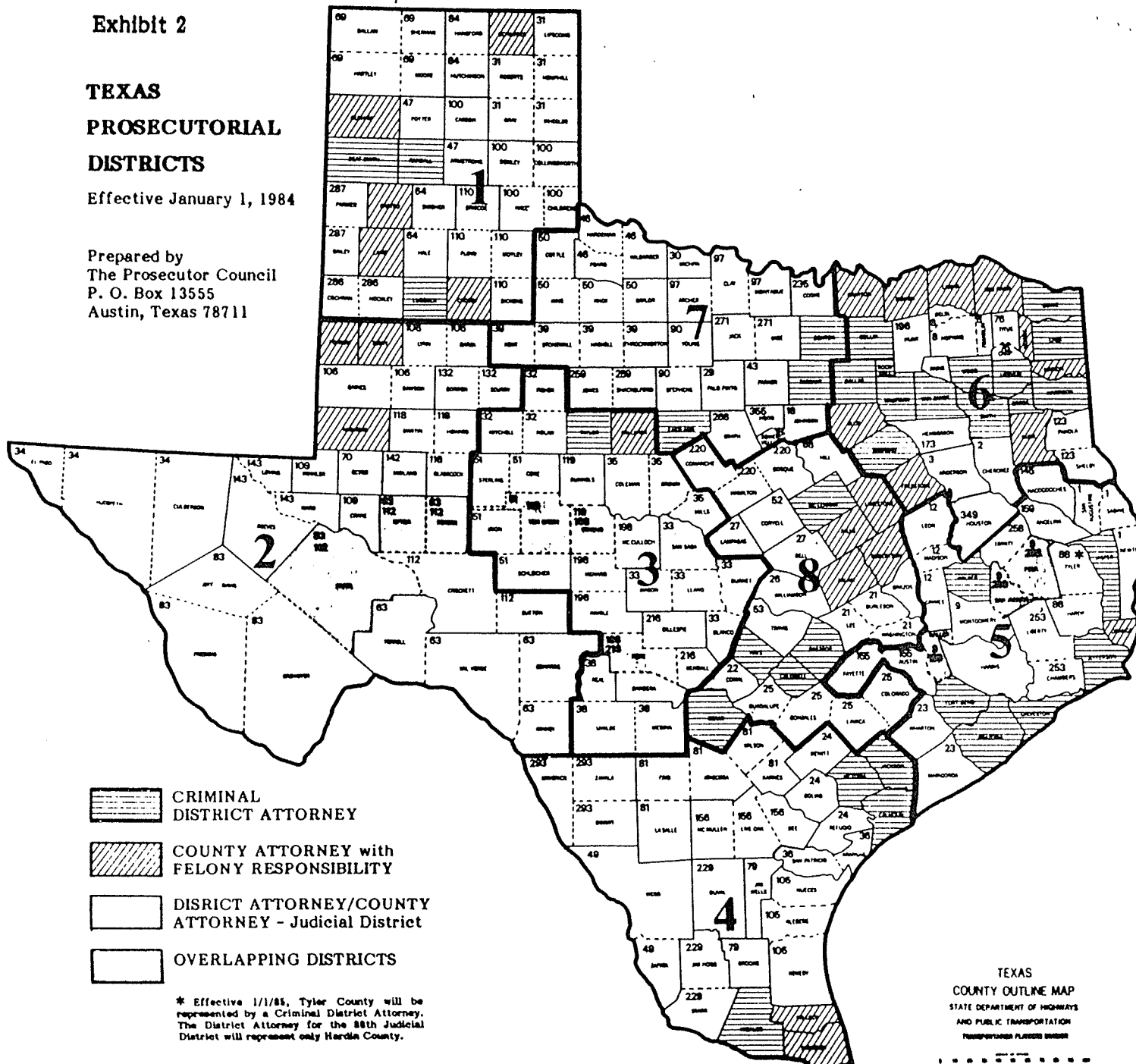
The Prosecutor Council was created, in part, to provide for a more comprehensive disciplinary process for the various kinds of prosecutors described above. The council's disciplinary process operates under rules established by the Texas Supreme Court. Disciplinary action against a prosecutor is initiated when a

Exhibit 2

**TEXAS
PROSECUTORIAL
DISTRICTS**

Effective January 1, 1984

Prepared by
The Prosecutor Council
P. O. Box 13555
Austin, Texas 78711



written complaint is received concerning the conduct of a prosecutor. A copy of the complaint is sent to the prosecutor asking for comments. At the same time, the person making the complaint is notified of the purpose and procedures of the council. A preliminary investigation of the complaint is then made by agency staff. The executive director then submits a written report of the staff's findings to the council. Based on the staff report, the council may: 1) dismiss the complaint as unwarranted, unfounded, or not within the jurisdiction of the council, 2) issue a private reprimand, 3) order a hearing before the council, 4) request the Supreme Court to appoint a master to hold a hearing, or 5) postpone action pending further investigation. If the council chooses to dismiss the complaint, both the complainant and prosecutor involved are notified of the council's actions and reason for dismissal. The complainant is also notified if the prosecuting attorney is given a private reprimand.

Upon reviewing a case, if the council decides the complaint of prosecutorial misconduct or incompetency is serious enough to require a hearing, they will conduct the hearing themselves or request the Supreme Court to appoint a master to conduct the hearing. By statute all complaint proceedings before the council are confidential. The hearings are non-adversarial and the accused prosecutor has no right to confront or cross-examine witnesses. Following the confidential hearing, the council decides either to dismiss the case, to issue a private reprimand, to issue a public reprimand, or to file a removal suit. It is important to note that the council does not make the final decision to remove a prosecutor from office. The council is authorized only to file a removal suit in district court if they believe there is good cause for removal. Removal suits are tried in the district court of the county where the prosecutor resides by a special judge appointed to hear the case. The judge appointed to preside over the proceedings in turn appoints a special attorney to prosecute the case. The entire disciplinary process of the council is outlined in Exhibit 3.

The council has voted three removal suits since its creation in 1978. They have issued three public reprimands and four private reprimands. The agency reports that, in addition, at least three prosecutors have resigned when faced with an investigation by the Prosecutor Council. As is evident by reviewing the figures provided in Exhibit 4, the council receives many more informal inquiries regarding prosecutor's conduct than formal written complaints. All formal complaints subject to council investigation are required to be in writing. Inquiries are defined by the agency as telephone complaints and/or inquiries about the prosecutor's role

