



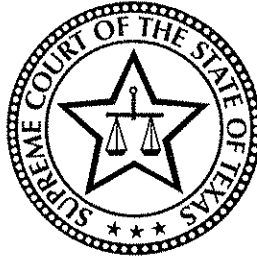
**The Grievance Oversight Committee
Appointed by
The Supreme Court of Texas**

Report 2008

P.O. Box 12487
Austin, Texas 78711

800-204-2222 ext. 1508
512-427-4108 Fax

www.TXGOC.com



**The Grievance Oversight Committee
Appointed by
The Supreme Court of Texas**

**Members
2007 – 2008**

**Gaines West, College Station, Chair
Judy Sebesta, Dallas, Vice-Chair
Demetrius Bivins, Houston
Virginia Bowers, Dallas
Randall Chapman, Austin
Karen Nicholson, Midland
Velva L. Price, Austin
Stan Serwatka, El Paso**

**Don Jones
Staff Counsel**

GRIEVANCE OVERSIGHT COMMITTEE

APPOINTED BY THE SUPREME COURT OF TEXAS

CHAIR
GAINES WEST

VICE CHAIR
JUDY SEBESTA

MEMBERS
DEMETRIUS BIVINS
VIRGINIA BOWERS
RANDALL CHAPMAN
KAREN NICHOLSON
VELVA L. PRICE
STAN SERWATKA

STAFF COUNSEL
DON JONES



*Reply to
Gaines West
1515 Emerald Plaza
College Station, Texas 77845
Phone: (979)694-7000
Fax: (979)694-8000
gaines.west@westwebblaw.com*

September 1, 2008

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

On behalf of the Grievance Oversight Committee, I am pleased to submit a summary Report in response to this Honorable Court's request. We understand that our 2008 Report is to discuss, among other issues, selected comments that the Court received after the Committee's first Report in 2007. It is the understanding of the Committee, therefore, that this 2008 Report will be far more succinct than our first Report in order to meet this charge of the Court. The Committee will return to a more expanded format in its 2009 Report.

This Committee has again traversed the State since writing its 2007 Report and interviewed many men and women working in our grievance governance system, our judiciary, respondents counsel and the general public who are concerned with lawyers conduct. Additionally, we attended the Grievance Symposium hosted by the Commission for Lawyer Discipline last fall.

I again would like to thank the Court, both personally and on behalf of each Committee member, for the opportunity to serve on the Grievance Oversight Committee. We continue to feel honored to serve the Court, the citizens of Texas and the legal profession as members of this Committee.

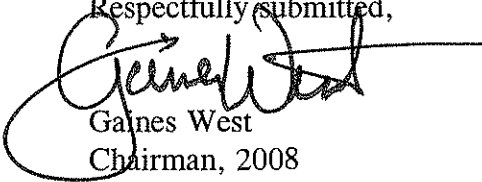
I would also be remiss if I did not mention the special staff support Don Jones gave to the Committee during this last year. He is a consummate professional and routinely goes beyond what we ask him to do in order to get the job done. His special skills are truly needed in providing the assistance we must have in the preparation of this Report each year.

September 1, 2008

Page 2

We are available to discuss this report with the Court, or answer any questions the Court might have, at your convenience.

Respectfully submitted,



Gaines West
Chairman, 2008

cc:

