



The Grievance Oversight Committee  
Appointed by  
The Supreme Court of Texas

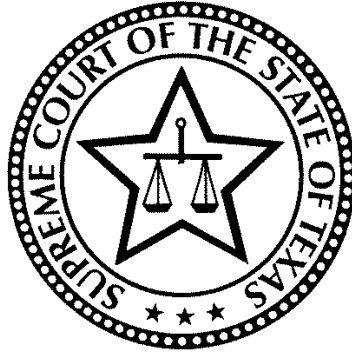
Report 2010

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The Grievance Oversight Committee  
Appointed by  
The Supreme Court of Texas

Members  
2009 -2010

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Don Jones  
Staff Counsel

# GRIEVANCE OVERSIGHT COMMITTEE

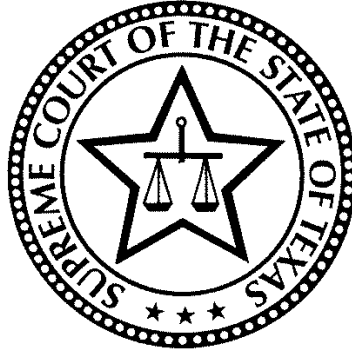
APPOINTED BY THE SUPREME COURT OF TEXAS

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June 1, 2010

The Honorable Chief Justice and Justices of the Supreme Court of Texas:

On behalf of the Grievance Oversight Committee, I am pleased to submit the Committee's 2010 Report in accordance with this Honorable Court's Order Reconstituting the Grievance Oversight Committee, Misc. Docket No. 06-9060.

The Committee again traveled the State throughout this past year in pursuit of input about the grievance governance process. The GOC continues to believe nothing can replace local visits in order to understand fully those processes that are working and those that need improvement. We visited with members of the judiciary, the public, respondents' counsel and representatives of the scores of men and women who work in the system of grievance governance.

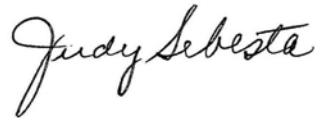
I want to express our thanks for the opportunity to serve the Court, the citizens of Texas and the legal profession. On behalf of the Committee, I want to thank Gaines West, our Immediate-Past Chair, whose term expired merely one month before submission of this report. Gaines' leadership, dedication and participation contributed significantly to the year-long preparation of this report. The GOC continues to enjoy a close working relationship with the State Bar staff and we are especially indebted to Don Jones for his continued invaluable assistance to the Committee, as well as, the assistance we have received from Jennifer Reames.

June 1, 2010

Page 2

Should you require, the GOC will be available to discuss this report with the Court, or answer any questions the Court might have concerning our comments and recommendations. Again, thank you for the privilege of serving the Court in this important undertaking.

Respectfully submitted,

A handwritten signature in cursive script that reads "Judy Sebesta".

Judy Sebesta  
Public Member  
Chairperson, 2010

cc:

Roland Johnson, Esq., President, State Bar of Texas

Terry Tottenham, Esq., President-elect, State Bar of Texas

David Fisher, Esq., Chairman of the Board of the State Bar of Texas

Betty Blackwell, Esq., Chair, Commission for Lawyer Discipline

Linda Acevedo, Esq., Chief Disciplinary Counsel

W. Clark Lea, Esq., Chair, Board of Disciplinary Appeals

Lisa Tatum, Chair, State Bar Board Discipline & Client-Attorney Assistance  
Committee



The Supreme Court of Texas  
Grievance Oversight Committee

Report  
2010

GRIEVANCE OVERSIGHT COMMITTEE

2010 REPORT

TABLE OF CONTENTS

HISTORY AND SCOPE OF REPORT ..... 7

ACCESS TO THE GRIEVANCE SYSTEM..... 7

EX PARTE COMMUNICATIONS... .. 9

REMOVAL OF IMPAIRED GRIEVANCE COMMITTEE MEMBERS ..... 10

DISPUTE RESOLUTION..... 11

OMBUDSMAN ..... 12

RESPONDENTS’ COUNSEL ..... 13

ACCOLADES ..... 13

## 2010 REPORT TO THE SUPREME COURT OF TEXAS

### GRIEVANCE OVERSIGHT COMMITTEE

#### **History and Scope of the Report:**

With the filing of this 2010 Report, the Grievance Oversight Committee (the “Committee” or “GOC”) completes its fourth reporting year since being reconstituted. The history of the Committee is detailed in our 2007 Report, and anyone not familiar with our history may refer to that report.