DISCIPLINARY PROCEDURE

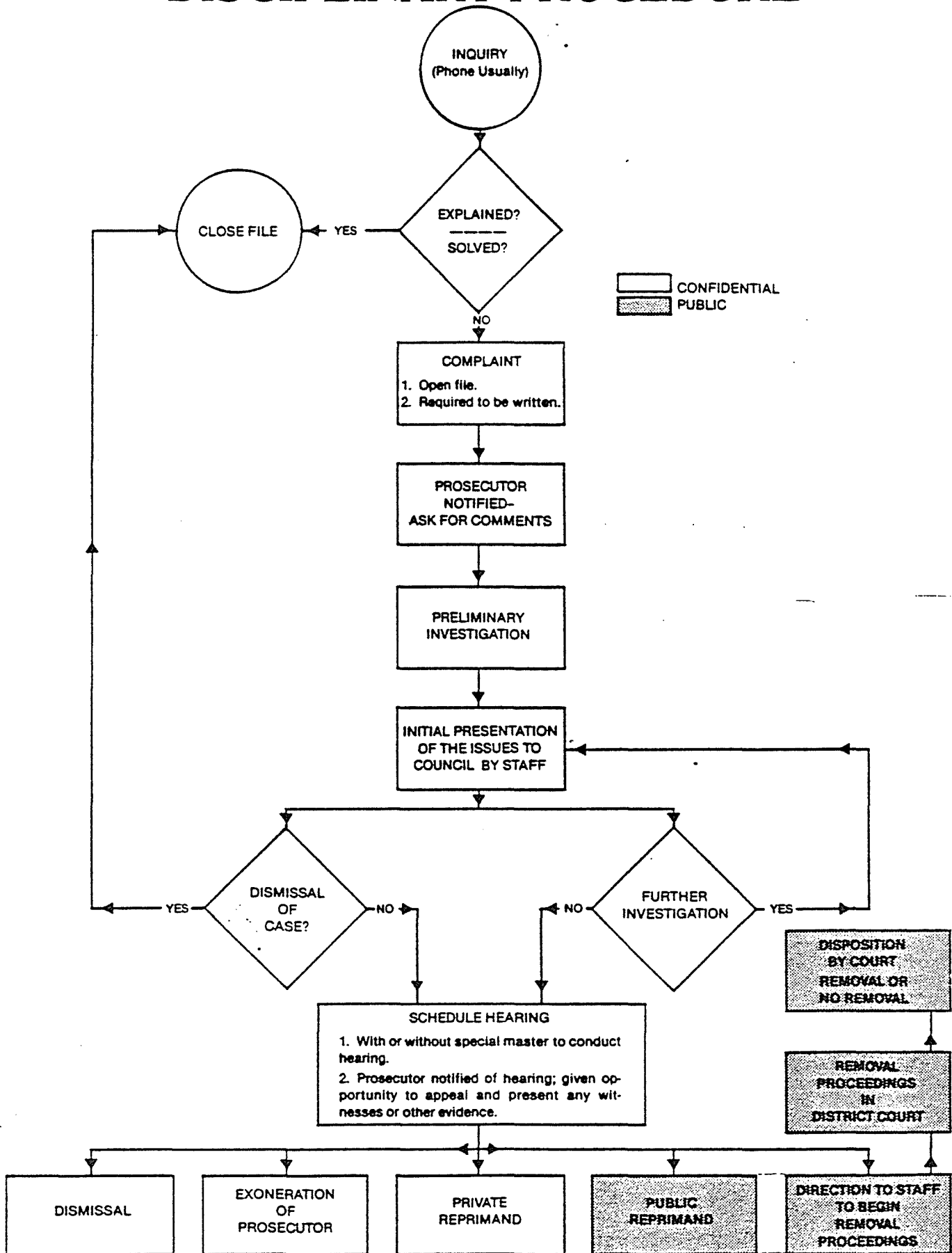


Exhibit 4

**DISCIPLINARY PROCEEDINGS
FISCAL YEAR 1984**

1. Number of inquiries concerning prosecutor conduct	
a. Number received	387
2. Number of formal written complaints against prosecutors	
a. Number received	119
b. Number pending at beginning of year	4
3. Disposition of formal complaints filed in fiscal year 1984	
a. Dismissals*	63
Complaints dismissed on the basis of:	
1) Action within prosecutorial discretion	24
2) Lack of substantial evidence	38
3) Not within council jurisdiction	8
4) Withdrawn by complainant	0
5) Properly handled through appellate process	4
6) Proper forum in District Court where criminal case pending	1
7) Other	7
* Some dismissals were for more than one reason	
b. Disciplinary Action	
1) Private reprimands	1
2) Public reprimands	2
3) Initiation of Removal Suit	1
c. No action	
1) Pending	56

and authority. During fiscal year 1984, the council disposed of 67 formal complaints, four of which resulted in disciplinary action.

The procedures used by the Prosecutor Council to receive, investigate and dispose of complaints of prosecutors misconduct appear to be generally appropriate. However, one recommendation was made as a result of the review of this function.

Standards and guidelines should be developed for disciplinary proceedings.

The Prosecutor Council procedures have been established as the method for disciplining and removing prosecutors from office. Although the council itself does not make the final decision on removing a prosecutor from office, the council's process is the only method to initiate any removal action.

The council's statute outlines broad conditions for which a prosecutor may be reprimanded, disqualified, or removed from office. These conditions include: 1) gross ignorance or neglect of official duty; 2) physical or mental defect which prohibits the prompt or proper discharge of official duties; 3) failure to maintain the qualifications required by law for election to office; 4) any unlawful behavior dealing with abuse of office as defined in Chapter 39 of the Penal Code or any act which is a felony or a misdemeanor involving moral turpitude; and 5) willful or persistent conduct which is clearly inconsistent with the proper performance of official duties. The review indicated that the council has never adopted more specific standards of conduct by which to discipline prosecutors than those outlined by statute. As a complaint against a prosecutor moves through the council's disciplinary process, council members must make judgments about whether the prosecutor is competent or whether the prosecutor's conduct is proper. Since no formal standards exist as to what actions constitute incompetency or misconduct, the council makes judgments on a case by case basis.

As a general state policy, when an administrative body is involved in a disciplinary process, there should be clear guidelines indicating the types of actions or behavior subject to sanction. This allows people who are regulated to adjust their behavior accordingly so they will stay within the guidelines set by the disciplinary body. The broad guidelines give prosecutors little idea of what specific types of action may result in a disciplinary sanction. One example of how a lack of guidelines for conduct might cause problems for a prosecutor is the use of discretionary funds. The legislature, in 1979, authorized prosecutors to assess fees

for the collection and processing of bad checks. Fees collected in this manner are deposited in the treasury and may be expended at the sole discretion of the prosecutor. The only direction given by the legislature regarding use of the fund is that it be used only to defray the salaries and expenses of the prosecutor's office. The Prosecutor Council would no doubt initiate disciplinary proceedings against a prosecutor for improper use of this discretionary fund. It would therefore be useful to prosecutors if the council developed some type of general guidelines for the proper use of discretionary funds. While the council does have a Hot Check Guidelines subcommittee that is active in this area, the subcommittee has not developed specific guidelines for the use of the fund which would allow prosecutors to adjust their behavior prior to being involved in any disciplinary proceedings.

The review also identified two other agencies with similar disciplinary procedures that have standards of conduct for the professions regulated by those agencies. The State Commission on Judicial Conduct, the agency in Texas responsible for disciplinary action against judges, utilizes the Code of Judicial Conduct promulgated by the Supreme Court. The State Bar of Texas, responsible for regulating attorneys in the state, has likewise developed standards of conduct for attorneys, known as the Code of Professional Responsibility.