Harper Estes, Esq., President, State Bar of Texas

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

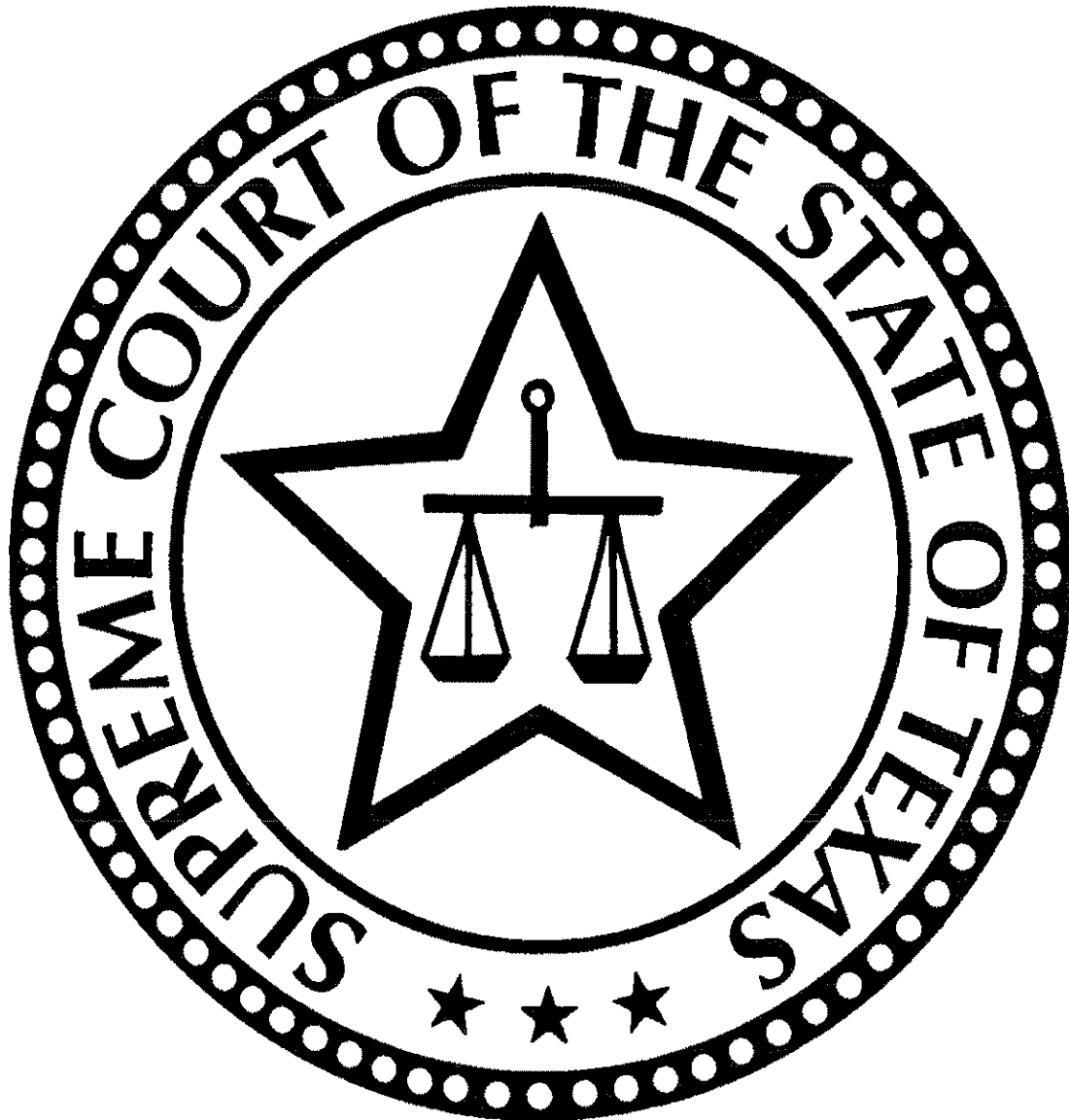
Joe Shannon, Esq., Chairman of the Board of the State Bar of Texas

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

John Neal, Esq., Chief Disciplinary Counsel

Tom Pitts, Esq., Chair, Board of Disciplinary Appeals

Michelle Cheng, Esq., Chair, State Bar Board Discipline & Client-Attorney Assistance Committee



