GRIEVANCE OVERSIGHT COMMITTEE
APPOINTED BY THE SUPREME COURT OF TEXAS

June 1, 2022

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

Under the Court's Order Reconstituting the Grievance Oversight Committee, Misc. Docket 11-9003, and the Amended Order Regarding Grievance Oversight Committee, Misc. Docket No. 12-9010, I am pleased to submit the Grievance Oversight Committee's 2022 Biennial Report. This Report discusses the Committee's work over the past biennium (the 2021 and 2022 State Bar of Texas fiscal years).

On behalf of the Committee, thank you for the opportunity to serve and the privilege to advise the Court on issues affecting the attorney-client disciplinary process. The Committee would be pleased to provide the Court with any additional information the Court might need regarding the Report and our recommendations.

Respectfully submitted,

Meryl Benham
Chairperson 2021-2022

cc: Sylvia Borunda Firth, President, State Bar of Texas
Laura Gibson, President-Elect, State Bar of Texas
Santos Vargas, Chair, State Bar of Texas Board of Directors
Roberto Ramirez, Chair, Commission for Lawyer Discipline
Seana Willing, Chief Disciplinary Counsel
Kelli M. Hinson, Chair, Board of Disciplinary Appeals
Jenny Hodgkins, Executive Director and General Counsel, Board of Disciplinary Appeals
Trey Apffel, Executive Director, State Bar of Texas
Stephanie Lowe, Ombudsman, Attorney Discipline System, State Bar of Texas
Jeanine Rispoli, President, Texas Young Lawyers Association
Michael J. Ritter, President-Elect, Texas Young Lawyers Association

Grievance Oversight Committee
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Biennial Report
June 1, 2022

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2022 REPORT TO THE SUPREME COURT OF TEXAS
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TABLE OF CONTENTS

2022 REPORT TO THE SUPREME COURT OF TEXAS
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BACKGROUND AND DESCRIPTION OF COMMITTEE ACTIVITIES DURING THE 2021-2022 BIENNIUM

The Texas Supreme Court originally established the Grievance Oversight Committee ("the GOC" or "the Committee") in the 1970s and then reconstituted the GOC by Order dated February 22, 2011. The Supreme Court has charged the Committee generally with reviewing the attorney-client grievance process and reporting its observations and recommendations to the Court. The Committee provides biennial reports to the Supreme Court and reports on specific issues as requested by the Court.[1] The Committee's report is usually submitted on June 1st of even-numbered years, but due to the COVID-19 pandemic, was delayed and last submitted on September 29, 2020.

Since then, the Committee held meetings throughout the state and via Zoom. The Committee reached out to a diverse group through email and telephone calls. The Committee was also contacted by individuals who provided their input on specific topics. Between October 1, 2021, and May 31, 2022, the Committee met in person in Austin, Dallas, Frisco, and San Antonio, and met with other stakeholders via Zoom. The GOC met with members of the judiciary; attorneys; representatives of public interest groups; law school professors; persons involved in grievance proceedings as grievance panel members; respondents and representatives of respondents; and personnel with:

- The Chief Disciplinary Counsel of the State Bar of Texas ("CDC"),
- The Commission for Lawyer Discipline ("CLD"),
- The Client-Attorney Assistance Program ("CAAP"),
- The Board of Disciplinary Appeals ("BODA"),
- The Grievance Referral Program ("GRP"),
- The Ombudsman for Attorney Discipline ("Ombudsman"),
- The Texas Lawyers Assistance Program ("TLAP"),
- The Texas Young Lawyers Association ("TYLA"), and
- The State Bar of Texas Task Force on Public Protection, Grievance Review, and the Client Security Fund ("Task Force").

Individual committee members met on numerous occasions with State Bar of Texas ("State Bar" or "SBOT") and CDC representatives to obtain information on various topics. The Committee also held business meetings to discuss its findings and to determine issues in this Report. In addition, committee members watched recorded grievance panel training sessions and Investigatory Hearings ("IVHs").

The Committee gathered information about the attorney-client disciplinary process and discussed systemic issues and potential areas for improvement. All stakeholders were cooperative and candidly

[1] Additional information on the GOC, as well as links to past reports, may be found at www.txgoc.com.

expressed a desire to improve the functioning of the attorney-client disciplinary process and maintain transparency of that process.

The Committee bases its observations and recommendations in this Report mainly on the input received from this broad base of persons. These individuals provided their observations and recommendations about the grievance process as citizens concerned with the proper operation of the legal profession. The Committee expresses its appreciation for the individuals who took the time to meet with or otherwise provide input to the Committee and share their experiences and insights.

COMMITTEE'S GENERAL OBSERVATIONS

The Committee appreciates the continued opportunity to advise the Court on issues affecting the attorney-client grievance process, and to do so through a process that involves collaboration among a diverse committee membership. The Committee's members are diverse in terms of their professional backgrounds (six lawyers and three non-lawyers), geography, community affiliations, race, gender, and ethnicity. This diversity has allowed the Committee to appreciate the impact that the attorney-client grievance process has on different groups. While the Committee believes there generally should be uniformity in process, it also recognizes that in a state as large and diverse as Texas, a "one size fits all" rule for many aspects of the attorney-client grievance process would not be feasible or appropriate.

The Committee recognizes that it provides a means for individuals to raise concerns regarding the attorney-client grievance process and appreciates the confidence of the Court in allowing it to fulfill this role. To ensure that the Committee received candid and complete input from all participants, the Committee operated, as in years past, on a "non-attribution" basis. This Report does not identify by name any individual who provided specific comments or suggestions to the Committee.

The Committee explains to all who raise concerns that its role is not to serve as an appellate or review body regarding the results of grievances. Individual grievances are administered through the CLD, CDC, BODA, and Texas courts.[2] The Committee recognizes and emphasizes to others that its role is only to assist the Court in overseeing the attorney-client disciplinary process and to help the Court examine issues about the attorney-client grievance process brought to the Court's attention.

[2] For a description of these entities, their organization and functions, including annual reports, please see the information available at www.texasbar.com.

CLIENT SECURITY FUND

FUND

The Client Security Fund ("CSF") is one of the most direct examples of the State Bar's ability to protect the client, or at least provide relief from injury caused by an attorney. Created in 1975, it provides a safety net to clients harmed by their attorneys through theft or dishonest conduct, including failing to refund unearned fees or misappropriating settlement funds. It is administered by the CDC and Client Security Fund Subcommittee ("the Subcommittee"), a standing subcommittee of the Discipline and Client Attorney Assistance Committee.[3] Its corpus must be maintained at no less than $2 million with anything over that amount authorized for use in awarding grants.[4]

FUNDING

The State Bar of Texas Board Policy Manual has very specific funding requirements for the CSF that includes a directive for the State Bar Executive Director to establish a separate investment portfolio for the CSF.[5] Granting sources also include: 1) an annual appropriation from the State Bar's general fund of no less than $300,000; 2) the interest earned on the corpus; 3) restitution and/or reimbursements to the CSF during the fiscal year; 4) any funds deposited into the corpus through funds collected from outside sources; and 5) any funds deposited into the corpus from unused money available for grants.[6]

As reported by the CDC, there were 400 pending applications as of October 29, 2021, seeking $4.4 million in grants.[7] As of August 31, 2021, there was only $3.7 million in the CSF, leaving just $1.7 million available for awards.[8]

APPLICATION

The CSF application can be found online at http://csf.texasbar.com/CSF/Home/Index and is only available in English. The application, along with the CSF rules and procedures, must be provided to the chair of each grievance committee to learn about client protection resources. The application is prepared by the

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[3] Tex. State Bar Bd. of Dir. Pol'y Manual §3.08.02(B) (February 2022), https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents1&Template=/CM/ContentDisplay.cfm&ContentID=55968 [hereinafter SBOT Policy Manual].
[4] *Id.* § 3.08.02(D)(1).
[5] *Id.* § 3.08.02(D)(2).
[6] *Id.* § 3.08.02(D)(3).
[7] Reynolds, Claire, (October 29, 2021), *State of the Client Security Fund* [Memorandum], Client Security Fund Subcommittee, pg. 2 [hereinafter State of CSF].
[8] *Id*.

