

# STATE BAR OF TEXAS

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Chief Justice Wallace B. Jefferson  
Supreme Court of Texas  
201 West 14<sup>th</sup> St.  
P.O. Box 12248  
Austin, TX 78711

Dear Chief Justice Jefferson:

Thank you for the opportunity to comment on the Grievance Oversight Committee's 2011 report to the Texas Supreme Court. We have reviewed the report, and we commend the volunteers who serve on the Committee for their dedication and work on behalf of the public and lawyers of Texas.

The State Bar of Texas is committed to ensuring the disciplinary system works efficiently and effectively both to protect the public and require lawyers to meet the ethical standards of the profession. We have addressed each of the Committee's recommendations below.

### *Recommendations Concerning the Client Attorney Assistance Program*

In its report, the Committee addressed the Client Attorney Assistance Program (CAAP), focusing on staff training, handling reports of rule violations, and confidentiality and reporting of misconduct.

The State Bar designed and began implementing CAAP in September 1999. Since then, CAAP has grown to eight employees, including one attorney (the CAAP director) and five program associates. The CAAP director and program associates have all completed the certification process for mediators in Texas.

CAAP's objectives are to:

- Assist clients and attorneys in resolving minor problems affecting their relationships when the issues do not involve misconduct under the Texas Disciplinary Rules of Professional Conduct;
- When appropriate, refer callers to State Bar departments, local bar associations, and other community and State of Texas agencies;
- Support the attorney disciplinary process by staffing the grievance hotline, providing grievance process information and grievance forms upon request. If someone contacts CAAP and describes conduct by an attorney that appears to violate the disciplinary rules, CAAP does not get involved. Instead, CAAP provides grievance forms to those who wish to report misconduct or unethical behavior.

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In 2003, the State Bar established CAAP as the voluntary mediation and dispute resolution process required by Tex. Govt. Code Section 81.072(e). In accordance with this statutory mandate, CAAP works to resolve allegations of attorney misconduct that are classified as inquiries because they do not allege an offense cognizable under the disciplinary rules, or are classified as complaints, but are subsequently dismissed. CAAP is required by statute to protect the confidentiality of all information, statements, records, and transcripts collected or produced in connection with this dispute resolution process.

In the 2010-2011 Bar year, CAAP received approximately 49,000 calls. The majority of the callers requested information about the grievance process or about some other non-disciplinary related State Bar services. More than 5,000 callers requested a grievance form. In addition, CAAP provided its dispute resolution or mediation services for approximately 1200 callers.

In its report, the Committee expressed concerns that CAAP staff might not be adequately trained concerning the disciplinary rules and process. It then recommended that:

CAAP intake staff members who take calls from persons who have a possible complaint concerning a lawyer either should be lawyers or should be non-lawyers who have extensive training concerning the Texas Disciplinary Rules of Professional Conduct and related standards governing the conduct of Texas lawyers.

CAAP staff receives extensive training concerning the disciplinary rules, standards, and process. Twelve years of experience with CAAP and its processes have given the State Bar, the Commission for Lawyer Discipline (CFLD), and the Chief Disciplinary Counsel (CDC) great confidence in CAAP's ability to handle the calls it receives appropriately. The State Bar, however, is continuously looking for ways it can improve all of its services and will consider steps it might take to enhance the quality and effectiveness of CAAP, including a review of CAAP staffing levels and training.

The Committee also expressed concern that CAAP is overemphasizing the private dispute resolution function and underemphasizing the disciplinary function. Because the primary objective of CAAP is dispute resolution, CAAP naturally emphasizes this function. The CAAP staff, however, is trained and charged to direct callers to the disciplinary process when appropriate. A review of the utilization statistics bears that out. Further, in those cases where a caller has not disclosed any information to indicate a cognizable offense by an attorney, but nevertheless wishes to file a complaint, CAAP ensures that the caller receives a grievance form along with information concerning the grievance process.

Finally, the Committee's report raises an issue with the confidentiality of CAAP and recommends that CAAP staff should report attorney misconduct to the Chief Disciplinary Counsel when a caller declines to file a grievance. The Committee quotes the CAAP training manual concerning confidentiality in support of its recommendation. The portion quoted is used in training CAAP staff to underscore the importance of confidentiality within the disciplinary process and as it relates to the attorney-client relationship.

