

STATE BAR OF TEXAS



Office of the Chief Disciplinary Counsel

August 22, 2022

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:

On behalf of the Commission for Lawyer Discipline (CFLD) and the Office of the Chief Disciplinary Counsel (CDC), thank you for the opportunity to respond to the Grievance Oversight Committee's (GOC) 2022 biennial report (the *Report*), and for giving us an additional week to submit our response. As always, we appreciate the tireless work of the volunteer members who serve on the GOC. We share with them the goal of improving the Texas attorney grievance system so that it remains a fair, effective, and efficient process of self-regulation of the legal profession, while ensuring the public will be protected from the unethical conduct of Texas attorneys.

Below are our responses to sections of the *Report* and recommendations that we believe warrant further attention:

Client Security Fund:

Background

Every state in the U.S. and every province in Canada has some form of client protection fund as part of the regulation of the legal profession. In Texas, the Client Security Fund (the CSF or the Fund) currently holds more than \$3 million in its corpus. Payouts are funded through an annual appropriation from the State Bar of Texas; interest on the corpus; and any restitution received from the attorney disciplinary process. The Fund was established by the State Bar of Texas to restore client confidence when a Texas attorney abuses his/her position of trust in financial dealings with the client. It provides financial relief to clients whose lawyers have stolen money intended for the client or failed to refund an unearned fee. The Fund remains a key piece of the CDC's

P. O. Box 12487, Austin, TX 78711, (512) 427-1350, (877) 953-5535, fax: (512) 427-4167

public protection mission and strives to provide meaningful assistance to clients who have been victimized by attorney misconduct.

Eligibility for Grants

In general, there are two main avenues for the eligibility of an applicant. The first is obvious attorney theft, such as when an attorney fails to turn over settlement funds to the client. The second is failure to refund unearned fees. This can include situations in which an attorney dies or becomes disabled, leaving behind insufficient funds in his/her attorney trust account, despite not having performed sufficient work to earn the fees that were paid.

In order to prove eligibility, an applicant must prove: (1) that his/her lawyer engaged in dishonest conduct; (2) that s/he was a client of that lawyer; (3) that the lawyer gained possession and control of the client's money or property; (4) that s/he sustained a loss of money or property as a result of the dishonest conduct; (5) that s/he participated in the grievance process when required; and (6) the application was timely filed. These requirements are discussed in greater detail throughout the Fund Rules.

Report Recommendations:

- (1) Among the items covered in the *Report* is the recommendation to increase the Fund balance to address the number of applications received in recent years relating to deceased attorneys. As the *Report* notes, in the 2019-2020 Bar year, the Fund received 24 applications involving deceased attorneys and 41.5% of its payouts were due to deceased attorneys. In the 2020-2021 Bar year, the number of applications involving deceased attorneys increased to 27, representing 36% of all payouts.

In response to this recommendation, we note that the Board of Directors has already recognized this need and increased its commitment to the Fund in the 2023 State Bar of Texas Budget.

- (2) The Report also recommends that, in lieu of lump-sum payouts to clients, the CSF structure payouts over time in order to decrease the impact on the Fund balance each year. *In response to this recommendation, it should be noted that a structured payout to claimants would increase the work of both the CSF Administrator and the Bar's Finance and Accounting Division. Ongoing challenges, including checks that are not cashed because the recipient has moved or loses the check, would increase with the issuance of multiple checks over time. The Finance and Accounting Division would be required to follow up on each of these payments and report the uncleared checks to unclaimed funds. Also, there is no evidence that delaying payment would have any impact on the fund balance since the payments would likely be issued over a one-year period.*

Based on initial discussions with the Finance and Accounting Division, it appears unlikely that this recommendation could be accomplished without committing significant Bar resources with no guarantee or likelihood of any positive impact on the Fund balance.

- (3) Another recommendation is for the CDC to implement stronger restitution and reimbursement efforts, discussed in more detail below.

Again, we respectfully disagree with GOC's suggestion that this could be accomplished without committing additional Bar resources, including but not limited to hiring additional staff to pursue additional collection efforts in court.

