

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

**Texas
Sunset
Advisory
Commission**

STAFF EVALUATION

State Bar of Texas

A Staff Report
to the
Sunset Advisory Commission

STATE BAR OF TEXAS

July 1990

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SUMMARY

Summary

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

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

Assessment of Need for Agency Functions

The review concluded that the State Bar Act should be repealed.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

Assessment of Organizational Alternatives

If the decision is made to continue regulation of attorneys by statute, the review concluded that the statute should address only the standard components of regulation. The provision which integrated the state bar should be repealed and a separate agency should be created to handle the regulation of attorneys. The association functions should be dealt with by the supreme court through its inherent powers. If the court decides to continue a unified bar, it can do so through court order. Separating the regulatory and association functions would provide an "arms length" distance between the interests of the profession and those of the state. This "arms length" structure exists for all other professions in Texas. The state regulatory agency would be responsible for annual renewal of attorneys' licenses and certification in specialty areas of practice, enforcing mandatory continuing legal education requirements, operating a discipline system to respond to complaints against attorneys and administration of a client security fund. The structure of the remaining association functions of the state bar would be determined by the supreme court through its inherent power.

Recommendations if Agency is Continued

The administration of the state bar should be modified by placing its funds in the state treasury subject to the legislative appropriations process.

- The operations of the state bar's programs should be improved by:
 - improving the public's awareness of the state bar's complaint process;
 - standardizing processing and investigation of complaints;

- resolving complaints using an administrative process;
- requiring public disclosure of all final disciplinary actions;
- improving the complaint tracking process; and
- establishing the client security fund in statute under the oversight of the supreme court.

FISCAL IMPACT

Preliminary estimates indicate that the recommendations will result in increased costs. If a separate agency is created for regulatory efforts, an additional \$1.2 million will be needed annually. The other recommendations, if adopted, would require approximately \$750,000 per year. The increased costs would be offset by fee increases ranging from \$14 to \$38 depending on which recommendations are adopted. If the state bar's funds are placed in the state treasury, an additional \$13 to \$20 million would be added annually to the state's fund balance.

BACKGROUND

Creation and Powers

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

The State Bar of Texas had its beginning in 1882 when the Texas Bar Association was formed as a private association by lawyers and judges in Texas. In 1939, legislation was passed establishing the State Bar of Texas as an integrated or unified bar which combined disciplinary and association functions. The 1939 Act required anyone who practiced law in Texas to be a member of the state bar. The supreme court amended this Act in 1940 by court order. The order approved a set of rules governing the State Bar of Texas which were similar to the legislative provisions in the 1939 State Bar Act.

The State Bar Act was re-enacted in 1979 following a review of the state bar's activities by the sunset commission. The amended act established the state bar as a public corporation and an administrative agency of the judicial department with ultimate responsibility for oversight vested in the Supreme Court of Texas. The Act specifies that the legislation is "in aid of the judicial department's powers under the constitution to regulate the practice of law". The constitutional power to regulate attorneys is not expressly stated in the constitution but is derived from Article II, Section 1 of the constitution which specifies that "The powers of the government...shall be divided into three distinct departments...and no person...being of one of these departments shall exercise any power properly attached to either of the other...". This provision has been used in court decisions to establish the supreme court's "inherent power" to regulate attorneys. The supreme court exercised its inherent power in 1979 when it entered an order which incorporated the provisions of the State Bar Act.

The State Bar Act specifies the following purposes of the state bar:

- to aid the courts in carrying on and improving the administration of justice;
- to advance the quality of legal services to the public;
- to foster and maintain on the part of those engaged in the practice of law high ideals and integrity, learning, competence in public service, and high standards of conduct;
- to provide proper professional services to the members of the state bar;
- to encourage the formation of and activities of local bar associations;
- to provide forums for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relationship of the state bar to the public; and
- to publish information relating to the subjects listed above.

Policy-Making Body

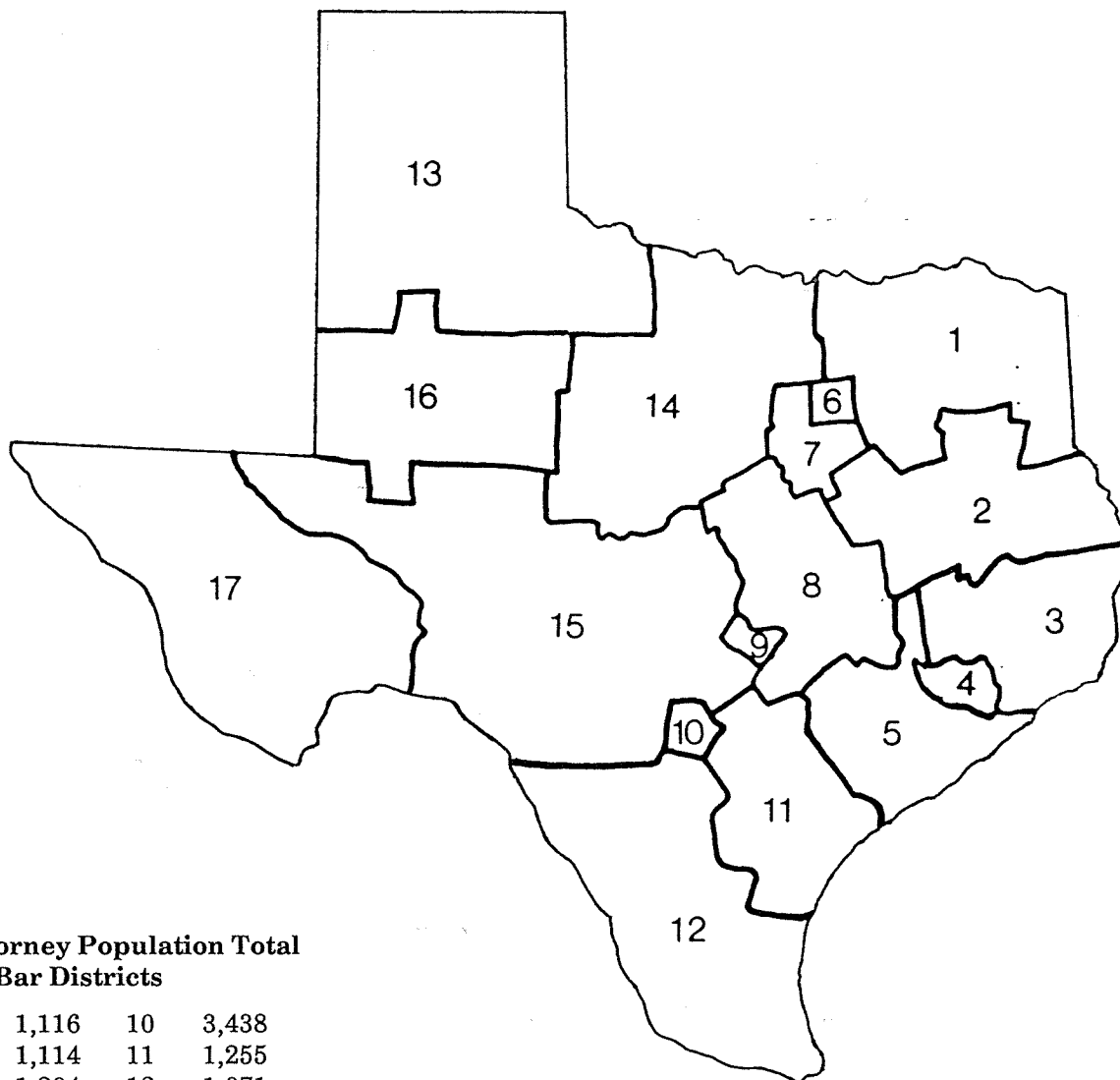
A 42-member board of directors serves as the state bar's policy-making body. Six of the members are public, or non-lawyer, members appointed by the supreme court, three of whom are selected from a list of names submitted by the governor. Each public member appointment is subject to confirmation by the senate. Thirty members are elected from 17 districts across the state. Each district elects by ballot at least one member to represent the district on the board. The number of representatives elected in each district is based on the number of attorneys in the district. A map of the districts and the attorney population totals by district is shown in Exhibit A. The remaining six members of the board are elected statewide and include the president, president-elect and immediate past president of the state bar and the president, president-elect and immediate past president of the Texas Young Lawyers Association. The chairperson of the board is elected by the board. The board also has four non-voting advisory members created by board policy. The board of directors fills the four advisory positions with persons representing a recognized minority. Nominees for these positions are solicited from various sources such as the Black Bar Association, the Mexican-American Bar Association and the Asian Bar Association.

The board of directors is responsible for enforcing the State Bar Act and related rules and for adopting policies necessary to guide the activities of the state bar. The board, as required by rule, generally meets four times per year. Members do not receive compensation for their service but are reimbursed for actual expenses incurred.

To assist the board of directors, the state bar also has 60 committees which conduct much of the state bar's work. For example, the committees examine a variety of legal issues and propose policies and procedures to the board of directors. In this way, the committees assist in the policy-making activities of the state bar. Committee members are appointed by the president of the state bar. Texas lawyers serve on the committees on a voluntary basis. The state bar reports that over 78,000 hours are donated each year in furtherance of the state bar programs through committees. Committees are divided into two categories: standing and special. Appointments to standing committees are for three years; appointments to special committees are for one year. Examples the topics assigned to the committees include "Federal Laws and Regulations Affecting the Bar", "Crime Victims and Witnesses", "Client Security Fund" and "Administration of Justice".

The rules of the state bar provide for an executive committee, consisting of the president, president-elect, chairperson of the board, immediate past president of the state bar; president, president-elect, and immediate past president of the Texas Young Lawyers Association; and such other persons as the board may designate. The executive director and the general counsel of the state bar serve as ex-officio, non-voting members of the executive committee. State bar rules define the purpose of the committee "to perform between meetings of the board such functions, consistent with the State Bar Act or rules, as the board may assign to it from time to time." For example, the committee meets monthly, or as needed, between regular meetings of the board of directors when decisions are needed.

**Exhibit A
Bar Districts and Attorney*
Population by Districts**



**Attorney Population Total
By Bar Districts**

1	1,116	10	3,438
2	1,114	11	1,255
3	1,204	12	1,071
4	13,846	13	752
5	1,162	14	1,013
6	10,142	15	992
7	2,652	16	1,004
8	1,185	17	947
9	4,474		

Out of State: 5,970

*As of June 1, 1990

The rules governing the state bar are promulgated by the supreme court. Changes to the rules may originate from the court itself or by a resolution of the state bar's board of directors or pursuant to a petition signed by at least ten percent of the registered members of the bar. The State Bar Act specifies that the rules may address the operation, maintenance and conduct of the state bar as well as the discipline of its members. Before rules can be changed they must be voted on by ballot by registered members of the bar. The returned ballots are counted at the end of a thirty day period and, by statute, the proposed change is considered valid only if 51 percent of the registered members of the bar have voted on the issue. The supreme court is directed by the act to promulgate the rules and amendments that receive a majority of the votes cast in an election, and they take effect immediately upon promulgation. A rule may not be promulgated without the approval of the members of the state bar in the manner described above. However, the supreme court has, through court order, adopted procedures and requirements without approval of the state bar membership.

Funding and Organization

The state bar annual operating budget for 1990 is approximately \$22.7 million. The state bar fiscal year runs from June 1 to May 31. The state bar does not receive any funds from the state's general revenue fund. Because the state bar's funds are not placed in the state treasury, they are not subject to the legislative appropriations process. The supreme court, rather than the legislature, approves the budget of the state bar.

Membership dues account for about \$5.2 million, or 23 percent of the state bar's income with the remaining \$17.5 million, or 77 percent coming from continuing legal education fees, sales of books and legal forms produced by the state bar, advertising income from the Texas Bar Journal and other sources including interest income and grants from the Texas Bar Foundation. Exhibit B shows the state bar's income by source for 1989.