**The Supreme Court of Texas
Grievance Oversight Committee**

**Report
2008**

GRIEVANCE OVERSIGHT COMMITTEE

2008 REPORT

TABLE OF CONTENTS

HISTORY AND SCOPE OF REPORT..... 1

COMMENTS AND UPDATES TO THE 2007 REPORT 1

JUST CAUSE OR INVESTIGATORY HEARINGS..... 1

CONSOLIDATION OF CDC OFFICES 3

COMPLAINT INTAKE AND PROCESSING 4

ETHICS ASSISTANCE:..... 6

ABA COMMITTEE ON PROFESSIONAL DISCIPLINE..... 8

DIVERSITY IN THE GRIEVANCE SYSTEM 8

RESPONDENTS COUNSEL..... 9

THE BOARD OF DISCIPLINARY APPEALS 10

ACCOLADES 10

2008 REPORT to the Supreme Court of Texas

Grievance Oversight Committee

History and Scope of Report

For a more thorough review of the history of the Grievance Oversight Committee (the “Committee”) please refer to our 2007 Report. In this, the Committee’s 2008 Report, we address selected comments made to the Court by several grievance governance entities concerning the Committee's 2007 Report.

To prepare this report the Committee, once again, traveled the State and met with many in our grievance governance system. In addition to meeting on several occasions with the Commission for Lawyer Discipline leaders, the Commission as a whole, and the Chief Disciplinary Counsel, select members of the Committee met with the Bar President and Bar President-Elect, representatives for the Texas Center for Legal Ethics and Professionalism, the Continuing Legal Education Committee, the Bar Board Chair, representatives for the Advertising Review Committee, the Texas Lawyers Assistance Program, and the Law Practice Management Section of the Bar. Several of our members also met with the Client Attorney Assistance Program Director, Bennie Ramirez. We also had the pleasure of meeting with many men and women in our judiciary, with public legal service organizations and members of the general public, all of whom provided valuable input and help in the process of our review of the grievance governance system.

Comments and Updates to the 2007 Report

Just Cause or Investigatory Hearings

Contained in the Background History section of its 2007 Report were statements by the Committee concerning issues involving the absence of what was once known as the just cause or investigatory hearing after the 2003 legislation changes to grievance processing. Some commented they feared the Committee was recommending, or favoring, either legislation or rule changes that would take the grievance system back to the one in effect before the 2003 legislative changes. It was expressed by some that it seemed the Committee’s real desire was to restore the use of investigatory panels in the local grievance committees to involve once again the complainant and respondent attorney in the system at an early stage.

We want to make it clear our intention was not to raise such an issue to support a roll back of the legislative changes, or suggest that any such specific remedy would be appropriate. The reason the Committee commented as it did was because we have heard, in interviews we regularly conduct from our travels around the State, that local grievance panel Chairs, grievance committee members and members of the public state a concern that neither the complainant nor the respondent attorney feel under the post 2003 legislative changes as if they are as involved in the grievance process in the same manner that they were prior to the 2003 legislative changes. We have noted the intensity of this concern varied depending on the size of the community we visited. In the smaller venues there was a greater concern that the grievance committee could no longer involve both the complainant and respondent attorney in the early stages of the grievance process. We found in the larger venues no similar concern that these changes caused such a result, and it is generally believed the post-2003 legislative changes have streamlined the process for the better. In larger communities the grievance committees felt the pre-2003 grievance system clogged their dockets and kept them from adequately and timely processing complaints.

We continued to hear these comments throughout our travels this past Bar year, but with much less vigor. In fact, many on the local grievance committees have little actual, or anecdotal, information about the earlier system (prior to 2003) since their tenure on their local grievance committee now normally does not pre-date the 2003 changes. We did note, however, little change in the desire of those in the smaller venues to want to have more input from the complainant and respondent attorney at an early juncture – especially those who had actual or anecdotal experiences with the pre-2003 system. Those in smaller venues also expressed the desire to have some input from the complainant and respondent attorney into the Summary Disposition of grievances. We also consistently heard that some grievance committees now rarely hold Evidentiary Panel proceedings and if they were called on to do so, they felt they would require additional training. We believe this all points to the need for the Commission for Lawyer Discipline ("Commission"), and the Chief Disciplinary Counsel ("CDC"), to explore within our existing Rules alternative ways of including more complainant and respondent attorney involvement early on in the processing of grievances and to also explore web based training for grievance committee members (somewhat like the Ten Minute Mentor Series, or Webinar offerings, now in use).