Subcommittee and is to be sworn and executed by the applicant under penalty of perjury.[9] The application asks for:

1) The name and address of the lawyer;
2) The amount of alleged loss;
3) The date or period of time during which the alleged loss was incurred;
4) The date on which the alleged loss was discovered;
5) The name and address of the applicant;
6) A general statement of facts relative to the application;
7) A statement that the applicant has read these rules and agrees to be bound by them;
8) A statement that the loss was not covered by any insurance, indemnity, or bond or, if so covered, the name and address of the insurance or bonding company, if known, and the extent of the coverage and the amount of payment, if any, made; and
9) A statement that the applicant agrees that the result of the investigation together with all evidence in connection with it shall remain confidential.[10]

The applicant must keep the Subcommittee apprised of his or her current address and telephone number. Failure to do so can be grounds for denial, rescission of approval, or rejection of the application.[11]

The application must be filed within 18 months from the time the disciplinary judgment was rendered, or if no grievance filed, within four years from time of the loss or when it should have been discovered.[12]

Eligibility Requirements, Rules, and Process

If the applicant has submitted the required application information in a timely manner, Board Policy Rules also require that the applicant participate in the grievance process unless the attorney is deceased, has been disbarred by the State Bar of Texas, has been adjudicated as mentally incompetent, or has resigned in lieu of discipline.[13] If the grievance results in a disciplinary sanction, the sanction can constitute sufficient evidence to support the application for relief.[14]

The applications are administered by two employees of the CDC. They present the completed applications to the Subcommittee that meets on a quarterly basis, for about an hour each time, usually a day before a regularly scheduled State Bar Board meeting. The number of applications considered at every meeting ranges from 30 to 50.

For each application, the Subcommittee must consider if the applicant has proven: 1) that the lawyer engaged in dishonest conduct (as further defined in Rules 2 and 3); 2) that he or she was a client of that

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[9] SBOT Policy Manual § 3.08.02(E)(1)-(2).
[10] *Id.* § 3.08.02(E)(2).
[11] *Id.* § 3.08.02(G) Rule 1(B).
[12] *Id.* § 3.08.02(G) Rule 7.
[13] *Id.* § 3.08.02(G) Rule 6(B).
[14] *Id.* § 3.08.02(G) Rule 10(A)(7).

lawyer (as further defined and limited in Rule 4); 3) that the lawyer gained possession and control of the client's money or property (as further defined and limited in Rule 5); 4) that he or she sustained a loss of money or property because of the dishonest conduct (as further defined and limited in Rule 5); 5) that he or she participates in the grievance process when required (as set forth in Rule 6); and 6) timely filing of an application for grant (as defined in Rule 7).[15]

The Subcommittee can conduct investigations or hearings to establish the facts in connection with the application and can delegate the duty to CDC employees. The applicant's burden of proof is a preponderance of the evidence.[16] According to the CDC, the timeline from receipt of the application to the time it comes up for a vote by the Subcommittee can be one to two years.[17]

NUMBER OF APPLICATIONS INCREASING

There are about 400 pending applications at any given moment. Two thirds of those applications involved attorneys who were disbarred, resigned without an underlying order of restitution as to the applicant, or died and left no funds in the trust account.[18] In fiscal year 2019-2020, there were 24 applications paid out that involved deceased attorneys. Those awards amounted to 41.5% of total payouts. In fiscal year 2020-2021, there were 27 applications paid out that involved deceased attorneys. Those awards amounted to 36.0% of total payouts.

Applications will likely increase as the effects of the pandemic continue to be felt and clients discover that their attorney passed away without having disbursed their settlement funds or failed to refund an unearned fee. This will prove a burden on both the employees at the CDC and the funds available for payout.

SUNSET REVIEW AND THE CSF

During the Texas Sunset Advisory Commission's State Bar review in 2017, the CSF was addressed by the Sunset Advisory Commission as a "major" public protection program along with the Disciplinary System and CAAP, among others.[19] The CSF is mentioned as part of the need for better enforcement and oversight practices within the disciplinary system.[20] Specifically, preventive measures were recommended to deter dishonest conduct. These recommendations included trust account overdraft notifications from financial

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[15] *Id.* § 3.08.02(G) Rule 1(D).
[16] *Id.* § 3.08.02(G) Rules 8-9.
[17] State of CSF, pg. 2.
[18] State of CSF, pg. 4.
[19] Tex. Sunset Advisory Comm'n, Sunset Rev., Staff Rep. with Final Results, 9, (Jun. 2017), https://www.sunset.texas.gov/public/uploads/files/reports/State%20Bar%20of%20Texas%20and%20Board%20of%20Law%20Examiners%20Staff%20Report%20with%20Final%20Results_6-21-17_0.pdf [hereinafter Sunset Rep.].
[20] *Id.* at 23-30.

institutions, reinstating subpoena power during an investigation, and investigating possible theft of settlement funds.[21]

RECOMMENDATIONS

INCREASE FUND BALANCE

The success of the CSF program has created an increase in the number of applications that does not seem to be slowing down soon, creating a need to increase the fund balance. The number of applications and award payouts involving the death of an attorney is increasing. This is caused by an aging population of licensed attorneys and the effects of the pandemic on the profession.

As suggested by the CDC, until and even after the fund balance is increased, it would help to structure award payouts throughout several years to decrease the impact on the fund balance.

Another way to help create a robust fund balance using current internal operations would be stronger restitution and reimbursement efforts. These are listed funding sources for the CSF that can be achieved with no new resources.[22]

UTILIZE PREVENTIVE MEASURES

The discussion of requiring financial institutions to report overdrawn trust accounts was part of the State Bar's Sunset Review and should be implemented to prevent further depletion of the funds. This would be an additional client protection and remove Texas as one of the states that does not require overdraft notification.

Another measure that other states have instituted that the Texas Department of Insurance strongly encourages is the payee notification rule that would require insurance companies to notify both claimant and attorney of settlement fund disbursements.[23] Because an ethical attorney should be notifying his or client of such disbursements as standard practice, the payee notification rule would only come into play when an attorney negligently or intentionally fails to inform his or her client about the disbursement. This would require a clear definition of "disbursement" to prevent the insurance carrier from abusing the rule and providing disbursements not agreed upon by the claimant's attorney.

GOVERNING BODY ACTION

Just as the CDC provides complaint forms in English and Spanish, the online application for CSF consideration should be in both languages. The CDC receives about half of its applications for CSF consideration through its online application, yet that form is only in English. Because the form must be

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[21] *Id.* at 28, 33.
[22] SBOT Policy Manual § 3.08.02(D)(2)(c).
[23] State of CSF, pg 4.

signed under penalty of perjury, client protection would be extended by ensuring those who apply can understand it before submitting.[24]

The CSF brochure found on the State Bar website should also be updated, as it is only available in English, consists of four pages, and does not mention the link to submit the application online.

Since applications might not reach final determination for a year or more after submission, there should be an increase in the number of meetings held by the CSF Subcommittee of the State Bar Board of Directors. The tools to allow for increased meetings are already in place since the CSF Subcommittee may meet by telephonic or electronic means.

With the many additional duties assigned to the administrator of the CSF and only one other CDC employee assisting, there is also a need to add staffing to review and report on the applications. Without the additional staff there will be a bottleneck created as the applications increase in quantity. It will not help to add more funds or meetings to the process if the CDC cannot review the applications in a timely manner. An increase in staff is essential.

Educate the Public

The importance of public education is magnified when no grievance is filed since the deadline is within four years from the time of the loss or when it should have been discovered.[25] A more detailed brochure should be added to the State Bar's website which should include the deadline for submitting an application – 18 months from the time the disciplinary judgment is rendered.

The State Bar Board of Directors should also amend its policy manual to formalize public education about the CSF. For example, Section 3.08.02(F), which requires the dissemination of rules, procedures, forms, and brochures to committee chairs, is a process that is not followed. The Section should be amended to require including information and brochures in the informational packet sent to members of the public who have filed a grievance. To leave Section 3.08.02(F) as is puts the committee chair in the awkward position of having to educate a complainant before them about the CSF process and giving the impression that a decision has been made in the matter at the time of the IVH or evidentiary hearing.

Board of Disciplinary Appeals

BODA consists of 12 attorneys appointed by the Supreme Court of Texas. BODA members on average possess 25 or more years of legal experience and represent legal and geographic diversity. Collectively, the members contribute over 2,000 hours annually in performing their duties. BODA maintains a website, www.txboda.org, at which detailed information including the most recent annual report can be obtained regarding BODA members and its operations.

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[24] SBOT Policy Manual § 3.08.02(E)(2).

[25] SBOT Policy Manual § 3.08.02(G)(Rule 7).

BODA has been part of the Texas grievance system since 1992. BODA's original executive director retired in January 2020. A new executive director/general counsel and a new deputy director/counsel were appointed in April 2020. GOC can report that the transition has been seamless and that BODA continues to function at an elevated level as shown by the 2020-2021 annual report.[26]

BODA has both appellate and original jurisdiction. BODA's appellate jurisdiction extends to classification appeals and evidentiary appeals from decisions of grievance panels. Classification appeals are decided in three-member telephone conferences. All other BODA matters are decided at quarterly en banc hearings at the Supreme Court of Texas courtroom. During the last two years the en banc hearings have been virtual because of the pandemic. BODA intends to return to in person en banc hearings when it is safe to do so.

Original jurisdiction of BODA consists of compulsory discipline (attorney convicted of an intentional crime), reciprocal discipline (attorney disciplined in a jurisdiction other than Texas where the attorney is licensed), revocation of probation (violation of probation imposed by an evidentiary panel or agreed to because of an investigatory panel), and disability cases and reinstatements (matters in which an attorney suffers from a disability that results in the attorney being unable to practice law).