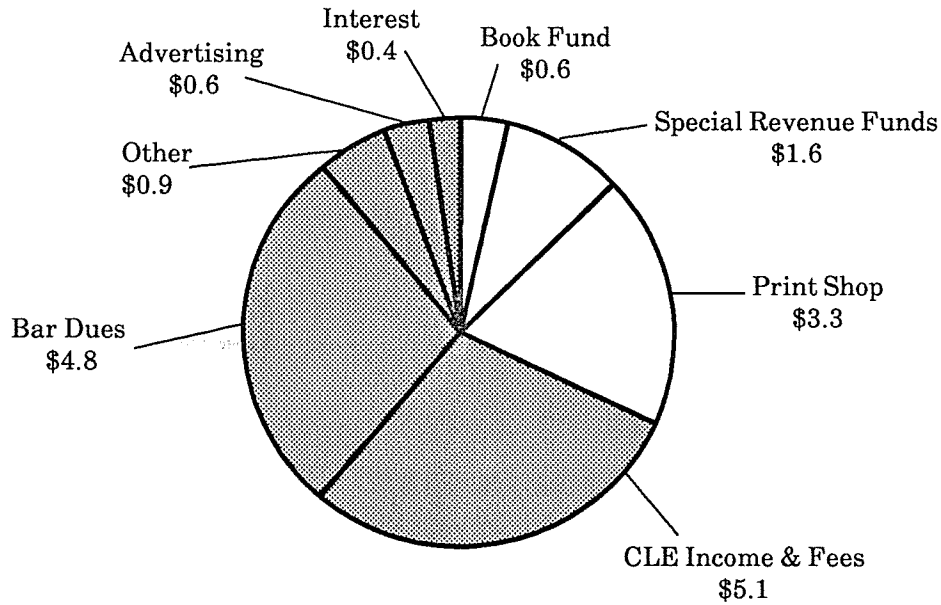
The state bar's two largest categories of expenditures projected for 1990 are salaries and fringe benefits (about \$7.3 million) and activities and projects (about \$5.4 million). The remaining projected expenditures are for administrative expenses, capital purchases, professional fees and advertising and publicity. The actual 1989 expenditures for the state bar are broken out by general categories in Exhibit B. The state bar uses certain services provided by the state and pays for these. These include employee insurance, employee retirement, aircraft services, audit services, supplies, computer service and telephone service and certain bidding and purchasing services. In 1989, payments to the state for these purchases totaled about \$1,200,000. The State Bar Act authorizes the state bar to acquire interest in real and personal property. Using this authority, the state bar has purchased land and buildings for its principal office building and print shop.

The state bar employs 218-full time persons. Twenty-eight percent of the employees are employed in the office of the general counsel, 16 percent in the print and mail division and 15 percent in the professional development program. The remaining 45 percent of the employees are allocated to the state bar's twenty-three other programs. Details on the state bar's organizational structure and employee allocation are shown in Exhibit C.

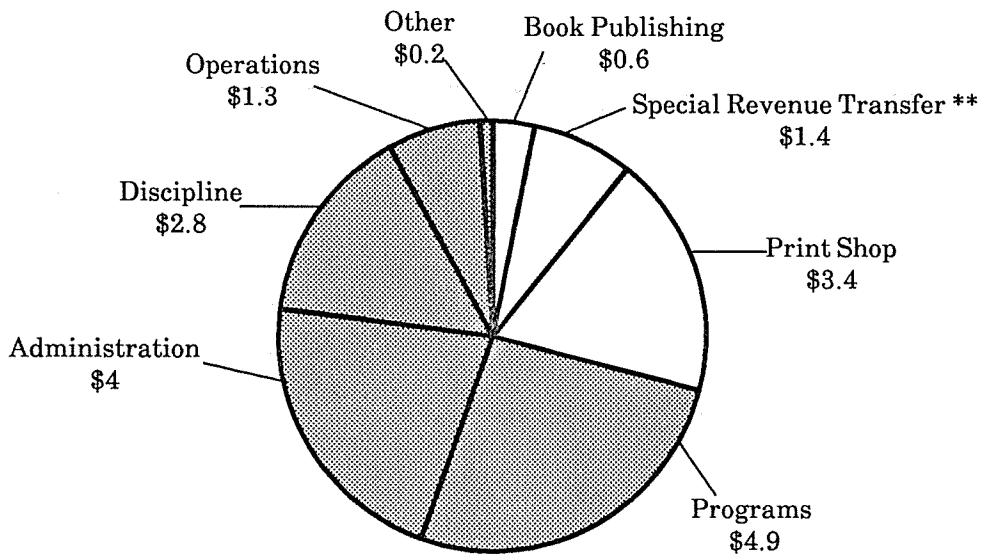
Exhibit B

State Bar of Texas
1988-1989 Actual Income and Expenditures*

INCOME
Total \$17.3 million



EXPENDITURES
Total \$18.6 million



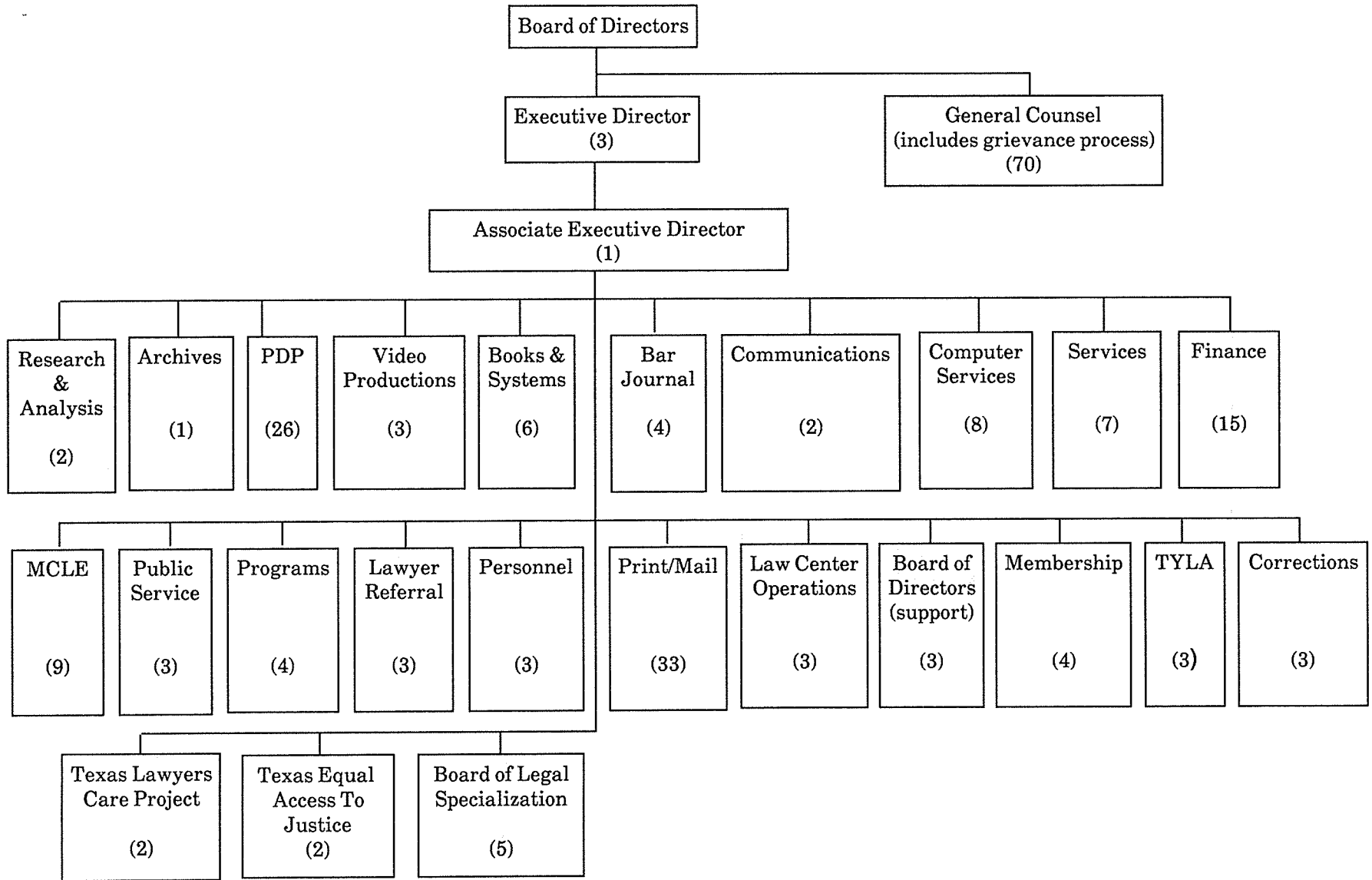
Figures are shown in millions of dollars.
Shaded areas represent the state bar's general fund.

*Expenditures in excess of income are supported by earnings from prior years.

**Revenues from conventions, legal specialization exams and seminars are allocated to their respective special program funds.

Exhibit C

State Bar of Texas Organization Chart and FTE Employees



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Sunset Staff Report

State Bar of Texas

Background

Programs and Functions

The state bar operates 28 programs which can be characterized as being regulatory, non-regulatory/association or administrative in nature. Although all of the programs are not described in detail, the major programs and activities are discussed below.

Regulatory Functions

The State Bar of Texas performs a number of functions which are similar to those of other state agencies which license and regulate professions. These include monitoring the membership status of attorneys and their participation in specialty areas of practice, enforcing minimum mandatory continuing legal education requirements, operating a disciplinary system to respond to complaints against attorneys and administration of a client security fund. The regulatory functions performed by the bar are discussed below.

Membership

The State Bar Act requires that all persons desiring to practice law in Texas be enrolled in the state bar by registering with the clerk of the supreme court. While lawyers are initially admitted to practice law by the supreme court through a process administered by the Board of Law Examiners, to actually practice they must maintain membership in the state bar and pay an annual membership fee. This fee can be compared to a licensing or renewal fee, because a person's continued ability to practice hinges on the payment of the fee. Fees are set by the state bar membership through a referendum and then approved by the supreme court. Current fees are \$35 for attorneys licensed three years or less; \$75 for attorneys licensed more than three but less than five years; \$120 for attorneys licensed over five years and \$60 for non-residents. Attorneys 70 years of age or older are exempt from fee payments. As of May 31, 1990, the state bar has approximately 52,000 attorneys as members. The division is operated with four staff persons using a budget of about \$278,000.

Attorney Discipline

The supreme court has the ultimate responsibility for attorney discipline in the state. In addition to the court's inherent power to regulate the practice of law, the State Bar Act provides the court with authority to adopt rules as necessary for disciplining, suspending, disbaring and accepting the resignation of attorneys. The court has established a grievance oversight committee consisting of six lawyers and three non-lawyers to assist in the oversight of the discipline system and its effectiveness. The court's rules place responsibility for actual administration of the system with the state bar board of directors and its disciplinary review committee.

The state bar's attorney discipline process is based on a decentralized local grievance committee system. Each of the 17 state bar districts has at least one grievance committee of lawyers and non-lawyers. One-third public membership is required. Committees must have at least six members. Currently the state bar uses 46 committees with an average committee size of 15 members. These committees are responsible for processing complaints of alleged violations of the state bar's disciplinary rules. If a violation is substantiated, the committee determines the appropriate sanction. Available sanctions include private and public reprimands, restitution, suspension, probation and disbarment. In addition, the committee may

add terms and conditions to a judgment as it deems appropriate. If the attorney involved does not accept the committee's judgment, a suit is filed by the state bar general counsel for a trial de novo in the district court of the county where the attorney resides. The court then determines the appropriate sanction.

Staff support for the discipline system is provided through the office of the state bar's general counsel. The general counsel has numerous responsibilities related to discipline including standardizing complaint procedures among the districts, maintaining records and statistics on grievances, representing the state bar and the grievance committees in court on discipline matters and providing staff support to the committees for investigations of complaints. The general counsel's office has 70 employees which include 16 attorneys, 16 investigators and 38 support staff. The Austin office has 28 of the employees with the remainder located in major metropolitan areas to support the district grievance committees. The office is operated on a budget of approximately \$3.5 million.