The Committee heard conflicting reports from respondent's counsel, and from the CDC, regarding the availability of mediation and how it may be used in evidentiary

proceedings. The mediation option was described by respondents counsel as a welcome option, when it is offered. The Committee encourages the Commission and the CDC to explore consistent application of dispute resolution techniques as early as possible in the grievance process. The Committee offers these comments to encourage use of our present Rules to accomplish these goals as much as possible. Should the Commission or CDC feel the need for Rules changes to offer dispute resolution early, and more often, the Committee will support both the Commission and CDC to further these goals.

Consolidation of CDC Offices

In this section of our 2007 Report we commented on the consolidation and closing of CDC field offices. In our travels this past Bar year we heard from two "outpost" destinations in our State that believe they are suffering from the lack of local field offices. In far West Texas, in the El Paso area, there is no CDC office closer than the San Antonio Regional office. This is also true for South Texas. Either Houston or San Antonio is the closest CDC office for them. From comments given to us by grievance panel chairs, grievance committee members, local bar presidents and state district court judges, both areas believe they are now underserved and that the lack of local CDC field offices has negatively impacted the number of grievance filings by complainants. They feel that a contributing factor to the lower number of grievance filings is that complainants no longer have the ease of accessing a local CDC field office. They have also told the Committee that computer access is limited in both of these areas as some residents are living on mere subsistence budgets and have no ready access to computers, or if they do have such access they have limited or no experience with them. Both in far West Texas and in deep South Texas, we were told that the local CDC field offices, prior to downsizing and consolidation, provided welcome personal contact with complainants who sometimes could neither read nor write. In fact, due to the lack of local CDC field offices in these areas – and in spite of the very professional and helpful staff in the San Antonio office – we have been told the options for a vast group of potential complainants seeking assistance in comprehending their rights and filing a complaint against a lawyer have been significantly reduced.

The Committee recommends the Commission and the CDC consider reevaluating their capability to provide some level of local service in what now appears to be underserved areas of our State. The Committee is mindful of the cost-benefit analysis that must be done by the Commission, and the CDC, to consider a return to providing more local service in underserved areas. The Committee notes that the lack of available local field CDC offices in underserved areas may be one of many factors that have led to a lower

number of grievances being filed in the grievance system. While it is tempting to conclude that other factors contribute to this reduction in the number of filed grievances (e.g., better ethics education and the impact of CAAP), we offer the comment that the lack of local field offices – or a meaningful intake alternative - in these areas appears to be a significant contributing factor which we believe should at least require further statistical analysis and investigation.

Complaint Intake and Processing

The CDC's office has been reorganized this past Bar year to create a central intake unit for the evaluation of *all* complaints. While this action on its face puts decision making further away from the regional offices, it has the positive effect of ensuring a higher level of consistency in classification determinations. For years the Committee has received comments that lawyers who commit misconduct in one grievance region would face more serious penalties than lawyers committing the same or similar infractions in another region. In fact we have heard that a lawyer could be sanctioned in one region, but not in another, for the same conduct. We believe the centralization of intake will help balance any real or perceived inequities in making classification decisions.

The 2007 Report included recommendations to make the grievance governance system more user friendly to the public, including the creation of an ombudsman function to assist persons with limited literacy or with no understanding of lawyer ethics requirements. In responses to the 2007 Report, we learned for the first time that the CDC has an ombudsman who responds to public complaints primarily *after* a grievance has been dismissed {there apparently is still no assistance available to help a complainant with filing a grievance}. Letters reviewed by the Committee, which were provided by the CDC ombudsman, frequently demonstrate a high level of dissatisfaction by complainants when complaints have been summarily dismissed. The purpose of the Committee's 2007 recommendation was to make the intake process more responsive at the front-end when complaints are initially filed. The Committee has been made aware of complaint procedures in governmental agencies, and in commercial enterprises, where members of the public are helped to construct their complaint. The Committee recommends implementation of a similar structure in the attorney disciplinary system. Additionally, currently neither CAAP nor the CDC website information provides sample complaints, or narrative descriptions of rules, that describe instances of misconduct. We believe finding ways to provide samples of complaints, or narrative descriptions, would be helpful to those unfamiliar with the grievance process. The Committee learned from the CDC that improved assistance and access would be helpful, but stated a preference