The agency reports that developing meaningful guidelines for prosecutorial conduct would be difficult given the variance between prosecutor's activities in different areas of the state. However, the 1976 interim report by the House Judiciary Committee, which recommended the creation of the Prosecutor Council, also recommended that the council be given the responsibility for establishing a code consisting of specific standards of conduct for district court prosecutors. The study emphasized the need for a prosecutor's code of conduct separate and apart from that of the legal profession. Judiciary Committee members recommended the Prosecutor Council be created and given the responsibility to develop "specific standards of conduct concerning the investigation of offenses (use of illegal means to obtain evidence), trial and disposition of charges (prompt disposition, punctuality), administration of his office, relations with the bench, bar defendants, and witnesses, grand jury responsibilities (improper influence or communications with the grand jury) and conduct outside the scope of his official duties (conflicts of interest, practice of law)."

In summary, since the Prosecutor Council is the only entity which has disciplinary jurisdiction over how prosecutors fulfill their official duties, it seems important that the council take steps to further define unacceptable prosecutorial

conduct and incompetency. Such a clarification would not only aid prosecutors in bringing their conduct in line with the established guidelines, but would also give the council specific criteria by which to judge prosecutorial complaints which come before them. Therefore, the statute should be amended to require the council to establish a code of prosecutor conduct.

Technical Assistance

As a part of its statutory mandate to help create a uniform quality of prosecution, the Prosecutor Council provides legal assistance upon request to prosecutors' offices. Technical assistance offered by the council to prosecutors is broad in scope. Prosecutors can request assistance from the agency from the beginning of a case when it is brought to the prosecutor's office for screening through and including the post-conviction process on both the state and federal level.

Two main categories of assistance are provided by the agency; on-site prosecutorial assistance, and in-house prosecutorial assistance. According to technical assistance guidelines established by the agency's advisory committee, the council will give first consideration to the following types of on-site assistance requests:

1. Where the prosecutor requires special expertise that is not available on his staff to meet a particular criminal matter.
2. Where the case is of such magnitude that the regular staff of the prosecutor's office is unable to handle it and the normal course of business at the same time.
3. Where the prosecutor feels that the public confidence would be better served by the assistance of an outside prosecutor.

In order to receive assistance from the council, the prosecutor must first make a request in writing which includes a description of the type of case, the type of assistance required, and the estimated time required for assistance. Each prosecutor is also asked to propose how much money will be locally contributed towards the total cost of the assistance. Although the council does not have minimum guidelines for how much an individual prosecutor must contribute to the technical assistance cost, prosecutors are encouraged to pay as much of the total cost as their budgets allow.

The agency's executive director reviews all requests for technical assistance and determines whether they fit within the guidelines for technical assistance outlined by the advisory committee of the council. In most instances, agency staff

do not actually provide on-site assistance to prosecutors, but instead are responsible for coordinating the process. If an on-site technical assistance request is approved, the agency's executive director will first attempt to fill the request by drawing necessary personnel from the pool of approximately 1,300 elected prosecutors, assistant prosecutors and investigators already employed in the various local prosecutorial offices. For example, the executive director might arrange for an assistant district attorney from Dallas county to go to Wichita county for a specified period of time to assist in a trial. Such arrangements are made using interagency and interlocal agreements. If the assistance is provided by a prosecutor, assistant, or investigator on the state payroll, salaries of the personnel are not reimbursed. The council will, however, reimburse the local entities for salaries of personnel providing technical assistance whose salaries are not paid by the state. Travel and subsistence funds are provided by the council for all prosecutors, assistants and investigators giving technical assistance services. In fiscal year 1984, the agency expended \$68,800 in general revenue funds for technical assistance.

If a person already employed in a prosecutorial office cannot be found to provide the assistance, the council will enlist the help of former prosecutors and other people who are in private practice. The assistance might come from attorneys, investigators, accountants, or other personnel with specialized knowledge. The council must sometimes utilize personnel outside of the prosecutorial offices due to time constraints or in situations where a particular experience is needed to properly prosecute a case. These personnel are reimbursed for their time through the council at a maximum of \$50 per hour. The prosecutor receiving the assistance coordinated through the Prosecutor Council has the total right of approval and rejection of any and all personnel giving assistance. The personnel provided through the agency serve at the pleasure of the prosecutor receiving assistance.

Upon conclusion of the assistance, both the prosecutor requesting assistance and the person providing it are asked to send a written summary of the assistance activities to the council. The council then uses the summaries to evaluate the technical assistance program.

The council also provides certain in-house assistance to prosecutors. In-house assistance is provided by agency staff and includes telephone assistance to prosecutors in trial, referral to experts in other prosecutor's office, legal research,

and assistance in the drawing of indictments. The Prosecutor Council has also, on occasion, given temporary financial aid to prosecutor's offices.

In fiscal year 1984, the council responded to 638 technical assistance inquiries. In 11 cases, the staff provided research and other assistance in office. In 35 cases, agency staff arranged for on-site investigation and legal assistance. All technical assistance for the period of September 1, 1983 through July 31, 1984 can be broken down as follows:

1.	Total number of on-site assistance cases	
	a. on-site	31
	b. in-house	<u>11</u>
2.	Type of Personnel Requested	
	Attorney	88%
	Investigator	<u>14%</u>
	Other (Specify)	<u>0%</u>
3.	Type of Service Requested	
	Investigation	24%
	Grand Jury Proceedings	<u>21%</u>
	Trial	<u>45%</u>
	Appellate	<u>12%</u>
	Briefing	<u>12%</u>
	Other (Specify)	<u>2%</u>
	(Coordination)	
4.	Origin of Personnel	
	Council	<u>26%</u>
	Another Prosecutor's	
	Office	48%
	Private Individual	<u>24%</u>
	Other (Specify)	<u>2%</u>
	(D.P.S.)	

The review of the agency's technical assistance activity resulted in the following recommendations which could improve the efficiency and effectiveness of the technical assistance service.

The council should coordinate with the attorney general's office in the provision of technical assistance to prosecutors.

In addition to the Prosecutor Council, the Prosecution Assistance Section of the attorney general's office also provides technical assistance services to prosecu-

tors. Assistant attorneys general from the Prosecution Assistance Section will provide, upon request, assistance to prosecutors including legal research, and investigative expertise in areas such as capital murder or white collar crime. Assistant attorneys general will also handle a grand jury and/or prosecution in cases involving local political controversies or legal complexities.

The evaluation of the assistance provided by both agencies indicate that, although there is duplication of function, the services differ in two ways. First, the method by which the assistance is given differs between the two agencies. All assistance provided by the attorney general is performed by the full time assistant attorneys general who staff the section. Assistance from the Prosecutor Council is generally provided, under a negotiated contract, by borrowed personnel from another prosecutorial office or by professionals in private practice. Second, there is some indication that the services offered by one or the other agency might be more appropriate in certain types of cases. For example, depending on the nature and extent of the case, a prosecutor might feel it beneficial to involve the attorney general's office in capital murder or civil rights cases. On the other hand, in cases which require highly specialized knowledge, a prosecutor might find it beneficial to negotiate through the Prosecutor Council for a professional in private practice with the specific expertise needed.

Currently, no efforts are made to coordinate technical assistance to prosecutors and to address the duplication of certain available services. To ensure that requests for assistance are addressed to and handled by the agency which can best provide the service in the most efficient and effective manner, a greater level of coordination between the technical assistance operation of the agencies should be developed. One method of achieving this coordination is to require that both agencies develop a memorandum of agreement that separates their respective responsibilities in providing technical assistance to prosecutors.