The state bar receives a large number of inquiries against attorneys each year. These "inquiries" are officially considered as complaints if the alleged conduct, if true, would constitute a violation of the state bar's disciplinary rules. In 1989, 7,470 inquiries were received with 4,536 upgraded to complaints. Exhibit D provides information for the last four years on the action taken by the state bar in resolving complaints.

Exhibit D
Summary of Action*
by the State Bar of Texas

	1986	1987	1988	1989
Disbarments	18	6	27	19
Resignations	11	9	14	15
Suspensions	55	77	80	126
Public Reprimands	59	38	62	40
Private Reprimands	108	79	97	101
Other	-	-	3	5
TOTAL	251	209	283	306

* Actions taken may resolve multiple complaints against the attorney disciplined; however, information on the number resolved "per action" was not available.

Mandatory Continuing Legal Education

Minimum continuing legal education (MCLE) is a program required by the Supreme Court of Texas through the state bar's rules. The program's purpose is to ensure that every active member of the bar pursue a plan of continuing legal

education throughout his or her career. The state bar's rules establishes an MCLE appointed by the state bar board of directors to oversee the program. This committee develops criteria for the accreditation of continuing legal education activities and designates the number of hours to be earned by participation in such activities. The rules require that, for an activity to be accredited, the subject matter must directly relate to legal subjects and the legal profession, including professional responsibility, legal ethics and law office management. Unless covered by an exemption, each member of the bar must participate in 15 hours of accredited continuing legal education year. Exemptions from the MCLE requirements are allowed for: judges who are subject to the supreme court order on judicial education, attorneys who are on an inactive status with the state bar, attorneys who are not practicing law in Texas, attorneys who have some type of hardship due to medical or physical disability, attorneys who are full-time faculty members at ABA-accredited law schools, and attorneys who have reached 70 years of age. The MCLE department issued approximately 4,700 notices of non-compliance to attorneys who failed to meet the annual requirement by their reporting deadline. In addition, 679 attorneys were suspended during the state bar's 1989 fiscal year for non-compliance with the MCLE requirements. A staff of seven persons performs the functions of this department with an annual budget of approximately \$419,500.

Client Security Fund

The client security fund of the state bar is designed to help offset the losses incurred by the clients of lawyers who commit dishonest acts. The fund was established by the state bar board of directors in 1975, with \$30,000 in initial funds and a \$20,000 contribution by the Texas Bar Foundation. The fund is now financed from the state bar's general fund through the board of director's budget process. The fund was created to provide monetary relief to clients who have suffered financial loss at the hands of dishonest lawyers, and is set up to pay only when lawyers commit dishonest acts such as theft or embezzlement. If an attorney's dishonesty cost a client money, the client may be eligible for cash relief. The fund is not intended to provide relief for the negligence of an attorney or the inability of an attorney to obtain the desired results of the client.

The client security fund is administered by a committee appointed by the state bar board of directors. A maximum recovery of up to \$20,000 is allowed for violations of dishonesty or theft; however, the committee may seek approval from the board of directors to pay a higher amount. Up to 50 percent of unearned fees paid to an attorney may also be recovered, up to a maximum limit of \$5,000. Since its creation, the fund has paid out over \$946,000. In 1989, nearly \$116,000 was paid from the fund on 16 claims leaving a year end balance of approximately \$1.4 million. The office of the general counsel provides 1.5 full-time equivalent staff to perform the investigative and administrative functions related to the fund.

Board of Legal Specialization

The supreme court has provided that only persons receiving certification by the Board of Legal Specialization may advertise or refer to themselves as specialists in certain fields of law, such as Real Estate, Tax, or Family Law. Currently, over 4,000 attorneys hold certification in 13 fields of specialization. To become board certified in a specialty area of practice, a lawyer must meet certain experience and continuing legal education requirements, submit to a peer review process and pass an

examination. This division operates with a staff of five persons and an annual budget of about \$540,000.

Unauthorized Practice of Law

An enforcement function in which the state bar has a limited involvement is regulation of the unauthorized practice of law. Sections 81.101 through 81.105 of the State Bar Act prohibits a person from practicing law in Texas unless the person is a member of the state bar. The practice of law is defined in statute as "the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined." The statute specifies, however, that the judicial branch has the power and authority to determine whether other services and acts not enumerated in the above definition may constitute the practice of law.

The State Bar Act also establishes an unauthorized practice of law (UPL) committee, under the supreme court which is required to seek the elimination of the unauthorized practice of law by "appropriate actions and methods", including the filing of suits in the name of the committee. The committee reports directly to the supreme court. The role of the state bar is limited to seeking injunctions or rendering other legal assistance at the request of the UPL committee. Upon request, the general counsel of the state bar investigates and prosecutes suits to enjoin non-members of the state bar from the unauthorized practice of law.

Non-Regulatory or Association Functions

In contrast to the regulatory functions described above which are similar to the functions of many state regulatory agencies, the state bar also performs a number of activities which are more characteristic of a professional trade association. The non-regulatory functions are described below.

Texas Lawyers Care

This division administers the pro bono effort of the state bar. These efforts include assisting in the development of pro bono programs, providing assistance to existing programs (such as recruitment and training of volunteer attorneys) and promotion of the concept of pro bono service. The state bar estimates that lawyers in Texas provide over 900,000 hours of pro bono services each year.

Lawyer Referral Service

The state bar operates a free statewide lawyer referral service. This service recruits attorneys to provide legal services at a reasonable fee to members of the general public who are in need of legal services. Referrals are made to members of the state bar who practice in the appropriate geographical areas and who practice in the appropriate areas of law. Efforts are made to refer callers who are unable to pay legal fees to individuals who may provide help free of charge. The department is staffed by three full-time equivalent employees and operates on a budget of \$169,893.

Texas Young Lawyers Association

The Texas Young Lawyers Association is a self-governing section of the state bar. Considered the "public-service" arm of the state bar, TYLA is different from other sections in that it is governed by an elected board of officers and directors. Its efforts include public education, projects to benefit children and the elderly and projects that assist for victims such as battered women. In addition to providing services to the public, TYLA also provides services to members of the legal profession. For example, TYLA sponsors seminars for attorneys, develops and distributes numerous legal publications and provides services to law students. The Texas Young Lawyers Association is staffed by 2.5 full-time equivalent employees of the state bar with a budget of \$584,479.

Legislative Program

The state bar, through its sections and with the assistance of the bar's programs department, has the ability to propose, support or oppose legislation. Because the statute prohibits the use of state bar funds for any activity other than the public purposes stated in its act, the state bar is limited in the types of legislation in which it may be involved. The public purposes which the state bar may address through legislation include such aims as aiding the court in carrying on and improving the administration of justice, improving the quality of laws, advancing the quality of legal services to the public and providing proper professional services to state bar members. The state bar's board of directors sets the policies for legislative action. Four employees support this program on a budget of \$237,000.

Interest on Lawyers' Trust Accounts (IOLTA)

The IOLTA program, which was authorized by the supreme court in 1985 and converted into a comprehensive program by court order in 1988, provides funds for use by the Texas Equal Access to Justice Foundation (TEAJF). The TEAJF, a non-profit organization, makes grants to organizations that deliver civil legal services to low income Texans. Seven directors of the TEAJF are appointed by the supreme court and six are appointed by the state bar with two directors in each group representing the public. Under the IOLTA program, lawyers' non-interest bearing trust accounts are converted into interest bearing status and the financial institutions holding the funds remit the interest to the TEAJF. Client funds include in these trust accounts are those which would not, by themselves, earn identifiable interest because of the small amount involved or the short time the money remains in the account. Income in 1988 provided for 1,989 grants to 35 organizations totaling \$800,000. Income in 1989 of approximately \$4,637,000 enabled TEAJF to make grants in 1990 totaling \$4,200,000 to 42 organizations.

Law Related/Public Education

The state bar has developed an extensive teacher training program in an effort to teach Texas children about the law. In 1988-89, through 49 workshops, the state bar trained 1,700 teachers to teach school children about their rights and responsibilities as citizens and consumers using materials developed by the state bar and TYLA. Over 136,000 students were reached in fiscal year 1989-90. The department has four full-time equivalent employees and a budget of \$243,550, which includes \$16,000 from federal grants and other sources.

Lawyers' Assistance Program

The lawyers' assistance program provides for identification, peer intervention and rehabilitation of any attorney licensed to practice law in Texas whose professional performance is impaired because of physical or mental illness, including deterioration through the aging process, or abuse of drugs, including alcohol. The aim of the program is to enable the attorney to resume the competent practice of law. The program was created by the state bar board of directors in 1983. The director, who is an attorney, receives an average of 100 calls a month on an "800" hotline from impaired attorneys, partners, family and grievance committee members. A statewide volunteer network of more than 450 attorneys, recovering from some impairment, has been established to assist the program director.

Professional Development Program

The state bar's professional development program division has 25 full-time employees. This division presents seminars throughout the year in about 90 locations throughout Texas. All are approved for minimum continuing legal education credit. The department also develops videotapes for use by local bars, law firms and others conducting continuing education activities. Books and tapes developed and produced through this division are sold to those unable to attend the programs. The division operates on a budget of about \$4.5 million, but generates over \$5 million in revenue from its activities.

The state bar also uses two full-time staff persons to operate an education honors program called the State Bar College. The program recognizes attorneys that accumulate large numbers of continuing education hours each year.

Sections and Divisions

To assist in conducting the business of the state bar, its members participate in various "sections" comprised of lawyers who practice in similar legal specialties. Lawyers wishing to join these self-sustaining sections pay additional dues. Each section is designed to bring attorneys engaged in specialized fields of law together to discuss specific topic areas, propose legislation and address problems that are prevalent in the specialty areas. To accomplish this, many sections publish newsletters, reports covering current topics, information on pending and adopted legislation, and recent updates on cases. Currently, the state bar has 33 active sections including such areas of practice as administrative and public law, family law, taxation and women and the law. The various sections are supported on an as-needed basis by 1.5 full-time equivalent employees of the state bar.

The state bar also supports separate divisions for related groups and professions currently including law students, legal administrators and legal assistants. The state bar provides liaison staff to these divisions on an as-needed basis as well.

Administrative Functions

The state bar performs a number of functions which support both the association and the regulatory programs. These functions are discussed below.

Executive and Administrative Services

The state bar is guided administratively by an executive director and an associate executive director. The executive director sits as an ex officio member of the state bar board of directors and has overall responsibility for the state bar's programs and operations. The executive director has delegated primary responsibility for overseeing the agency's administrative functions to the associate executive director. The standard administrative functions of the state bar are provided through a personnel division, a department of finance, a computer services department, a communications department which handles media relations and a print shop which provides most of the agency's printing needs. Fifty-one employees are assigned to these activities.

Video Production

The video production department provides videotape production services and facilities for the state bar. Using two full-time equivalent employees, the department's main function is to provide production support to the professional development program. This department assists a number of bar divisions, including the Texas Young Lawyers Association and the lawyers care program. The division also serves other state agencies on an hourly charge-back basis. The division produces about 100 hours of edited video per year.

RESULTS OF REVIEW

Overall Approach to the Review

Overall Approach to the Review

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

Prior Sunset Review

The State Bar of Texas was reviewed by the sunset commission in 1979 and continued for a 12-year period. As part of the current review, the staff examined the previous staff report, the recommendations adopted by the sunset commission and the resulting statutory changes made by the legislature.

