

Grievance Oversight Committee
Appointed by
The Texas Supreme Court

Report on the Grievance Classification Process
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Report on the Grievance Classification Process
By the Grievance Oversight Committee

Background

The Texas Supreme Court originally established the Grievance Oversight Committee (“the GOC” or “the Committee”) in the 1970s, and most recently reconstituted the GOC by Order dated February 22, 2011. The Supreme Court has charged the Committee generally with reviewing the operation of the attorney-client grievance process and reporting its observations and recommendations to the Court. Over the life of the GOC, the Committee has provided both periodic annual and biennial reports to the Supreme Court, as well as reports on specific issues affecting the grievance process as requested by the Court.¹

By letter dated April 16, 2015, the Supreme Court requested the GOC investigate concerns raised to the Court’s attention about “the process by which grievances are classified as ‘inquiries’ and dismissed without further investigation or action in instances where the face of the grievance alleges that an attorney has violated one or more of the Texas Rules of Disciplinary Procedure.”²

Executive Summary

The GOC has undertaken the investigation requested by the Court of the process by which grievances are being subjected to an initial screening classification as “complaints” or “inquiries,” pursuant to state law and Texas Rule of Disciplinary Procedure 2.10. Following the Committee’s investigation, it provides the following observations and recommendations to the Court, all of which are explained in further detail below in this report:

- (1) The grievance classification process is administered and overseen by highly competent and dedicated personnel at the State Bar’s Office of Chief Disciplinary Counsel (“CDC”).
- (2) The decision to centralize the grievance classification process in the CDC headquarters in Austin, which was implemented in 2007, has provided benefits both in oversight of the process and consistency of grievance classification determinations.

¹Additional information on the GOC, as well as links to past reports, is available at www.txgoc.com.

²A copy of the Supreme Court’s letter requesting the investigation is attached as **Tab 1** for the Court’s convenience.

- (3) The Board of Disciplinary Appeals (“BODA”) provides effective oversight of the CDC’s administration of the grievance classification process, through the attorneys who serve as members of BODA, as well as through its highly competent and dedicated staff.
- (4) The current structure of the State Bar Act and Rules of Disciplinary Procedure has resulted in a system in which seventy (70) percent or more of grievances are dismissed as inquiries through the classification process, before the facts underlying the grievances are evaluated in any respect—internally at CDC, or by a grievance panel or district court. The high percentage of grievances dismissed as inquiries through the “initial filtering” process of grievance classification makes it all the more critical to ensure that the grievance classification process operates as effectively and as transparently as is possible.
- (5) As with any process, the current administration of grievance classification under the Rules of Disciplinary Procedure should be continuously evaluated for potential improvements. The Committee makes the following recommendations for such improvements:
 - a. In the interests of transparency and improving public confidence in the grievance classification process, CDC should provide grievance-specific explanations in writing to a person whose grievance is classified by CDC as an inquiry.
 - b. CDC should revise the notification letters it sends to a person whose grievance is dismissed as an inquiry to clarify the process currently provided under the Rules of Disciplinary Procedure by which that person may appeal that classification, and later amend the grievance as provided by the rules.
 - c. The Court should consider whether the Rules of Disciplinary Procedure should be clarified, in a manner consistent with the State Bar Act, to allow a complainant to attempt to amend a grievance once before the CDC within 20 days of receiving a CDC notification letter, in lieu of the complainant taking an appeal to the BODA.
 - d. Appeals to BODA from dismissals of grievances on grounds that the respondent attorney is not a member of the State Bar, or has been disbarred or resigned, are not necessary, and the applicable rules should be amended as a result.
 - e. Given the large number of grievances dismissed through the grievance classification process, the State Bar of Texas, in consultation with the Commission for Lawyer Discipline and the CDC, should consider whether additional attorney resources and qualified Spanish language/translation services should be dedicated specifically to the grievance classification process.
 - f. Given the large number of grievances dismissed through the grievance classification process, and as a mechanism for providing additional training and support to classification attorneys on CDC staff, the CDC should consider whether any portion of these additional attorney resources should be dedicated to

an internal “quality control” review of classification decisions, under which a random sample of grievance classification decisions would be periodically reviewed.

- g. The CDC should review its internal operational policies, procedures, and training to reaffirm in writing certain core principles that CDC currently applies to the grievance classification process, such as the liberal reading of grievances at the classification stage; the need to analyze, independently of how issues are phrased in what may be a “lay person’s” grievance, whether the asserted facts could, if proved, constitute a violation of the Disciplinary Rules of Professional Conduct; and the need for individual classification attorneys, in cases of doubt, to seek additional input from peers or a supervisor.
 - h. The CDC should continuously review the training provided to classification attorneys on the CDC’s Austin staff, on the classification process procedures employed at CDC as well as on the Disciplinary Rules of Professional Conduct.
- (6) Given the repeated uncertainty arising in the context of the classification of grievances raising issues under Disciplinary Rule of Professional Conduct 8.04(a)(3), which provides that a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” additional clarity on the application and scope of the rule, in either the rule itself or the comments to the rule, is warranted.