Discretion to Enter a Judgment of Less Than Full Revocation

The Texas Rules of Disciplinary Procedure ("TRDP") confer jurisdiction on BODA to revoke probation for any probated suspension entered by an evidentiary panel.[27] In such a proceeding, the burden is on CDC to establish, by a preponderance of the evidence, "a violation of probation."[28] Upon such proof, the probation "shall be revoked."[29] The TRDP do not define or clarify the term "violation of probation." Evidentiary panel judgments often contain the provision that revocation may occur following a "material" violation of the terms of the judgment. Such language is consistent with CDC policy to initiate a revocation proceeding only when it believes violation(s) to be material. The rules, however, contain no materiality requirement. This leaves BODA without discretion to consider materiality, instead making revocation mandatory for "a violation" that CDC may consider material, but BODA does not. Further, if a violation is established, TRDP do not provide for discretion by the Board to take any action other than to order active suspension for the length of the entire probation term, with no credit for any time served.[30] Taken together, the TRDP give BODA no discretion to consider materiality of any violation, no discretion to decline to revoke probation even if a violation is shown, and no discretion to vary the term of active suspension for minor deviations from the terms of probation.

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[26] Bd. of Disciplinary Appeals 2021 Annual Report, https://txboda.org/annual-reports/2021-annual-report.

[27] Tex. Rules Disciplinary P. R. 2.22, *reprinted* in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1. https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Rules-of-Disciplinary-Procedure/II--THE-DISTRICT-GRIEVANCE-COMMITTEES/2-23-Probated-Suspension-Revocation-Procedure

[28] *Id*.

[29] *Id*.

[30] *Id.*

Under the TRDP, the only discretion in the revocation context is the prosecutorial discretion of CDC. While that discretion has been, in BODA's experience, exercised judiciously, BODA reports it has found itself in a position of having no discretion where it might consider exercising discretion.

BODA's lack of discretion to continue or modify probation, and the lack of discretion to suspend for less than the full term of probation, does have a strong deterrent to ensure a lawyer's compliance with probation terms. But this mandatory process can also work counter to the equally important goals of rehabilitation and reintegration into the profession, particularly for lawyers attempting to resume a practice after an active suspension. The personal and professional strain of an active suspension can create circumstances in which compliance matters can be overlooked or where compliance with financial terms of the judgment can become difficult or impossible. In fact, the lack of authorization for BODA to be flexible can work against the lawyer's ability to make, and the client's ability to receive, ordered restitution payments. While the CDC's compliance staff typically affords significant leeway to lawyers before instituting revocation proceedings, giving BODA discretion could create more just outcomes in some cases.

Recommendation

Amend TRDP 2.22 to give BODA discretion in revoking probation, including the ability to take action less drastic than automatic active suspension for the full period of suspension. This would facilitate more effective enforcement of probation conditions, aid in the collection of outstanding restitution, and allow for the lawyer to return to a financially viable practice.

Discretion to Refer to CAAP and to Consider CAAP Resolution

CAAP is a confidential statewide dispute resolution service of the State Bar of Texas. CAAP's objective is to facilitate communication and foster productive dialogue between Texas lawyers and their clients to assist them in resolving minor concerns, disagreements, or misunderstandings impacting the attorney-client relationship.[31] One of CAAP's principal goals is to resolve these issues between lawyer and client without resorting to the grievance system. Often this simply involves helping to re-establish communication between lawyer and client or assisting in the return of the client file after representation.

The CDC may refer a case to CAAP following the initial review by CDC's classification attorneys.[32] After CAAP's involvement concludes, the case returns to the grievance process, which can still result in an appeal to BODA.[33] Neither the State Bar Act nor the TRDP provide clarity as to BODA's role in reviewing classification appeals previously referred to CAAP, nor do the rules indicate whether BODA may refer a classification matter to CAAP.

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[31] Tex. Gov't Code § 81.072(e).
[32] *Id.* at § 81.072(e)(1).
[33] Tex. Rules Disciplinary P. R. 2.10.

Discretion to Refer to CAAP

While the CDC may refer grievances alleging minor misconduct to CAAP, it is unclear whether BODA has such authority as part of its classification function. BODA has sometimes stated in its disposition of a classification appeal that it intends that a matter be referred to CAAP, but under the current rules, that can be made only with a reversal and results in classification of the grievance as a complaint. This results in an investigation by CDC. A dismissal can only be via a summary disposition hearing. Such grievances are handled through the disciplinary system rather than through CAAP's dispute resolution system.

Some classification appeals, while presenting allegations of problematic conduct by the lawyer that may not warrant reversal and the full involvement of the disciplinary system, could still benefit from CAAP's dispute resolution process. Those same classification appeals often present situations in which the client's goal may be accomplished simply through the intervention of a third party, such as CAAP. Discretion to refer classification appeals to CAAP could benefit both lawyers and complainants.

Allowing BODA to refer matters for dispute resolution through CAAP would follow statutory language that created CAAP, which urges coordination between Bar entities and programs to further CAAP's goal of resolving disputes outside of the grievance system.[34]

Discretion to Consider CAAP Resolution

BODA would also benefit from a rule amendment expressly acknowledging the Board's authority to consider CAAP's resolution in discretionary referral cases. Such a case, by definition, involves allegations of only "minor misconduct."[35] And, in signing a grievance, complainants affirm their understanding that the CDC may refer a matter to CAAP "for assistance in resolving a subject matter of this Grievance." In making a discretionary referral, the CDC has considered the misconduct alleged and determined that a dispute described in the grievance could be resolved with CAAP's assistance, assuming the respondent attorney's voluntary cooperation with the CAAP dispute resolution process.

When a complainant appeals the dismissal where the CDC referred the grievance to CAAP and ultimately classified it as an inquiry, the file provided to BODA contains CAAP's file showing the correspondence between the complainant, the respondent attorney, and CAAP. Because a discretionary referral allows CAAP to facilitate a resolution of conflict between attorney and client with no further involvement by the disciplinary system, the Board should have express authority to consider CAAP's file and resolution.

Further, given the discretionary referral process, CDC rarely pursues a disciplinary case against a respondent attorney who has engaged with CAAP and resolved a dispute with a client. But sometimes,

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[34] *See* Tex. Gov't Code § 81.072(e) ("The state bar shall establish a voluntary mediation and dispute resolution procedure to: (1) attempt to resolve each minor grievance referred to the voluntary mediation and dispute resolution procedure by the chief disciplinary counsel; and (2) facilitate coordination with other programs administered by the state bar to address and attempt to resolve inquiries and complaints referred to the voluntary mediation and dispute resolution procedure.").

[35] Tex. Rules Disciplinary P. R. 1.06(M).

BODA has seen that the resolution achieved through CAAP did not address all the allegations in the grievance.

RECOMMENDATIONS

Establish a third classification disposition option. Currently, BODA may only (1) affirm classification as an inquiry, thus affirming dismissal of the grievance; or (2) reverse classification as an inquiry, thus reversing dismissal and continuing the complaint through the disciplinary process. Under a third option, BODA could refer to CAAP, just as the CDC can, allowing CAAP to help resolve the dispute outside the disciplinary system. After CAAP's involvement concludes, the matter could be returned to BODA for final disposition as occurs when CDC makes the referral.

Clarify how BODA should review appeals that CAAP deemed successfully resolved, and when reversal of such a case would be appropriate.

DISCRETION TO ALLOW RESPONDENT TO RAISE DEFENSES

A conflict between the TRDP and the BODA Internal Procedural Rules ("IPR") has led to confusion in reciprocal discipline cases where the respondent does not file an answer within 30 days of the show-cause order, hearing notice, and petition are mailed or served. TRDP 9.03 contains mandatory language stating that if the respondent does not file an answer to the petition by this deadline, "the Board of Disciplinary Appeals shall enter a judgment imposing discipline identical, to the extent practicable, with that imposed in the other jurisdiction." TRDP 17.05 provides that the time period in Rule 9.03 is mandatory.

In reciprocal discipline cases, the answer is of particular importance because TRDP 9.04 sets forth five specific defenses to reciprocal discipline, each of which it is the respondent's burden to prove by clear and convincing evidence. The answer thus serves to provide notice to the petitioner and BODA as to what defenses will be at issue. Without such defenses, the other jurisdiction's disciplinary order or judgment is prima facie evidence of professional misconduct, and conclusive for reciprocal discipline.[36]

BODA IPR 7.03 provides, "If the Respondent does not file an answer within 30 days...but thereafter appears at the hearing, BODA may, at the discretion of the Chair, receive testimony from the Respondent relating to the merits of the petition."[37] Given the mandatory language in TRDP Rule 9.03, it is unclear what purpose this provision serves, and it is further unclear the scope of issues that can be asserted by the respondent in such instances. Is the phrase "merits of the petition" in IPR 7.03 meant to give the BODA chair discretion to allow the attorney to assert defenses under TRDP 9.04 despite lack of a timely answer, or is it intended to limit a respondent to presenting only his or her own testimony as to whether the petitioner has met its burden of proof, without consideration of TRDP 9.04 defenses?

