
The Grievance Oversight Committee
Appointed by
The Supreme Court of Texas

Biennial Report
June 1, 2012

Members
2011 -2012

Judy Sebesta, Dallas, Chair
Demetrius Bivins, Houston, Vice-Chair
Kelly Benzon, Austin
Faye M. Bracey, San Antonio
Joey Gonzalez, Edinburg
Charles Herring, Jr., Austin
Karen Nicholson, Midland
Velva L. Price, Austin
Stan Serwatka, El Paso

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CHARLES HERRING, JR.
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REPLY TO
JUDY SEBESTA
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June 1, 2012

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

On behalf of the Grievance Oversight Committee, I am pleased to submit the Committee's 2012 Report in accordance with this Honorable Court's Order Reconstituting the Grievance Oversight Committee, Misc. Docket No. 11-9003 and the Amended Order Regarding Grievance Oversight Committee, Misc. Docket No. 12-9010.

The Committee again traveled across the State to solicit and obtain input about the grievance system. The GOC continues to believe nothing can replace local visits in order to understand fully the processes that are working and those that need improvement. Our visits since our June 2011 Annual Report included the following locations: San Antonio, Austin, El Paso, Laredo, Corpus Christi, Dallas, Fort Worth and Houston. We visited with members of the judiciary, the public, public interest groups, respondents' counsel, and representatives of the scores of men and women who work in the grievance system.

I want to express our thanks for the opportunity to serve the Court, the citizens of Texas, and the legal profession. The GOC will be available to discuss this report with the Court, or answer any questions the Court might have concerning our comments and recommendations. Thank you for the privilege of serving the Court in this important undertaking.

Respectfully submitted,

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

Judy Sebesta
Public Member
Chair, 2011-2012

cc:

Bob Black, Esq., President, State Bar of Texas
Buck Files, Esq., President-elect, State Bar of Texas
Beverly B. Godbey, Esq., Chairman of the Board of the State Bar of Texas
Ron Bunch, Esq., Chair, Commission for Lawyers Discipline
Linda Acevedo, Esq., Chief Disciplinary Counsel
W. Clark Lea, Esq., Chair, Board of Disciplinary Appeals
Kyle Lewis, Esq., Chair, State Bar Board Discipline & Client-Attorney Assistance
Committee

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GRIEVANCE OVERSIGHT COMMITTEE

JUNE 2012 REPORT

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2012 REPORT TO THE SUPREME COURT OF TEXAS

By The GRIEVANCE OVERSIGHT COMMITTEE

History and Scope of the Report:

The Grievance Oversight Committee (the "Committee" or "GOC") hereby submits its 2012 Report as ordered by the Texas Supreme Court. The history of the Committee is detailed in our 2007 Report. Additionally, the Texas Supreme Court's Amended Order Reconstituting the Grievance Oversight Committee, dated February 22, 2011, Misc. Docket No. 11-9003, revised the terms of Committee members. The Court's Amended Order Regarding Grievance Oversight Committee, dated January 24, 2012, Misc. Docket No. 12-9010, revised the annual reporting to biennially in even-numbered years.

During the year, the Committee travels across Texas to meet with local and State Bar leaders, grievance system volunteers, judges, and the public. It is an intense process that requires each member to draw on his or her substantial experience in the grievance system to question and evaluate the answers and comments we receive. In addition, the GOC reviews reports submitted by various grievance system entities and asks hard and relevant questions. The GOC is not an audit committee, and has no regulatory oversight authority.

Throughout this process, the GOC continues to find that the dialogue that results from its reports encourages improvement of the grievance system. The Committee's goal is to ask challenging questions and evaluate the answers we receive and then report on what we see and hear to our one constituent, the Supreme Court of Texas. The Court has the ultimate responsibility to administer the grievance system. Our responsibility is to evaluate what we see and hear, comment, and suggest recommendations to the Court based on this constant review of the grievance system. The Committee appreciates the opportunity to provide input to the Court as it administers the grievance system.

Barratry

Background:

Historically, Texas barratry restrictions have rarely been enforced. As recently as 1994, a Texas law review article noted that “despite periodic refinement of the [barratry] statute, no Texas lawyer has been convicted under the 118-year-old law.”¹ Nonetheless, anecdotal reports of barratry have proliferated—including reports to the Grievance Oversight Committee.