The Committee travels throughout the State each month of the year to meet with local and state bar leaders, grievance governance volunteers, judges and the public. It is an intense process that requires each member to draw on his or her substantial experience in the grievance system to question and evaluate the answers and comments we receive. Throughout the year the GOC meets with representatives from every segment of the grievance governance system as required by the order from the Court. The GOC reviews annual reports and asks hard questions. The GOC is not an audit committee, and we have no regulatory oversight authority. Our mission is to review and evaluate the grievance system and then report what we see and hear to the Court. This 2010 Report includes updates and further recommendations to our comments made in previous reports, as well as new topics brought to our attention.

Throughout this process the GOC continues to find the dialogue that ensues shapes and changes the grievance system for the better. Seeking no credit for changes, the goal is to continue to ask hard questions and evaluate the answers we get and then report on what we see and hear to our one constituent, the Supreme Court of Texas. Our job is to make recommendations to the Court based on our constant review of the grievance system. The Court is tasked with running this grievance system, and we enjoy the role and the privilege they have given us to inform them.

#### **Access to the Grievance System:**

The GOC commented in its 2008 GOC Report, on some of the unfortunate consequences of the consolidation and closing of Chief Disciplinary Counsel (“CDC”) offices. During that year, the GOC heard from communities other than the large metropolitan areas regarding this issue. These communities believed that the consolidation and closing of CDC offices adversely affected them for different reasons. For example, these areas believed they were underserved and that the closing of the CDC offices negatively impacted the ability of complainants to address their concerns about their representation. A contributing factor was that complainants no longer had the ease of

accessing a local CDC field office or representative. Most importantly, complainants did not have access to an actual person. The GOC believes this lack of personal communication with a “live person” has contributed to the decline in grievance filings.

Although the State Bar of Texas (“SBOT”) increased the ability to access information through the various means of technology, such access is not necessarily true for rural areas and small communities where a significant percentage of the population does not have access nor skills to take advantage of these new services. Further complicating matters is that a significant number of complainants may not speak or write the English language. Through numerous interviews with grievance committee members, bar leaders, and district judges, their collective opinions were that for a vast group of potential complainants comprehending their rights was significantly reduced by the consolidation and elimination of field offices. In 2008, the GOC recommended the Commission and the CDC consider reevaluating their ability to provide alternative methods of supplying services to these impacted areas. Mindful of the costs associated with reopening local field offices, the GOC recommended that the CDC and the Commission for Lawyer Discipline (the “Commission”) find a way to provide more local services to these underserved areas.

It is well documented that although the number of licensed attorneys continues to increase on a yearly basis, the number of grievances filed continues to decrease. In the 2008 Report, the GOC noted that the lack of local field offices in underserved areas could have been a significant factor that led to a lower number of grievances being filed in those areas. The GOC commented that further scrutiny into the issue, through statistical analysis and investigation, was warranted.

Since the closing of the local field offices, in South Texas for example, local legal service organizations have seen an increase in the need to assist in requests for information and assistance from potential complainants. This increase appears to be an unintended consequence of reduced access to the grievance system after closing local field offices. Further, this unintended consequence has shifted some of the responsibility of serving complainants from the CDC and the Commission to the already overburdened local legal service organizations.

Based on conversations with those in the legal service system, it is common for individuals seeking services regarding grievance filing to be frustrated by the inability to visit with someone in person. Meeting someone in person who can answer questions and assist in form-processing is extremely important to these individuals who may lack technological sophistication and who may not be proficient in the English language. Again, the lack of personal assistance due to the closing of local field offices has shifted this responsibility to local legal services organizations.



