STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

February 26, 2021

VIA EMAIL:
Honorable James D. Blacklock
Justice, Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Ms. Nina Hess Hsu
General Counsel
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Dear Justice Blacklock and Ms. Hess Hsu:

The Commission for Lawyer Discipline (CFLD) and Office of the Chief Disciplinary Counsel (CDC) welcome the opportunity to provide feedback and comments regarding the Grievance Oversight Committee's (GOC) 2020 biennial report. We also thank you for approving our request for additional time to prepare our response.

It cannot be overstated that the hard work of the GOC these past two years resulted in a report that is thorough and thoughtful, and it provides great clarity regarding the Texas attorney disciplinary process. We appreciate the professional manner in which the members of the GOC approached their responsibilities and welcome the opportunity to assist the GOC and the Court in achieving their goals. We look forward to working with the GOC in the same collaborative manner as it continues its efforts to improve the disciplinary system.

Training and Staffing of Grievance Panels:
In its report, the GOC voiced a need for additional training for those involved in the attorney disciplinary process. This included recommendations that the CDC create video recordings for grievance committee member training to include mock investigatory hearings (IVH) and evidentiary hearings (EVH); create "FAQ" videos to better explain the IVH and EVH hearing processes to Respondents and Respondents' counsel; and create more video content throughout the year to provide additional ongoing training opportunities for new grievance panel members as they participate in the hearings process. In addition,

GOC recommended that the CDC stress the importance of the Texas Lawyer Assistance Program (TLAP) in all trainings and ask grievance committee members to complete a questionnaire following their trainings to better gauge effectiveness and areas for improvement. In an effort to address the ongoing challenge of making a quorum for disciplinary hearings, GOC recommended that an additional public member be added to the panels and that members be required to sign a "Commitment Memorandum," stressing the importance of their commitment to the grievance process and committing to attend scheduled hearings.

In response to these recommendations, the CDC and CFLD agree that it is important to provide panel members and other participants with as much training and other information about the grievance process as practicable. In the past, in the orientation meetings with grievance committee members in June of each year, the training included a presentation of a mock EVH. With changes to the rules in 2018 that resumed the IVH process, we agree that providing new grievance panel members with a mock IVH presentation would also be helpful. Having such a presentation recorded and making the recording available to grievance panel members, as well as to members of the State Bar Board of Directors, for training throughout the year should bring needed clarity and understanding to the IVH process, not just for grievance panel members but also for the Directors who will be nominating new panel members to serve on grievance committees.

Although CDC staff already make efforts to stress TLAP and other attorney support resources such as the Grievance Referral Program in training and at hearings, we will continue to do so in a more formal manner or through a video presentation that could be accessed by panel members wishing to obtain additional training throughout the year.

It should be noted that despite our best efforts to stress the importance of participating in orientation and training, it has been an ongoing challenge to convince some grievance committee members to attend even one annual training. In some regions, there has consistently been a lack of interest or incentive for certain panel members to become better trained about the rules and procedures, which is consistent with a lack of willingness to attend hearings and to be prepared for the cases on the docket.

While we recognize and appreciate that the grievance panel members are all volunteers, in truth, there is no substitute for actually showing up for the scheduled hearings and participating in the investigation and decision-making process. Since late 2018, with the reintroduction of the IVH process, grievance panels across the State are far busier than ever before. Regular and consistent attendance at the hearings scheduled each month would provide far more valuable experience than watching a video if and when a panel member's schedule permits. We agree with the GOC that sending a survey or questionnaire after the initial orientation/training may help us evaluate whether and where there are weaknesses in the current level of training.

Regarding the "Commitment Memorandum," we would note that grievance members currently recite and execute a lengthy, detailed "Oath of Office" before commencing their terms. Nevertheless, an additional document that reinforces the panel members' commitment to attend scheduled hearings, prepare for the cases on the docket, maintain confidentiality, and conduct themselves impartially and with appropriate decorum could address many of the current challenges addressed by the GOC's report. Given the unique relationship between the CDC and the grievance committees, we would be concerned that asking grievance panel members to sign and acknowledge a "Commitment

Memorandum," while well intentioned, may be a challenge - especially if it comes from the CDC. However, if the Board of Directors deems it appropriate, we would suggest that such a document be included in the Board's Policy Manual as a prerequisite for prospective panel members to complete and submit before being appointed to serve. Along these lines, rules and procedures for the removal of grievance committee members by the Board of Directors would be helpful in those rare instances when a grievance member violates the Oath, fails to attend hearings, or otherwise engages in misconduct in his/her capacity as a panel member.