In the last Session, the Texas Legislature passed SB 1716, creating new civil remedies against barratry. SB 1716 amended Texas Government Code § 82.065 and added § 82.0651. Section 82.065 now provides remedies for clients who are subjected to barratrous conduct—clients may void a contract that results from barratry. Section 82.0651 provides a remedy for non-clients who are solicited through barratrous conduct (even those who never enter a contract with a lawyer). Those solicited persons may recover (1) a \$10,000 penalty, (2) actual damages, and (3) attorney’s fees. That legislation, and the resulting statutory amendments, have focused considerable media attention on barratry.²

The Committee also received reports from the Office of Chief Disciplinary Counsel (the CDC) concerning its ongoing monitoring and assistance in recent barratry prosecutions. Additionally, the Committee contacted the Office of the Texas Attorney General (OAG). The white collar crime division of the OAG has coordinated with district attorneys around the state to assist with criminal prosecution of barratry violations. The OAG has no independent statewide prosecutorial jurisdiction over barratry. However, the OAG assistants have on occasion served as district attorneys pro tem to prosecute cases or have served as special assistant district attorneys for a particular case. Most of the reported prosecutions involve chiropractors, not lawyers.

Nonetheless, despite the many anecdotal reports of “rampant barratry” in some parts of the state, prosecutions remain difficult and infrequent. One reason is that barratry is usually a “closed-loop” crime. For example, if a lawyer pays a case-runner to commit barratry by soliciting cases, ordinarily the transaction is in cash. The resulting client may be unaware of the barratry. Thus, unless the lawyer fails to pay the case-runner, or otherwise alienates the case-runner, the runner has no reason to report the crime—and ordinarily no one else knows about it. Moreover, if the non-lawyer runner reports the barratry, the prosecution may boil down to a credibility battle between a lawyer and the non-lawyer case-runner. Understandably, such crimes are difficult to

¹ Katherine A. Laroe, *Much Ado About Barratry: State Regulation of Attorneys’ Targeted Direct-Mail Solicitation*, 25 St. Mary’s L. J. 1513, 1524 (1994). A recent story concerning a rare barratry conviction appears in Michelle Villareal, *Former Corpus Christi Attorney, Employee Sentenced in Barratry Case*, Corpus Christi Caller (May 23, 2012), available at <http://www.caller.com/news/2012/may/23/former-corpus-christi-attorney-employee-in-case/>.

² The principal criminal prohibition against barratry is in Section 38.12 of the Texas Penal Code. *See also* Tex. Penal Code § 38.18 (addressing use of certain accident reports information). No Texas statute defines “barratry.” Case law reflects various definitions—such as “vexatious incitement to litigation, especially by soliciting potential legal clients.” *State v. Jiminez*, 148 S.W.3d 574, 576 (Tex. App.—El Paso 2004, pet. denied) (quoting Black’s Law Dictionary 144 (7th ed. 1999)). Texas Disciplinary Rule of Professional Conduct 8.04(a)(9) prohibits barratry. Texas Rule of Disciplinary Procedure 1.06(V) defines “professional misconduct” as including “[e]ngaging in conduct that constitutes barratry as defined by the law of this state.”

investigate and even more difficult to prove. Some lawyers who testified before the Committee recommended that the Bar or local law enforcement should use undercover investigative techniques to detect and prosecute barratry. The Committee is sympathetic to that request and intends to investigate that option further during its next term.

Barratry prosecutions also are outside the typical comfort zone of many district attorney offices. Complaints are rare and most district attorney offices lack staff who are experienced in barratry prosecutions.

Recommendations: For the present, the Committee has concluded that monitoring the enforcement and effects of the new civil remedies and attempting continued and enhanced coordination of existing prosecutorial resources are the best approaches. Further, we recommend that the CDC continue to coordinate with the White Collar Crime division in the Texas Attorney General's office to attempt to track and report annually the number of barratry prosecutions undertaken across the state, the types of barratry prosecutions (e.g., attorneys, chiropractors, bail bondsman), and the number of successful prosecutions. The CDC should establish a process to coordinate with local, state, and federal law enforcement agencies to assist in barratry prosecutions and to investigate the feasibility of undercover operations to enforce criminal and disciplinary prohibitions against barratry. The CDC should also monitor the effects of the enforcement of the new civil remedies for barratry.

Education and Training of Volunteers

The GOC is always interested in the education of the volunteers who participate in the grievance system. When meeting with those participants across the state, the GOC asks the volunteers to evaluate the training they receive. Our prior reports have addressed those comments and areas for improvement.

Comments we received this year from panel members identified inconsistencies in the amount, availability, and quality of training. We have shared many of the comments with CDC personnel and have been assured that regular, consistent, comprehensive training is occurring. Consistent and thorough training is important for a system that relies on volunteers who enter and leave the system on a regular basis. Listed below are examples of the comments and questions we received from panel members.