In the twelve years since the implementation of CAAP, it has yet to encounter a situation in which a caller clearly reports a violation of the disciplinary rules that would require attorney reporting under rule 8.03(a) of the disciplinary rules, but is not willing to file a grievance him or herself. Often, the reverse of such a situation is the case. As noted above, in those instances, CAAP provides the caller with a grievance form and with information concerning the disciplinary process, even though the caller has disclosed nothing to indicate a cognizable offense, but nevertheless wishes to file a grievance.

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In its role as a dispute resolution program, CAAP does maintain confidentiality of the participants in the process, even with regard to the CDC's office. For CAAP to do otherwise would impose a chilling effect on the program and render it virtually impossible to obtain cooperation from attorneys in resolving issues with their clients. Confidentiality issues require a delicate balance, and the State Bar will continue to work with CAAP, the CFLD, and the CDC to determine the most appropriate and effective means of accomplishing CAAP's objectives while ensuring the protection of the public.

*Recommendations Concerning the Chief Disciplinary Counsel Ombudsman*

Maureen Ray serves as the CDC's ombudsman, responding to calls and correspondence primarily from complainants who are dissatisfied with the outcomes or processing of their grievances. During the 2009-2010 Bar Year, Ms. Ray fielded 61 calls and letters from complainants. Many of those who contact the ombudsman have filed complaints which were dismissed. Understandably, they are upset and want to know the basis for the dismissal. Others express concerns about the processing of their complaints. In these instances, Ms. Ray must review the case files, conduct an internal investigation of the process, and send her findings to the client in writing. As an attorney in the CDC office, Ms. Ray is accorded wide latitude, access, and independence in conducting these investigations. Ms. Ray also provides the CDC with suggestions for improvements in internal processes that are identified in these investigations. Last year, Ms. Ray conducted 37 internal procedural investigations. The State Bar and the CDC receive letters and calls of commendation for the services of the ombudsman, and we believe the ombudsman position to be well-placed to perform a valuable service to the public and our members.

Ms. Ray is not involved in any part of the process of investigating, processing, trying, or appealing disciplinary actions or complaints. However, in addition to her role as ombudsman, Ms. Ray does field calls from the public with questions concerning the grievance process and how to file a complaint (referred to by the Committee as the "call-intake function"). Often, callers need assistance in differentiating fee disputes and quality-of-service issues from rule violations. If a caller wishes to file a complaint, Ms. Ray provides them with a grievance form and information on the process. In appropriate cases, Ms. Ray also refers callers to CAAP for dispute resolution services.

The Committee's report contains three recommendations regarding the CDC ombudsman: 1. To move the ombudsman from supervision by CDC, and place it under the supervision and control of the Texas Supreme Court, the Board of Disciplinary Appeals (BODA), or the Grievance Oversight Committee; 2. To remove the call-intake function from the ombudsman function and place it with CAAP; and 3. To review and monitor the other duties assigned to Ms. Ray to ensure they do not create any conflict of interest or interfere in any way with her ombudsman duties.

The role of an ombudsman can be defined many different ways depending on the needs of an organization or process. In many situations, an ombudsman is the first stop in resolving disputes or complaints. In other cases, an ombudsman acts as a liaison between the public and an organization, explaining services and procedures. In still others, an ombudsman fields complaints about services and procedures and conducts internal investigations to identify whether anything has gone amiss and to recommend changes and improvements for future action.

In the attorney discipline system, despite the wishes of many callers, the ombudsman cannot, and should not be able to, change the disposition of a particular grievance; nor can the ombudsman act as an informal appellate tribunal. The best use of the ombudsman is as an educator concerning the grievance system and process, and as a knowledgeable attorney well-placed to examine the handling of particular grievances, review processes and procedures, and recommend solutions to issues that may be discovered. To provide these services effectively, the ombudsman must have access to confidential grievance files as well as information concerning the handling of particular grievances. Accordingly, while the State Bar has considered and understands the reasoning behind the Committee's first recommendation regarding the ombudsman, we believe that the suggested options would render the investigatory functions of the position ineffectual if not impossible. Moving the ombudsman to another office or changing her call-intake responsibilities would hamper her ability to provide the services described above. We also refer the Court to the comments to the Committee's report submitted by BODA expressing concern that placing the ombudsman under BODA's supervision would be contrary to BODA's judicial function.