During our travels this year, the GOC continued to hear similar concerns from the rural and small communities regarding the consolidation and closing of field offices. Two common themes have emerged:

1. Consistent with the concerns expressed in 2008, the lack of field offices make it difficult for individuals in underserved areas to have face-to-face assistance in navigating the grievance process. In some areas, fact sheets and grievance forms are provided to court personnel, but they are not easily accessible to complainants.
2. Equally important is that the lack of field offices has removed the “face” of the CDC from underserved areas. Without a local office, complainants find it necessary to seek assistance from the local legal services organizations or through the internet. As the disciplinary system increasingly relies upon technology as the primary vehicle to educate the public and capture complaints, access to the system by those without sufficient technological ability or access will necessarily decrease.

**Recommendation:** The GOC recommends increasing public knowledge and information regarding the grievance system through Public Service Announcements (PSAs). Print advertisements and radio/television announcements, both in English and Spanish, are options, as well as permanent, visible and accessible kiosks in courthouses throughout the state to provide actual grievance forms in both English and Spanish with instructions. Because the distribution of fact sheets and grievance forms to various court personnel is inconsistent, the GOC recommends that the CDC and the Commission work with the District Clerk’s Association, local legal aid associations and other such groups to insure consistent availability.

#### **Ex Parte Communications:**

It has been brought to our attention that some panel members have inappropriately contacted the CDC requesting advice or answers to various questions specific to filed complaints. The GOC has been assured by the CDC that such inappropriate ex parte communications are addressed in the training materials and are discouraged.

**Recommendation:** The GOC encourages the CDC to continue using their training materials to stress the inappropriateness of this direct contact. The CDC staff should be admonished not to enter into such discussions. Additionally, the existence of this continued contact warrants the need for improved training materials providing more in depth guidance to answering any questions that might arise.

## **Removal of Impaired Grievance Committee Members:**

The attorney grievance system of the State Bar of Texas is dependent upon the dedicated and professional volunteer lawyers and members of the public who gratuitously give of their time to serve on the various District Grievance Committees. The State Bar Board of Directors' Policy Manual outlines the duties, responsibilities, training and procedures for operation of grievance committees and panels. Further, the Policy Manual provides the procedures for the nomination, appointment and removal of grievance committee members. As a general rule, the District Directors nominate and the State Bar President appoints grievance committee members. Likewise, the President with the concurrence of the applicable Director(s) may remove a grievance committee member.

During the travels of the GOC throughout the state and discussions with various groups, the GOC found that most, if not all, grievance committee members find their service on panels to be both rewarding and enjoyable. On rare occasions, dedication to service can morph into a sense of entitlement, and it becomes necessary to remove a grievance committee member involuntarily. Section 6.04.11 (Removal of Grievance Committee Members) of the Policy Manual provides the guidance and authority for the removal of grievance committee members. In summary, the Policy Manual provides that the President may remove a member for "cause" or shall remove a member for certain convictions. Section 6.04.11 defines six categories for a "cause" removal.

Conspicuously missing as a ground for removal is the impairment of a member. Often in the case of impairment, the effected person may not fully appreciate his or her infirmity or limitations. It has been brought to the attention of the GOC that subsequent to appointment there have been grievance committee members who became impaired. By necessity, the impacted chairs have developed various "work arounds" to address the situation. The GOC recommends that the SBOT implement changes to the Policy Manual to add a third category authorizing the President to remove a grievance committee member for impairment and providing a definition for impairment. The GOC recommends adding a third category as opposed to adding a seventh provision for "cause" in order to avoid any unjustified stigma associated with removing a member for "cause."

**Recommendation:** The GOC recommends the following amendment to Section 6.04.11 of the State Bar Board of Directors' Policy Manual:

**6.04.11 Removal of Grievance Committee Members.** The President may remove, for cause **or for impairment**, grievance committee members, with the concurrence of the Director or the majority of the Directors in whose District the grievance committee member serves. The President shall remove from a grievance committee any member who during his or her term of service has been convicted of a misdemeanor involving theft, a felony, or a crime involving moral turpitude. The Chief Disciplinary Counsel shall keep the Commission, the President, and the appropriate Director(s) informed as to any problems with either attendance or performance of grievance committee members.

"Cause" for the purpose of recommending the removal of a grievance committee member shall include:

- (A) when a member has two absences from meetings of the grievance committee or panel thereof within any twelve-month period;
- (B) when a member of a committee neglects or breaches the duties for that office;
- (C) when a sanction has been imposed on a lawyer committee member during the term of service;
- (D) when it is learned that a member made a material misrepresentation regarding his or her eligibility to serve;
- (E) when it is learned that a member is or has become ineligible to serve; or
- (F) when a member is charged with or indicted for a misdemeanor involving theft, a felony, or a crime involving moral turpitude.