The agency should limit the types of technical assistance services reimbursed with state funds.

One type of technical assistance request from prosecutors which receives priority consideration by the council is the request for trial or investigation assistance in cases where there is believed to be a conflict of interest. Where the prosecutor feels the public confidence would be better served by the assistance of an outside prosecutor, the council will obtain the services of personnel from another prosecutor's office, a former prosecutor, or an individual in private

practice to handle the matter. From September 1, 1983 through July 31, 1984, 19 of the 42 technical assistance requests involved some type of conflict of interest. In many of these conflict of interest cases, the locality or professional providing the assistance is reimbursed with council funds. According to agency data, at least \$11,500 in state funds was reimbursed for conflict of interest assistance in fiscal year 1983.

Results of the review indicated potential problems with using state funds to pay for assistance in such cases. Currently, the potential exists for a prosecutor to obtain the services of an outside prosecutor to handle a case because their personal involvement would be uncomfortable, difficult, or in some way inconvenient. Prosecutors are designated to represent the state in all criminal matters. They are paid by state and local government to do a job, and should be responsible for carrying out the duties of office unless it is absolutely clear that their involvement in a case would result in a true conflict of interest. A true conflict of interest would be those instances where the prosecutor claims financial involvement, a family relationship, or some type of professional relationship that would be prohibited under the state bar's Code of Professional Responsibility.

In summary, prosecutors should do what they are paid to do, even in instances where their involvement is personally or professionally uncomfortable. The statute should be amended to require that guidelines be developed so that state reimbursement funds are used only when a true conflict of interest exists or when a prosecutor lacks the necessary expertise or staff to prosecute a case.

The council should provide guidelines for reimbursement of technical assistance services.

Prosecutor's offices in Texas are funded with both state and local funds. Financial support from state and local sources varies depending on the type of prosecutor and the population of the prosecutor's jurisdiction. State funding to prosecutors with felony responsibility in areas of the state of small or average population size generally exceeds local funding.

Although the Prosecutor Council strongly encourages local involvement and contributions toward the cost of each technical assistance service provided, the council does not currently have guidelines for a minimum dollar amount required from a prosecutor receiving assistance. Each prosecutor requesting service negotiates individually with the council and with the other local entities involved as to what the monetary commitment will be. The review indicated that sometimes

the prosecutor has assumed the majority of the cost for the technical assistance service, while other times the council paid for the majority of the cost using state funds set aside for the technical assistance function.

One of the benefits of providing technical assistance to prosecutors is that it allows for local support and commitment. The council, however, does not have the ability to determine whether a local prosecutor's office is able to pay for the assistance without reimbursement from the state. In order to further encourage the expenditure of local funds prior to the expenditure of state funds for prosecutor assistance, the Prosecutor Council should not fund more than 75 percent of the total technical assistance cost. Since the council now has a technical assistance expenditure limit of \$10,000 on any given case, a commitment of at least 25 percent should not result in undue hardship for local prosecutorial offices. In the past, the majority of prosecutors have contributed much more than 25 percent of the technical assistance cost. A 75 percent limit on council expenditures would not only help assure the proper expenditure of state funds, it would also provide evidence of increased local support for the service provided. This practice would also enable county government officials to be aware of the overall financial needs and abilities of their prosecutor's office.

Agency staff should not be directly involved in the provision of on-site technical assistance.

The Prosecutor Council is somewhat unique in that it both disciplines prosecutors and offers them assistance. This situation provides potential for conflict. One area where there is potential for conflict is in the direct provision of technical assistance by agency staff. In most cases, the conflict is avoided because the agency only coordinates the technical service. As previously mentioned in the report, the agency's executive director generally arranges for a borrowed prosecutor from another office or for other professionals to provide investigative, trial, or other on-site assistance. The review indicated, however, that in some cases agency staff actually tried cases or handled criminal investigation for local prosecutors. The review also indicated that the council has requested funds to continue or increase direct, on-site technical assistance.

The potential conflict identified resulting from this type of involvement by the staff is the possibility that council staff, through direct participation in prosecutorial duties, could be involved in a disciplinary complaint. The council

would then be placed in the position of investigating and making judgements on the actions of agency employees.

The council has established a technical assistance system of utilizing personnel from other prosecutor's offices or individuals in private practice that appears to work well. In order to maintain a separation between the technical assistance and discipline functions, the statute should be amended to prohibit agency staff from participating directly in the provision of on-site technical assistance.

Training

The council is involved in three training activities that provide education and professional development for prosecutors and their staffs. The council conducts and contracts for training courses, provides funds for travel expenses to attend training courses, and has developed manuals which are used to standardize and upgrade procedures of prosecutors' offices.

In the area of training courses, the council contracts for three courses a year for the professional development of prosecutors and their staffs. To date, these courses have been provided by the Texas District and County Attorneys Association through a low bid contract. Two of the courses, the Investigator's School and the Basic Prosecution Course, are provided each year. The investigator's course is an annual refresher course to update investigators on current investigative methods and improve their skills. The prosecution course is designed for new prosecutors as an orientation on successful prosecution techniques. A third course is also offered each year which varies in subject matter based upon prosecutors' needs as determined by the council through its advisory committee. In 1984, this course dealt with capital murder cases and related issues. These courses are held in various places around the state and had 519 participants in 1984. (see Exhibit 5)

Exhibit 5
Contract Courses for 1984 with Attendance

<u>Course</u>	<u>Attendance</u>
Investigator's School	130
Basic Prosecution Course	266
Capital Murder Seminar	123
TOTAL	<hr/> 519

In addition to the contract courses, the council staff also conducts its own training courses. These courses are sponsored by local prosecutors and law enforcement groups and are designed to coordinate local law enforcement efforts. For example, the Law Enforcement Workshop teaches law enforcement personnel improved report writing skills thereby providing prosecutors with complete, accurate evidence for cases. The council conducted six courses in 1984 with 561 attendees.

Another aspect of the council's training activity involves reimbursement of travel expenses for prosecutors and their staffs to attend council courses and other courses approved by the council. Through the use of its advisory committee, the council has established guidelines that identify those courses conducted by other groups which are eligible for travel reimbursement and has established procedures for approving additional courses. The legislature, by a rider to the council's appropriation, has limited reimbursement to the district attorney, assistant district attorney, or investigators, but no more than four persons from each office can claim reimbursement for any particular course. The council has established a reimbursement policy which generally conforms to the travel policy for state employees outlined in the Appropriations Act, but also includes several additional restrictions limiting reimbursement. In 1984, approximately \$138,000 was expended for travel of prosecutors and their staffs to attend training courses.

A final training activity of the council is the development of training and operations manuals for use by prosecutors and their staffs. The council determines the need for the manuals by using its advisory committee along with surveys of prosecutors. Once the type of manual needed is determined the advisory committee directs the staff in developing the manual. A prosecutor or other

individual with expertise on the subject may also be contracted with to write the manual. Once written, the manuals are updated by the council as necessary.