Finally, regarding the recommendation to add another public member to serve on grievance panels, the CDC would direct the Court's attention to two issues. First, adding another public member to a panel would violate TRDP 2.02, which governs the composition of members. The current rule requires a ratio of 2/3 attorneys and 1/3 public members on every grievance panel. Adding another member would alter the required ratio and, without a rule change, would void the actions of that panel. Second, it is the duty of the District Bar Directors to find qualified, committed individuals to serve on grievance panels. Finding qualified and committed public members has always been a challenge across the State. Adding an additional public member to the panels will require a real commitment from the Bar Directors. In the past, in certain regions, CDC staff has notified the District Director of the need for additional panels, and we have been able to accomplish this adjustment by working with the Directors in those regions. We would also point out that a wholesale increase in the number of panel members in all of the regions needs to be assessed in conjunction with the additional work this would create for CDC staff, who would need more time and resources in order to prepare for more hearings.

Sanction Enforcement:

GOC recommendations to improve the CDC's enforcement of sanctions and the probation revocation process deserve thoughtful consideration. GOC recommends that the CDC should prioritize the collection of attorneys' fees and restitution; that judgments should be more uniform and should require all conditions to be met well before completion of the probation period; that the CDC should better monitor its enforcement of orders, the tracking of payments, and the practice of law by attorneys under suspension.

The collection of attorneys' fees and restitution has always been the number one priority for the CDC's Compliance Monitor – it is the primary focus of her job, and her efforts have consistently resulted in the CDC collecting between $300,000 and $430,000 in revenue every year. As GOC's Report points out, there are fees that remain outstanding and uncollected every year. What appears to be missing from the report's analysis of outstanding fees is that there are numerous respondent attorneys in the compliance program who are making installment payments toward the total amount of attorney's fees owed. The data provided to the GOC represents a snapshot in time of what is owed on any given day; it does not take into account the efforts of the Compliance Monitor and her team to collect installment payments over time. Additionally, a significant amount of the fees are not collected because respondent attorneys have been disbarred, imprisoned, or died. It remains unlikely that fees from those respondents will ever be collected unless a respondent attorney attempts to be reinstated after disbarment.[1]

[1] The Client Security Fund pays out hundreds of thousands of dollars each year to clients whose attorneys (mostly attorneys

There does not appear to be a clear way to collect from more respondent attorneys, especially those who have been disbarred. In fact, attempts to pursue payment from a disbarred attorney would require a large expenditure of time and resources on our part (i.e., filing and pursuing a collection action in court) without any guarantee the judgment would be paid. In many instances, even if we were to obtain a civil judgment, we would be forced to expend additional resources in collecting that judgment, including pursuing a claim in bankruptcy or probate court. If the Court believes this is worthy of pursuit, we would recommend increasing the CDC's budget to include sufficient staffing for such collection or funding to retain an outside entity to collect on our behalf.

We agree with the GOC that requiring uniformity to disciplinary judgment language and compliance due dates could greatly assist in the collection of some outstanding fees. As a general rule, judgments should state that payments of attorneys' fees and restitution are due at the start, or no later than the mid-point, of a probated suspension. This would allow the Compliance Monitor and the CDC ample time to pursue compliance and/or petitions for revocation, if necessary. For those respondents who cannot afford to pay at the start of the probated suspension, judgments could require monthly payments with the final installment due no later than half-way through the probated suspension. This would provide certain respondents facing economic (or other) hardships with more time to pay but also leave the Compliance team with sufficient time to enforce judgments, if necessary. In cases of a short probated suspension (four months or less), respondents should be required to pay at the time of the judgment signing.