Recouping Payment from Attorneys: *An ongoing challenge for the CSF remains the collection or recoupment of moneys paid out of the Fund from respondent attorneys who have been the subject of grant applications. This complex issue is further complicated by attorneys who: (1) have been ordered to pay restitution under a disciplinary judgment; or (2) are disbarred, resigned, or deceased.*

- a. Order of Restitution: Approximately 1/3 of the Fund's applications are filed as a result of attorneys who did not pay restitution after they were ordered to do so. In almost every case, the attorneys were either disbarred via an underlying disciplinary judgment or a subsequent one. In many cases in which an attorney was disbarred or resigned in lieu of discipline, s/he struggled with a mental health issue or substance use disorder. These attorneys are almost always insolvent making the likelihood of collecting or recouping funds very low. Additionally, nearly 3/4 of the disciplinary judgments were rendered by an evidentiary panel rather than a district court.

Absent filing its own suit in district court, there is no other legal mechanism available to the CSF for converting an order of restitution issued by an evidentiary panel to a money judgment that can be enforced in district court. This issue could be resolved with legislation or a Court Rule that would specifically provide a mechanism for the CSF to convert an order of restitution issued by an evidentiary panel to a money judgment that can be enforced in district court.

- b. Disbarred/Resigned Attorneys and Deceased Attorneys: Approximately 2/3 of the Fund's applications come from clients whose attorney was disbarred or resigned without an underlying order of restitution as to the applicant, or whose attorney has died leaving no money in a trust account, despite not having earned the retainer fee. When the attorney has died, the CSF Administrator conducts a search to ascertain whether there is an open estate that might be capable of paying the applicant. This rarely occurs. In these cases, there is no judgment on which to collect.

This issue could be resolved with legislation or a Court Rule that would specifically provide a mechanism for the CSF to obtain a money judgment that can be abstracted after a payout by the Fund.

- (4) The GOC has recommended two loss-prevention measures that are worthy of serious consideration as both are successfully being utilized in other jurisdictions:

- a. Payee Notification: This loss-prevention method requires insurance companies, when issuing settlement checks payable to both the claimant and their attorney, to provide written notice to the claimant at the same time payment is made to the attorney. At least 10 other states have some form of payee notification requirement. Texas law currently does not require this.¹

A revision to TDRPC Rule 4.02, or the comments to this rule, could aid in this effort by creating an exception allowing TDI to notify both the claimant and their attorney in this particular instance.

- b. Trust Account Overdraft Notification: This loss-prevention method requires attorneys to keep their attorney trust accounts at banks that notify disciplinary authorities when an attorney trust account is overdrawn.

Texas is one of only 4 states without this requirement. This early detection system could serve as a meaningful preventative tool for all Texas attorneys and, in particular, could assist struggling solo and small firm lawyers² by directing them to helpful resources before they enter the attorney grievance system.

- c. Unclaimed Trust Account Funds: Though not included in the Report, other jurisdictions have provisions that allow the CSF to collect unclaimed trust account money belonging to missing clients

¹ In August 2010, at the request of the State Bar of Texas, the Texas Department of Insurance issued a bulletin strongly encouraging all insurance companies to notify claimants of the amount and method of payment and the name and address of the party to whom the payment was made. That request has not been renewed and no additional bulletins have been issued since then.

² In Texas, solo and small firm lawyers account for approximately 40% of Bar membership but receive 70% of all grievances filed with the CDC and 86% of all sanctions issued.

and deceased attorneys to be held by the Fund for a period of time before the Fund may use those funds as a revenue source.

This provision, as well as those identified above, could be accomplished through a Court Rule.

- (5) The Report also recommends that: (a) the CSF online application be available to applicants in both English and Spanish; (b) the CSF brochure should be updated, made available in English and Spanish, provide more detailed information, including the deadline for submitting an application, and include a link to the online application; (c) the CSF committee should meet more than quarterly; and (d) additional staff within the CDC should be devoted to supporting the CSF Administrator.

We support each of these recommendations; however, implementing these recommendations would require additional resources, including possibly an increase in the CDC's budget to fund additional staff support. Additional staff support would be necessary due to the likely increase in the number of applications, including applications in Spanish that would require translation, resulting from making the process more accessible to more members of the public.