To date, six manuals have been developed and distributed to prosecutors' offices. (see Exhibit 6) A certain number are provided without charge; additional copies are available at cost. These manuals assist prosecutors with areas such as drawing valid indictments and developing a system for collecting hot checks. Over 12,500 were distributed to prosecutors' offices in 1984.

Exhibit 6
Training Manuals

1. Investigator's Desk Manual: It is a basic manual for the beginning investigator and provides basic investigative skills. It is used by law enforcement personnel throughout the state.
2. Elements Manual: This is a publication designed for prosecutors, grand jurors, and law enforcement officers. It is used by the Council at its law enforcement workshops and is included in the grand jury folders.
3. A Guide to Report Writing: A publication to assist the officer in preparing his report by detailing the information necessary for the more common crimes. It can be adapted to any offense report form.
4. Reciprocal Child Support Manual: This manual emphasizes "how to" skills with legal forms, office forms, and suggested letters. It provides a complete system to deal with this area of the law.
5. Hot Check Manual: This manual was devised to give the prosecutor a system for collecting hot checks, including a section on the hot check fee as well as providing the law and the forms for trying a hot check case.
6. Indictment Manual: This is a manual designed to assist prosecutors in drawing valid indictments and is a definitive dissertation on substantive law in this area. This manual is in loose leaf form and allows the council to provide changes that can be inserted directly into the manual to keep it up to date.

The review of the training function indicated that the function was needed but that three improvements in the agency's system of travel reimbursement to prosecutors and staff would be useful.

Prior notification by prosecutors
should be required for reimburse-
ment of travel expenses.

The council currently provides reimbursement to prosecutors and staff for travel expenses to approved training courses. No more than four persons from each prosecutor's office may be reimbursed for any particular course. The council has established a travel expense policy which is the same as that set for state employees in the appropriations act.

The council also has an established list of approved courses for which travel expenses will be reimbursed. Prosecutors and staff may attend any of these courses without any further approval and receive reimbursement for travel expenses by submitting a request to the council. This policy amounts to blanket approval for prosecutors to attend courses and receive reimbursement for travel expenses. Prosecutors must obtain prior approval to attend a specific course only when that course has not been previously approved by the council.

The review indicated several concerns with the current reimbursement system. Without prior notification of travel plans, the council cannot effectively budget travel funds since it does not know the number of prosecutors and staff attending training courses or the mode of transportation used for travel. Only upon receipt of a reimbursement request can the council staff determine the amount of travel funds which are needed for reimbursement. Under such a system, the council could conceivably use its appropriation for travel before the end of a fiscal year if requests for reimbursement were greater than existing funds. In this case, needed training might be missed because of the lack of available travel funds. This is more likely to occur in the future because of the increased use of funds by prosecutors resulting from the change approved by the legislature in 1983. This change increased the number of persons eligible for travel expenses for each course from two to four.

To improve the council's ability to control the use of travel funds, the statute should be amended to require prosecutors and staff to notify the council prior to attending training courses to be eligible for reimbursement of travel expenses. This would allow the council to monitor the amount of travel funds being obligated and the use of those funds. Adjustments in reimbursement policy could then be

made as necessary to avoid problems such as over-spending at the end of the fiscal year.

Vouchers for travel reimbursement should be completed prior to signing by prosecutors.

The council's current reimbursement policy allows prosecutors to submit a signed blank state travel voucher with their request for travel expense reimbursement. The prosecutor can authorize council staff to transfer the information from the reimbursement request to the travel voucher, correcting any errors or mistakes. Otherwise, the prosecutor can send in a reimbursement request and council staff will complete a travel voucher and send it to the prosecutor for signature.

The review indicated one concern with the current payment procedure. While the procedure expedites the repayment to prosecutors for travel expenses, it circumvents one of the purposes of the state travel voucher. A prosecutor, upon signing a voucher form, is certifying that the information on the voucher is complete and accurate. This certification does not occur when prosecutors sign blank vouchers and allow council staff to complete the forms. Should a mistake be made when the voucher is completed, the prosecutor involved would be liable for the mistake and could be subject to penalties associated with submitting an incorrect voucher.

The current reimbursement procedure should be changed so that travel vouchers are completed prior to signing by prosecutors. This would allow prosecutors to certify that the information on the voucher is accurate and eliminates the potential liability of prosecutors for a mistake by council staff on the travel vouchers.

Travel funds for prosecutors should be allocated based on a system which funds 75 percent of the travel expense for each prosecutor office to attend one course per year and distributes the remainder of available travel funds as needed.

The council currently provides travel funds to any prosecutor requesting reimbursement for attendance at an approved course when travel funds are available. Expenses are reimbursed within the guidelines of the council's travel policy. While there is no limit on the number of courses a prosecutor or staff can

attend and receive reimbursement, only four persons from each office can be reimbursed for each course.

The review indicated two problems with the current method of distributing travel funds. First, there is no system established to ensure that travel funds are distributed among all prosecutors' offices thus ensuring that every office is benefiting from the state program. Second, despite the joint state/local nature of prosecutors' offices, the council is, in many cases, providing all of the travel funds for prosecutors and their staffs to attend eligible training courses.

With regard to the first problem, the council does not maintain information on the distribution of travel funds, making it difficult to determine the extent to which particular prosecutor offices are being funded. Travel funds should be made available to all prosecutors and their staffs in a fair and uniform manner. To help ensure that travel funds are better utilized by prosecutors across the state, the statute should be amended to require the council to allocate travel funds to each local prosecutor based on an allocation system which allows all prosecutor offices to attend one course each year and distributes the remainder of available travel funds as needed. Under this system, the council would collect travel requests from each prosecutor office for the course that the office desired to attend that year. After setting funds aside for these courses, the council could distribute the remainder of available travel funds based on the individual needs of each prosecutor's office. This system would ensure that funds are available to each prosecutor's office, but also gives priority to offices with the greatest training needs.

The second problem with the distribution of travel funds relates to the source of the funds. The state in most cases, is providing, all of the funds for travel of prosecutors to training courses. Prosecutors' offices are jointly supported by the state and the counties, but most counties do not provide support for training. Some counties, particularly those with metropolitan areas, provide some funds for travel to courses but there is no requirement for local support of training. This support should be provided because of the benefits to local communities, such as higher conviction rates, that can result from improved local prosecution efforts. To ensure a minimum level of local support for prosecutor training, the statute should be amended to limit state reimbursement for travel to 75 percent of the expenses eligible for reimbursement. This requirement, however, could be waived on travel reimbursements approved by the council based on need. No waiver of the 75

percent ceiling for travel reimbursement would be allowed for the one course allocated to each prosecutor office annually.

Information/Services

The council's information/services activity is designed to provide information to assist prosecutors in carrying out their responsibilities and to improve the overall public understanding of prosecutors' activities and needs. Since most prosecutors do not have the staff to develop this type of information, newsletters and pamphlets distributed to prosecutors, as described in Exhibit 7, allows them to keep up with current events in the field of prosecution. Also, prosecutors can use council information to educate the public about trends in criminal activity and how the prosecution system works.