We agree that the CDC should monitor the enforcement of orders, the tracking of payments, and the practice of law by attorneys under suspension[2], which our Compliance Monitor already does very effectively as part of her daily job duties. She currently tracks payments, along with all judgment terms, through the JustWare case management software calendaring system. The Compliance Monitor and Legal Secretary for Compliance prepare quarterly reports for the Deputy Counsel for Administration, who reviews cases involving non-compliant respondents. The report identifies respondents who are non-compliant, what conditions they have not complied with, and the Compliance Monitor's recommendations for further action.

The Compliance Monitor can only "monitor" the practice of law by attorneys under suspension if someone contacts the CDC to report this may be happening. Whenever that information comes to the Compliance Monitor's attention, she immediately informs the trial attorney that handled the original disciplinary matter who in turn investigates the claim. Absent additional staff and resources, it remains unclear how we would better "monitor" whether suspended attorneys are engaging in the practice of law.

The CDC and CFLD have historically prioritized the collection of restitution over attorneys' fees in disciplinary cases in order to fulfill our mission to protect the public. Until very recently, it has been our experience and understanding that the Board of Disciplinary Appeals (BODA) disfavored revoking

who have been disbarred or who have died) stole their money or failed to return unearned fees. The CDC notes that only some of those respondent attorneys owe those unpaid or stolen fees through a disciplinary judgment.

[2] Currently, all Texas courts are regularly provided a list of the names of respondent attorneys who have been actively suspended from the practice of law so that court appearances by those suspended attorneys can be reported to the CDC. Additionally, all respondent attorneys who are actively suspended or disbarred or who have resigned in lieu of discipline are required to notify clients and the courts of their disbarment or suspension status.

an order of suspension in cases where the respondent attorney had only failed to pay the ordered attorneys' fees. The CDC's internal policy of bringing revocation proceedings before BODA only for failure to pay restitution or for engaging in the practice of law while suspended apparently evolved from this experience. As a result of the GOC Report recommendations, the CDC intends to revise its internal policy and will begin filing revocation proceedings in all cases where the respondent attorney has not complied with the order to pay attorneys' fees.

Investigatory Hearing (IVH) Process:

It is understandable that the GOC Report focused attention on the investigatory hearing (IVH) process, which went into effect on June 1, 2018. Analyzing nearly 18 months' worth of data and feedback from stakeholders in the disciplinary process, the Report made a number of recommendations to improve the IVH, including the following that the CDC and CFLD chose to highlight and respond to below:

a. Treat the IVH process like a mediation, in which witnesses and respondents would not be placed under oath and statements made in the IVH could not later be used to prove or disprove the merits of a disciplinary case during an evidentiary hearing or district court trial.

At the outset, we acknowledge a perception that the IVH process is far more formal and adversarial in practice than what is depicted by SBOT rule, policy, and literature. This perception may be due to a lack of familiarity with the process and a lack of understanding of the intended purpose of the process. Our experience has been that this lack of familiarity and understanding often results in challenges to the process by some respondents and their counsel, who often choose to interact with the IVH panels, CDC staff, complainants and witnesses in an adversarial manner. In this regard, we recognize that current education and training efforts should target this concern as more respondents and respondents' counsel participate in the IVH process.

We also appreciate that the attorney disciplinary process is unique compared to regulatory proceedings involving other licensing agencies. It is not a perfect system, but it has been found to be fair, effective, efficient, and aligned with best practices according to internal audits and evaluations by the Sunset Review Commission and the Supreme Court's Ombudsman. We recognize that with the reintroduction of the IVH process in 2018, there exists a tension between what happens during the investigatory stage (pre-Just Cause) and the litigation stage (post-Just Cause) when respondents elect or default into an evidentiary proceeding. The role of CDC staff changes along with the role of the grievance committee members appointed to hear the EVH. What was once intended to be "non-adversarial" and "informal" becomes adversarial and formal. While the panel assigned to hear the IVH enjoys an attorney-client privileged relationship with CDC staff, the panel that presides over the EVH (required to be an entirely different panel) becomes the tribunal and the CFLD becomes the CDC's client in those cases. While this unusual process is clear and well-understood by CDC staff, there may be other participants or observers for whom this process makes no sense and appears to be unfair. As a result, they remain highly critical of the IVH process. This may be at least one source of the GOC Report's recommendation to transform the IVH process into a mediation.