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[36] *Id.* at R. 9.01.

[37] Bd. of Disciplinary Appeals Internal Procedural Rules R. 7.03, https://txboda.org/sites/default/files/BODA%20IPR%206-26-18_0.pdf.

Recommendation

Provide BODA with discretion to allow a respondent who appears but has not filed a timely answer to present defenses. This would bring the reciprocal discipline procedure in line with the law surrounding default judgments generally, and the legal concept that a defendant who is not consciously indifferent to being sued should usually be given an opportunity to defend himself. GOC recommends changing the mandatory "shall enter judgment" in TRDP 9.03 to "may enter judgment."

Discretion to Initiate a Disability Proceeding

BODA plays a limited role in attorney disability cases. The only entities with authority to initiate a disability proceeding are the CDC and local evidentiary panels.[38] In classification appeals, and in matters in which BODA has original jurisdiction, attorneys have appeared before BODA who might meet the criteria for a disability suspension. But BODA does not have discretion to initiate a disability proceeding.

BODA technically oversees disability proceedings.[39] But BODA's role is only ministerial. BODA appoints the members of the district disability committee and, if requested, counsel for the respondent.[40] After these appointments, BODA has no further involvement. The panel chair conducts the hearing, and the panel makes a finding. BODA signs any judgment of suspension, and even in this, BODA has no discretion.[41] Therefore, BODA's limited ministerial role in overseeing a disability case should not create a conflict with BODA having discretion to refer an attorney for a disability proceeding when BODA believes a lawyer may have a disability that has resulted in the inability to practice law.

Recommendation

Because BODA has original jurisdiction over certain disciplinary matters, it should have discretion like that of an evidentiary panel exercising its original jurisdiction, allowing BODA to make such a referral and toll the statute of limitations as to any pending disciplinary matters.

Discretion as to Term of Suspension and Final Hearing

Discretion as to Term of Suspension

Neither the TRDP nor the BODA IPR provide clarity as to the appropriate length of an active suspension for an attorney subject to compulsory discipline, where the criminal sentence was fully probated. In such instances, BODA may either disbar or actively suspend the respondent lawyer.[42] TRDP 8.06 states that the lawyer "shall be suspended during the term of the probation." Moreover, TRDP 8.07 provides that early

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[38] Tex. Rules Disciplinary P. R. 12.02, 2.19(P)2).

[39] *See Id.* Part XII.

[40] *Id.* R. 12.02.

[41] *Id.* R. 12.04.

[42] *Id.* R. 8.06; *In re Isassi*, Board of Disciplinary Appeals Case No. 57699 (2017).

termination of the probation shall have no effect on the term of suspension. The Texas Supreme Court has held that BODA does not have discretion to suspend an attorney beyond the term of the criminal probation.[43] The Court later referred to Rule 8.06 as limiting BODA's discretion by conditioning the length of the suspension on the length of the probation period.[44] BODA has interpreted these authorities to mean that if it chooses to suspend, the suspension must run concurrently with (and not beyond) the criminal probation.

Periodically, a compulsory discipline matter does not reach BODA for adjudication until most, or sometimes, all the probationary period has passed. This can be for reasons not caused by the respondent, such as delayed filings by CDC, appellate court delay, or other administrative issues. But it can also be due to the respondent's own actions, such as delayed reporting of a conviction to CDC or efforts to avoid service of the petition for compulsory discipline. Rule 8.01 generally preserves the ability of BODA to consider a compulsory discipline case, and order compulsory discipline, even after the criminal sanction has passed.[45] This provision, however, offers no answer as to the timing and length of an active suspension, if one is imposed under TRDP 8.06 and the *Isassi* factors, and the Court's prohibition in *Ament* as to suspension beyond the term of the criminal probation.

Under the current formulation, if an attorney's criminal probationary period has nearly elapsed, BODA's only option is an active suspension if some time remains in the criminal probation. If the probation period has expired, BODA's options are limited to disbarment or no suspension. In such instances, BODA would benefit from additional discretion to vary the length of the active suspension. If an attorney can establish that he or she has not practiced law during the criminal probation, BODA should have the ability to give credit for this "time served" and have the suspension terminate at the same time as the criminal probation. On the other hand, if an attorney has continued practicing during a criminal probation, the rules should similarly allow BODA discretion to impose an active suspension equal to the original length of the criminal probation, even if it extends beyond the criminal probationary period.

Giving BODA discretion as to the length of suspension would minimally change the nature of compulsory disciplinary proceedings, which are by design a streamlined process that "admits no discretion."[46] The Texas Supreme Court has described the remedial purposes behind compulsory discipline proceedings as "protection of the public from attorneys who are under the disability of criminal censure," noting that the criminal court determines the period of censure and is presumed to consider compulsory discipline consequences of sentencing.[47] But because the rules also authorize BODA to disbar lawyers under fully probated sentences, the rules recognize that BODA's purpose in protecting the public is broader than simply rubber-stamping the criminal court's sentencing time period. In cases where the remaining

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[43] *In re Ament*, 890 S.W.2d 39, 41 (Tex. 1994).

[44] *In re Caballero*, 272 S.W.3d 595, 601 (Tex. 2008) ("If BODA decides to suspend an attorney's license, the suspension period must equal the length of the probation period.").

[45] Tex. R. Disciplinary P. R. 8.06 ("The completion or termination of any term of incarceration, probation, parole, or any similar court ordered supervised period does not bar action under Part VIII of these rules as hereinafter provided").

[46] *In re Lock*, 54 S.W.3d 305, 306 (Tex. 2001).

[47] *Ament*, 890 S.W.2d at 41.

probation period is short, some discretion to vary the suspension period would allow for protection of the public short of disbarment.

Discretion to Hold Final Hearing

BODA practice is to hold a hearing on a motion for entry of final judgment where an attorney has been placed on interlocutory suspension pending the outcome of the criminal appeal. But Rule 8.05 states: "If the motion is supported by [documents] showing that the conviction has become final, the motion shall be granted without hearing, unless within ten days following the service of the motion . . . the attorney so convicted files a verified denial contesting the finality of the judgment, in which event the Board of Disciplinary Appeals will immediately conduct a hearing to determine the issue." BODA's historical practice of holding such hearings follows the desire for transparency and ensures that compulsory discipline is supported by due process.

Recommendations

Provide BODA with discretion to determine the length of a suspension that could exceed the criminal court's probation term.

Change "shall" to "may" in TRDP 8.05 to allow BODA to hold hearings on motions for final judgment, while also preserving the ability of BODA to grant the motion without a hearing.

TLAP Confidentiality

TLAP offers an invaluable service to attorneys suffering from crisis, burnout, mental health or substance abuse issues, and ideas of suicide.[48]

One of TLAP's most important tenets, and one by which its employees and volunteers operate with strict adherence to, is confidentiality. An attorney can seek support, or sometimes another person can seek assistance for an attorney, with the expectation of complete anonymity. Attorneys seeking advice can rest assured that their identity and any subsequent interactions with TLAP will remain confidential. This trust in TLAP is paramount to the benefit TLAP provides.

Texas Health and Safety Code Chapter 467 explicitly provides statutory confidentiality to programs like TLAP.[49] There are, however, outlined exceptions in the statute that might cause hesitation for some.[50] Unfortunately, that hesitation could mean the difference in life or death, illustrating the importance of reassuring attorneys there is no risk of their contacting TLAP later being used against them in any context, including at a disciplinary hearing.

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[48] The GOC discussed and applauded TLAP's efforts at length in its 2020 Biennial Report, pp. 25-28.
[49] Tex. Health & Safety Code § 467.007(a).
[50] *Id.* § 467.007(b).

Throughout its website, TLAP reassures visitors of its confidential nature by using phrases such as "Strictly Confidential," and "Confidential. Respectful. Voluntary."[51] Most recently, TLAP added a link to a joint statement issued by the State Bar and CDC, further memorializing and emphasizing the confidential nature of TLAP.[52] Before the issuance of the joint written statement, it had long been the internal policy of CDC to forego seeking any information related to an attorney's use of TLAP services, treating such information as confidential. The written statement further reassures attorneys of TLAP's confidential nature and encourages them to utilize TLAP's valuable resources. The statement reads in part, "the [CDC] and the State Bar of Texas want to assure all lawyers, law students, and judges that the CDC and the State Bar of Texas adhere to and support [TLAP's] commitment to confidentiality above and will not seek confidential information from TLAP."[53]

Many states go a step further and classify communications between their state's lawyer assistance program and attorneys as privileged information akin to the privileges that currently exist in the Texas Rules of Evidence.[54] TLAP believes, and the GOC agrees, that reinforcing the confidential nature of TLAP – by any possible avenue – will improve participation in the program and reduce confusion and fear. Providing direct privilege by way of rule or guidance could only help those efforts.