The council also has the responsibility to develop information which can be used to improve prosecution efforts in the state. Included in this responsibility is a mandate to develop and adopt minimum standards for the operation of prosecuting

Exhibit 7

INFORMATION FOR PROSECUTORS

1. Newsletter - The council provides prosecutors with information as to the activities of the council, provides a means for disseminating the latest technical assistance information and also provides an opportunity for other prosecutors to know what is going on in the field of prosecution throughout the state. The newsletter includes articles on law, discipline, ethics, and technical assistance.
2. Information Releases - Another service of the council is providing information releases to local prosecutors so they can inform the public of duties and responsibilities as prosecutors.
3. Audio-Visual Library - A library of films, video cassettes, and audio cassettes have been compiled for the use of prosecutors. It is divided into two sections: 1) instructional material which are used by prosecutors in improving their skills; and 2) information materials which are used to inform the public of what they can do to assist in the law enforcement process.
4. Advisory Bulletins - Advisory bulletins are mailed to prosecutors when needed. They include "indictment alerts" to inform prosecutors of recent court decisions which affect pleadings. In addition, summaries of the statute of the law, such as the series on the law of search and seizure, are provided from time to time. These bulletins are sent out between issues of the newsletters.
5. Pamphlets - These are brochures which prosecutors distribute to the public to keep them informed about subjects such as hot checks.
6. Grand Jury Folders - The council provides an information packet which prosecutors give to their grand jurors. These folders contain information which assists the grand jurors in performing their duties.
7. Crime Biters - The council provides an educational program both for children and for senior citizens in the areas of crime prevention and understanding of the criminal justice system.
8. Victim/Witness Assistance - The council is just beginning to assist prosecutors in dealing with the treatment of victims or witnesses of crimes. Council staff provide information, pamphlets and suggested procedures.

attorneys' offices. By establishing minimum office standards, the council provides a basis for uniformity in office operation and funding. The council has developed office minimum standards for prosecutors which were reported to the 67th Legislature.

The council is also directed by statute to provide the governor and the legislature with information necessary to determine the proper jurisdiction and the adequate funding of local prosecutors' offices. In response, the council has developed and maintained information on prosecutors' salaries, personnel, and budgets.

In general, the services provided by the council are adequate. However, one change in these services provided would improve the information provided by the agency relating to the funding of prosecutors' offices.

The council should be given the responsibility to coordinate the development of a budget request for prosecutors to the legislature.

Most local felony prosecutors currently receive a state salary and state funds for a portion of their office operating expenses. Salaries for 1985, with a few exceptions, are set at \$43,050 or \$49,050 depending upon whether the prosecutors engage in a private law practice in addition to their prosecutorial duties. An allocation of \$13,650 or \$27,650 is also provided to felony prosecutors for office support again based on whether the prosecutor has a private practice and on the size of the prosecutor's district. These funds can be used for staff salaries and travel and consumable supplies. Prosecutors with multi-county districts also receive additional travel funds of \$1,500 per county for up to six counties. All state funds are provided to prosecutors through an appropriation to the state comptroller's office.

While the state provides funds to support local prosecutors and their offices, there is no procedure established to allow the legislature to effectively determine the budget needs of prosecutors. Currently, prosecutors do not have a way to submit a budget request and participate in the budget process of the Legislative Budget Board and the governor's office. Budget requests, generally submitted by state agencies, convey the budget needs of the requesting agency. Agencies may also be given the responsibility to request funds for other groups. For example, the Office of Court Administration coordinates a budget request for district judges who then receive a state salary from the comptroller's office using a system similar to that for prosecutors. No agency currently has the specific responsibility

to develop and submit a budget requests for prosecutors. The council has the ability to determine the salary and operating expense needs of prosecutors. In addition, the council has the responsibility to report to the governor and the legislature on needed funding for prosecutors' offices. This responsibility could be expanded to provide that the council develop and submit a budget request for prosecutors. Using its advisory committee, the council is involved in surveying prosecutors to determine the needs of prosecutors in areas such as training, travel and technical assistance. This process could be used to identify funding levels needed by prosecutors for salaries and office support. The council could gather the information necessary and develop a budget request for submission during the biennial budget process of the legislature.

To provide prosecutors with a chance to submit their budget needs to the legislature, the statue should be amended to give the council responsibility for development and submission of a budget request for prosecutors. Additional staff might be required to carry out this function depending on the level of information required by the legislature.

EVALUATION OF OTHER SUNSET CRITERIA

The review of the agency's efforts to comply with overall state policies concerning the manner in which the public is able to participate in the decisions of the agency and whether the agency is fair and impartial in dealing with its employees and the general public is based on criteria contained in the Sunset Act.

The analysis made under these criteria is intended to give answers to the following questions:

1. Does the agency have and use reasonable procedures to inform the public of its activities?
 2. Has the agency complied with applicable requirements of both state and federal law concerning equal employment and the rights and privacy of individuals?
 3. Has the agency and its officers complied with the regulations regarding conflict of interest?
 4. Has the agency complied with the provisions of the Open Meetings and Open Records Act?
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EVALUATION OF OTHER SUNSET CRITERIA

This sections covers the evaluation of the agency's efforts in applying those general practices that have been developed to comply with the general state policies which ensure: 1) the awareness and understanding necessary to have effective participation by all persons affected by the activities of the agency; and 2) that agency personnel are fair and impartial in their dealings with persons affected by the agency and that the agency deals with its employees in a fair and impartial manner.

Open Meetings/Open Records

The Texas Open Meetings Act (Article 6252-17 V.A.C.S.) is applicable to state boards and commissions only when those agencies are created within the executive or legislative branches of government. As an agency established within the judicial department of state government, the Prosecutor Council is not subject to the open meeting requirements. In practice, however, the agency does comply with the act. Notices of meetings are published in the Texas Register and meetings are open to the public. As permitted under the open meetings act, disciplinary proceedings for state prosecutors are conducted in closed or executive session.

While the Prosecutor Council is not subject to the open meetings act, the agency is subject to the open records act. A review of the agency's open records policy indicated that the agency is in general compliance with the act. Although most of the information maintained by the agency is open to the public, certain documents such as personnel files and confidential complaint files are properly withheld from disclosure. Currently, all records relating to the investigation of complaints against prosecutors are designated by statute as confidential until such time as they are introduced as evidence in any removal proceeding.

EEOC/Privacy

A review was made to determine the extent of compliance with applicable provisions of both state and federal statutes concerning affirmative action and the rights and privacy of individual employees. The agency is currently operating under an affirmative action plan which includes a policy statement and affirmative action goals. In addition, the plan establishes an EEO advisory committee composed of agency employees to review and update the plan annually. Although the agency does not have a written grievance procedure for employee complaints,

the agency indicates that the employee advisory committee is available to handle employee related complaints.

Public Participation

The agency's policies and practices were examined to determine whether the public has been kept informed of its activities and whether the public has been allowed to participate in the agency's policy formulation process. The results of the review indicated that the public has adequate awareness of council activities and sufficient opportunity to participate in agency decision making processes.

In general, information designed to improve public awareness of council activities is distributed to the public through the various prosecutors' offices around the state. The council makes information available to the public which describes the duties of prosecutors and explains certain aspects of the criminal justice system. Examples of these publications include a hot check pamphlet, grand jury folders, and information releases on prosecutor responsibilities. In addition to the distribution of publications, the council also provides educational programs in the area of crime prevention.