- I was told about the training, but nothing made me think it was important.
- It would be helpful to know a choice of dates or places to attend the training—some alternatives if we couldn't attend our own training. I thought if I couldn't attend one, I didn't have another choice.
- We have a luncheon once a year. I think that's where we have some kind of training. It never lasts long.
- As a public member, I relied on the attorneys to explain things to me. There was a lot of terminology that I didn't know.
- As a public member, I felt very comfortable. I went to the training and read everything they gave me.

- GRP? What's that?
- TLAP? Never heard of it.
- I'm an attorney; I can run an evidentiary hearing.
- Although I'm an attorney, I really didn't feel comfortable at my first evidentiary hearing. I was glad to have step-by-step directions telling me how.
- Some of my committee members came with an agenda. We should all maintain respect for each other and for general populations.

Recommendations: Variations of some of these recommendations have been included in previous reports. We repeat those recommendations as we continue to hear these concerns in our interviews across the state.

1. The disciplinary system must continuously evaluate and improve training. The CDC must continue to stress the importance of training. All components of the grievance system should be included in annual training. A schedule of dates and locations for training should be provided to all panel members across the state. This unified schedule would provide panel members alternative dates and locations in case of local scheduling conflicts.
2. Convene a group of persons who have recently completed their terms, including public members, to review the current training materials and make recommendations for improvement.
3. Additional training should be made available to public members specific to the needs of non-lawyers.
4. All panel members should be required to observe an evidentiary hearing before participating on an evidentiary panel. A good option is to watch the mock hearing, "What to Expect in an Evidentiary Hearing," created by CDC and available on the State Bar website.
5. District panels members should meet together annually to discuss and exchange information. Another option is for the district panel chairs only to meet together.
6. Panel members should complete a training session before participating on a panel. Panel chairs should determine whether new panel members have completed that training and should notify CDC if any panel member has not received training, either by attending training in person or watching online training.

Education and Training of Local Bar Leaders

The GOC has previously emphasized the importance of educating the general public about the grievance process. This year, we received comments from local bar leaders who were unfamiliar with the grievance process, including for example the panels in their own city. We encountered this situation primarily in smaller cities or areas that no longer have a CDC field office. Local bar leaders with larger memberships and/or with a local CDC attorney seemed to have greater familiarity with the process.

Recommendations: The Committee recommends increase efforts to educate local bar leaders concerning the grievance system resources in their cities.

1. One option is for a CDC attorney to meet with local bar leaders.
2. Another option is a breakout session at the Bar Leaders' Conference to address the grievance process and its available resources.

Grievance System Symposium

The GOC has previously recommended that another Grievance System Symposium be conducted. Such a symposium was held on May 16, 2012. We applaud CDC and the Commission for Lawyers Discipline (the CLD) for their leadership in organizing and sponsoring the symposium.

The Texas Bar Exam

In GOC's 2011 annual report, the GOC recommended that the Texas bar exam include questions based on the Texas Disciplinary Rules to ensure that Texas applicants and newly licensed attorneys would review and study the Texas Disciplinary Rules before beginning law practice in Texas. Based upon that recommendation, the Board of Law Examiners voted unanimously to recommend revising the Texas Bar Examination Subjects list to address the Texas Disciplinary Rules of Professional Conduct. At the Board's direction, Ms. Vaughan has submitted a letter to the Texas Supreme Court suggesting specific revisions. The GOC greatly appreciates the Board's responsiveness and cooperation on this issue.

Panel Letter

Several grievance committee panel members told the GOC about a situation that sometimes arises in cases in which grievance committees conclude that the factual circumstances do not warrant further investigation or discipline. In some of those cases the panel also concludes that the attorney should be informed that the panel was concerned about the attorney's conduct or practice methods. A few panel chairs stated that in such cases they wrote to the attorney to explain their concerns about such potential rule violations or practice methods. Other panel chairs stated that while at times they wanted to express such concerns, they concluded that no procedure existed under the rules to authorize such communication. Nothing in the rules expressly prohibits such a letter, but at present the practices vary among panels across the state.

The GOC is aware that several states use "letters of admonition" as a disciplinary sanction, usually the lowest form of discipline. Rule 10 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement similarly provides for a "Letter of Admonishment" as a disciplinary sanction. The GOC does not recommend incorporating "Letters of Admonishment" as a disciplinary sanction under the rules. However, the GOC believes a panel letter expressing concerns could be an effective tool to appropriately inform lawyers in such instances.