**“Impairment” for the purpose of recommending the removal of a grievance committee member means any physical, mental or emotional inability to appropriately carry out his or her responsibilities as a grievance committee member.**

### **Dispute Resolution:**

The GOC stated in our 2008 report that there was conflicting information about the availability of dispute resolution without a hearing. Respondents’ counsel suggested such a resolution is a welcome and successful option, when offered. The GOC continues to hear inconsistent reports from grievance committee members and the CDC about the use of such dispute resolution.

The GOC suggested that if rule changes were needed to offer dispute resolution, then we would support them. The GOC thinks there are some clear advantages to early dispute resolution in the process. Some with whom we have met suggested an option to enter into an agreement with both parties to place the critical time line in abeyance in order to pursue dispute resolution. Others have said the ability to schedule a meeting with the complainant, the respondent and the CDC before the summary disposition would be helpful. Members of grievance committees with whom the GOC has met see value in dispute resolution, not just during the evidentiary phase, but earlier in the process.

**Recommendation:** The GOC recommends, while not going back to a prior grievance system, some dispute resolution options be a part of the grievance system.

**Ombudsman:**

The GOC, in its 2007 Report recommended the establishment of an ombudsman office or position to help complainants with issues involving complaint filing. The GOC recommended the ombudsman's office not be in a reporting line of responsibility to the CDC, the Commission for Lawyer Discipline, or the Board of Disciplinary Appeals, but rather that the DCAAP Committee of the Bar Board consider the creation and staffing of an ombudsman office or position. In several of the responses to the 2007 Report, the GOC was informed that such office exists within the Chief Disciplinary Counsel's Office.

Having been so informed, the GOC in its 2008 Report, looked at how the Ombudsman's position was used within the CDC. The CDC indicated the ombudsman responds to public complaints primarily after a grievance had been dismissed. Based on the GOC's review of letters and responses to questionnaires provided by the CDC, the GOC noted a high degree of dissatisfaction by complainants whose complaints were summarily dismissed. The 2008 Report expressed the GOC's belief that the intake process should be made more responsive at the front end when complaints are initially filed. The GOC's concept of "ombudsman" is an individual who assists complainants outside the CDC system to access, understand and participate in the grievance system.

The ombudsman within the CDC's office does assist potential complainants who are sight impaired or have some other disability in the preparation and filing of complaints. Likewise, the ombudsman will provide guidance in general terms, *i.e.* it is not necessary to cite a particular rule of conduct or use the language of the rule. This assistance appears to be administrative, not substantive. The GOC has been told the ombudsman also receives numerous calls from complainants, investigates issues raised by the calls, and prepares written findings when warranted. Again, this process appears to take place after the filing of the complaint. When there is a finding of no just cause or a summary dismissal, complainants are referred to the Client-Attorney Assistance Program (CAAP) by the CDC. The GOC has been informed that the ombudsman is also responsible for handling the Client Security Fund, a significant responsibility in itself. Likewise, the GOC has learned that the CDC staff expends a significant amount of time addressing complainants' concerns about the grievance process.

**Recommendation:** The GOC appreciates the efforts of the CDC and the ombudsman, both for the work they perform and for their forthright responses to the GOC inquiries. The GOC, however, continues to believe the position of ombudsman should be disassociated from the CDC with its only responsibility being to the public in any and all aspects of the grievance system.

## **Respondents' Counsel**

This year, to capture the respondents counsel perspective, the GOC asked Jim McCormack to prepare a memorandum to address issues of particular concern based on his experiences in representing counsel who find themselves in the grievance system. Mr. McCormack's memorandum is attached to this report. His comments are similar to some observations made by the Committee, but ultimately his comments are his own and do not necessarily represent the viewpoint of the Committee. The GOC believes that providing a forum for these opinions is a healthy exercise and one that will provide an important voice in the dialogue concerning grievance governance issues.