Public participation in the council's decision-making process is accomplished through the inclusion of four public members in the council's nine-member policy-making body. While the agency permits the public to express their viewpoint at regular council meetings, public participation at these meetings has been limited. The presence of public members on the council does provide an adequate level of public participation in the council's general policy decisions and in the consideration of complaints filed against prosecutors.

Conflict of Interest

The review focused on agency efforts to inform board members and employees of responsibilities related to conflict-of-interest statutes and compliance with applicable statutes. The conflict-of-interest statute requires that board members disclose any substantial interest in a business entity regulated by a state agency or a business entity that does business with a state agency. Each employee and board member is provided a copy of the conflict of interest statutes by the agency personnel officer. In addition, council members disqualify themselves on discipline complaints that deal with their office or in which they have a personal interest. Agency policy prohibits outside employment of employees where the outside employer is engaged in activities related to agency responsibilities.

ALTERNATIVES

The analysis of whether there are practical alternatives to either the functions or the organizational structure are based on criteria contained in the Sunset Act.

The analysis of alternatives is directed toward the answers to the following questions:

1. Are there other suitable ways to perform the functions which are less restrictive or which can deliver the same type of service?
 2. Are there other practical organizational approaches available through consolidation or reorganization?
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ALTERNATIVES

As part of the review of this agency, the functions performed by the agency were evaluated to determine if alternatives to current practices were available. Agencies in Texas with functions similar to those performed by this agency were reviewed to determine if they had developed alternatives to organizational or program practices which offered substantial benefits and which could be implemented in a practical fashion. It was concluded that a practical alternative to the current structure does exist, and it is discussed below.

The council could be abolished and the agency's functions could be transferred to other state agencies.

The council's current responsibilities are conducted by the agency through four separate programs which investigate complaints and discipline prosecutors, coordinate technical assistance for prosecutors, fund prosecutor training, and provide prosecutors with certain services such as newsletters and information pamphlets. Much of what the council does is also done through programs or other services provided by other state agencies. In fact, the council's disciplinary function is the only activity performed by the agency that is not also carried out by other state programs. To determine if it would be feasible to transfer any of the council's programs to other state agencies, the review examined other state agencies which performed similar functions. It was determined that certain benefits such as cost savings and better coordination could result from the abolition of the agency and the transfer of the functions. Each of the agency's functions is dealt with separately below.

Discipline

The Prosecutor Council is responsible for investigating complaints against prosecutors and for imposing sanctions on and initiating removal suits against prosecutors when incompetence or misconduct is found. Council authority in this area is primarily concerned with the prosecutors official conduct as a state official. All prosecutors, however, must be attorneys and possess a valid license to practice law in the state. The State Bar of Texas is responsible for investigating complaints and imposing sanctions for attorney misconduct. Thus, in Texas, a system has developed that potentially requires two state agencies to investigate complaints against prosecutors.

The state bar grievance process is geared toward the enforcement of the Code of Professional Responsibility which imposes certain ethical considerations and disciplinary rules on attorney conduct. This process includes review by local grievance committees and can result in a reprimand, a suspension, or the revocation of an attorney's license to practice law. As previously described, the Prosecutor Council is responsible for the enforcement of standards related to prosecutorial incompetence and misconduct.

While theoretically, these two functions are discrete, they overlap to a large extent for several reasons. First, many of the cases involving misconduct would violate both agencies' ethical standards. Although the sanctions imposed by the agencies differ, the investigation and development of findings for a complaint are similar in both situations. In practice, only a few complaints each year are investigated by both the council and the bar. However, in light of the relative few number of cases where the council actually found misconduct, the overlap appears more significant.

Second, many prosecutors are also engaged in the private practice of law. While figures are not available regarding the portion of the 182 county attorneys that engage in private practice, the private practice of prosecutors with felony responsibility is controlled by the Professional Prosecutors Act. Approximately one-third of the felony prosecutors engage in private practice, as shown below.

Felony Prosecutors Engaging Private Practice

a.	Number of felony prosecutors	139
b.	Number of professional prosecutors	90
	Number of felony prosecutors allowed to have private practice	49

Since the state bar is the state agency with exclusive disciplinary jurisdiction over attorneys in private practice, the potential for overlap between the state bar and the prosecutor council is increased by the private practice of some prosecutors.

In transferring the disciplinary responsibility for prosecutors to the state bar, the need for two state agencies to investigate the activities of the same persons would be eliminated. Complaints against prosecutors could be investigated through the state bar general counsel's office and disciplinary decisions could be made by a Prosecutor Committee attached to the state bar. One drawback to this transfer

would be the loss of visibility that exists with an independent agency. However, the benefits of reducing overlap appear to outweigh this drawback.

Technical Assistance

A prosecutor needing assistance with some aspect of prosecuting a case currently has two options for receiving aid. Prosecutorial technical assistance is available both through the Prosecutor Council and the Office of the Attorney General. Under Article 4399 (V.A.C.S.), the attorney general is required to respond to requests for assistance received from district attorneys or grand juries throughout the state. Since 1972, the attorney general's office has designated a unit of the Criminal Law Enforcement Division to provide the required assistance. The section currently responsible for handling technical assistance in the attorney general's office is the Prosecution Assistance Section, staffed with three full-time attorney positions and one investigator. Results of the review indicated that most of the technical assistance services provided by the two agencies are duplicative. In addition, the exhibit below shows that both agencies are actively providing similar levels of assistance to prosecutors.

Exhibit 8

**TECHNICAL ASSISTANCE PROVIDED TO PROSECUTORS
Fiscal Year 1984**

	<u>Attorney General</u>	<u>Prosecutor Council</u>
a. Number of technical assistance inquiries received	500 (regular phone line) 300 (crime prevention watts line)	638
b. Number of cases for which on-site technical assistance was provided	34	35

As mentioned in a previous section of this report, the attorney general and the Prosecutor Council use different methods to provide technical assistance. The Prosecutor Council generally arranges for others to provide on-site technical assistance, while assistance from the attorney general's office is given directly by the staff of the Prosecution Assistance Section. Both methods appear to have merit depending on the type of case where assistance is needed. While both systems work adequately, it is not necessary to have two state agencies performing the technical assistance function. The attorney general's office could coordinate

the type of technical assistance system presently offered through the Prosecutor Council. Instead of adding more full-time staff to take care of increased technical assistance responsibilities, the attorney general's office could assume the additional coordination role of arranging for personnel in other prosecutor's offices to handle certain types of assistance. Such an arrangement would preserve both methods of technical assistance provision in a cost effective way while at the same time reducing duplication.

One disadvantage to transferring the council's technical assistance function to the Office of the Attorney General was noted during the review. Texas has a distinct separation between criminal jurisdiction and civil jurisdiction. Criminal jurisdiction is the domain of local prosecutors and the attorney general has no original criminal jurisdiction. Prosecutors are sensitive about maintaining a clear separation between the two jurisdictions and the issue has been one of continuing discussion. Some prosecutors fear erosion of criminal authority and might be hesitant to have the attorney general's office be the sole provider of technical assistance for this reason. However, if all technical assistance was offered through the attorney general's office, the attorney general would still not be able to enter a prosecutor's jurisdiction unless invited by the prosecutor.