- (6) Finally, the Report recommends updating or amending Section 3.08.02(F) of the Board of Directors' Policy Manual regarding the dissemination of CSF rules, procedures, forms and brochures to Grievance Committee Chairs. As the GOC correctly points out, this current requirement places Committee Chairs in a difficult position when presiding over Investigatory or Evidentiary Hearings.

Amending the policy to require informational materials to be sent to complainants by the CDC as part of the close-out process, which we currently do, would bring Board policy in line with current practice.

Investigatory Hearing (IVH) Process:

- (1) In addition to removing references to the "non-adversarial" nature of proceedings in CDC notices to respondents, the GOC recommends that the CDC add information in the IVH notices to respondents regarding the number and percentage of IVH cases that are resolved through GRP or with outright dismissal.

As noted, the CDC has revised its IVH notices and hearing scripts to remove references to the "non-adversarial" nature of the proceedings. However, we have concerns that including data in the IVH hearing notices about the number of cases dismissed or resolved through GRP could be misleading or a misrepresentation of what the outcome of the hearing will be for any particular respondent.³ This information could give a respondent false hope of a favorable outcome or a perception that the CDC is indicating that we believe the grievance will be dismissed or result in a GRP. This could also result in a complainant's perception that the case has already been decided and that the IVH is merely a formality with a pre-determined outcome in favor of respondents.

- (2) The GOC also recommends that the CDC ensure that the hearing scripts used by Grievance Panel Chairs at IVHs are consistent across the State, especially in terms of providing more due process to the respondents (i.e., providing opportunities for respondents' counsel to make an opening statement, question witnesses, make objections).

TRDP Rule 2.12(F) generally sets forth the procedure that Panel Chairs may follow in an IVH, including allowing the CDC, the respondent, or the panel to question witnesses; however, Rule 2.12(F) does not provide opportunities for anyone to make an opening statement or to make objections. The CDC provides IVH scripts to all Grievance Committee Panel Chairs and ensures that the scripts are

³ Since the IVH process was reintroduced in FY19, 37% of complaints were dismissed after an IVH, and 22% were diverted to GRP. During this same period, over 40% of complaints resulted in discipline following an IVH.

uniform/consistent across the State. In practice, however, the scripts may not always be consistently followed by the Chairs, many of whom have their own “local” preferences regarding how an IVH should be conducted or deviate from the script depending on the amount of time available for a hearing or based on the conduct/behavior of the respondents/respondent’s counsel. Beyond providing training at the annual meeting and a uniform script for the hearings, the CDC does not have the ability to control how individual Panel Chairs conduct an IVH.

- (3) The GOC recommends further that the CDC bolster confidence in the IVH process through outreach efforts (presentations at CLEs; article in TBJ) and updating brochures and resource materials on the State Bar website.

The CDC, CDC staff, and certain CFLD members routinely provide information about the attorney grievance process to local bar associations, the Board of Directors, law students, new attorneys, solo and small firm practitioners, and at CLE programs throughout the year. We recognize that some written materials and brochures might need to be updated; however, demand for those written materials has remained low, especially during the past 2 years of the pandemic. We are currently working on updating the written materials and information found on the State Bar’s website as time and resources permit.

- (4) Another recommendation is for the CDC to create a mock IVH video to provide to respondents and respondent’s counsel.

The CDC began working on this project in mid-2022 and will try to complete the project as time and resources permit.

- (5) Finally, the GOC recommends that the CDC create a FAQ sheet to go out to respondents with the IVH notices.

This information could be helpful and is something the CDC will begin working on as time and resources permit.

Other GOC Recommendations: The *Report* contained numerous recommendations that involve processes or entities outside the direct purview of the CDC or CFLD. In many instances, we take no position on the merits of the recommendations. To the extent that a recommendation might impact the work of the CDC/CFLD, our response to those recommendations follows in italics:

Board of Disciplinary Appeals (BODA):

- (1) Discretion for BODA to enter a judgment of less than full revocation:

GOC recommends amending Rule 2.22 to give BODA discretion when revoking probation, including the ability to take an action less drastic than automatic active suspension for the full period of the judgment of suspension. According to the GOC, although the current rule allowing for no discretion provides a strong deterrent to ensure compliance, it is hopeful that giving BODA some discretion in this area would facilitate more effective enforcement of probation conditions, aid in the collection of outstanding restitution, and promote the goals of rehabilitation and reintegration into the profession at the end of an active suspension.