Understanding the source of frustration and criticism surrounding the IVH process, we respectfully disagree with the recommendation that IVHs be treated and conducted like a mediation. We believe that this recommendation would be inconsistent with the goals of an investigation and

our mission to protect the public. While we recognize that the IVH stage was reinstituted to provide the opportunity for respondents to resolve their cases earlier in the disciplinary process, it was never intended as a tool for the CDC to negotiate with respondents or their counsel to settle cases. Practically speaking, the CDC has no settlement authority in the IVH stage, and there is no one serving in the role of "mediator." The IVH panel's role is to investigate, serve as a fact finder, and recommend an outcome in the case, which could include dismissal. Unlike an IVH, mediation does not result in a dismissal of the case. This is critical when considering the recommendations to eliminate the requirement for oath-taking during an IVH and not permit statements to be admissible elsewhere. This too would be inconsistent with our mission to protect the public. It is an unfortunate, and not infrequent, reality that respondents lie during the disciplinary process.[3] Just as it remains a crime to lie to law enforcement during its investigation of a crime, there should be consequences for respondents who lie during an IVH. In terms of the likelihood that a respondent would lie to a grievance panel and have his/her complaint dismissed as a result of that lie, this GOC recommendation would not align with our mission to protect the public and would undermine the credibility of the CDC, the grievance panels, and the attorney disciplinary system as a whole. A mediation also cuts the complainant completely out of the process, which is not what was intended when the Legislature and Court reinstituted the IVH process.

Similarly, the CDC's ability to use a respondent's statements for impeachment purposes in a later adversarial proceeding should remain intact and governed by the Texas Rules of Evidence. If admissible, these statements should be made available to the EVH panel to evaluate its decision under the Sanction Guidelines mandated by the Court and Legislature. Frankly, if a respondent has not committed misconduct and/or has told the truth in response to the complaint, there should not be a legitimate concern about testifying under oath at an IVH if s/he wants to argue that the complaint should be dismissed.

We do understand why a respondent would not want the IVH to be recorded and potentially used against him/her in litigation. However, it should be noted that the fact that the CDC is recording the proceedings actually works in respondents' favor in many instances. With the arrival of the COVID-19 pandemic, which forced the CDC and grievance panels to conduct remote IVHs utilizing Zoom video technology, the CDC's recording of the proceedings is now the best evidence as to what actually occurred during the hearing. Although the CDC and grievance panels have issued warnings to address concerns about illicit or secret recordings being made by individuals participating remotely in the hearings, there is no guarantee that a witness or complainant is not recording the proceedings. With the current state of technology and the proliferation of misinformation on social media, not having an official recording of the hearing made and maintained by the CDC would be a grave disservice to all participants.

b. Provide respondents with more specific "notice" of potential rule violations and include language that the panel has discretion to evaluate all potential violations.

[3] Complainants and witnesses often lie during disciplinary proceedings as well; however, we would argue that the harm to the attorney disciplinary system and to the public as a result of fraud, dishonesty, deceit or misrepresentations by respondent attorneys far outweighs the costs and burdens imposed on the disciplinary process posed by false statements from complainants or witnesses.

As a general rule, when drafting their complaint against an attorney believed to have mistreated or stolen from them, complainants are not expected to be sophisticated enough about the law to know the specific rules that may have been violated. Therefore, by itself, the narrative contained in the complaint should not limit the scope of the investigation. Unless the respondent has been asked to respond to an SBOT-initiated complaint, the CDC is not the one making allegations at this point; it is not our complaint to make or to limit.

In contrast, respondents (and their counsel) are, or should be, experienced and sophisticated enough to know how to spot the legal issues raised in the information provided to them by CDC staff during the investigation. This includes issues raised by a notice of subpoena requesting specific records and issues raised by what is contained in the IVH packet they receive prior to the IVH. It has been our experience that responsible respondents (and their counsel) contact the CDC during the investigation to ask what is needed as part of their response or to prepare for the IVH. CDC staff always inform the respondent or his/her counsel what we have identified as possible rule violations. We also tell them that the IVH panel may inquire about additional violations during the hearing, since it is part of the investigation. Prior to the hearing, we provide them with a copy of everything in the IVH hearing packet that the panel and CDC staff have (except the Investigation Report, which is privileged).