The previous staff review concluded that the regulatory functions of the state bar should be separated from its association functions. The review also concluded that all aspects of the regulation of attorneys, including the admissions functions of the Board of Law Examiners, should be placed in one agency under the oversight of the supreme court. The review also suggested consideration of the following:

- placing the state bar's funds in the state treasury subject to legislative appropriations;
- transferring the disciplinary functions of the local grievance committees to a central committee consisting of attorneys and public members appointed by the supreme court;
- opening meetings of the central committee to the public;
- providing the central committee with necessary administrative support;
- establishing standard procedures for receipt and disposition of complaints using a central filing system with all documents open to the public;
- requiring that all disciplinary actions against attorneys be approved by the supreme court and, for all sanctions less than disbarment, removing the requirement that the state bar must go to court to impose sanctions not agreed to by the attorney;
- eliminating all existing rules governing advertising and limit future rules to those based on documented harm to the public;
- transferring the state bar building to the state for use by agencies of the judiciary; and
- subjecting all policy bodies of the state bar to conflict-of-interest provisions.

The sunset commission adopted some of the staff recommendations and expanded the scope of others. The recommendations concerning advertising, conflict of interest, placing the state bar's funds in the treasury, and standardizing procedures for complaint disposition were adopted. In addition, the commission recommended the following:

- changing the composition of the state bar to 15 members, 11 appointed by the supreme court and four by the court of criminal appeals with five of the members representing the general public;
- granting the state bar corporate authority necessary to administer and manage the Texas Law Center;
- subjecting the state bar board of directors to the Administrative Procedure and Texas Register Act; (APTRA)
- authorizing the board of directors to establish a continuing education program;
- changing the appointment process for the local grievance committees so that the members are appointed by the chairman of the board of directors and requiring that one-third of the members represent the general public; and
- permitting the appeal of grievance committee decisions to the state bar board of directors.

The sunset bill finally passed by the 66th Legislature in 1979 contained some of the sunset commission's recommendations. Changes adopted included granting the state bar corporate authority; subjecting the state bar board of directors to the open meetings act; providing for appointment of the grievance committees by the state bar president; requiring one-third public membership on the grievance committees; and permitting appeal of grievance committee decisions to the state bar board of directors (using a procedure approved by the board).

Approach to Current Review

In accordance with the Sunset Act, the review of the state bar included an assessment of the need to continue legislative regulation of the functions performed by the agency; whether benefits would be gained by changing the organizational structure of the agency; and finally, if regulation of the functions is continued in its present form, whether changes are needed to improve the efficiency and effectiveness of the agency.

With the state bar, the need for the regulation focused on whether continued legislative involvement in the regulation of attorneys was necessary in light of the supreme court's "inherent power" to regulate the practice of law. The review then examined, if legislative involvement is determined to be necessary, whether benefits would result from separating the state bar's regulatory and association functions. The remainder of the report details changes needed if the state bar's current structure is maintained.

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

- review of agency documents, legislative reports, other states' reports, legal treatises, law review articles, court cases, and literature containing background resource material;
- reports on the state bar by consultants and other independent sources;
- interviews with members of the state bar board of directors, grievance committee members, state bar staff in Austin and regional offices;
- attendance at state bar board of directors meetings and executive committee meetings;
- phone interviews with the American Bar Association, the Institute for Court Management, the National Center for State Courts, other states' audit committees and legislative committees, judges, and other states' bar staff; and
- interviews with groups affected by state bar activities and policies including minority bar associations, other associations of attorneys and numerous consumer groups.

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

Assessment of Need for Agency Functions

ISSUE 1: The State Bar Act should be repealed and the regulation of attorneys should be carried out by the supreme court through its inherent power.

BACKGROUND

The practice of law is regulated in all 50 states. With few exceptions, the states' supreme courts have assumed the ultimate responsibility for regulation. In Texas, regulation of the practice of law is currently addressed in two documents--the State Bar Act, as passed in 1979 and a supreme court order issued shortly thereafter. These two documents, although they set out the same provisions, reflect the efforts of the legislature and the judiciary to regulate the practice of law.

The supreme court derives its power to regulate the practice of law from the Texas Constitution. While the constitution does not explicitly grant the court authority over the regulation of attorneys, it states that the supreme court shall exercise the judicial power of the state. This power, in concert with the constitutional requirement for the separation of powers, has been used to support the argument that the supreme court has the ultimate power to regulate the practice of law.

The current State Bar Act was passed in 1979 by the legislature "in aid of the judicial department's powers under the constitution to regulate the practice of law, and not to the exclusion of those powers." The Act states that the Supreme Court of Texas, on behalf of the judicial department, shall exercise administrative control over the state bar and that rules governing the admission to the practice of law are within the exclusive jurisdiction of the court. The legislature's role, therefore, has been to "assist" the supreme court in regulating attorneys.

After the passage of the State Bar Act in 1979, the supreme court issued an order to clarify the court's interpretation of the Act and to re-establish that the supreme court "has the primary responsibility for the administration of justice in the constitutional separation of powers between the three governmental branches." The order declared that the court has a duty to exercise its own inherent power to regulate and control the practice of law and to provide for the proper administration of justice. In ordering that the State Bar Act, "as supplemented by this order and subsequent orders, and all prior orders of the court shall govern the State Bar of Texas", the court asserted its authority over the regulation of attorneys while agreeing to comply with the provisions of the State Bar Act. The order indicated that the legislative act is in effect "until further order of the court", clearly indicating that the court could take action to void the act if it so chose

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

- ▶ **Texas courts, in numerous instances, have recognized their inherent powers to regulate the practice of law.**

- In Eichelberger v. Eichelberger, 582 S.W. 2d 395 (Texas 1979) , the supreme court pointed out a number of cases in which Texas courts have recognized or used their inherent powers to regulate the practice of law These include, among others, State v. Pounds, 525 S.W. 2d 547 (Texas Civ. App., 1975) and Grievance Committee, State Bar of Texas, Twenty-First Cong. Dist. v. Dean, 190 S.W. 2d 126 (Texas Civ. App., 1945) .
- In Banales v. Jackson, 601 S.W. 2d 508 (Texas Civ. App., 1980) the court cited the Eichelberger case and the supreme court's June 11, 1979 order as examples of the existence of the inherent power of the supreme court to regulate the practice of law
- ▶ **The supreme courts of 47 of the 50 states concur that regulation of the legal profession is inherently part of the judicial power of government, to be exercised by the supreme court as the head of that branch of government.**
- ▶ **The Texas supreme court's authority to regulate the practice of law is not restricted by legislative provisions.**
- In State v. Pounds, 525 S.W. 2d 547 (Tex. Civ. App.--Amarillo 1975) the court determined that the Texas State Bar Act provision which required disbarment proceedings be held in the district court of the attorney's county of residence did not limit the court in establishing other rules relating to disbarment.
- In Grievance Committee of State Bar of Texas, Twenty-First Congressional District v. Dean, 190 S.W. 2d 126 (Tex. Civ. App.--Austin 1945), the court acknowledged that, although the legislature has defined what constitutes the practice of law, the definition does not deprive the judicial branch of the power and authority to define other acts that may constitute the practice of law.
- ▶ **The supreme court can and does implement new regulatory programs and requirements without any involvement by the legislature For example, by court order, the court has established a legal specialization program, a program for minimum continuing legal education, an Interest on Lawyers Trust Accounts program and regulations on advertising by attorneys.**
- ▶ **State supreme courts regulate the practice of law with little or no legislative involvement.**
- Courts in eleven states regulate the practice of law under a constitutional provision granting them exclusive jurisdiction over the state bar. These states include Arkansas, Florida, Indiana, Kentucky, Louisiana, Montana, New Jersey, Ohio, Pennsylvania, Utah and Vermont.
- In all but three of the remaining 39 states, the supreme courts have adopted, by rule, order or court decision, the principle that the court has exclusive jurisdiction over the practice of law. The involvement

of the legislature is minimal. For example, only 13 states including Texas, mandate membership in a state bar by statute and the American Bar Association reports that the legislature has jurisdiction over attorney discipline only in California.

▶ **Courts have frequently determined that to the extent any legislative enactment conflicts with the rules of the court, the rules must take precedence and the conflicting statutory language is without force or effect.**

-- In Banales v. Jackson, 601 S.W. 2d 508 (Tex. Civ. App., 1980), the court said "...when a provision of the State Bar Act conflicts with orders of the Supreme Court regarding attorney conduct as to fees or other related matters, the statutory provisions must yield to the court's rules,...because the supreme court does not share the power to regulate the practice of law with the legislature. The ultimate constitutional power lies solely within the jurisdiction of the supreme court".

-- In In re Mackay, 416 P. 2d 823 (Alaska, 1964, rehearing 1965 at 416 P2d 829) a statute directing the court to issue an order of discipline in accordance with recommendations of the state bar board was found unconstitutional for invading the court's inherent power to discipline members of the bar.

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

RECOMMENDATION

- **The State Bar Act should be repealed.**

The repeal of the State Bar Act will completely eliminate legislative involvement in the activities of the state bar and leave the supreme court free to exercise its inherent power to regulate attorneys. The court could continue current efforts to regulate attorneys and the practice of law through court order.

FISCAL IMPACT

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

Assessment of Organizational Alternatives

ISSUE 2: If the legislature decides to regulate attorneys through statute, the statute should address only the standard components of regulation. The professional association aspects of the state bar should be dealt with by the supreme court through its inherent power and not by statute.

BACKGROUND

The oversight of the legal profession in Texas is split between the supreme court, the state bar and the Board of Law Examiners. The supreme court has the overall responsibility to regulate the legal profession. The admissions process is administered by the Board of Law Examiners while the state bar is responsible for regulating attorney performance. The supreme court oversees the operation of these two agencies.

The state bar had its beginning in 1882 as a voluntary organization, the Texas Bar Association. In 1939, however, with the enactment of the State Bar Act by the 46th legislature, a unified or integrated bar was established and named the State Bar of Texas. Under the integrated bar structure, attorneys who desire to practice law in Texas must maintain membership in the state bar, adhere to rules of professional conduct and be subject to a disciplinary process for violations of the rules. Texas was not unique in its move to integrate the state bar. The integration of bars was prevalent in the late 1930s and now 33 states have integrated bars. The integration movement was justified in part as a means of setting up a system of lawyer discipline and promoting professionalism. The compulsory membership requirement made it possible to bring all practicing attorneys together, not only for the purposes of professional development but to establish and maintain professional standards and discipline those who violated the standards. In addition to compulsory membership and a discipline system, other regulatory functions exist within the integrated state bar. These include the certification of attorneys in specialty areas of practice, enforcing mandatory continuing legal education requirements and administration of a client security fund.

The integrated bar structure also combines professional association functions with the regulatory functions discussed above. For example, in Texas, the statute provides for policy direction regarding both association and regulatory functions through a board of directors elected by district to represent attorneys throughout the state. The statute establishes sections which represent specialty groups within the state bar membership to conduct activities of either a regulatory or professional association nature. The statute also provides for democratic decision-making by requiring that rules governing the state bar be approved by the members through a referendum in which 51 percent of the membership must participate. The decision-making for the regulatory and association functions is done, therefore, in accordance with statutory requirements. Voluntary bars, in contrast, establish a system for conducting their association functions without legislative intervention.

An examination of the appropriateness of legislative involvement in developing the structure of the state bar's association functions indicated the following:

- ▶ **The legislature is not involved in developing the structure or overseeing the operation of any professional association except that for attorneys.**
 - The state bar is the only state agency in Texas with a statute that establishes a professional association as part of the agency's role. Other professions such as the medical or accounting professions have a private, voluntary association. The Texas Medical Association (TMA) operates as a voluntary private professional association for physicians. The legislature does not involve itself in determining the proper functions or structure of the TMA, or any other professional association.
 - In all cases of state professional regulation except for the regulation of attorneys, the legislature establishes an "arms length" relationship between the profession and the regulatory agency to assure the public that the regulated profession does not exercise undue control over the regulatory process and the decisions it renders. An example of an "arms length" relationship is the relationship between the Texas Medical Association, which operates as a voluntary private professional association and the State Board of Medical Examiners which regulates physicians. The legislature is involved only in overseeing the activities of the state regulatory agency.
- ▶ **The supreme court, if it determines that an association structure is necessary for the administration of justice, can develop the appropriate structure through court order.**
 - All 50 states and Washington D.C. regulate the practice of law. A majority of the states integrate the professional association functions with the regulatory functions.
 - Texas is one of the 15 states which provides a structure for the professional association functions through statute.
 - Fourteen states and Washington D.C. have developed their professional association structure solely through rule of the state's supreme court.