Training

The council is currently involved in three training activities for prosecutors and their staffs. The council conducts and contracts for training courses, provides funds for travel expenses to attend courses, and has developed training and procedure manuals for prosecutors. The review indicated that, if the council were abolished, these training activities could be transferred to the state bar which performs some similar activities.

The state bar has a professional development section which provides extensive training and continuing education for lawyers. The state bar has also developed several manuals of procedure for use by lawyers. The training activities performed by the council could be carried out by the state bar. While the state bar does not currently conduct training specifically for prosecutors, it could develop courses using the appropriated funds now provided to the council. The state bar could also contract with the Texas District and County Attorneys Association for training courses as is currently done by the council.

With regard to manuals provided by the council, the state bar could expand its current efforts to develop new manuals for prosecutors as needed and update the ones currently in use. Finally, travel funds provided to prosecutors by the

council could be distributed by the state bar. Essentially, this process is a reimbursement system almost identical to that used for all state employees. While the state bar is not currently involved in a similar process, it would be able to develop a system to provide these travel funds to prosecutors.

Transfer of training activities to the state bar would eliminate current duplication of effort by the council and the state bar, and assist in centralizing training efforts in the legal area. One drawback identified during the review was the possibility that training provided by the state bar tends to be more expensive than council training efforts. This would result in fewer prosecutors benefiting from the limited amount of state funds available. It appears, however, that the benefits from consolidation could outweigh the drawbacks, particularly when considered along with benefits associated with transfer of other council activities.

Information/Services

The council provides information such as newsletters, advisory bulletins and brochures to prosecutors to keep them and the public informed on issues affecting prosecution. The council also has responsibility to provide the governor and the legislature with information to assist with funding and other decisions affecting prosecutors. The review indicated that, if the council were abolished, this activity could be discontinued and the information supplied by the council could be provided by other sources without any formal transfer of responsibilities.

The state bar and the attorney general's office have newsletters which include information similar to that of the council's newsletter. The Texas District and County Attorney's Association also publishes a newsletter which is specifically designed to provide information to prosecutors. Information needed by the governor and the legislature or for public distribution could be supplied by the state bar or the attorney general.

The benefits from discontinuing the council's information activity are elimination of some duplication which now exists with several newsletters providing similar information and elimination of the expenditures associated with the council's information activities.

One drawback related to discontinuance of the council's information activity is that the information needs of the prosecutors may not be apparent unless some state agency exists to determine what information is needed. It was concluded that this possible drawback did not appear to outweigh the benefit of discontinuing this function.

OTHER POLICY CONSIDERATIONS

During the review of an agency under sunset, various issues were identified that involve significant changes in state policy relating to current methods of regulation or service delivery. Most of these issues have been the subject of continuing debate with no clear resolution on either side.

Arguments for and against these issues, as presented by various parties contacted during the review, are briefly summarized. For the purposes of the sunset report, these issues are identified so they can be addressed as a part of the sunset review if the Sunset Commission chooses to do so.

OTHER POLICY CONSIDERATIONS

This section covers that part of the evaluation which identifies major policy issues surrounding the agency under review. For the purpose of this report, major policy issues are given the working definition of being issues, the resolution of which, could involve substantial change in current state policy. Further, a major policy issue is one which has had strong arguments developed, both pro and con, concerning the proposed change. The material in this section structures the major question of state policy raised by the issue and identifies the major elements of the arguments for and against the proposal.

Should the council's disciplinary responsibility for elected prosecutors be expanded to include assistant prosecutors?

Currently, the council's statutory responsibility to investigate and to take disciplinary action for prosecutorial misconduct and incompetency is limited to only elected prosecutors. This responsibility applies to the persons holding the offices of county attorney, district attorney, or criminal district attorney who represent the state in criminal cases. Persons who are appointed to perform the duties of these offices pro tempore during a period of disqualification or suspension of the elected prosecutor are also subject to the council's disciplinary authority. Under the present statute, the authority to discipline prosecutors consists of three different actions: a private reprimand, a public reprimand, or initiation of removal suit in district court.

Presently, elected prosecutors are responsible for the actions of the assistant prosecutors employed in their offices. This system depends upon the elected prosecutor to take whatever disciplinary action is necessary when an assistant prosecutor is involved in misconduct. The council has no jurisdiction over these assistant prosecutors except through the elected prosecutor. When the council receives a complaint against an assistant prosecutor, the council will investigate the complaint. If the council believes that some disciplinary action should be taken, they will notify the elected prosecutor of their findings. Should the elected prosecutor not take the appropriate action, the elected prosecutor is then subject to disciplinary action from the council on the theory that the misconduct has been condoned by or is the policy of the elected prosecutor.

Because assistant prosecutors are employees and not state officials, the extension of the council's disciplinary jurisdiction to assistant prosecutor would not include the authority to initiate removal suits. This authority could, however, include public and private reprimands.

It can be argued that such a shift would make the assistant prosecutors more accountable for their actions. Being directly subject to council action, assistant prosecutors would be more likely to make independent judgements on ethical matters than to merely reflect existing office attitudes. Additionally, expanded council disciplinary jurisdiction could reduce the potential of an elected prosecutor instructing an assistant prosecutor to act in an inappropriate fashion and then firing the assistant once a complaint was filed.

On the other hand, it can be argued that the extension of the council's disciplinary responsibility argue that the current system adequately regulates the practices of all prosecutors and their staff. Because the assistant prosecutors are employees of the elected prosecutors and do not hold state offices, the assistant prosecutors should be accountable to the elected official and not to a state agency. Elected prosecutors are responsible for all the cases prosecuted in their counties or districts and should ultimately be responsible for the actions of their employees. Additionally, the expansion of council authority would increase the workload of the agency staff because hundreds of assistant prosecutors would be added into its enforcement responsibility.

ACROSS-THE-BOARD RECOMMENDATIONS

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 are denoted in abbreviated chart form.

PROSECUTOR COUNCIL

Applied	Modified	Not Applied	Across-the-Board Recommendations
	*		A. GENERAL
X			1. Require public membership on boards and commissions.
X			2. Require specific provisions relating to conflicts of interest.
X			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.
X			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, the auditor, 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 that the state auditor shall audit the financial transactions of the board at least once during each biennium.
X			10. Provide for notification and information to the public concerning board activities.
*			11. Place agency funds in the Treasury to ensure legislative review of agency expenditures through the appropriation process.
X			12. Require files to be maintained on complaints.
X			13. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
		X	14. (a) Authorize agencies to set fees. (b) Authorize agencies to set fees up to a certain limit.
X			15. Require development of an E.E.O. policy.
X			16. Require the agency to provide information on standards of conduct to board members and employees.
X			17. Provide for public testimony at agency meetings.
X			18. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.

*Already in statute or required.

Prosecutor Council
(Continued)

Applied	Modified	Not Applied	Across-the-Board Recommendations
			B. LICENSING
		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.
		X	3. Provide an analysis, on request, to individuals failing the examination.
		X	4. Require licensing disqualifications to be: 1) easily determined, and 2) currently existing conditions.
		X	5. (a) Provide for licensing by endorsement rather than reciprocity.
		X	(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 statute or required.