that it be located outside of the CDC office. We agree. The Committee questioned CAAP staff about complaint assistance being an appropriate CAAP function. We were told that the Bar's existing policies do not allow them to provide the needed help. The Committee recommends the Bar Board re-examine this policy with a view to improve public protection and assistance by creating an ombudsman position outside the CDC and the Commission to help answer questions about complaint filing and composing complaints.

The Committee also recommends that the CDC utilize modern technology to allow for the online preparation and filing of complaints. This is a process that is used by many governmental entities, such as the Public Utility Commission, to allow for easier access by the public when rule violations are discovered or suspected. The Committee was pleased to recently learn that the CDC is upgrading its computer and case management system to facilitate the potential for the online filing of complaints.

Committee members also reviewed with the CDC that there appears to be a limited number of complaints handled against public officials and against members of the judiciary. The Committee intends further study of this apparent trend. The Committee heard recently that the CDC intends to consider collecting data on complaint handling when public officials are involved. The Committee believes this will provide needed additional data to evaluate the effectiveness of our system when public officials are involved in a complaint.

Also, in our meetings across the State, we were told that lawyers who work in governmental service often have complaints about ethics violations pursued with less vigor than those filed against lawyers dealing with fee generating clients. We were also told that individuals represented by appointed counsel appear to complain at a disproportionately higher rate about their grievance complaints being dismissed. These anecdotal reports are being further evaluated by the Committee and the Committee plans to continue to monitor these two issues. Additionally, the Committee has been told that complainants who have grievances against judges, who violate lawyer ethical standards as set out in the Disciplinary Rules of Professional Conduct, are routinely referred to file complaints solely with the Commission on Judicial Conduct. The Committee knows of no requirement that a victim of lawyer misconduct must make an election to file with one agency or another, and we therefore recommend that intake procedures be modified to ensure that the public is informed that certain actions by judges may result in sanctions by the Commission on Judicial Conduct, as well as sanctions by the Commission for Lawyer Discipline.

The Committee believes that it has been somewhat stymied in its ability to review closed complaints due to an internal State Bar rule that allows for (but does not require) the destruction of complaint files 180 days following a dismissal. The policy was apparently established at a time when storage problems were a concern when extensive paper files were the norm. Today, with low-cost electronic storage, and with more documents being electronically scanned, the Committee now recommends that the retention policy used by the Commission and the CDC be revised consistent with statutes of limitations for civil lawsuits. We have been told that the Commission and CDC are reviewing these issues and most recently have agreed to consider revising record retention to two years. The Committee believes this longer record retention period will ensure better access and review of many issues.

In addition to the development of centralized intake, there are two other changes that have been implemented since our last report that deserve favorable mention. In the past, the CDC has encountered difficulties with lawyers failing to keep the State Bar informed of their location. Newly adopted rules now require all lawyers to self-report membership data changes. The Committee was also informed of exploratory efforts by the CDC to have a separate clerk's office handle administrative filings. Removing that function from the prosecutorial responsibilities of the CDC, and the oversight and "client" responsibilities of the Commission, the Committee believes will provide a more neutral platform for the docketing function involved in grievance processing and provide improved public access to docketed information. We heartily support these efforts.