## **Accolades:**

In previous reports, it has been customary for the GOC to recognize many individuals who have been an exemplary part of the system of grievance review and processes. This year the GOC wants to thank Justice David Medina, who made himself available to us throughout this past year as the Court's liaison. The GOC is also pleased that Justice Don Willett is our new liaison on the Court for the coming year. The GOC appreciates his interest in the grievance system and the work of the Committee.

As a committee, the GOC will certainly feel the void created by the term expiration of our Immediate-Past Chair, Gaines West. Gaines' leadership over these past years, including the 2007 reconfirmation of the value of the Supreme Court's Grievance Oversight Committee, cannot go without special recognition. Many thanks to Gaines for his innovations and openness to consider any option to make the grievance system better and for creating dialogue amongst the many entities that make up the body of the Texas system of grievance governance.

It is difficult to single out the many individuals whose contributions continue to be responsive to the needs of an ever growing and changing grievance system. Therefore, the GOC thanks all who met with us during the year from around the State, to the many participants of the grievance governance system – both attorney and public members – who have volunteered their time to policing this profession. The GOC will continue to assist in the pursuit of a better grievance governance system, and it is to this goal that the Grievance Oversight Committee will continue to dedicate itself.

VIA EMAIL AND REGULAR MAIL

May 14, 2010

Ms. Judy Sebesta, Chair  
Supreme Court Grievance Oversight Committee  
9027 Glen Springs Circle  
Dallas, Texas 75243

Re: Respondent Counsel Letter for the Committee's Consideration.

Dear Ms. Sebesta:

I am privileged to be asked to provide my thoughts as a respondents' counsel to the Supreme Court Grievance Oversight Committee for inclusion with its annual report to the Court.

Although I now occasionally represent respondent attorneys in the State Bar grievance system (and have since at least the late 1990s), I have had also had the perspective of serving on the other side of the docket as Chief Disciplinary Counsel of the State Bar of Texas from 1991 to 1996.<sup>1</sup> While a "respondents' counsel letter" might be expected to focus on problems and issues relating to my representation of respondent attorneys in the grievance system, my more pressing concerns involve the discouraging developments within the grievance system over the last 20 years.

#### **Four Charts**

I have attached four charts (two numerical charts and two line graphs) that I developed to illustrate the input and output of the grievance system over the last 20 years. I believe that the data reflected on these charts is the same as that provided by the grievance system to your Committee in past years, although I found and corrected a couple of mathematical errors in that data. The Bar's original data did not include some earlier years that are depicted on my charts, but, fortunately, I had the data from the early 1990s (from my tenure as Chief Disciplinary Counsel and as reported by the Commission for Lawyer Discipline to the State Bar Board of Directors). I acquired the information relating to the growth of the Texas lawyer population for the last 20 years from the State Bar's website.<sup>2</sup>

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<sup>1</sup> I served on the Texas Disciplinary Rules of Professional Conduct Committee of the Bar for several years after my tenure as General Counsel and Chief Disciplinary Counsel. I am also a past Chair of the Texas Center for Legal Ethics and Professionalism.

<sup>2</sup> It would be very helpful for the grievance system to capture even more data: for example, the system does not apparently capture how many times a particular disciplinary rule is violated, as reflected in final disciplinary judgments. To learn this information now, a person would have to sort through every disciplinary summary in every *Texas Bar Journal* for a period of time. There are at least two benefits to capturing these facts: (1) CLE programming can be better directed toward understanding disciplinary rules that are regularly violated; and (2) in efforts to revise disciplinary rules—such as the process underway now at the Court—it would be useful to know how often certain disciplinary rules are violated and how they are violated.

As a result, I was able to chart the growth in the Texas lawyer population compared with the number of complaints filed each year (where data was available—the earliest year depicted in the charts was an “estimate”<sup>3</sup> that I inherited when I started as Chief Disciplinary Counsel in the fall of 1991) and also compared with the number of lawyers disciplined each year.<sup>4</sup> As noted above, in some of the reported data, there were relatively minor mathematical errors (e.g. for some years, the total number did not equal the numbers in the column—for example, in the total disciplines imposed each year, there were reported totals in 2004-05 and 2007-08 that were in error). I checked the math for all years and believe that my totals are correct and that the reported totals are, in two years, incorrect.<sup>5</sup> The correct total in 2004-2005 should be 414 total disciplines (not the reported 427) and in 2007-2008 the total should be 299 and not the reported 266.