We take no position on this recommendation assuming any proposed changes would not impede or interfere with our duty to enforce the terms of a disciplinary judgment. Our main concern in this regard has been raised in the Report itself in that providing non-compliant respondents with more opportunities to drag their feet on paying restitution or complying with other conditions, particularly rehabilitative terms of judgments, could further undermine our efforts to enforce disciplinary judgments, resolve disciplinary cases through settlement, and otherwise protect the public.

(2) Discretion to refer cases to CAAP and to consider a CAAP resolution:

According to the *Report*, some classification appeals could benefit from a referral to the Client Attorney Assistance Program (CAAP) without having to go through the grievance process. GOC's recommendation is for there to be a third classification disposition option that allows BODA to refer classification appeals directly to CAAP and, after CAAP involvement concludes, the case would return to BODA for final disposition. The *Report* also notes that some resolutions through the CAAP discretionary review process do not address all of the allegations raised by the complainant. Therefore, GOC further recommends that BODA be allowed to review appeals of grievances that CAAP deemed successfully resolved to determine if the decision to classify as an inquiry should be reversed.

We take no position on this recommendation. While it may help resolve a few more grievances earlier in the process, without the need for a respondent to prepare and file a formal response, we caution that the procedure contemplated by the recommendation, on its face, seems rather cumbersome. Our concern would be that it would likely add needless delays and a lack of finality in the grievance process further complicating an already complicated process for complainants and respondents.

(3) Discretion to allow a respondent to raise affirmative defenses to Petition for Reciprocal Discipline without filing an answer:

GOC recommends amending the mandatory "shall enter judgment" language in Rule 9.03 to "may enter judgment" in order to give BODA the discretion to allow a respondent who has not filed an answer, but appears before BODA, to present affirmative defenses. According to the *Report*, this would bring the current process in line with BODA's internal operating rules (Rule 7.03) and with default judgment procedures in civil cases generally. It would also give a respondent who is not consciously indifferent to answering the petition and engaging in the reciprocal discipline process the opportunity to defend him/herself.

We take no position on this recommendation assuming any proposed changes would not impede or interfere with our duty to present and prosecute Reciprocal Discipline cases.

(4) Discretion to initiate disability proceedings:

According to the *Report*, BODA has no discretion in the classification appeals process and in matters in which BODA has original jurisdiction (i.e., reciprocal, compulsory, and revocation process) to initiate a disability proceeding. GOC contends that because BODA's role in disability proceedings is merely ministerial (it has no discretion in signing a disability suspension judgment), there would be no conflict of interest were it to make such a referral itself. GOC recommends a rule change to provide BODA with the discretion to initiate disability proceedings on its own in the Classification appeal, reciprocal, compulsory, or revocation stages and to toll the statute of limitations as to any pending disciplinary action.

The Report claims that BODA's role is "ministerial" in a disability proceeding; however, that is not entirely accurate. While BODA "shall suspend" for an indefinite period if it finds that a respondent suffers from a disability, it is BODA that determines whether there is a disability after a trial, during which the CDC has the burden to prove the respondent's disability by a preponderance of the evidence (including testimony, records, etc.). BODA acts as judge and jury in a disability proceeding; therefore, in any case that it would initiate, BODA would then hear and decide the case. In certain situations, such as after a compulsory hearing or reciprocal hearing, BODA could include mental health or other rehabilitative terms if deemed warranted. An additional concern would be that more disability cases would put a strain on CDC resources

as it would create more work for the CDC, which is charged with preparing for and presenting those cases.