Recommendations: The GOC recommends that panel chairs or their designee be allowed to write to the respondent-attorney informing him or her of the panel's concerns and practice recommendations. Panel training should include training concerning this option.

Diversity of Grievance Committee Members

In its 2011 Annual Report, the CLD provided a diversity breakdown for the grievance committee membership and compared the percentage to the State Bar of Texas membership. However, one concern expressed by some persons who spoke to the GOC this year was that the attorney membership on grievance panels does not reflect the diversity existing among actual State Bar membership. The issue arises because the grievance committee consists of both public and attorney members, but the State Bar of Texas membership consists solely of attorneys. The last column of the table below shows the diversity numbers resulting if only attorney members are compared to the State Bar of Texas attorney population:

*Commission for Lawyers Discipline, 2011 Report

**Suggested Column Addition

Gender	Diversity of Membership			**	
	Attorney Membership	Public Membership	Diversity per CLD Report*	Diversity Actuals of SBOT Membership Without Public Members**	
Male	73%	68%	72%	67%	
Female	27%	32%	28%	33%	
Ethnicity					
White Caucasian	76%	71%	76%	83%	
Asian	2%	0%	1%	3%	
African American	7%	16%	10%	5%	
Native American	0%	1%	1%	<1%	
Hispanic	12%	10%	11%	8%	
Other	3%	1%	2%	1%	

Recommendations: Provide the additional statistical breakdown (shown in the last column above) in order to give a clearer picture of the diversity of attorney panel members compared to the State Bar attorney membership. That additional statistical breakdown shows that including public members on panels increases overall panel diversity. Providing the additional statistical breakdown suggested in the table above would assist in analyzing this diversity issue on an ongoing basis.

Attorney Suspensions

Currently no formal system exists to confirm that suspended attorneys are not still practicing law. On occasion CDC receives informal or anecdotal reports that suspended attorneys are, in fact, still practicing law. However, CDC does not check on or audit compliance with suspension requirements. On the other hand, some court clerks' offices now allow online checks to determine the license status of all attorneys of record who appear as current counsel. A comprehensive monitoring system is not possible, but at least some spot-checking may be possible through such computerized docket systems.

Recommendations: The CDC should investigate developing additional measures to determine whether suspended attorneys are still practicing law.

Case Management and Statistical Reporting

As addressed in the GOC 2011 Report, the Texas Supreme Court has assigned GOC the responsibility to review available current reports and statistics generated by the various entities of the disciplinary system. Better statistics and other data are critically important, both for GOC to perform that assignment and for the various disciplinary system components to enhance their own self-evaluations. The CDC continues to pursue the development of the new Case Management and Statistical Reporting system with the goal of obtaining "management information that is timely, reliable, and will facilitate faster and easier decision-making."

The CDC currently estimates that the new-improved system will be operational by September of 2012. The GOC looks forward to the finished CCMS product and the improved ability to accomplish our responsibilities to the Court.

Public Access

The GOC received input from a public interest group indicating that some of the Bar's online materials explaining the grievance process are written in language that sometimes uses legal terminology not familiar to all laypersons (e.g., "signing the grievance (complaint) form waives the attorney-client privilege"). The suggestion was that such language is not sufficiently "consumer friendly" or written in "plain English," and thus may deter some potential non-lawyer complainants from going forward with the process.

Recommendation: Have a plain-language expert review the online grievance materials (and any comparable printed Bar brochures) to identify and reword any language that is unnecessarily technical or not "consumer friendly." The same sort of review should be made for any available Spanish-language materials.

Accolades

The GOC wants to thank Justice Don Willett as the Court's 2011-2012 liaison to the GOC. The GOC appreciates Justice Willett and Jennifer Cafferty, General Counsel to the Supreme Court of Texas, for their assistance and guidance. Justice Willett's and Jennifer Cafferty's willingness to set aside time to meet with us, both in person and by phone, has been invaluable in the performance of our duties for the Court.

This August 2012, the GOC will feel the void created by the term expiration of Karen Nicholson, a public member from Midland, and Velva Price, an attorney member from Austin, both who have served the Court on the GOC for a decade. Karen's and Velva's unselfish willingness to contribute their time and their experience to the betterment of the legal profession in the State of Texas began with their volunteer service on other committees and boards within the grievance system over a span of many years. Karen's and Velva's tireless contributions to the grievance system processes cannot go without special recognition in this 2012 Report to the Court. They will be missed as the GOC continues its work.

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