### **The Overall Trend is Discouraging**

The overall trend is discouraging since, as the Texas attorney population has steadily increased over the last 20 years (by at least **30,000** new lawyers during that period), the number of complaints filed and the number of lawyers disciplined have been in relatively steady decline since the 1994-95 bar year. Although there is slight “up and down” fluctuation in some years, the overall trend over the longer term is downward. The last four bar years (since 2005) have seen the total number of lawyers disciplined settle in at roughly half (or less) of the number of total disciplines imposed 15 years ago.

I can understand someone trying to argue that this is good news because lawyers are simply committing less misconduct than in the past, but I doubt that anyone believes that is the case. With the growth of the legal profession in Texas over the last 20 years, most people would reasonably expect the growth in the number of complaints and the number of lawyers disciplined to roughly track that significant and steady increase in lawyers—as well as the steady growth in the Texas population. I see no reason why this should not be so.<sup>6</sup>

I also realize that the grievance system is underfunded (in fact, it was just a few years ago that the Chief Disciplinary Counsel’s Office was defunded by at least \$1 million per year) and that the CDC closed offices and reduced staff. Around the same time, the grievance system itself was “reformed” to eliminate investigatory panel hearings (largely, in my view, for the convenience of lawyers and to the detriment of complainants). It would not be surprising if these steps to reduce costs (and

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<sup>3</sup> Little statistical information of any kind regarding the grievance system was available prior to the 1991-1992 period and thereafter.

<sup>4</sup> It is true that one disciplinary action against a lawyer may actually dispose of more than one complaint (for example, several complaints may result in a single disbarment), but this has always been the case. It would be incorrect to argue that this is a significant factor in assessing the inputs and outputs of the grievance system.

<sup>5</sup> I am glad to be corrected if I have made math errors of my own.

<sup>6</sup> Improved State Bar CLE programming with emphasis on legal ethics might also be a factor, although one thing does not change over time: human nature and the propensity to do something wrong even though it is known to be wrong.

inconvenience) did not significantly hamper effectiveness. It would also be useful to know if there is something internally within the grievance system's operations that is reducing the number of lawyers disciplined each year, beyond mere budgetary and staffing constraints.<sup>7</sup> For example, systems of any sort under the stress of numbers and demands may have a tendency to "triage" inputs so that an unofficial higher threshold is set for devoting attention and resources to certain matters.

I understand that meaningful reform of any system comes around only once in a generation or so. There was great energy and financial commitment devoted by the Bar to the improvement of the grievance system in 1991—a Sunset year for the Bar in the Texas Legislature—and for some time thereafter. Over time, it is perhaps inevitable that other priorities would begin to intrude upon that level of energy and financial commitment and that certain decisions would be made to incrementally scale back the reforms of 1991-1992.<sup>8</sup> Historically, the grievance system has been the primary *raison d'être* for the State Bar. It would be appropriate to retrace our steps now to determine if we lost sight of that for a time.

Again, I appreciate very much the opportunity to share my thoughts with the Committee. I do not intend my comments as critical of any institution or individual. Too often we focus on blame when we should be focused on identifying solutions. The Committee can be a catalyst in this regard.

Very truly yours,

James M. McCormack

Enclosures.