(5) Discretion as to term of suspension and final hearing:

In its *Report*, GOC notes that there is a lack of clarity under TDRP Rules 8.06 and 8.07 as to the appropriate length of active suspension for an attorney subject to compulsory discipline where the criminal sentence is fully probated. In such cases, BODA can only disbar or actively suspend the attorney. Moreover, BODA's discretion is limited to suspending the attorney only for the length of the criminal probation and not longer. Likewise, BODA has no discretion to give a respondent "credit" for time served. GOC believes that in certain instances, BODA should be able to impose an active suspension that extends beyond the criminal probationary period if the remainder of that probation period is short, and the respondent practiced law during the period of probation. This discretion would provide BODA with a compulsory discipline option short of disbarment.

Additionally, the Report recommends amending TRDP Rule 8.05 to allow BODA to hold hearings on motions for final judgment (to provide transparency and due process) while preserving its ability to grant a motion without a hearing in some instances.

We take no position on this recommendation assuming any proposed changes would not impede or interfere with our duty to present and prosecute Compulsory Discipline cases.

TLAP Confidentiality:

The CFLD and CDC fully support TLAP's ongoing commitment to confidentiality as indicated in the Joint Statement/Memorandum of Understanding between the State Bar of Texas and the CDC highlighted in the Report. We take no position with regard to the recommendation to amend Rule 510 of the Texas Rules of Evidence. We understand that such a proposal is an effort to enhance existing confidentiality laws currently in place by creating an evidentiary privilege protecting communications between respondent attorneys and TLAP staff; however, to the extent that the proposed amendment might interfere with the disciplinary process or otherwise impede the CDC's and CFLD's efforts to ensure that respondent attorneys remain compliant with the rehabilitative terms of disciplinary judgments, we respectfully disagree that such a change is warranted. Alternatively, we would request further clarification or language expressly protecting our ability to enforce the TDRPC and TRDP.

Training for District Court Judges for Disciplinary Trials:

We take no position regarding the GOC's recommendations that district court judges be provided with additional training, either in person or through a self-study video course, about the attorney grievance system generally. If the curriculum committee at the Texas Center for the Judiciary would allow for a 30-minute presentation by the CDC or CDC staff at the College for New Judges or during one of the annual judicial conferences, this could accomplish the goal of providing judges who might be assigned to preside over a disciplinary case with some general information about the attorney grievance system. However, having district court judges "trained" to handle grievance trials specifically, especially by one party to those proceedings, seems problematic and could create a perception of undue influence or a lack of fairness in the eyes of respondent attorneys and/or their counsel. Moreover, it is presumed that district court judges are sufficiently experienced and well-trained in how to preside over and conduct civil trials generally, including jury trials, leading us to question what other information would be necessary to prepare judges to preside over disciplinary proceedings.

While it is unclear what "annual CDC trainings" the GOC refers to in the Report, inviting judges to attend annual trainings conducted by the CDC (as opposed to Texas Center for the Judiciary trainings) would likely be cost-prohibitive if the CDC were responsible for paying for the judges' travel, accommodations, meals, and

added security.

De-Mystification: Among the recommendations outlined in the *Report* to aid in educating lawyers about the Texas attorney grievance and disciplinary system are the following:

- (1) Update the Grievance and Malpractice 101 Guide and other TYLA-sponsored resources and information contained on the TYLA website.

We stand ready to assist TYLA if/when they update the resources and materials they have published about the attorney grievance system. We have reached out to incoming TYLA Presidents in the past to offer assistance and collaboration on projects relating to educating members about the grievance and disciplinary system.

- (2) Partner with Texas law schools in order to provide information about the attorney grievance and disciplinary system to law students.

We remain responsive to requests from law school faculty across the State and have provided training to law students about the grievance system when asked.

In conclusion, the CFLD and CDC wish to acknowledge the efforts of the GOC over the past two years to assist the Court in its constitutional and statutory responsibility for the Texas attorney grievance system by reviewing the system and reporting its observations and recommendations to the Court. The GOC has prepared and filed a thoughtful and detailed report, with valuable observations and helpful recommendations for improving the disciplinary process. We look forward to working with the GOC in the same cooperative manner as it continues its efforts to improve the disciplinary system – a goal we all share.

Sincerely,



Roberto L. Ramirez, Chair
Commission for Lawyer Discipline



Seana Willing
Chief Disciplinary Counsel
State Bar of Texas

cc: Melody Poole, GOC Chair
Trey Apffel