RECOMMENDATIONS

The GOC supports all efforts of the CDC and the State Bar to ensure TLAP's confidentiality and inform Texas attorneys of its existence.

Expand the definition of a "professional" in Texas Rule of Evidence 510(a)(1) to include someone "acting as an employee or agent of the Texas Lawyers' Assistance Program."[55]

Expand the definition of "patient" in Texas Rule of Evidence 510(a)(2)(A) to include someone who consults or is interviewed by a professional for "referral" and expanding a "confidential" communication to include a "referral" under part (a)(4)(A).[56]

TRAINING FOR DISTRICT COURT JUDGES FOR DISCIPLINARY TRIALS

In the decades since the grievance process was initiated in Texas, it has evolved into a multi-level, complex process to ensure both the public's protection and a fair and equitable process for respondent attorneys.

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[51] https://www.tlaphelps.org

[52] *Id.* A copy of the Memorandum of Understanding Regarding TLAP Confidentiality, the State Bar of Texas, and the Office of Chief Disciplinary Counsel is attached at Tab A.

[53] *Id.*

[54] Some states provide such a privilege as part of their state statutes (New York and Louisiana), as part of their Supreme Court rules (Colorado and Tennessee), or as part of their professional rules of conduct (Illinois and Pennsylvania).

[55] Currently, a 'professional' in Rule 510 is defined as someone authorized to practice medicine; licensed or certified by the state to diagnose, evaluate, or treat mental or emotional disorders; involved in the treatment or examination of drug abusers; or someone the patient reasonably believes is a 'professional.' Tex. R. Evid. 510(a)(1).

[56] Tex. R. Evid. 510.

A key element to a fair and unbiased system is the training and oversight of the various groups, including the 13 regional grievance panels that act as the first level of formal adjudication of a complainant's grievance.

Annually, the CDC conducts comprehensive training for grievance panel members throughout the 13 regions in Texas.[57] However, there is a gap in the training, e.g., the training of the judiciary charged with presiding over grievance cases when respondent attorneys elect district court. Based on CLD data, the number of respondents who elected district court adjudication for the 2020-2021 Bar year was 27 out of 225 matters (12%); in the 2019-2020 Bar year, the number of district court elections was 30 out of 278 (10.7%).[58] These grievance trials can be either bench trials or full jury trials.[59]

While evidentiary panel hearings are confidential allowing for a private reprimand, district court proceedings are public with the lowest sanction available being a public reprimand. Thus, there can be a difference in potential publicity of a grievance proceeding depending on the respondent's election. While the Rules of Judicial Education have some statutorily mandated trainings for judges, typically for specific case types or parties, there is no statutory requirement for training on attorney disciplinary trials.[60] While the 22-page report from the State Bar Task Force on Public Protection, Grievance Review, and Client Security Fund outlined and recommended "further education of lawyers," it did not examine any training or education of judges overseeing grievance trials.[61]

RECOMMENDATION

Training of the judiciary should be addressed to ensure the overall confidence in a fair district court proceeding, whether a bench or jury trial. This could include:

- a one-hour presentation on the grievance process in general and grievance trials specifically be instituted at Texas Center for the Judiciary's New Judges School and bi-annually at Judges' CLE conferences;
- an online self-study video course prepared by the CDC; and/or
- inviting judges to the annual CDC trainings.

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[57] Comm. for Lawyer Discipline Annual Rep. Jun. 1, 2020 - May 31, 2021, 5 and 15-16, *https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=54492*.

[58] *Id.* at 21.

[59] *See* Tex. Rules Disciplinary P. Part III.

[60] Court of Crim. Appeals Jud. and Court Personnel Training Program, Rules of Jud. Educ. R. 12 (Mar. 5, 2021) https://www.txcourts.gov/media/1447901/rules-of-judicial-education.pdf.

[61] Task Force on Public Protection, Grievance Review, and the Client Security Fund Report, 14 (Jun. 16, 2021) https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=53664 [hereinafter Task Force Rep.].

While the number of grievance trials is small, it is critical for a fair and equitable system that all arbiters in the grievance process be adequately trained.

Burden of Proof

At an evidentiary hearing, "[t]he burden of proof is upon the CLD to prove the material allegations of the Evidentiary Petition by a preponderance of the evidence."[62] The same holds if the matter is handled in district court.[63] This is also the standard for the CLD to establish that an attorney suffers from a disability, to obtain an interim suspension, or revocation of probated suspension. It is the standard for a respondent to establish that the continued practice of law does not threaten clients or the public pending an appeal of an order of disbarment, and in a request for termination of suspension or a request for reinstatement.[64]

Throughout the many discussions across the state, a few stakeholders recommended that the standard of proof be increased to that of clear and convincing evidence. In a poll conducted by a group of Texas attorneys, 97% of 500 participating respondents (of the group's more than 15,000 members) voted for changing the burden of proof to clear and convincing. The Task Force Report recommended that the legislature and other interested stakeholders study whether to raise the burden of proof, noting the balance needed "between protecting the public and attorney's interests in defending their law license and being afforded due process and equal protection under the law."[65]

This Court described the varying evidentiary standards as

> generally determined by the nature of the case or particular claim. Criminal cases require proof beyond a reasonable doubt, a near certainty, whereas civil cases typically apply the preponderance-of-the evidence standard, that is, a fact-finder's determination that the plaintiff's version of the events is more likely than not true. Some civil claims, including some defamation claims, elevate the evidentiary standard to require proof by clear-and-convincing evidence. This standard requires that the strength of plaintiff's proof produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations.[66]

Proponents of elevating the standard most frequently contend that attorney discipline proceedings are quasi-criminal in nature, with the potential for the attorney's reputation to be permanently tarnished and possibly loss of livelihood through suspension or disbarment. Some cite the U.S. Supreme Court's language in *Addington v. Texas*, wherein the Court explored the role of an intermediate standard—and its varied names—describing the typical use of the clear and convincing standard in civil cases involving allegations of fraud or some other quasi-criminal misconduct where the interests at stake are deemed substantial enough to warrant adjusting the standard of proof to reduce the risk to the defendant of having his

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[62] Tex. Rules Disciplinary P. R. 2.17(M).
[63] *Id.* at R. 3.08(C).
[64] *See Id.* at R. 2.22, 2.24, 3.12, 3.13, 11.03, 12.03, 12.06(C), and 14.02.
[65] Task Force Rep. pg. 17 par. v.
[66] *In re Steven Lipsky*, 460 S.W.3d 579 (Tex. 2015) citing *Bentley v. Bunton*, 94 S.W.3d 561, 596-97 (Tex. 2002).

reputation tarnished erroneously.[67] Or put differently, where the possible injury to the adverse party is greater than any possible harm suffered by the state. Many advocating for the heightened standard believe it is not an onerous standard and does not diminish the protection of the public, as sustained allegations will generally have a convincing paper and/or testimony trail. They also call attention to the fact that one-third of decision makers on attorney grievance matters are members of the public. No proponent discussed with the Committee simultaneously raising the standard when the burden of proof is on the respondent.

Those opposed generally refer to the Court's compelling interest in protecting the public against an attorney who does not measure up to professional standards and who can cause irreparable harm to clients and to public confidence in the legal system. They claim effectively policing Bar membership ensures that other attorneys will be less likely to commit similar offenses and reference the honor and privilege it is to self-police the profession. They raise the Texas Lawyer's Creed sentiment that "I know that professionalism requires more than merely avoiding the violation of laws and rules" and the Preamble to the Texas Rules of Professional Conduct that

> The legal profession has a responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the Bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.[68]

ABA Model Rule 18 calls for clear and convincing evidence for "formal charges of misconduct, lesser misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability inactive status."[69] The comment to the rule states that this is higher than "preponderance of the weight of credible evidence" which is usually deemed sufficient in civil proceedings, yet not as stringent as "beyond a reasonable doubt" required in criminal cases.[70] In a cursory review of the standard of proof for attorney discipline in the 50 states and the District of Columbia, about 80% appear to require clear and convincing evidence for charges of misconduct. Some require pre-trial settlements to reflect there was clear and convincing evidence, some draw the line at public reprimands or worse, and in some states the standard does not attach except to formal proceedings.

As compared to other occupational licensing agencies within Texas, "the State Bar is an outlier" with the "unusual privilege of self-regulation."[71] As the last Sunset Review repeatedly noted, this leads to an image by the public of a "closed society focused on protecting its own interests."[72] Despite the seemingly "bizarre" approach, the Commission found the structure generally well-functioning, except for concerns

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[67] *Addington v. Texas*, 441 US 418, 423-24 (1979).

[68] Tex. Lawyer's Creed; Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 8, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A.

[69] Model Rules of Pro. Conduct R. 18 (Jul. 20, 2020).

[70] *Id.* cmt.

[71] Sunset Rep. at 1.