RECOMMENDATION

- **The statutory provision which establishes an integrated bar should be repealed. The supreme court should determine whether the bar should be integrated. The statute should specify that the regulatory functions of the state bar should be conducted by an agency of the supreme court. The regulatory agency should:**

- operate under the guidance of a nine-member board appointed by the supreme court consisting of six lawyers and three public members;
- perform the following regulatory functions: annual renewal of licenses, certification in specialty areas of practice, enforcement of minimum continuing legal education requirements, operation of an attorney discipline system, and administration of a client security fund; and
- be supported by license fees set by the supreme court at a level necessary to fund the agency operations.

Creating a separate agency by statute for the regulation of attorneys would eliminate the legislature's involvement in the association functions currently conducted by the state bar. The supreme court, through its inherent power, can determine the structure and operation of the professional association activities. Separating the regulatory and association functions would also provide an "arms length" distance between the interests of the profession and those of the state. This "arms length" structure exists for all other professions in Texas.

The state regulatory agency would be responsible for annual renewal of attorneys' licenses and certification in specialty areas of practice, enforcing minimum continuing legal education requirements, operating a discipline system to respond to complaints against attorneys and administration of a client security fund. The association functions of the state bar would be left to the discretion of the supreme court.

FISCAL IMPACT

Adoption of this recommendation would require creation of a license fee to generate revenue to fund the new regulatory agency. Currently, attorneys pay a membership fee (\$35 to \$120) to the state bar which helps support current regulatory efforts as well as association activities. Membership fees currently generate approximately \$4.8 million per year. The cost of the regulatory programs operated by the state bar is also approximately \$4.8 million. An additional \$1.2 million would be needed to provide administrative support for the new agency. This figure, which would represent 20 percent of the new agency's total budget, was calculated using the state bar's current administrative costs and estimating the amounts applicable to the regulatory programs. Therefore, using the current fee membership categories, license fees of \$60 to \$145 (an increase of \$25) would be necessary to fund the regulatory activities at their current level.

Recommendations if Agency is Continued

ISSUE 3: The state bar's funds should be placed in the state treasury subject to the appropriations process.

BACKGROUND

The State Bar of Texas operates on an annual budget of over \$20 million held outside the state treasury and not subject to the legislative appropriations process. The state bar's funds are derived primarily from membership dues, sales of books and other materials and continuing legal education activities. Membership fees are set by the supreme court and paid to the clerk of the supreme court who retains the fees until distributed to the state bar. The state bar's budget is initially developed by its staff and reviewed by a ten-member budget committee of the state bar board of directors. The budget committee submits its proposed budget to the state bar's board of directors and the budget is published in the Texas Bar Journal and discussed in a public hearing. The board of directors then adopts a proposed budget which is submitted to the supreme court for review and approval. Any amendments to the budget during the year must also be approved by the supreme court.

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

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

- ▶ **The budget approval process and oversight of expenditures does not provide the same level of accountability as the standard state process.**
 - The state's budget approval process provides a number of external check points such as the Legislative Budget Board, the governor's budget office, house and senate budget committees, the full membership of the house and senate and, ultimately, a review by the governor. The state bar has only the supreme court acting as an external check point in its budget approval process.
 - Once agencies receive an appropriation, expenditures are subject to the oversight of the state comptroller's office and audit by the state auditor. Agencies also prepare an annual report accounting for all receipts and disbursements. The state bar has no ongoing external check of its expenditures like that provided by the state comptroller, only the internal oversight of the state bar board of directors. While the supreme court provides a potential external checkpoint, the oversight is not mandatory and varies depending on the court's level of interest.

- ▶ **The state bar's budget process differs from that which governs the funding of other judicial branch entities.**
 - The state bar and the Board of Law Examiners are the only judicial branch agencies not subject to the legislative appropriations process.
 - All other judicial entities including the supreme court, the court of criminal appeals, the State Law Library, the Texas Judicial Council, the Court Reporters Certification Board and the State Commission on Judicial Conduct are subject to legislative appropriations.
- ▶ **In other states, the agencies regulating attorneys have budget processes that include greater legislative involvement than Texas.**
 - At least six states receive funds for their attorney discipline process by legislative appropriation. These include Connecticut, New York, North Dakota, South Dakota, Vermont and Tennessee.
 - In California, the state bar's budget is subject to review of a joint legislative budget committee.

PROBLEM

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

RECOMMENDATION

- **The statute should be changed to require the state bar to deposit its funds in the state treasury's general revenue fund subject to the legislative appropriations process.**

This recommendation requires the state bar to deposit its funds in the state treasury's general revenue fund subject to the legislative appropriations process with oversight of expenditures by the state comptroller's office. The legislature will determine the level of funding for the state bar as it does for most other state agencies.

FISCAL IMPACT

Under this recommendation, approximately \$20 million generated by the state bar would be placed in the general revenue fund in the state treasury available for appropriation by the legislature.

ISSUE 4: The state bar should increase efforts to improve the public's awareness of its attorney complaint process.

BACKGROUND

Currently the state bar informs the public about the attorney grievance process primarily through distribution of a short pamphlet. The information included generally describes the state bar, the parameters of professional misconduct, the various phases of the grievance process, and what the consumer can expect from the process. Approximately 8,000 pamphlets are distributed annually to the public by the state bar and district grievance committee members. In addition to pamphlet distribution, grievance committee members give occasional speeches within their local community to inform the public about the process and the state bar infrequently discusses the grievance process in public relations spots on the radio.

The review of the state bar's efforts to publicize its complaint process involved a comparison with efforts of other regulatory agencies in the state and agencies in other states with responsibility for attorney discipline. The review also assessed the public's general awareness of the state bar's grievance process. The results included the following:

- ▶ **Current efforts by the state bar to publicize the complaint process are minimal.**
 - The state bar relies heavily on the existence of the local committee structure to inform the public of the availability of the grievance process. Local grievance committees throughout the state have not put forth any formal outreach efforts to publicize the grievance process. Though committee members may speak occasionally to the public on the grievance process, in most cases, the local committees rely on word-of-mouth to increase public awareness.
 - The state bar sends out pamphlets on the grievance process only when an individual contacts the state bar for information. Generally, the pamphlet is included with each complaint form mailed to individuals with possible attorney grievances.
- ▶ **The American Bar Association, in its 1981 evaluation of the state bar's disciplinary system, recommended that the state bar develop a program of public information and education for the public on its attorney grievance process. The state bar has not implemented such a program since the evaluation.**
 - The ABA recommended that the state bar issue press releases to publicize the appointment of nonlawyer members to the grievance committees. The recommendations also encouraged the state bar to offer assistance in drafting feature articles about the discipline

- system for Texas newspapers and to solicit speaking engagements for nonlawyer members of the agency to address citizen groups on the grievance process. Press releases of this type have not been developed. The only effort identified was an article which appeared in a major newspaper on the Client Security Fund explaining how one complainant received restitution after filing a claim.
- ▶ **Discussions with consumer groups and local grievance committee members during the review indicated a general lack of public awareness of the existence of the grievance process and that most people hear about the process through word-of-mouth.**
 - ▶ **Keeping the public informed about complaint processes has been a continual problem for state agencies. Other state agencies have developed programs to increase the availability of information.**
 - The sunset commission has developed an across-the-board recommendation on information to the public which has been routinely applied to agencies it has reviewed. An agency is required to develop information on its complaint process and establish methods to ensure that the information is available to the public. Efforts include publicizing through information posted on a sign in the business establishment and information listed on business contracts used by the regulated licensee or business. In a limited survey, staff found more than twenty state agencies that, in response to sunset legislation, had increased public awareness efforts.
 - More than fifteen state agencies, including the State Board of Medical Examiners, the Texas Department of Licensing and Regulation, the Texas Employment Commission, the State Property Tax Board, the Texas Department of Health, and the State Board of Insurance provide a toll free "800" number for consumers to call for information on filing complaints. Other efforts include listing numbers in phone books, and advertising in the yellow pages. The State Board of Pharmacy has completed extensive mailouts of complaint brochures to pharmacies statewide as well as to consumer groups such as the Grey Panthers and the American Association of Retired Persons.
 - The state bar currently provides four toll free "800" numbers for information on lawyer referral, professional development, lawyers assistance, and lawyer correctional services. An "800" number is not provided for questions about the grievance process although one is included in the changes to the grievance process under consideration by the state bar and the supreme court.
 - ▶ **Other states have developed comprehensive outreach programs to publicize the disciplinary procedures available to the public for filing complaints against attorneys.**
 - Twenty other states have expanded past the standard "upon request method" of outreach. These states distribute information on state discipline in various ways including law offices, court houses, county

bars, the county clerk's office, prisons, adult education programs, large-scale mailings, citizen complaint agencies, social service agencies, the mayor's office, and libraries.

- Nine other states have a toll free "800" number for use by the public.
- California's public awareness program includes press and media releases, presentations to bar groups, public service announcements in English and Spanish, letters to the editor, and television "talk-show." Additional publicity is provided through direct mailings to libraries, prison libraries, adult education programs and individuals on the state bar's marketing list.
- In Maryland, large-scale mailings are done across the state and an annual report is sent to legislative committees, judges and the circuit courts to publicize the state discipline system.

PROBLEM

The public is generally not well informed about the existence of the attorney grievance process and is receiving limited information on the opportunity to file a grievance against an attorney. State bar efforts to inform the public have been overly reliant on the decentralized grievance committee structure and have not produced a cohesive awareness program for delivery across the state. Other Texas state agencies and attorney discipline agencies in other states have developed more extensive public outreach programs.

RECOMMENDATION

- The statute should require the state bar to increase efforts to develop the public's awareness of the attorney complaint process. These efforts should include requirements for:
 - notice to clients by attorneys of the existence of a grievance process;
 - a description of the grievance process in the state bar's telephone directory listings statewide;
 - a toll free "800" number for access to the general counsel's office in Austin;
 - complaint forms in all county courthouses; and
 - general notices prepared both in English and Spanish.

The establishment of a public outreach program will increase the the public's knowledge of how to file a complaint against an attorney for professional misconduct. The program should include the sunset commission's across the board approach which would require attorneys to provide notice to clients of the availability of the grievance process through sign-posting or information on business contracts. Telephone directory listings of the state bar general counsel

should be expanded statewide to include language explaining how to file complaints. The state bar should institute a toll free "800" number which would provide access to the general counsel's office in Austin. The toll free number should be generally publicized and distributed to other state agencies that catalog and provide toll free numbers to the public for various state services. Complaint forms with instructions for filing complaints should be distributed to all county courthouses in the state. These efforts will increase public awareness and help ensure that the grievance process is available for use by those that need it.

FISCAL IMPACT

This recommendation will have an estimated fiscal impact of \$36,000 in increased annual costs to the state bar. Expenses relate to printing for the increased distribution of complaint pamphlets, expanded telephone directory listings, and the cost of a toll free "800" number.

ISSUE 5: The state bar should establish a standardized process for processing and investigating complaints.

BACKGROUND

The state bar's attorney grievance process begins when an individual contacts one of the 46 local grievance committees or the state bar with a grievance matter. If the state bar is contacted directly it will forward the complaint to the appropriate grievance committee. For this initial contact or "inquiry," as it is officially called, to become a complaint, a local grievance committee must determine whether the inquiry is either an allegation of attorney misconduct or attorney mental incompetency. If so, the complaint is "docketed" and the grievance committee notifies the general counsel, the complainant, and the accused attorney that the complaint has been scheduled for action by the committee. As the committee processes complaints it reports action to the general counsel. State bar staff assists approximately half of the local committees in the screening and docketing of complaints.