The Committee also wishes to recognize actions undertaken to expedite grievances against attorneys who have committed crimes. In the past, the disciplinary process has literally been placed on hold for those attorneys who face criminal proceedings. The Commission then acted to, in effect, piggyback its disciplinary actions after a criminal conviction had been finally adjudicated. This delay has no doubt resulted in attorneys continuing to practice law who might otherwise have been sanctioned, and who could potentially have continued to harm clients. In the last year the CDC has filed for interim suspensions against attorneys resulting in quicker disciplinary action, when appropriate, and we congratulate the CDC and the Commission on this improved system of intervention.

Ethics Assistance

Lawyers have two sources for help within the Bar when an ethical issue arises in their practice of law. The Ethics Helpline was established years ago and it is modeled after

similar hotlines in other states. The purpose is to provide a practicing attorney with guidance on interpretations of rules. In our 2007 report the Committee noted that there is currently only one lawyer to perform this function statewide for the approximate 80,000 licensed attorneys in Texas. The Committee consistently heard complaints of lawyers who were unable to reach the Helpline attorney, and at times an attorney would receive messages that the telephone voicemail was “full”. The State Bar recognized the need for additional staffing and has budgeted funds for a second attorney to provide this valuable resource.

The Committee was also informed of policy discussions regarding whether the CDC office was the most appropriate place for an ethics Helpline attorney to be stationed. With the Helpline attorney now reporting to the CDC, the Committee believes that some lawyers may be reluctant to contact the Helpline out of fear (real or perceived) that fact patterns would be revealed in the process of asking for help that could result in the initiation of disciplinary proceedings against them. The Committee urges the Bar leadership to continue an analysis of whether this function could be more appropriately handled in an independent setting such as the Texas Center for Legal Ethics and Professionalism or in an ombudsman office outside of the oversight of the Commission or the CDC.

While the Helpline does provide needed attorney assistance, the office staffing and oversight, as it now apparently exists, does not allow the Helpline attorney to provide case-specific legal advice. Attorneys who desire clarity in what may appear to be competing interpretations of rules, or, for instance, where no clear guidance is available, may present an ethical question and receive a definitive ruling from the Professional Ethics Committee. The Professional Ethics Committee provides a vehicle for lawyers to more formally ask questions regarding lawyer ethics issues and to receive written interpretations. The Professional Ethics Committee’s only staffing is the same attorney who handles the ethics Helpline. That attorney provides the Professional Ethics Committee with no help in the preparation of its opinions.

The Committee has learned of a backlog of requests in the Professional Ethics Committee, with some lawyers waiting literally years for the issuance of an opinion to answer their question. The Committee believes that lawyers facing ethical dilemmas should have more ready access to more immediate interpretations on ethical issues and that the current level of delay is unacceptable. The Committee therefore recommends that the State Bar and the Court review the staffing and budgetary needs of the

Professional Ethics Committee on an expedited basis to consider staffing it to meet the more immediate needs of attorneys seeking guidance on ethical issues.

ABA Committee on Professional Discipline

In this section of our 2007 Report, we briefly commented that the Court should once again consider our recommendation that the ABA Committee on Professional Discipline perform an audit of our Texas grievance system. The Committee's desire in making this recommendation was to find an economical way to get a comparative baseline study against which we could measure future performance of our grievance governance system and compare our system to those in other states. Our recommendation generated a lot of comment. Those comments suggested that the ABA review activity should instead be the charge and responsibility of our Committee, but with essentially no outside assistance. The Committee appreciates the confidence expressed in our capabilities; however, when the Committee this past Bar year sought an increase in its budget to perform more than anecdotal analysis on the grievance system, and seek outside assistance in preparing reports and analysis, these expressions of support were not reflected in our budget increase. While our budget was raised, for which we are thankful, we were not able to obtain the funding or staffing we believe is necessary to appropriately discharge our duties for the Court. We will, however, use available funds to do the best we can do to report on the grievance system each year as directed by the Court. Additionally, should we identify specific projects requiring additional help or expenses, we intend to direct our concerns to the Court, and to the State Bar leadership.