[72] *Id.*

that constrained the CDC's ability to meet its public protection responsibilities.[73] Their report was consistently concerned with ensuring "the public interest is put above the profession's interest" and principally focused on the privilege of self-regulation necessitating the responsibility to act in the public interest, citing the same excerpt from the Preamble quoted above.[74]

A 2019 Texas Lawyer article pointed out that despite a nearly 20% increase in the number of licensed attorneys in Texas in the last decade, the number of grievances filed in the same timeframe remained conspicuously flat.[75] Texas' population grew by about 16% between 2010 and 2020 to over 29 million, while the number of attorneys in Texas increased in a similar span by about 22% to over 106,591.[76] Despite the continued growth, the number of grievances filed against Texas attorneys has remained at about 7-8,000 each year. Of the 7,007 grievances filed in 2020-2021, less than 30% of those actually alleged any conduct that could constitute a violation of the Rules and thereby required any response from an accused attorney. Ultimately, 372 sanctions were issued against attorneys, which is less than 0.003% of the Texas attorney population.[77]

Recommendation

Considering the circumstance of the State Bar as self-regulating; the duty of the CDC in protecting the public; and coupled with the consistency in the standard of proof for the CDC and Respondents, the GOC does not recommend increasing the standard of proof in grievance matters.

Remote v. In-Person Proceedings

During the GOC's many discussions across the state with lawyers representing both respondents and complainants involved with evidentiary and investigative hearings, a topic that was top-of-mind for all was the increased use of videoconferencing during the pandemic. These conversations engendered strong opinions for both its elimination and for its continued use. It should be noted that at the time of this Report's writing the State of Texas is emerging from the pandemic and the wide-ranging implementation of health and safety protocols such as proof of vaccination and/or negative test requirements for private and public building entrance, social separation recommendations, and mask mandates. This is a highly dynamic time to be evaluating the pros and cons of remote lawyering, though it is important to distinguish the difference between the broader discussion regarding the use of videoconferencing for jury trials in general and the use of this technology solely in the grievance process. This Report's focus is on the latter.

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[73] *Id.*
[74] *Id.* at 14, and repeated theme throughout issues/recommendations 1 through 3.
[75] Morris, Angela, *Is Texas' Ethics Authority Outnumbered?,* Texas Lawyer 13-15, Dec. 2019.
[76] 2010 Census Texas Profile; 2020 Census Texas QuickFacts; SBOT Attorney Stastical Profile (2010-11); SBOT Attorney Statistical Profile (2020-21).
[77] CLE Rep. at 9, 18, 20.

As succinctly outlined in the Texas Bar Journal:

> The new remote lawyering norm creates novel changes because many of us have been forced to quickly and significantly change our workplace and the ways we interact with clients, courts, colleagues, and each other. Lawyers who are inexperienced with maintaining a law practice from home have developed a sudden need to know how to not only use technology effectively, but also how to use it in a way that complies with legal and ethical obligations toward clients…[78]

While it is impossible to capture all aspects of the nuanced debate on the topic, the most expressed opinions both for and against continued use of videoconferencing in the grievance process can be summarized:

PROS

1) Provides a path to safely unclog the significant trial backlogs;
2) Increases efficiency in reaching a resolution;
3) Improves balance between efficacy and efficiency;
4) Easily increases availability of required quorums;
5) Reduces expenses in the trial process;
6) Provides fairer access to the process by reduced geographic barriers, particularly in more rural areas;
7) Increases access to remote talent and subject expertise; and
8) Reduces length of hearing while increasing focus of discussion.

CONS

1) Reduces efficacy as it is more difficult to "read the room;"
2) Reduces the impact of professional tools and expertise that an attorney has developed over time;
3) Changes the basic interaction with clients, courts, and colleagues;
4) Requires an ability to use technology effectively;
5) Potentially provides a tactical advantage to those with greater comfort and skill with technology;
6) Increases risk of privacy breach of confidential information while trying to meet current reasonable security requirements for privacy;
7) Opens questions about witness credibility; and
8) Creates an unlevel playing field due to differences in adaptation and adoption rates of technology.

In an article by U.S. District Judge Lee Rosenthal, Houston attorney Christopher L. Dodson, and UC Hastings Professor Scott Dodson, they conclude:

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[78] Rogers, Elizabeth, *"Remote" Lawyering*, Texas Bar Journal Vol. 83 No. 11 Dec. 2020, 864, https://lsc-pagepro.mydigitalpublication.com/publication/?i=683328&article_id=3814857&view=articleBrowser

> Although many aspects of federal civil litigation are still most effective in person, efficacy has always been balanced against efficiency, cost, and convenience. The pandemic has taught that videoconferencing can offer powerful cost savings and efficiency gains, and with, in some circumstances, only marginal loss of efficacy. Permanent videoconferencing adaptations should be considered for witness interviews, low-value depositions, status conferences, routine court hearings, and the like, especially when they involve burdensome participant travel or difficult scheduling logistics…we see great promise for far more pervasive and routine use of videoconferencing in the future.[79]

By rule, an IVH may be conducted by teleconference.[80] While there are no criteria officially laid out for deciding when an IVH should be by videoconference or in person, the criteria used to determine if a matter is appropriate for referral to the GRP provides a reasonable guide:

A. Respondent has not been disciplined within the prior three years;
B. Respondent has not been disciplined for similar conduct within the prior five years;
C. Misconduct does not involve misappropriation of funds or breach of fiduciary duties;
D. Misconduct does not involve dishonesty, fraud, or misrepresentation;
E. Misconduct did not result in substantial harm or prejudice to client or complainant;
F. Respondent maintained cooperative attitude toward the proceedings;
G. Participation is likely to benefit the Respondent and further the goal of protection of the public;
H. Misconduct does not constitute a crime that would subject the Respondent to compulsory discipline under ... these Rules.[81]

While all matters will have adversarial conduct, the evidence and testimony for the cases listed above will not be determined almost exclusively on the credibility of the respondent. In such settings many attorneys have expressed preference for a face-to-face hearing.

Understandably, the CDC conducted nearly all IVHs via teleconference during the pandemic and learned of the many benefits, such as increased quorums, increased participation in training, and easier access for remote participants. But as the pendulum started with almost fully in person, and by necessity swung to almost fully by teleconference, the balance of efficacy and efficiency must be considered as we settle into a post-pandemic new normal.

RECOMMENDATION

Develop guidelines for determining when the use of videoconferencing is beneficial to effective investigation and a fair grievance process.

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[79] Rosenthal, Lee Et. Al., The Zooming of Federal Civil Litigation, Judicature Bolch Judicial Institute Vol. 104 No. 3 Fall/Winter 2020-21, 13, https://judicature.duke.edu/articles/the-zooming-of-federal-civil-litigation/.
[80] Tex. Rules Disciplinary P. R. 2.12.
[81] *Id.* at R. 16.02.

DEMYSTIFICATION

MUCH ANXIETY AND MYSTERY STILL EXIST REGARDING THE ATTORNEY-CLIENT DISCIPLINARY PROCESS. THE CDC STRIVES TO SHOW COMPASSION TO RESPONDENTS AND COMPLAINANTS ALIKE WHO BECOME INVOLVED IN THE PROCESS, BUT ALL STAKEHOLDERS AGREE THAT PREVENTION IS KEY REGARDING ATTORNEYS ENTERING THE GRIEVANCE SYSTEM.

The GOC repeatedly heard incidents of attorneys becoming overly anxious upon receiving a grievance notice and not knowing how to proceed. Besides the emotional toll that the stress takes on an attorney's well-being, a lack of guidance and understanding about the process can slow the system itself as some simply "freeze" and do not respond. This conundrum demands further exploration of how to best reach and educate more attorneys on the attorney-client disciplinary process.[82]

Many in the legal community have been calling for increased awareness through education about the grievance process by way of CLE presentations, law school presentations, mock hearings, and mentorship programs.[83] The GOC supports such ideas. By implementing uniform attorney-client disciplinary process education programs throughout the state assisted by TYLA, law schools, and other interested legal entities, information regarding the process should become common knowledge, reducing some of the anxiety and mystery. Lawyers will better understand how to navigate the process—decreasing the likelihood they simply give up and ignore the grievance altogether—and they will also know where to access important resources.

TYLA, as the public service arm of the State Bar of Texas, creates impactful service projects and educational outreach, both for attorneys and the public. On its website, TYLA has a helpful list of resources for judges, attorneys, law students, and the general public.[84] Resources created and compiled for attorney members include a Predicates Guide, TYLA Suicide Prevention Guide, TYLA Evidence Guide, and Attorney Billing Guide.[85] Notable among the list is Grievance and Malpractice 101.[86] Pertinent to this Report, TYLA, with the State Bar of Texas, provides a general overview of the grievance system and important tips on what attorneys should do if they receive a grievance.[87]

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[82] Many resources regarding the attorney-client disciplinary process already exist. Among some of those resources are the State Bar of Texas website https://www.texasbar.com, which includes several videos and articles, including *How to File a Grievance* under 'For the Public' and *Grievance and Ethics* under 'For Lawyers'; frequent presentations to local bar groups and SBOT-sponsored CLEs offered by CDC staff and/or CLD; podcasts regarding the attorney-client disciplinary process (including the Texas Appellate Law podcast); brochures; information provided by the Ombudsman (https://txcourts.gov/organizations/bar-education/ombudsman-for-attorney-discipline/); and various social media on the topic managed by the State Bar Communications Director.