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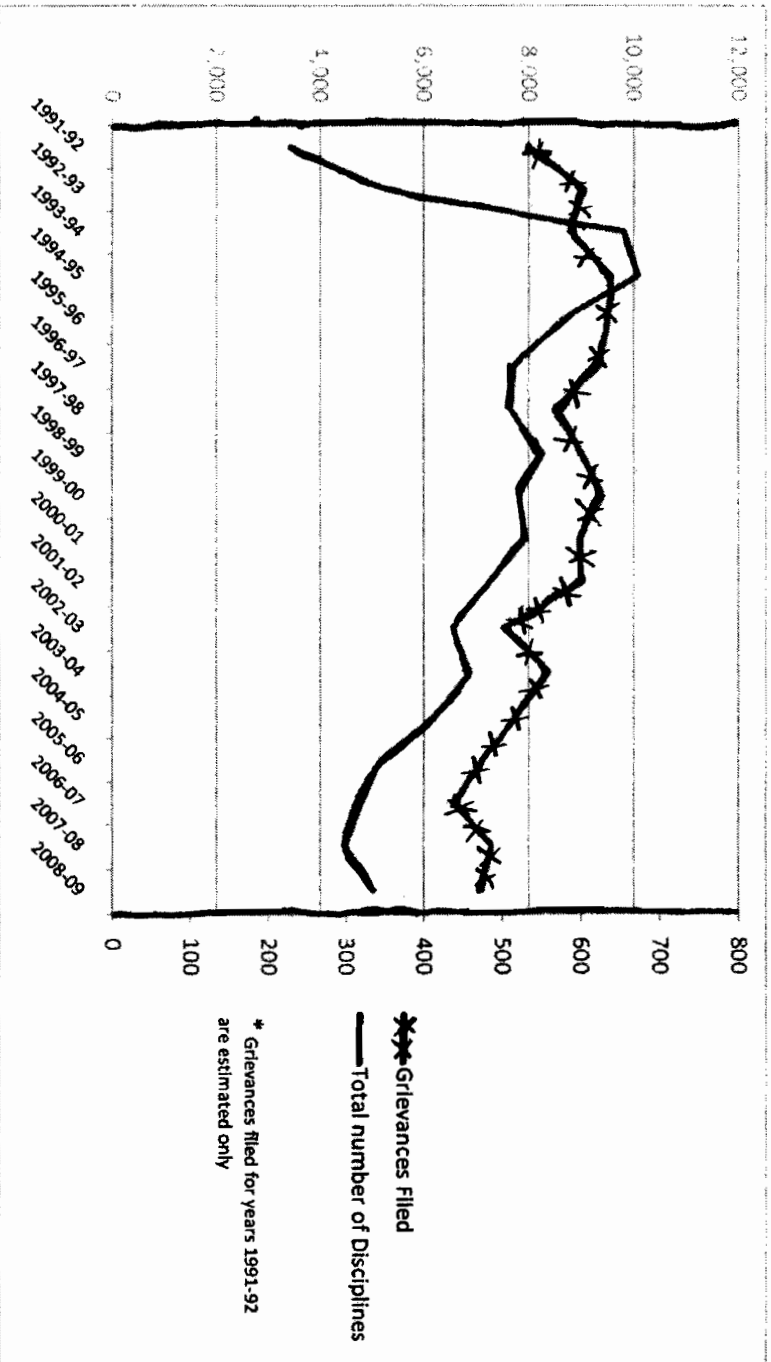
<sup>7</sup> I am not critical of the Chief Disciplinary Counsel's Office in terms of its commitment to manage the system that it is permitted to have—nor am I critical of the current Chief Disciplinary Counsel's skill, experience and knowledge. There has never been a Chief Disciplinary Counsel (or before that title, a General Counsel of the Bar) who came to this position with as much hands-on experience and historical knowledge of the grievance system as Linda Acevedo. She has spent nearly 25 years in the process and is an able lawyer and manager.

<sup>8</sup> I am not critical of all of the changes made over the past 15 years. Certainly, it is a rare period of reform that does not need some adjustment over time. We all live with financial constraints of one kind or another—and the Bar is no different. It would be best if there was a different method for periodically adjusting State Bar membership dues to reflect the increased costs that every organization faces. When I think of all of the expenses that we face in practicing law (from rent to office equipment and staff), our bar dues are an immaterial expense at their current modest level. The Court could certainly take the lead in directing regular, incremental increases in bar dues so that the 83,000 strong membership of the Bar is more of a financial partner in the legal profession in Texas.