Diversity in the Grievance System

Although the perceptions of unfairness due to the lack of diversity in grievance governance and the processing of grievances continues, we find that reality does not support this perception. The need continues, however, for more retrievable statistics on race, gender and practice diversity in our system of grievance governance and processing. While cognizant of the cost of collecting and reporting on such information, we believe it is vitally important that the Commission and the CDC further commit to the ongoing collection of more information and report regularly on what they find in a more public forum. The goal the Committee recommends is for the Commission and CDC to shape perceptions by more regularly communicating the reality concerning diversity issues.

We believe that a greater *public* commitment to these diversity issues could include more and better advertising in professional publications and the Bar Journal, and communication of this commitment in more Seminar and CLE events. We have learned

that most appointments to grievance committees, and to other grievance governance bodies, are presently solicited by personal contact and by who you know, not by "casting a broad net" of interest and seeking the broadest array of participation, considering diversity as a goal. To ensure a continued diverse new population on our grievance governance bodies, we assert that less should be said in defense of where we are now and more should be promised and done to communicate the need for continuing a commitment to recruiting for diversity and reporting on our continuing progress. We also want to encourage the Bar Board to better utilize Minority Directors in the recommendation of grievance committee members. Heretofore these Minority Directors have apparently had limited input into this recommendation process. In order to "cast the broadest net" possible to attract a diverse constituency to grievance committees, we urge greater utilization of input from Minority Directors.

We must again report that we believe the opportunity to encourage involvement in grievance governance by diverse populations could be stimulated by MCLE credit for service in our grievance system. Section 4 {A}, of the MCLE Rules does seem restrictive of this goal. We believe, however, that the duties required of members of grievance committees, and grievance governance bodies, are so outside what anyone should perceive as "regular duties on a committee..." as that term must mean, as to require a reevaluation of this proscription. Having men's and women's practice lives in "the hands" of grievance governance members is a weighty and often a time consuming task. We believe such service should be viewed differently than service on other boards and committees. We also believe this distinctive recognition would encourage more interest in service on grievance governance bodies and appropriately encourage attorneys to serve the Bar in this special capacity.

Respondents Counsel

This year, to capture the respondents counsel perspective, we asked Chuck Herring to prepare a memorandum to address issues of particular concern based on his experiences of representing counsel who find themselves in the grievance system. Mr. Herring'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. We believe 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.

The Board of Disciplinary Appeals

The Committee again recommends that the Court consider immediately adopting the proposed rule revisions contained in then Chairperson Karen Watkins' letter to the Court dated July 27, 2007. In essence, as a follow-up to our recommendation to the Court, BODA requested rule changes to effect the publication of its orders. The Committee believes the immediate implementation of these rule changes will benefit both the public and attorney population for the reason that it will provide improved access to new and evolving law.

The Committee also recommends that the Court consider appointing a panel or committee to recommend an appropriate re-write of the Texas Disciplinary Rules of Procedure, with particular emphasis on the issues that continue to largely remain unresolved relating to the definition of serious and intentional crimes. This entire body of procedural rules could stand close study and a recommendation for updating the rules to more readily conform to actual practice needs and norms. The Committee also continues to recommend that the Court place a link on its website to BODA to facilitate any inquiry for a review of disciplinary opinions.

The Committee wrote in its 2007 Report of the need to consider restoring respondents right to appeal classification decisions. The Committee renews this request and adds that the review of only one side of the matter, the complainants appeal, necessarily limits BODA's ability to guide, and or shape, what constitutes a complaint. We believe the law makes it BODA's responsibility to guide the complainant, respondent, CDC and the Commission on whether a writing constitutes a complaint. As the system is now constructed, BODA has less ability to guide the development of this important body of law.

The Committee notes that BODA continues to maintain a very up-to-date docket for reviewing matters that come before it. The Committee believes that this is a credit to the men and women who serve on this judicial body, and to those who administer its functions.