To investigate complaints, state bar rules authorize the committees to conduct investigations, including the use investigatory hearings to determine the facts. Upon request of a committee, state bar staff assist in the investigation of a complaint and attend the investigatory hearings. The state bar general counsel employs sixteen full-time investigators to assist the local committees in complaint investigation. The general counsel's staff has grown considerably in the past 10 years. Between 1981 and 1988, four state bar field offices with staff attorneys and investigators have been established in Houston, Dallas, Fort Worth, and San Antonio to assist the local grievance committees. Additional investigative staff has been placed in other mid-size urban areas such as Corpus Christi, Midland, and Tyler. The general counsel is responsible for providing grievance committees with standard procedures for processing complaints but cannot mandate the use of those procedures.

The review examined the consistency of complaint processing and investigations and compared the procedures to those of other licensing agencies and other states. The findings indicated the following:

- ▶ **The state bar's current system has not ensured consistent processing and timely investigation of complaints.**
 - The state bar's general counsel has the responsibility to develop standard procedures but has been unable to ensure compliance because of the autonomy of the local committees.
 - The autonomy of each of the 46 local grievance committees allows committees to operate independently and has resulted in inconsistent screening and investigation. Approximately half of the local grievance committees use no assistance or only limited assistance from the general counsel's office. Consequently, practices

in these committees vary depending on how the chair of the committee chooses to operate. For example, in some committees, chairs do initial screening with review and approval by the committee, other committee chairs screen without actual review by the committee. Other committees use a panel of the committee to screen complaints.

Investigations also differ from committee to committee. Some committee chairs may conduct the investigations while others delegate all investigations to the members. Some committees have members with expert knowledge in complicated areas of law to conduct investigations while other committees do not have such a resource from which to draw. Some committees use staff to conduct entire investigations while other committees use staff to assist or do not use staff at all.

-- Because of the variations between committees, complainants are often subject to varying procedures depending on where they live. Some committee chairs write all correspondence to complaint parties, others assign it to the member conducting the investigation, while others depend on staff. Examples of correspondence sent to complainants indicated variations in the form and content of notices received by complainants. Some grievance committees may track progress and disposition of their complaints while some committees rely on the general counsel's office for complaint tracking.

-- The lack of standardization was identified during the sunset review in 1979 and was raised in a report issued by the American Bar Association (ABA) in 1981. The ABA concluded that the committee system lacks coordination, standardization, and control in processing, screening and investigation of complaints.

▶ **The processing and investigation of complaints is more standardized and consistent when performed by staff of the general counsel's office.**

-- Upon request, the general counsel's office provides support to local committees by handling the administrative and investigative work required to process a complaint. Interviews with state bar regional office staff showed that unlike the committees, complaints are processed according to uniform procedures with direct administrative oversight. Investigations are conducted by trained, experienced investigators in contrast to the committee members who generally do not have professional investigative experience. Upon conclusion of an investigation, staff prepare a standard report which is reviewed internally before presentation to the grievance committee. Investigative reports developed by volunteer committee members are not required to meet a standard of preparation or thoroughness.

-- Four regional offices are available to provide committees with full staff support. Additional investigation staff is available in five locations. Although the general counsel's office indicated that most

committees have some staff support available to them, 22 of 46 committees currently use minimal or no staff support from the general counsel's office. These committees have complaint jurisdiction for approximately one-fourth of the attorneys in the state.

- When the state bar increased its professional staff the large backlog of complaints that existed in the urban committees was significantly reduced. Grievance committee members indicated that having general counsel staff support continues to reduce backlog and aids in keeping the age of complaints within one year. In Houston for example, in 1983, 344 complaints were over one year old. After six years of professional staff assistance, the number of cases over one year old has been reduced to an average of 19.
- ▶ **The volunteer nature of local grievance committees causes variation in processing time and quality of investigations.**
 - Cases processed by grievance committee volunteers may take more time because action on a complaint, including actual investigation is often done by the committee members in their spare time. Interviews with committee members indicated that investigations do suffer because members do not have the time to devote to the complaint. Some members also felt that the cases considered by the committee vary in stages of development because members lack time to investigate complaints.
 - The quality of the investigations is dependent on the expertise of the committee member assigned to a case. The committees currently assign more complex cases to members with more experience. Members indicated that the ability to function as an effective member of the committee is achieved by serving multiple terms on the committee. Newer members must assist in investigations due to the workload of the committees, but cannot provide the same level of expertise as the more experienced members. Staff attorneys must frequently conduct additional investigation on cases that have been developed by the volunteer committee members to have sufficient information to proceed with a court case.
 - The ABA, in its 1989 Model Rules for Lawyer Disciplinary Enforcement, recommends avoiding the use of volunteers because of the limitations on time available to process complaints when compared to paid counsel. To stress the need for professional staff investigations, the ABA indicated that, in complicated cases, volunteers cannot investigate as thoroughly as trained professionals.
- ▶ **The ABA, in its 1989 Model Rules for Lawyer Disciplinary Enforcement, recommends that all investigations be conducted by disciplinary counsel. The model rules stress the importance of separating the processing and investigation functions from the adjudicative or hearing function and recommends that all processing responsibility should be vested in the disciplinary**

counsel separate from the committee responsible for hearing the complaint.

- ▶ **In at least 40 other states, the processing and investigation of attorney grievances is done by disciplinary counsel. Only a few states use volunteers to screen, investigate or resolve complaints.**
 - States with sizeable attorney populations comparable to Texas such as New York, Michigan, California, and Illinois all use paid, professional staff to process and investigate complaints.
 - Only a small number of other states including Alabama, Florida, Kentucky, Montana, New Jersey and Oregon use volunteers to assist disciplinary counsel in processing of complaints. In Florida, however, even though volunteers assist in processing complaints, a designee of the disciplinary counsel monitors committee actions and reviews all committee recommendations for dismissals and discipline.
- ▶ **Most licensing agencies in the state process complaints using standard procedures and employ staff for investigations.**
 - At the State Board of Medical Examiners, 16 full-time staff investigators located across the state are responsible for investigating all complaints filed at the agency. To ensure uniformity, complaints are screened centrally by the chief investigator who assigns cases to staff with processing instructions.
 - The State Board of Pharmacy maintains six full-time field investigators for complaint processing. Complaints are filed centrally at the agency, screened by the executive director, director of investigations and the director of compliance and then assigned to staff.

PROBLEM

Methods used to process complaints across the state depend on the preference of the independent local grievance committee responsible for the complaint. Consequently, important steps in the grievance process such as providing information to complainants, investigations and setting hearings are left to the discretion of the local committees resulting in inconsistent treatment of complaints. Current complaint and investigation procedures used by the state bar are unlike those used by other licensing agencies in the state and most other states as well as those recommended by the ABA model rules of lawyer discipline.

RECOMMENDATION

- **The statute should be changed to require processing and investigation of complaints by state bar general counsel staff using standardized procedures developed by the general counsel's office.**

Using state bar staff will ensure consistent screening of complaints, more thorough and timely investigations, and more uniform treatment for both complainants and accused attorneys regardless of geographic location. Since established procedures are currently used by regional office staff, this recommendation would require all complaints received by the state bar to be processed using standard procedures. Administration of the process by staff will also assist in effective tracking of complaints and maintenance of statistical records.

FISCAL IMPACT

This recommendation will have a substantial fiscal impact on the state bar. Additional district offices, staff attorneys, investigators and administrative support will be necessary to provide for the processing and investigation of complaints. Currently, 22 committees are not supported by state bar staff at the level suggested by this recommendation. These committees have jurisdiction for discipline of one-fourth of the state's attorneys. Preliminary estimates indicate that one investigator office and three new full-service offices, staffed by 13 additional employees, will be needed to provide the recommended support. Using current budget figures for offices of comparable size, the additional offices would cost approximately \$700,000. Membership dues would need to increase by \$14 per attorney to fund this effort.

ISSUE 6: Complaints should be resolved using an administrative process like that used by other licensing agencies.

BACKGROUND

The state bar uses a decentralized grievance committee process to resolve complaints. By statute, these committees, made up of local volunteer attorneys and members of the public, have jurisdiction to hear complaints about attorneys in the committees' districts. The investigatory hearings are structured like those of a grand jury and are nonadversarial in nature. Both the complainant and the attorney provide testimony to the committee and answer questions. Each party may be represented by counsel and call witnesses. The parties are not generally present for each other's testimony and cross-examination is not allowed. The state bar general counsel and the committees have subpoena power to assist in gathering necessary information.

After the hearing, the grievance committee has the authority to resolve the complaint. If a violation is substantiated, the committee determines the appropriate sanction - private or public reprimand, restitution, suspension, probation, or disbarment. The committee negotiates with the attorney for an agreed sanction. If an agreement is reached, the committee issues a judgment that has the force and effect of a judgment of the district court.

If the attorney involved does not accept the committee's judgment, the state bar general counsel files a suit in district court on behalf of the committee seeking the proposed sanction. The court, through a trial de novo, then determines the appropriate sanction.

If the committee dismisses the complaint, the complainant is notified by letter. The complainant may appeal the case, upon approval of the general counsel, to the Disciplinary Review Committee of the state bar. This committee, composed of 17 lawyers and eight public members, reviews the case and may ask the district committee to reconsider the case "when there is clear and convincing evidence that the decision of the committee is erroneous".

The review of the state bar's complaint resolution process included a comparison to the process used by other licensing agencies in the state and other states. The results indicated the following:

- ▶ **All other licensing agencies resolve complaints using a standard administrative process.**
 - The legislature, through the Administrative Procedure and Texas Register Act (APTRA) has designed a hearings process which guides the complaint resolution process of all other licensing agencies.
 - The standard process used by most agencies includes informal resolution when agreed to by the licensee involved. If contested,

- complaints are resolved using an open hearings process. This process allows the accused to appear with counsel, produce witnesses and allows cross-examination of witnesses.
- Decisions are made based upon findings of fact and conclusions of law. The formal hearings may occur before a hearing officer, a hearing panel of the agency's board or the entire board. In all cases, however, the final decision is approved by the agency's board and must be made available to the public.
 - All final decisions made using the formal hearing process are appealable to district court for judicial review. The burden of proof is on the licensee.
- ▶ **The current complaint resolution process used by the state bar does not include the steps contained in the standard process used by other licensing agencies.**
- The state bar does not provide for an open, formal hearing as part of its process. Decisions are made by local grievance committees in closed hearings. Parties to the complaint are not allowed to hear the testimony presented in the hearings. In 1989, 58 percent of all complaints resolved were decided by committees in a closed hearing.
 - Unlike other agencies, decisions are not reviewed by a central oversight body. Local committees impose sanctions against attorneys with no review of their decisions.
 - Unlike other licensees, an attorney can refuse a sanction which requires the state bar to go to court to impose a sanction. A trial de novo is held in district court.
 - The use of the court system to resolve contested decisions unduly increases the processing time of complaints. The state bar reports an average of 520 days to resolve complaints through court. Agencies using an administrative process to resolve contested cases report a quicker resolution time. For example, the board of pharmacy indicated that an average of 230 days is needed for resolution.
- ▶ **Other states' attorney discipline systems include elements similar to the standard administrative process used in Texas.**
- Most other states' resolve complaints using a formal hearing open to the public. The hearing is held by a hearing committee or special master (appointed judge). The committee or master draws conclusions and recommends a sanction to an independent disciplinary board or the supreme court who imposes the attorney discipline.
 - Thirty three other states administer attorney discipline through a separate disciplinary board that is responsible for reviewing sanctions recommended through formal hearings. In many states,

the board makes recommendations to the state supreme court for final disposition of the case.