While we disagree that respondents are not currently provided sufficient notice or due process before they appear before an IVH panel, there are steps that we can take to address these concerns. As recommended, in the IVH notice letter sent to respondents, we can include the specific allegations and rule violations that we have identified as having been raised by our investigation. In addition, we already include in the notice letter a statement notifying the respondent that the IVH panel is not bound by the issues raised by the CDC and may expand the scope of the investigation during the course of the hearing.

c. Formalize the process for selecting which cases go to IVHs and for allowing the CDC to withdraw cases set on the IVH docket when appropriate.

It is our belief that formal rules as to which cases should be set for an IVH and which cases should not go before an IVH panel are not needed. We have great trust and confidence in our CDC attorneys, who are well-trained, experienced, and more than capable of making these decisions without having to get approval from the Regional Counsel or the CDC in every case. There have always been informal guidelines that consistently apply. For example, if it is a complicated case, involves multiple witnesses and/or serious misconduct, or involves a respondent who is uncooperative, non-responsive, or has multiple cases, a decision by CDC staff attorneys to go straight to litigation is sound.

*Among the criticisms surrounding the IVH process presented to the GOC was that certain cases on the IVH docket were not appropriate for an IVH and should not have been heard by an IVH panel. While CDC staff remain in the best position to identify when a case is appropriate for an IVH and which cases are not appropriate, there have been instances when the decision to set a case for an IVH had to be made in the absence of complete information from respondent or an investigative subpoena. Currently, the CDC lacks authority to pull a case back from the IVH process once it has been set. Often, we receive new information from respondents **after** they are notified*

of the IVH setting and become sufficiently motivated to participate more fully in the process. That new information might have exonerated the respondent and could have led to an earlier recommendation of dismissal without the need to conduct a hearing. Alternatively, the new information could have complicated a simple case or raised far more serious allegations of misconduct, which would have led the CDC to take the case into litigation earlier in the process.

Unfortunately, respondents are notorious for waiting until the day(s) before the IVH to provide records that could have resolved the case without a hearing. Some respondents wait to respond to the complaint until the IVH has convened while others fail to appear despite having been provided with notice multiple times. IVH panels are understandably frustrated when having to sit through hearings on cases that ultimately have no merit or where the respondent refuses or fails to appear. The CDC should have the discretion to pull a case back from the IVH docket if something material is discovered and not force the panel to hold unnecessary hearings.

Uniform Sanction Guidelines:

The GOC Report recommended that the CDC track case outcomes against the sanction guidelines to determine whether the grievance committee panels are following the guidelines and that the CDC survey panel members to determine if the guidelines were adequately explained to them by CDC staff.

In litigation, the CDC currently reports to the CFLD whenever a grievance committee or court issues a sanction that falls outside the CFLD's recommended range. This may or may not include cases where the sanction guidelines were not followed. Tracking this information at the IVH stage as well would be instructive, especially if it demonstrates a trend within a particular region or with a particular panel. However, it remains unclear what purpose this information ultimately would serve since the entire premise ignores the reality that grievance panels exercise discretion to decide cases however they want, regardless of sanction guidelines. CDC staff provides the information to panels at hearings, and it is discussed as part of the grievance committee member orientation/training as well. In the end, grievance panels often do their own thing for their own reasons, and the reality is that these are just "guidelines," not mandates. Nevertheless, it remains a concern to the CDC that failure to follow the sanction guidelines could expose the CDC and CFLD to claims of disparate or unequal treatment of certain respondents.

Grievance Referral Program (GRP):

GOC has asked that the CDC evaluate whether the criteria for participation in GRP could be expanded further to promote greater efficiency and to have the GRP Administrator send a follow-up questionnaire to respondents who have completed the program.