Accolades

In our 2007 Report we recognized numerous people who have helped us, and continue to help us now. This year we want to say a special "thank you" to Justice Scott Brister, our liaison on the Texas Supreme Court. Justice Brister has been especially helpful and has provided needed guidance to us at just the right time. He is always available to us for

counsel and direction on these issues. We also thank him for organizing the lunch with grievance governance organizations and the Supreme Court last year. This was an extremely helpful event and provided needed communication at just the right time with all the grievance governance leaders. We would like this type of meeting to be repeated.

Additionally, we want to thank the Commission for Lawyer Discipline for hosting the Grievance Symposium in Dallas last fall. That Symposium provided the impetus for further meaningful communication by and between the stakeholder grievance governance organizations. Orrin Harrison was largely responsible for organizing this Symposium. We want to thank him for making the Symposium happen. We look forward to working with the Commission in the development of future symposia.

Finally, we want to thank all who took the time to comment on our 2007 Report. We learn through this process and we aim to improve our reporting with the additional funds we have been provided. Harper Estes was instrumental in obtaining additional funds for our Committee this last Bar year, and he has pledged to make available to the Committee additional State Bar staff resources for purposes of research and analysis and/or for other needed requests. To him we are especially grateful.

We have received feedback about increased communication among various entities in the grievance system, and we think that is a very valuable consequence of our 2007 Report. We hope that you find in our 2008 Report more ideas which will encourage continued dialogue about issues which will result in further improvements to better our system of self governance.

August 26, 2008

Mr. Gaines West, Chairman
The Grievance Oversight Committee
c/o West Webb Allbritton & Gentry, P.C.
1515 Emerald Plaza
College Station, Texas 77845-1515

Mr. Randy Chapman
Texas Legal Services Center
815 Brazos
Austin, Texas 78701

Dear Chairman West and Mr. Chapman:

I appreciate the opportunity to provide some comments to The Grievance Oversight Committee. I offer these comments only on behalf of myself, based on my experience as counsel for both respondents and complainants. Taking to heart your directive that this year's report is to be brief, I offer five observations:

1. Inconsistencies continue to appear in classification decisions. Conduct that, if true, clearly violates the rules (e.g., alleging that a lawyer made an express misrepresentation of material fact to a court) is often classified as only an inquiry. In part, that is simple inconsistency among classifiers. But in some instances the Commission for Lawyer Discipline (CLD) and the Chief Disciplinary Counsel (CDC) appear to have made policy decisions concerning what violations they will and will not pursue. The refusal to pursue discipline against habeas corpus lawyers who obviously perform inadequately in death penalty cases—instances in which lawyer misconduct literally can be a matter of life and death—is an unfortunate example of that sort of policy decision. The CDC and the CLD also frequently reject grievances arising from litigation—apparently concluding that other remedies (e.g., court sanctions) may be available, despite the fact that the disciplinary system is supposed to be an entirely separate system for our profession to police itself.

2. Publication of prosecutorial and classification guidelines (including from BODA classification decision reviews) would avoid a lot of confusion and frustration for complainants, respondents, and their counsel. At present, it is very difficult to advise potential complainants concerning what rule violations the CDC and CLD will pursue.

3. The severely limited role of complainants in the system remains a great source of frustration. I have represented several corporate complainants who have had to sit on the sidelines, unable to bring forward evidence as the disciplinary matter goes forward. I believe that

that sense of exclusion and frustration will lead to legislative reform measures in the next Session.

4. The inconsistency between the SBOT's ad review department's treatment of advertising rule violations—generally the department is highly technical but focuses on encouraging future compliance—and the CDC's treatment—more frequently pursuing discipline automatically—is a continuing source of unfortunate inconsistency.

5. Sanctions in the disciplinary system too often ignore what should be a central goal: improving the practice level of respondent lawyers. CLE and mentoring tailored to a particular practice deficiency can have a positive effect for both the lawyer and his or her future clients. Too frequently punishment appears to be the only goal. Increased use of flexible, carefully crafted sanctions would better help lawyers, clients and the public.

Again, thank you very much for considering these observations.

Sincerely,



Charles Herring, Jr.