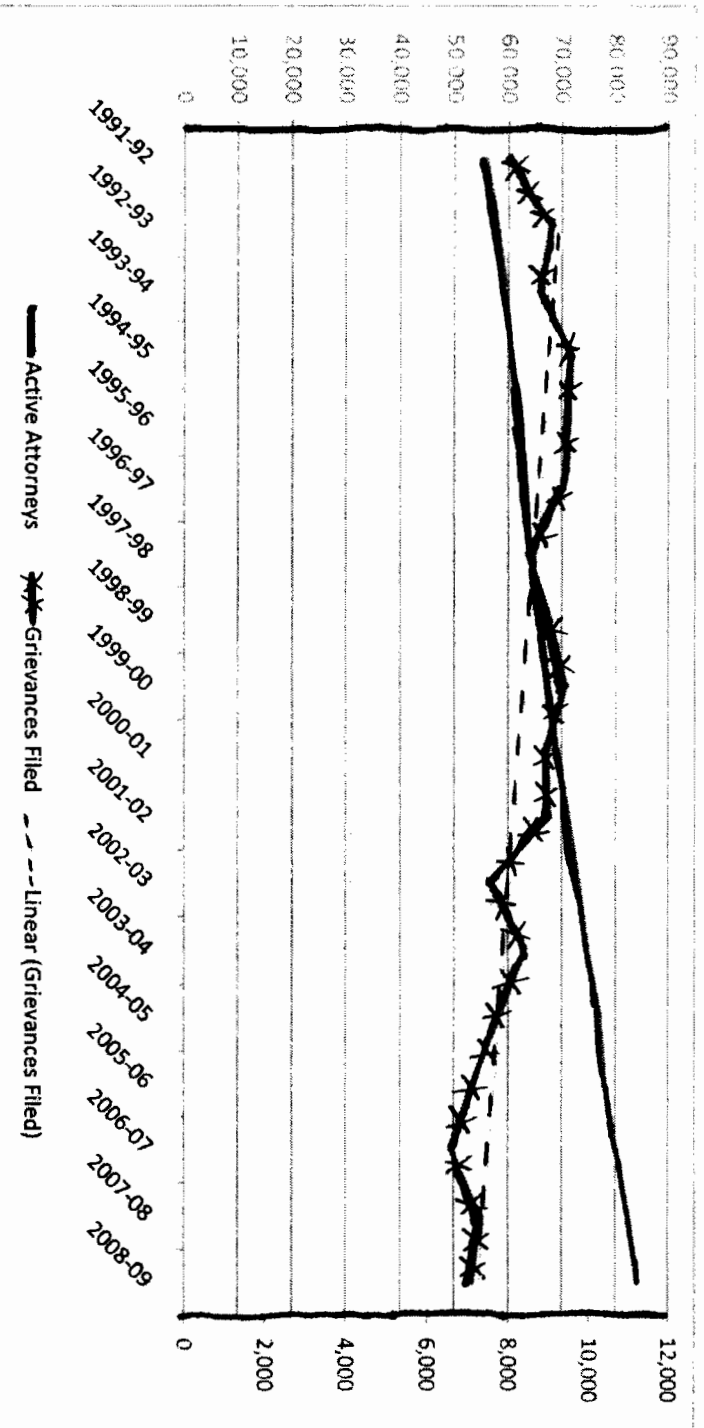
# State Bar of Texas Attorney Grievance Chart

## Grievances Filed v. Total Number of Disciplines



	<b>Grievances Filed</b>	<b>Total number of Disciplines</b>
1991-92	8,000	228
1992-93	9,079	354
1993-94	8,783	655
1994-95	9,582	673
1995-96	9,523	575
1996-97	9,376	515
1997-98	8,484	511
1998-99	9,040	552
1999-00	9,430	521
2000-01	8,962	530
2001-02	9,027	482
2002-03	7,518	437
2003-04	8,404	459
2004-05	7,780	414
2005-06	7,117	344
2006-07	6,577	320
2007-08	7,308	299
2008-09	7,108	335

# State Bar of Texas Attorney Grievance Chart



	Active Attorneys	Grievances Filed
1991-92	55,883	8,000
1992-93	57,921	9,079
1993-94	59,495	8,783
1994-95	60,500	9,582
1995-96	61,638	9,523
1996-97	63,469	9,376
1997-98	63,810	8,484
1998-99	66,093	9,040
1999-00	67,524	9,430
2000-01	69,201	8,962
2001-02	71,170	9,027
2002-03	73,084	7,518
2003-04	74,675	8,404
2004-05	77,056	7,780
2005-06	77,934	7,117
2006-07	80,094	6,577
2007-08	82,414	7,308
2008-09	84,183	7,108