- Other states do not require their disciplinary counsel to go to district court to impose sanctions against an attorney. Texas is the only state which substitutes the trial in district court for a separate administrative process. Georgia provides the attorney with an opportunity to use the court system, but uses its formal hearings process for almost all its discipline cases. The state's supreme court is currently considering eliminating the court option.
- ▶ **The current system used by the state bar differs significantly from the model system recommended by the American Bar Association (ABA).**
 - The ABA, in its 1989 model rules for lawyer discipline, recommends a system similar to that used by other licensing agencies in Texas.
 - The model rules recommend a governing board of nine members to establish rules for lawyer discipline, to review the administration of the system, and appoint a chief disciplinary counsel to perform screening, investigating, and review of complaints. Hearing committees or inquiry officers, appointed by the board, would hear complaints with review by the board. Under these rules, the board's decision would be reviewed by the supreme court.
- ▶ **The supreme court's grievance oversight committee and the state bar are jointly proposing changes to the grievance process which will be submitted to the state bar membership for approval in the fall of 1990.**
 - The proposal includes the creation of a separate commission to oversee the state's attorney discipline system.
 - Attorneys will be provided the option of using an administrative hearing to resolve their complaint instead of the current committee hearing.
 - Appeals from the administrative hearing will be heard by an internal review committee and then directly to the supreme court.

PROBLEM

The complaint process currently used by the state bar is not like that used by other licensing agencies or other states. Final decisions are made by local committees in closed hearings which are not reviewed by a central oversight committee. Decisions must be agreed to by the attorney involved or the state bar must go through a lengthy court trial to impose sanctions.

RECOMMENDATION

- **The statute should be changed to modify the complaint resolution process as follows:**
 - **transfer of final authority for disposition of complaints to the supreme court's grievance oversight committee;**
 - **provide for informal resolution through a regional panel process using three member panels, composed of two lawyers and 1 public member, appointed by the grievance oversight committee with approval of decisions by the committee;**
 - **provide upon request of the complainant, a review by the panel chairs of complaints dismissed by staff;**
 - **eliminate trial in district court and provide the opportunity for a formal hearing conducted according to the APTRA by a hearing officer who will provide findings of fact and conclusion of law and a recommendation to the oversight committee; and**
 - **provide for final decisions by the oversight committee appealable directly to the supreme court.**

The grievance oversight committee, authorized by the State Bar Act, is composed of nine members appointed by the supreme court. Current statute requires the committee to review the structure, function and effectiveness of the grievance process. This recommendation would expand the purpose of the committee and require its direct participation in the disciplinary process with responsibility for imposing lawyer sanctions. The committee would determine the appropriate number of hearing panels and review and approve informal agreements of sanctions between attorneys and regional panels. If informal resolution is not possible, a formal hearing will be conducted by a hearing officer who will recommend disposition with the committee responsible for the final decision. Because the supreme court has ultimate responsibility to regulate attorneys, appeals of committee decisions would be heard by the supreme court. Exhibit 1 in the Appendix provides an outline of the proposed complaint process.

FISCAL IMPACT

The grievance committee will incur additional expenses resulting from its expanded role in the grievance process. The exact amount, expected to be minimal, has not been estimated. The hearing panels' expenses should be offset by redirecting current expenditures related to the district grievance committees. Also, no additional expenses are anticipated related to the use of hearing officers because the general counsel already has eight staff attorneys that can assume the role of hearing officers. These attorneys currently travel the state litigating court cases against attorneys to impose sanctions for the grievance committees.

ISSUE 7: The statute should require public disclosure of all final disciplinary actions against attorneys.

BACKGROUND

Many licensing statutes have general provisions that specifically protect the confidentiality of information concerning their licensees. Since the boards collect a great deal of background information on their licensees and receive numerous complaints about their licensees, these general statutory provisions protect against improper release of information. Boards generally release information about a licensee only when authorized by the licensee or when the board has taken disciplinary action against the licensee.

The State Bar Act provides that all grievance committee records are confidential and not subject to disclosure under the open records act. Although the statute provides that final actions of disbarment, suspension or public reprimand be made public, the statute further provides that committee action resulting in private reprimand remain confidential.

A majority of the attorney grievances are handled in informal disciplinary proceedings held by the local grievance committees. The proceedings and the results are closed unless the attorney agrees to make them public. Following the proceeding, if the grievance committee decides to disbar, suspend, or a publicly reprimand an attorney and the attorney agrees to the discipline, the committee action is made public. However, if the committee decides to privately reprimand the attorney, disciplinary action remains confidential. Consequently, a major element of the disciplinary process is not open to the public.

Publicity of private reprimands is limited to publishing a notice in the Texas Bar Journal. Private reprimands are included with other information reporting the actions of local grievance committees. A short, general description of the violation is provided along with the city or county where the reprimand was given. Private reprimands are intended to provide committees with a sanction to use when a violation needs attention but would not justify a public sanction.

The review of public's ability to gain access to adequate information about the disciplinary record of an attorney indicated the following:

- ▶ Availability of disciplinary actions taken is important so the public and other licensees can stay informed of potential problems within a profession as well as the performance of individual members of the profession. Privacy of the licensee is important but is outweighed by the need for public access to the fact that a disciplinary problem has been identified and action taken.
- ▶ Over the past 10 years, an average of 67 (thirty seven percent) disciplinary actions issued each year were private reprimands.

- Thus, a significant number of disciplinary action against attorneys are kept from the public.
- ▶ The current policy regarding the release of information on disciplinary actions causes an inconsistent release of information.
 - Decisions reached through informal proceedings resulting in private reprimands are not available to the public. The public has no access to the identity of the licensee, the specific nature of the complaint or action taken.
 - Complaint dispositions involving any of the other available sanctions such as disbarment or suspension are available to the public once the decision is final. The action is printed in the State Bar Journal and released to newspapers in the area where the attorney resides.
 - ▶ The autonomy of the local grievance committees allows for variation in the use of private reprimands.
 - The same violation can receive a public or private sanction depending on the circumstances involved. One decision would be open to the public and the other would not.
 - Of the 101 private reprimands issued in fiscal year 1989, nearly half were for rule violations which, in other committees, resulted in public reprimands for attorneys.
 - ▶ Many state boards, such as the Board of Medical Examiners, the Board of Pharmacy and the Board of Architectural Examiners, routinely release all final orders containing disciplinary actions against licensees, including agreements reached in informal conferences.

PROBLEM

Current use of the private reprimand by the state bar unnecessarily restricts the public's access to information on final disciplinary actions taken against attorneys. Other licensing boards routinely release this type of information.

RECOMMENDATION

- The state bar act should be modified to remove the state bar's ability to use private reprimands and require that all final orders containing disciplinary actions against attorneys be open to the public.

Requiring all final disciplinary actions against attorneys to be open and available upon request would ensure public access to information about the qualifications

and professional history of an attorney. The identity of the complainant and the investigative files would not be available to the public.

FISCAL IMPACT

No fiscal impact is expected from this recommendation.

ISSUE 8: The state bar should improve its complaint tracking system.**BACKGROUND**

Tracking complaints is an important function of a regulatory agency. Information on complaints is used by an agency to assess the effectiveness of its complaint process and identify problem areas. Complaint information also provides a basis for projecting staffing needs to process complaints in a timely fashion. In addition, complaint tracking can be used to identify problem areas in the practice of a regulated profession.

The state bar's general counsel is responsible for collecting and maintaining all records related to discipline of attorneys. The counsel's office receives complaint information in two ways. First, the regional state bar offices in Fort Worth, Dallas, Houston, and San Antonio enter information on inquiries, complaints docketed, and actions on complaints into the state bar's central computer system. A written copy of the information is also sent from the regional offices to the general counsel. Second, local grievance committees that are not supported by state bar staff send copies of complaints and committee meeting minutes to the general counsel's office in Austin. The counsel's staff is responsible for reading the meeting minutes to determine committee action on complaints and entering the information onto the computer.

From the information collected, the general counsel's office generates a list of the active cases which is distributed to the regional offices and grievance committees to assist in tracking the age of complaints. In addition, the staff issues a quarterly report of disciplinary actions taken, brief descriptions of grievance committee actions, items under litigation, a cumulative inquiry/complaint report, and monthly reports from staff supported committees.

The review of the state bar's complaint tracking system focused on the availability of information to monitor the resolution of complaints and assess the effectiveness of the complaint system. Also, the system was compared to those of other licensing agencies. The results indicated the following:

- ▶ **The state bar receives more complaints than any other licensing agency in the state with approximately 5,000 received in 1989 (of 7,400 "inquiries" against attorneys). In comparison, the State Board of Medical Examiners received approximately 2,000 complaints, State Board of Public Accountancy received approximately 1,900, the Texas Real Estate Commission received almost 1,500, and the State Board of Pharmacy received approximately 500.**
- ▶ **Other licensing agencies have developed complaint tracking systems which allow effective monitoring.**

- The board of pharmacy monitors all phases of a complaint's processing. The agency tracks: how a complaint is received - by telephone, letter, visit, other agency report, or field inspection; who filed the complaint - consumer, government agency, pharmacist or doctor; nature of the alleged complaint; the time required for complaint resolution split into the investigative and adjudicative phases; and the resolution - the number of informal conferences, agreed board orders, formal hearings and final board orders.
- The board of medical examiners has developed a similar tracking system. Information is available on who filed the complaint and its type, the time required for resolution and the method of resolution.
- ▶ **The legislature, in the appropriations bill, requires a standard approach for a complaint tracking system.**
 - In a rider to Article 1, the legislature established minimum requirements for complaint tracking to be followed by all occupational licensing agencies. The information collected must be included in an agency's annual fiscal report.
 - Minimum requirements include the number of complaints received, the number of complaints resolved and how the complaints were resolved, the categories and number of complaints received within categories, and the average length of time required to resolve each category of complaints.
 - While the state bar is not required to comply with the appropriations rider, the requirements serve as an indicator of basic information needed to effectively monitor complaint activity. The state bar currently cannot compile the information required by the rider.
- ▶ **The state bar has had difficulty compiling adequate information on complaints.**
 - The autonomy of the local grievance committees has caused inconsistent reporting of committee action. When committees operate without staff support, the general counsel's office must depend on committee chairs to send in minutes of their meetings and then must review the minutes to determine what actions were taken. Staff indicated that reviewing the minutes was cumbersome and susceptible to inaccurate determination of committee action.
 - The collection of information is improved in locations where the general counsel staff provide support to the local committees. For example, in the Fort Worth regional office, staff track the number of phone inquiries received, the number of complaint forms sent out to the public, the number disposed of monthly (by type of resolution) and the number of active cases over 180 days old.
 - Because of the variability of information received by the districts, the state bar cannot easily compile information needed to effectively monitor the resolution of complaints.

- The state bar had difficulty providing information requested as part of the sunset review. For example, the state bar does not compile information on complaints by category of violation and cannot track the resolution of complaints and the time frame for resolution.

PROBLEM

The state bar has the largest number of complaints of all the licensing agencies but, by comparison, does not have an adequate complaint tracking system. The current system does not provide adequate information to ensure timely and consistent resolution of complaints.

RECOMMENDATION

- The statute should require the state bar to improve its complaint tracking system by maintaining information to monitor processing of complaints by category, method of resolution and the length of time required for resolution.

The further development of a complaint tracking system would ensure that the state bar has access to basic information needed to monitor the large number of complaints it receives each year. The system should at a minimum provide information on the number of complaints received broken into categories of violations, the number of complaints resolved and how they were resolved and the time required to resolve each complaint and the average length of time required to resolve each category of complaint. The state bar district offices maintains some of this information but a standard approach statewide will enable the general counsel's staff, the board of directors and the supreme court to monitor and assess the effectiveness of the disciplinary process.

FISCAL IMPACT

Although the development of a tracking system will require additional staff effort, existing staff should be able to develop a system to capture the needed information.

ISSUE 9: The client security fund should be established in statute under the oversight of the supreme court. Changes should be made to the current structure of the fund to raise payment limits and require a minimum balance using a dedicated funding source.