[83] More information on the variety of mentorship programming offered by TYLA can be found at: https://tyla.org/resource/ten-minute-mentor/.

[84] https://tyla.org/resources/.

[85] https://tyla.org/resources/attorneys/.

[86] *Id.*

[87] *Id.* (The guide was created in 2013 before the reinstitution of the IVH process).

The GOC met with many law school professors and administrators over the last few years about presenting the Texas attorney disciplinary process more fully in law school. Most respond that finding time to do so with an otherwise full curriculum is challenging.

Recommendations

Update the Grievance and Malpractice 101 guide and include more information about the grievance process, specifically IVH, which is of recent implementation.

Current or future TYLA leadership can use its platform to help better inform and educate Bar members regarding the attorney-client disciplinary system. The GOC leaves the details of any project to the TYLA leadership but suggests creating a fresh presentation or other innovative messaging that could be easily shared through a podcast, blog, or other form of social media. Such messaging could efficiently reach attorneys in all areas of law and in all geographic regions of the state.

One of the primary goals behind a project by young attorneys would be to educate younger and less experienced attorneys *before* they ever enter the attorney-client disciplinary process. The goal is to help them avoid the system altogether, but at the very least, to better inform attorneys on the best way to respond should they face a grievance.

Partner with Texas law schools to include a presentation about the attorney disciplinary process as part of required ethics courses.[88] Ethics professors could require students to view one or several of: a clear and concise video, live presentation, online grievance simulation, and/or podcast.[89] After viewing the presentation or participating in the presentation outside of class, the professor could lead the class in a productive discussion and address questions. Such discussions should not detract from in-class teaching and would help better prepare the soon-to-be attorney for situations they (or their colleagues) might encounter. This hands-on education and increased awareness earlier rather than later would directly translate into a more positive interaction with the attorney-client disciplinary system.[90]

Mistrust of the IVH Process

The reinstitution of the IVH in the attorney-client disciplinary process remains a hot topic. In ongoing conversations with stakeholders across the state, the GOC notes varied reactions to the concept of IVH and whether an attorney should participate. Experienced attorneys who regularly represent respondents disagree on IVH. Some think they are beneficial and that the respondent has little to lose and much to gain, including a dismissal. Others routinely recommended that their clients not even participate.In 2017, the Texas Legislature enacted key legislation affecting the attorney disciplinary process following the

[88] *See* 2020 GOC Biennial Rep., pp. 20-21.
[89] Many Texas law schools have a variety of graduation requirements, e.g., pro bono service requirement. CDC staff has indicated that they would be willing to help with this initiative.
[90] *See* 2020 GOC Biennial Rep., pp. 20-21.

Sunset Report.[91] Restoring the CDC's investigatory subpoena power and its ability to convene IVHs were two of the most notable changes.[92]

As background, once the CDC has classified a grievance as a "complaint," it can, at its discretion, set the complaint for an IVH.[93] The CDC convenes an IVH and conducts it as a confidential proceeding before a grievance panel.[94] After choosing which cases to set for IVH, the CDC "invites" the complainant (and counsel) and the respondent (and counsel) to attend. At the end of the IVH, the matter may be dismissed, or if Just Cause is found, the respondent may enter into an agreed judgement or proceed to litigation via an evidentiary hearing or district court proceeding.

The TRDP categorize the IVH as "non-adversarial," but as they are recorded and may be used in any resulting evidentiary proceeding, this caused much debate among respondents. The CDC recently removed all "non-adversarial" language from its letters to complainants, respondents, and scripts.[95]

Some attorneys are hesitant to participate in the IVH process because they are fearful about what might happen to them and confused as to how the proceeding is run and what types of rule violations they might face.[96] Some attorneys believe that the IVH process is a 'fishing expedition;' respondents' due process rights are not observed; and there is too much discrepancy in conducting hearings. The CDC, however, repeatedly expresses its goal to achieve fair outcomes in an expeditious fashion.[97]

The CDC and State Bar offer many educational materials to help explain the IVH process, including helpful videos and articles on the SBOT website,[98] frequent presentations to local Bar groups and SBOT-sponsored CLEs offered by CDC staff and/or CLD, podcasts regarding the attorney-client disciplinary process, brochures, information provided by the Ombudsman,[99] and social media on the topic managed by the State Bar Communications Director.

RECOMMENDATIONS

Beyond just removing the "non-adversarial" language (which the GOC supports), consider including a statement that the majority of IVH cases get resolved by GRP or outright dismissal. For Bar year 2021-2022 (as of the writing of this Report), almost 30% of IVH cases resulted in a dismissal, and about 21% resulted in a GRP referral (up from 17% last year), accounting for over 50% of outcomes.[100] Without

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[91] Tex. Gov't Code §§ 81.080, 81.082.
[92] *Id.; see* 2020 GOC Biennial Rep. for more background discussion, pp. 31-35.
[93] *See* Tex. Rules Disciplinary P. R. 2.12(F).
[94] *Id.* at R. 2.12(f).
[95] *See id.;* Copies of the form letters sent to the complainant and respondent are attached at Tab B.
[96] *See* 2020 GOC Biennial Rep., p. 34.
[97] The CDC strives to "afford[] complainants and accused lawyers a fair and just system…" A copy of the CDC Mission Statement is attached at Tab C.
[98] https://www.texasbar.com.
[99] https://txcourts.gov/organizations/bar-education/ombudsman-for-attorney-discipline/.
[100] Statistics based on evaluating year-to-date CDC data as provided in their quarterly reports.

overselling the process, referencing such compelling statistics could effectively illustrate the potential upside of participating in IVH.

Strive to achieve a certain uniformity in the way that IVHs are conducted. This can be achieved and still allow the chair in each region some flexibility and discretion. Each chair uses the same opening script provided by the CDC.[101] For important matters that touch on respondents' due process (e.g., respondents' attorneys having the ability to make an opening statement, question witnesses, or make objections), those matters should be handled the same way region to region.[102]

Bolster, update, and modernize the existing education materials mentioned above. Consider ways to best disseminate information to help educate attorneys regarding the grievance process generally but IVH specifically. Perhaps partner with other agencies (e.g., TYLA) or consider writing an informational article in the Texas Bar Journal. Create an updated informational video and post it on the State Bar website regarding the IVH process specifically, a longer version of which could be offered as a webinar and/or CLE opportunity. Record a mock IVH video which could train grievance panels and be provided to Bar membership (through the State Bar website) to help demystify the IVH process.[103] Create an easily accessible description of the IVH process available to attorneys that could be mailed along with notice of the IVH hearing to respondents.[104] Some version of the above materials should be offered at the law school level.

Study of Potential Disparities in the Discipline of Texas Lawyers

In late 2019, the State Bar of California released a report of findings made because of a study that examined possible disparities in the discipline system. The results were significant. The study was conducted by a professor from the University of California, Irvin. The ABA Journal reported that the study, as reported to them by the California Bar, "found racial disparities in probationary discipline, disbarment and discipline-related resignation, with greatest disparities between black and white male lawyers."[105] The probation rate for male black lawyers was 3.2% as compared to 0.9% for white lawyers. Disbarment/resignation for that group was 3.9% compared to 1% for white lawyers. The study noted discrepancies among other racial, ethnic, and gender groups.

Recommendation

In response to inquiries from this Committee, the CDC reported that there is an ongoing independent study researching any racial/ethnic discrepancies within the system. The CDC hopes to have a report

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[101] *See* Panel Chair Script at Tab D.
[102] *See* 2020 GOC Biennial Rep., pp. 50-51.
[103] *See* 2020 GOC Biennial Rep., p. 9. The CDC was working on this initiative before the COVID-19 pandemic and hopes to record a Mock IVH by June 2022.
[104] According to the CDC, mailing brochures was paused during the COVID-19 pandemic, but the CDC agrees that resuming its efforts might be a helpful way to disseminate information regarding the IVH process to attorneys.
[105] Debra Cassens Weiss, *New California Bar Study Finds Racial Disparities in Lawyer Discipline,* ABA Journal, 11/19/2019, https://www.abajournal.com/news/article/california-bar-study-finds-racial-disparities-in-lawyer-discipline.

finalized by the end of this calendar year, which would permit the Committee opportunity for review before the next biennial report.

Concluding Comments

The GOC appreciates the continuing opportunity to assist the Court in its oversight of the attorney grievance process. The Committee stands ready to answer questions from the Court about this Report and to provide any additional research, resulting observations, and recommendations as the Court might find helpful or necessary.