The other two Committee recommendations relate to the performance by Ms. Ray of duties and functions outside of her role as ombudsman. As mentioned above, Ms. Ray is not involved in the process or handling of any complaints or disciplinary actions. This separation of duties is intentional, to avoid any concerns of conflicts or interference with her ombudsman's role.

#### *Recommendations Regarding the Grievance Referral Program*

The Committee has made three recommendations concerning the CFLD's Grievance Referral Program (the GRP): 1. Increase the profession's awareness of this program by publicizing its availability as a disciplinary option in appropriate cases; 2. Continue to capture and improve the documentation and statistical case management of the program; and 3. Make this valuable re-education program available to more lawyers.

As the Court is aware, the GRP was established by the CFLD and the CDC to identify and deal with lawyers who have impairment or performance issues and who enter the disciplinary system as a result of minor misconduct. For a lawyer to participate in GRP, he or she must meet specific eligibility criteria and must agree to fulfill the terms of a rehabilitative or remedial program specifically designed for that lawyer. Typically, a lawyer participates in the program for three to six months and if successful, the complaint is dismissed. If the lawyer fails to comply with the program, the prosecution of the complaint is resumed. During the past Bar year, the GRP accepted 50 participants.

The GRP is a "disciplinary option" only in the sense that, if offered to a respondent, he or she may choose to participate or may proceed through the ordinary disciplinary procedure. Whether this option is offered is at the discretion of the CDC and the CFLD in consultation with the GRP staff – it is not an option a respondent may demand in lieu of discipline. The State Bar believes the GRP is extremely valuable, and the rehabilitative and remedial measures used by the GRP are offered to Texas attorneys through other programs of the State Bar, such as the Texas Lawyers Assistance Program. Because participation in the GRP is at the discretion of the CDC and CFLD, we are concerned that "publicizing its availability as a disciplinary option" could be counterproductive and raise unwarranted expectations of a right to participate by respondents.

The State Bar, along with the CDC and CFLD, will continue to collect, monitor, and report data and statistics regarding the GRP to ensure its effectiveness and appropriate utilization.

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*Recommendations Concerning Prosecutors Reporting of Attorney Convictions*

Over the past few years, the CDC office has worked to enhance its relationship with the Texas County and District Attorneys Association and with local prosecutors to increase reporting by prosecutors of criminal convictions of Texas attorneys. The Committee's recommendations aimed at increasing the reporting by prosecutors of criminal convictions of attorneys contain excellent suggestions in this regard, and the State Bar will help the CDC find ways to continue and enhance its close working relationships with local prosecutors.

*Recommendations Concerning Education of Grievance Committee Members*

The Committee recommended that the CDC continue to provide CD training media for grievance committee members, increase training to more than just during the first year of service, provide more hands-on discussion oriented training, and share more reports describing sanctions imposed across the state.

The training media referenced in the recommendation will be continued, and an online training program will be added. In-person training of grievance committee members has been, and will continue to be, offered to *all* grievance committee members – not just those in their first year of service.

The State Bar and the CDC are constantly exploring options for enhancing the education and participation of its volunteers, including its grievance committee members, and will include the Committee's recommendation in its consideration.

*Recommendations Concerning the Grievance System Symposium*

We believe all participants in the past Grievance System Symposia have been impressed with the value of the events. The CDC is considering enhancements for future symposia and the State Bar will assist and participate as appropriate.

Again, thank you for requesting our comments on the Committee's report and recommendations. As always, the State Bar stands ready to serve the Court, the public and the lawyers of Texas to fulfill the trust with which it has been charged.

Sincerely yours,



Bob Black

cc: Justice Phil Johnson  
Justice Don Willett  
Jennifer Cafferty  
Michelle Hunter