BACKGROUND

The client security fund is not required by statute or supreme court order and was voluntarily created in 1975 by the state bar's board of directors to provide monetary relief to clients who have suffered financial losses through the actions of dishonest lawyers. The fund, by board policy, is designed to pay only when lawyers commit dishonest acts such as theft or embezzlement. The client may be eligible for cash relief if an attorney's intentional dishonesty costs a client money. The fund is not intended to provide relief for the negligence of an attorney or the inability of an attorney to obtain the desired results. The fund is financed through the state bar's annual budget process and was started with a \$30,000 donation from the state bar and \$20,000 from the Texas Bar Foundation. Allocations to the fund averaged \$25,000 for the first few years of the fund's existence, increased to \$250,000 per year from 1982 through 1987 and then decreased to \$150,000 for the 1988 fiscal year. No additional allocations have been budgeted for the 1989 or the 1990 fiscal years.

To use the fund a person must file a claim with the state bar's office of the general counsel in Austin. The claim is then reviewed by the client security fund committee of the state bar to determine whether the act involved is the type for which reimbursement can be made. If the claim is appropriate for reimbursement, state bar staff conduct an investigation. The procedures used to determine the outcome of a claim may include a hearing, a state bar grievance committee proceeding, a criminal prosecution, or the claimant may be required to pursue the claim in court before reimbursement from the fund is possible. After the investigation, the committee determines if the loss is reimbursable and, if so, how much will be paid from the fund.

The fund reimburses up to \$20,000 of an amount lost by a claimant due to a lawyer's dishonest act except in cases where a lawyer has failed to perform legal services which were paid for in advance. In those cases, the fund will only pay up to 50 percent of the unearned portion of the fee not to exceed \$5,000. Current procedures provide that the State Bar of Texas has the right to recover the full amount paid by the fund from any liable person, firm or corporation.

A review of the non-statutory structure and viability of the client security fund and a comparison with other states' funds and similar funds in Texas indicated the following:

- ▶ Unlike Texas, twenty-eight other states have chosen to establish a client security fund through statute, supreme court rule, or a combination of both.

- Twenty-two states have a client security fund established by order or rule of the state's supreme court.
- Four states have a fund created by statute.
- Two states have a statute and a court rule which establish a fund.
- ▶ **The state bar doesn't take steps to ensure that the public is aware of the fund's existence.**
 - Current efforts are limited to informing persons with a complaint filed with the state bar.
 - Other states, like New York and Pennsylvania use a variety of methods to promote their funds, such as addressing professional and civic service organizations, providing bar associations with articles for publication in journals and newsletters and announcing awards of reimbursements publicly by press release to the media statewide. Other efforts include serving as guests on radio and television programs, producing public service announcements and hiring a consulting firm to assist with a special outreach program for the general public.
- ▶ **Current reimbursement limits place unnecessary restrictions on recovery.**
 - Texas' maximum reimbursement limit for theft is \$20,000. In contrast, Florida, Nebraska, Ohio and Oregon have maximum limits of \$25,000; California, Washington and Pennsylvania have a \$50,000 maximum; Hawaii and New York have a \$100,000 maximum and New Jersey has a maximum limit of \$200,000.
 - Current reimbursement limits have, in some cases, prevented the fund from paying the full claim amount. In 1989, \$173,714 in legitimate losses were claimed against the Texas fund. Because of the limit, only 67 percent or \$115,763 was paid on the claims. The full amount of losses, an additional \$57,951, could have been paid if the limit had been set at \$50,000.
 - Texas' maximum reimbursement for unearned fees is \$5,000. Interviews with Pennsylvania, New Jersey and New York (states that have active client security fund programs) indicated that none of these states distinguish between unearned fees and theft in the maximum limits that are set. Current limits for unearned fees have substantially limited claim payments. Because of the limit, only 27 percent of the losses claimed in Texas for 1989 were paid by the fund.
- ▶ **The current method of financing does not provide a stable source of funds to pay claims.**
 - The current method of financing the fund through the state bar's budget process requires the board of directors to balance the needs of the client security fund against the other needs of the state bar.

- Funding levels have ranged from \$250,000 per year to zero for the current year. This method does not provide fund administrators and the public with certainty that the fund will be supported from year to year.
- Most states with a security fund provide a dedicated source of revenue to ensure a constant level of funding. Based on a 1987 American Bar Association survey, at least 32 of 49 states with funds use some method of assessing lawyers an amount which is dedicated to the fund on either a regular or "as needed" basis.
- Dedicated funding by other states has, in many cases, provided a higher level of funding than the amount allocated in Texas. The 1987 ABA survey indicated, compared to the \$250,000 allocated to the Texas fund in 1986, California allocated \$885,900; New Jersey allocated \$1,038,920; New York allocated \$2,670,000 and Pennsylvania allocated \$1,322,280.
- ▶ **A minimum fund balance is needed to ensure that sufficient funds are available to pay claims.**
 - A required minimum balance provides stability for fund administrators and ensures the public that funds will be available to pay legitimate claims.
 - The state bar, by practice in the last two years, has maintained a \$1 million balance.
- ▶ **Current state bar procedures provide a needed structure for the operation of the fund which should be incorporated in statute.**
 - Current procedures establish filing procedures, define reimbursable losses and establish guidelines for payments. These provisions help ensure the efficient operation of the fund.
 - Other recovery funds in Texas have statutory provisions which provide a similar structure to ensure the efficient management of the fund.
- ▶ **The client security fund is the only part of the state bar's grievance process outside the direct oversight of the supreme court.**
 - The fund is part of the grievance process since claims involve offenses which are subject to the grievance process.
 - The grievance process is under the direct oversight of the court by statute and court order.
 - The fund is operated by the state bar under procedures approved by the state bar board of directors, not by the supreme court.

PROBLEM

The recovery fund is not statutorily required and is the only component of the grievance process outside the oversight of the supreme court. Current operating procedures restrict payment of claims, do not provide adequate public knowledge of the fund and do not provide a stable, adequate level of funding.

RECOMMENDATION

- **The client security fund should be established in statute. The statute should:**
 - **require efforts to increase public awareness of the fund;**
 - **increase the limit for individual claims to \$50,000 including claims involving unearned fees;**
 - **require an assessment of the state bar's members as needed to maintain a beginning year balance of \$1 million;**
 - **incorporate current state bar procedures which provide the fund's operating structure; and**
 - **provide for oversight of the fund by a committee appointed by the supreme court.**

Promoting the fund will increase the awareness of the public of the availability of reimbursement for theft by an attorney. Placing the client security fund under the oversight of the supreme court is consistent with the court's role in other aspects of the attorney grievance process. Setting out the provisions for the management and distribution of the fund assets in statute provides continuity for the fund. Raising the maximum reimbursement limit from \$20,000 to \$50,000 will allow full payment of claims in a majority of cases. Establishing a minimum balance for the fund helps to ensure that funds will be available to pay legitimate claims. This recommended minimum balance would be consistent with the fund balance currently maintained by the state bar and is sufficient to cover expected claims. Increased publicity and higher claim limits should lead to a higher number of claims being filed and larger payments necessitating increased funding. If the approximately 51,000 bar members in Texas were assessed a \$10 fee either as part of or in addition to state bar dues, approximately \$500,000 per year could be generated for the fund. The amount generated would cover twice the current level of claims payments.

FISCAL IMPACT

The state bar would incur some additional expenses by increasing promotion of the client security fund. Promoting the fund and raising the maximum limit per claim will result in a higher level of payments from the fund. The additional funds needed would be generated by a fee paid by attorneys. Because of uncertainty as to the actual level of future claim payments, the amount of required additional funding cannot be determined.

... 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 is denoted in abbreviated chart form.

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

* Already in law -- no statutory change needed.

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

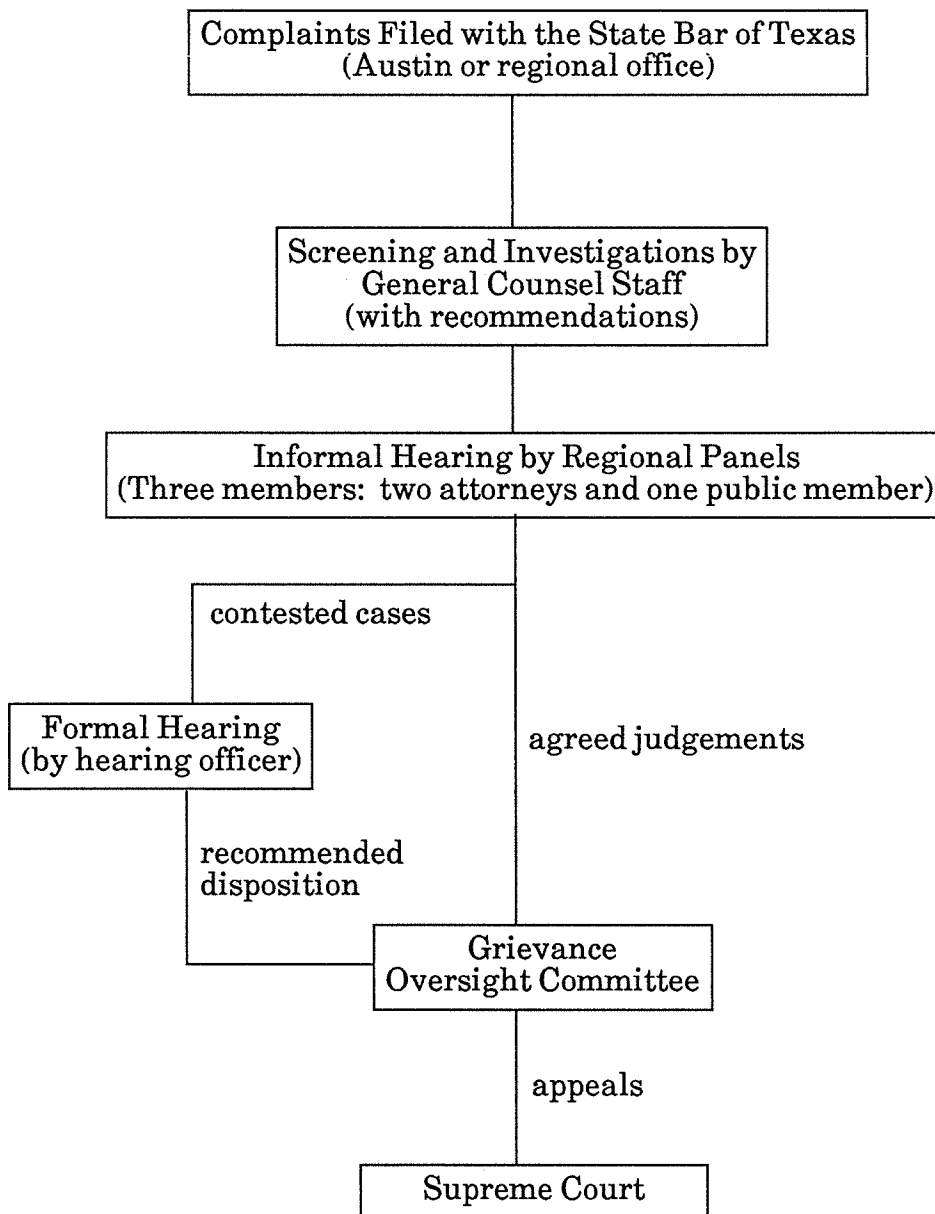
State Bar of Texas (cont.)			
Applied	Modified	Not Applied	Across-the-Board Recommendations
			B. LICENSING
		x	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
		*	2. Provide for notice to a person taking an examination of the results of the exam within a reasonable 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) related to currently existing conditions.
		x	5. (a) Provide for licensing by endorsement rather than reciprocity. (b) Provide for licensing by reciprocity rather than endorsement.
x			6. Authorize the staggered renewal of licenses.
		x	7. Authorize agencies to use a full range of penalties.
		x	8. Specify board hearing requirements.
		x	9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
		*	10. Authorize the board to adopt a system of voluntary continuing education.

* Already in law -- no statutory change needed.

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

Appendix

Exhibit 1 Proposed Complaint Resolution Process



The State Bar of Texas

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