*Like the sanction guidelines, the GRP criteria are made available to grievance panels by CDC staff, but it remains within the panel's discretion whether to follow the criteria. In truth, it would be more helpful to the GRP Administrator and would promote greater efficiency for the GRP Program overall if the grievance panels **followed the existing criteria** as opposed to the current practice of expanding the criteria on an informal, ad hoc, and inconsistent basis. It is CDC's concern that the current practice could expose the CDC and CFLD to claims of disparate or unequal treatment of certain respondents (similar claims could be made if panels do not consistently follow the sanction guidelines).*

Additionally, GRP cannot be successful if grievance panels "expand" the criteria and send the wrong people into the program. Among the issues raised by the GRP Administrator and Legal Secretary for

Compliance are when panels place an uncooperative or nonresponsive respondent into GRP. This is counterproductive. In addition to increasing the workload for the GRP Administrator, it likely results in the nonresponsive/uncooperative respondent failing to complete the program (resulting in a delay in the resolution of the grievance). If a respondent has not cooperated during the investigation or has waited until the IVH or EVH hearing to respond, odds are they will not cooperate in GRP. Similarly, someone accused of barratry/improper solicitation or an advertising violation would likely not benefit from the GRP program. Referring respondents who have already completed GRP (and had their complaints dismissed) defeats the purpose of the program and incentivizes respondents/respondents' counsel to try to negotiate the dismissal of more serious misconduct cases with a referral to GRP.

*In line with **following** existing criteria for GRP eligibility and participation, grievance panels should require every GRP participant to pay restitution and/or attorneys' fees **before** they enter GRP; otherwise, even a "successful" GRP participant will be sent back into the disciplinary process as having "failed" GRP simply because they were unable or failed to make the last payment towards the fees owed. In light of these examples where panels have "expanded" the criteria in certain cases, the CDC would argue against any further expansion.*

As a result of the GOC recommendations, the GRP Administrator has prepared a survey/questionnaire to go to GRP participants with their closing letter and will provide feedback regarding any responses to the Deputy Counsel for Administration.

The GOC Report contained some recommendations that, though outside the direct purview of the CDC or CFLD, some response from us might nevertheless prove instructive to the Court.

Assumption and Cessation of Practice:

Although Rule 13 of the Texas Rules of Disciplinary Procedure still provides the CDC with jurisdiction to ask for court-ordered custodianship in cessation-of-practice cases, the "pilot program" for the assumption and cessation of practice was recently moved out of CDC and is now part of the State Bar's Law Practice Management Division. This program remains an important service provided to support SBOT membership and is critical for the Bar's public protection mission. There is much work that still needs to be done in this area to prevent the wholesale abandonment of client files and property in trash bins, dumpsters, or abandoned storage facilities. These improvements will require rule changes and possibly legislative action.

Law School Curriculum:

Although we have no involvement in any law school's curriculum decision, we have always been and will continue to be responsive to requests from faculty to provide training to law students about the grievance system. One of the upsides to moving to remote operations and having to conduct meetings and trainings by Zoom is that there are more opportunities for us to present to more diverse groups across the State without incurring the time and expense of travel.

Ombudsman:

Although the Ombudsman is independent of the SBOT and answers only to the Texas Supreme Court, we have routinely provided complainants, lawyers, and the public with information about the Ombudsman program. If there are concerns from GOC that the program is not well known, it is likely only due to the fact that it is still relatively new.

TLAP:

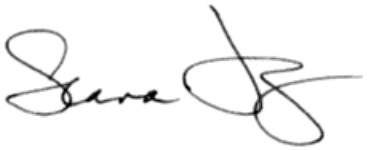
TLAP is an independent program of the SBOT. It needs to be, and must be perceived to be, totally separate from the CDC and CFLD. Training and information about TLAP are currently provided in CFLD and grievance panel member trainings and orientations. TLAP is also included in nearly all ethics presentations given by CDC staff to various bar associations and other lawyer groups. The CDC herself has presented entire hour-long, recorded webinar presentations on TLAP for CLE credit. It remains one of the most important services provided to attorneys, judges, and law students, especially during the global pandemic. The work of TLAP's staff and volunteers saves lives; its innovative programs, trainings, and resources have made it a model for other states.

There are other recommendations and topics that the GOC Report covered that should be more appropriately addressed by other divisions, committees, and entities within or outside of the SBOT. However, we stand ready to provide additional information and resources to the Court in the event that our input on those recommendations is sought.

Please do not hesitate to contact us if you would like to discuss our response further.

Sincerely,

Gena Bunn, Chair
Commission for Lawyer Discipline



Seana Willing
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cc: Meryl Benham
Trey Apffel