About TLAP Confidentiality

The Texas Lawyers' Assistance Program (TLAP) does not share any information from an attorney, law student, or judge seeking help from TLAP with non-TLAP third parties, the State Bar of Texas, the Texas Board of Law Examiners, the Office of Chief Disciplinary Counsel (CDC), or any other disciplinary agency or entity. TLAP keeps all communications confidential pursuant to statutory confidentiality granted by the Texas Health and Safety Code Section 467 except in very rare circumstances to prevent death or serious harm to a person or where required by law for child or elder abuse. TLAP is staffed by attorneys who have spent many years struggling with addiction and depression, and our team would go to any length to protect the people we care about most: those seeking help! If there is any fear of consequences in calling TLAP, we encourage those in need to call us anonymously—we can help.

Memorandum of Understanding Regarding TLAP Confidentiality, the State Bar of Texas, and the Office of Chief Disciplinary Counsel

To whom it may concern,

Lawyers, law students, and judges must be able to avail themselves of the help frequently needed for mental health and substance use issues without fear or hesitation. In that spirit, the Office of Chief Disciplinary Counsel (CDC) and the State Bar of Texas want to assure all lawyers, law students, and judges that the CDC and the State Bar of Texas adhere to and support the Texas Lawyers' Assistance Program's commitment to confidentiality above and will not seek confidential information from TLAP. We firmly stand behind the principle that "it's good to get help." (click hyperlink for more)

TREY APFFEL
EXECUTIVE DIRECTOR OF THE STATE BAR OF TEXAS

SEANA WILLING
CHIEF DISCIPLINARY COUNSEL FOR THE OFFICE OF CHIEF DISCIPLINARY COUNSEL

March 1, 2022

Record D Test Jr.
123 Main Street
Austin, Texas 78701

Re: 00D00708TCSE - Ryan A Wagner, Esq.;New Test Test; Test Case, Jr. - Primer Record Tester, I

Dear Mr./Ms. Test:

Pursuant to Rule 2.12 of the Texas Rules of Disciplinary Procedure, please be advised that the above referenced grievance will be set for an Investigatory Hearing. An Investigatory Hearing before a local Grievance Committee Panel may result in an agreed resolution of this matter, dismissal or may lead to the finding of Just Cause and the matter proceeding to an Evidentiary Hearing or a trial in district court. During the Investigatory Hearing, the Panel will evaluate the grievance under any applicable disciplinary rules and consider allegations made in the complaint, additional information received during the investigation of the complaint, and information presented during the hearing.

Once the Investigatory Hearing is set, you will be given written notice of the date, time and location.

Please do not hesitate to contact this office should you have any questions.

Sincerely,

John R. Smith
Administrative Attorney

JRS/eyl

March 1, 2022

Joe James Test
1414 Colorado Street
Austin, Texas 78701

Re: 00D00708TCSE - Ryan A Wagner, Esq.;New Test Test; Test Case, Jr. - Primer Record Tester, I

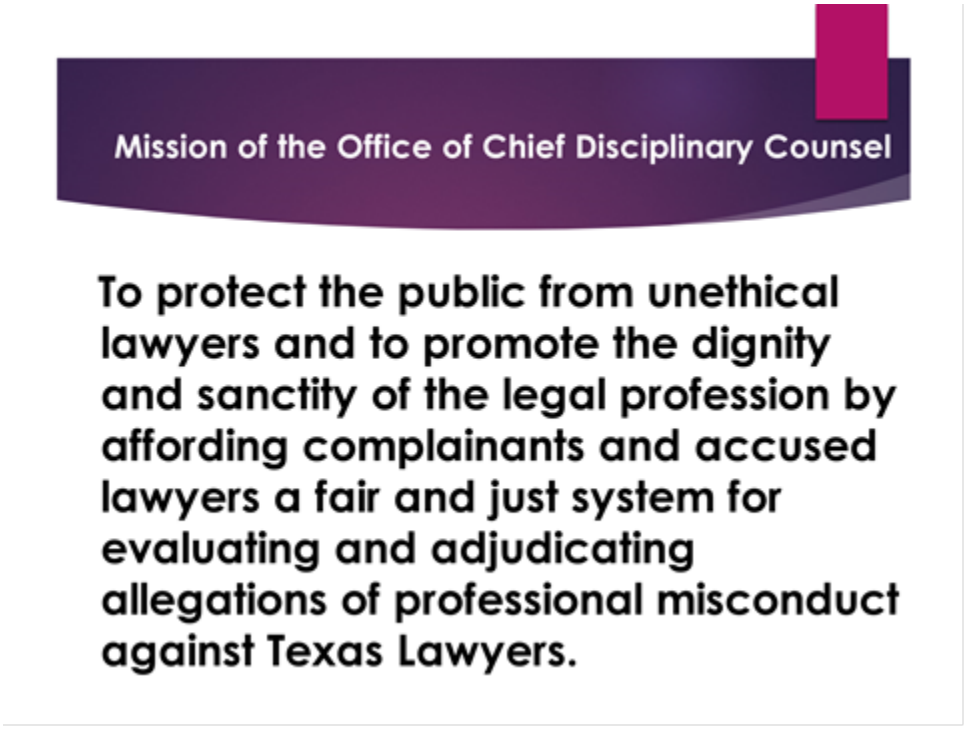
Dear Mr./Ms. Test:

Pursuant to Rule 2.12 of the Texas Rules of Disciplinary Procedure, please be advised that the above referenced grievance will be set for an Investigatory Hearing. An Investigatory Hearing before a local Grievance Committee Panel may result in an agreed resolution of this matter, dismissal or may lead to the finding of Just Cause and the matter proceeding to an Evidentiary Hearing or a trial in district court. During the Investigatory Hearing, the Panel will evaluate the grievance under any applicable disciplinary rules and consider allegations made in the complaint, additional information received during the investigation of the
complaint, and information presented during the hearing.

Once the Investigatory Hearing is set, you will be given written notice of the date, time and location.

Sincerely,

John R. Smith
Administrative Attorney
JRS/eyl


Mission of the Office of Chief Disciplinary Counsel
To protect the public from unethical lawyers and to promote the dignity and sanctity of the legal profession by affording complainants and accused lawyers a fair and just system for evaluating and adjudicating allegations of professional misconduct against Texas Lawyers.

INVESTIGATORY HEARING PANEL OPENING STATEMENT

Good Morning/Afternoon:

My name is _____**.** I am the Chair of this Investigatory Panel of the District __ Grievance Committee hearing Case Number _____. This is an Investigatory Hearing on a grievance filed by _____ against _____. I now call this hearing to order.

This panel consists of ___ members. I am the Panel Chair and a lawyer. A quorum is present. The other Panel members present are:

_____	who is a lawyer,
_____	who is a lawyer,
_____	who is a lawyer,
_____	who is a lawyer,
_____	who is a public member and not a lawyer; and
_____	who is a public member and not a lawyer

Also present are:

_____	from the Chief Disciplinary Counsel's Office
_____	from the Chief Disciplinary Counsel's Office
_____	Respondent
_____	Complainant
_____	[peace officer] [for in-person hearings]

We are here to investigate the allegations of professional misconduct. The Panel has received and read the materials that have been submitted by the Complainant and Respondent. This is an ongoing investigation to determine if Just Cause exists. Any testimony offered today will be taken under oath.

This proceeding is being recorded by the Chief Disciplinary Counsel's Office. Other than the recording device used by the Chief Disciplinary Counsel's Office, no other recording devices are allowed.

Pursuant to Rule 2.12(F) of the Texas Rules of Disciplinary Procedure, this hearing is strictly confidential and the recording of this hearing can only be released for use in further disciplinary matters.

All attorneys are asked to conduct themselves professionally and with civility in accordance with the tenets of the Texas Lawyer's Creed. At a minimum, all participants should conduct themselves with civility and respect as if you were in a court of law. If you become combative or disruptive, you will be excused from the hearing.

At the conclusion of this hearing, all witnesses will be dismissed and the Panel will deliberate. If this Panel believes there is enough credible evidence to support a finding of Professional Misconduct, the Panel will recommend a sanction ranging from private reprimand to disbarment. The Respondent will be advised of the Panel's recommendations in writing.

At this time, I ask anyone present who will give testimony to stand and be sworn.

DO YOU SWEAR OR AFFIRM TO TELL THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

DO I HAVE YOUR AGREEMENT THAT YOU, OR ANYONE ACTING ON YOUR BEHALF (OTHER THAN THE CDC), WILL NOT RECORD ANY PART OF THIS PROCEEDING?

(Proceed with summarizing the grievance, the Respondent's defenses and questioning of the witnesses.)

AT CONCLUSION: Thank you for attending this investigatory hearing. The panel will now deliberate the evidence and Respondent will be notified in writing of our recommendation. The hearing in now concluded and the witnesses are dismissed.