Methodology for Investigation and Report

The Committee undertook the following steps to conduct the investigation as requested by the Supreme Court:³

- Reviewed the Supreme Court's assignment to the GOC, and requested and received additional information from the Court regarding the concerns raised to the Court.
- Reviewed applicable law and the Rules of Disciplinary Procedure and Disciplinary Rules of Professional Conduct relating to both the grievance classification process and concerns raised about that process.
- Reviewed various concerns raised to the Supreme Court about the grievance classification process.
- Collected and reviewed materials related to the administration of the grievance classification process, including policies and procedures at both CDC and BODA.
- Collected and analyzed data regarding the grievance classification process.
- Conducted interviews of CLD/CDC personnel, BODA members and staff, grievance panel members, and persons from throughout the state⁴ who have had interactions with the grievance process.
- With the assistance of CDC personnel, walked through the actual grievance classification process that involves three classification attorneys reviewing approximately 7000 grievances or more per year.

The Committee commends all persons contacted and/or interviewed by the Committee for their cooperation with and candor shown in the GOC's investigation. With respect to interviews conducted by the Committee, the GOC also made efforts to contact every person whom the Court had identified as approaching it with concerns about the grievance classification process. All of the CDC and BODA personnel the Committee contacted were cooperative and provided helpful information to the Committee. The Committee also interviewed several complainants regarding their experiences in the grievance classification process and they were

³In addition to the members listed on the cover page, former GOC member Faye M. Bracey, San Antonio, also contributed to the research and interviews underlying this report.

⁴As part of its normal annual operations, the GOC conducts meetings throughout the state who are involved in the grievance process. The GOC invites to and includes in its meetings not only persons who have served on local grievance panels, but also individuals and representatives from various groups and organizations from communities across Texas who have had interaction with the process, such as complainants, respondents, lawyers who represent complainants and respondents, district attorneys, and representatives of public service and pro bono groups.

professional, courteous, and thoughtful in their responses. Only one such person (a complainant invited to meet with the GOC) contacted by the Committee declined to participate in the process through an interview.

Description of Current Grievance Classification Process

A. Legislation and Rules Regarding Process

The current grievance classification process, as reflected in the current version of Rule of Disciplinary Procedure 2.10, has been in place for grievances filed on or after January 1, 2004. During the 78th Session, the Texas Legislature added the following provision, among others, to the State Bar Act, Chapter 81 of the Texas Government Code:

Sec. 81.073. CLASSIFICATION OF GRIEVANCES. (a) The chief disciplinary counsel's office shall classify each grievance on receipt as:

(1) a complaint, if the grievance alleges conduct that, if true, constitutes professional misconduct or disability cognizable under the Texas Disciplinary Rules of Professional Conduct; or

(2) an inquiry, if:

(A) the grievance alleges conduct that, even if true, does not constitute professional misconduct or disability cognizable under the Texas Disciplinary Rules of Professional Conduct; or

(B) the respondent attorney is deceased, has relinquished the attorney's license to practice law in this state to avoid disciplinary action, or is not licensed to practice law in this state.

(b) A complainant may appeal the classification of a grievance as an inquiry to the Board of Disciplinary Appeals, or the complainant may amend and resubmit the grievance. An attorney against whom a grievance is filed may not appeal the classification of the grievance.

Under the authorization of the 2003 legislation amending the State Bar Act,⁵ the Supreme Court renumbered the then-existing Rule of Disciplinary Procedure 2.09 to the current version of Rule of Disciplinary Procedure 2.10,⁶ which provides as follows for grievances filed on or after January 1, 2004:

⁵It is important to note that legislative history indicates that the 2003 State Bar Act amendments were intended in part to eliminate delays in grievance processing and promote efficiency.

⁶The Supreme Court did so in its Order dated December 29, 2003.

2.10 Classification of Inquiries and Complaints

The Chief Disciplinary Counsel shall within thirty days examine each Grievance received to determine whether it constitutes an Inquiry or a Complaint. If the Grievance is determined to constitute an Inquiry, the Chief Disciplinary Counsel shall notify the Complainant and Respondent of the dismissal. The Complainant may, within thirty days from notification of the dismissal, appeal the determination to the Board of Disciplinary Appeals. If the Board of Disciplinary Appeals affirms the classification as an Inquiry, the Complainant will be so notified and may within twenty days amend the Grievance one time only by providing new or additional evidence. The Complainant may appeal a decision by the Chief Disciplinary Counsel to dismiss the amended Complaint as an Inquiry to the Board of Disciplinary Appeals. No further amendments or appeals will be accepted. In all instances where a Grievance is dismissed as an Inquiry other than where the attorney is deceased or is not licensed to practice law in the State of Texas, the Chief Disciplinary Counsel shall refer the Inquiry to a voluntary mediation and dispute resolution procedure. If the Grievance is determined to constitute a Complaint, the Respondent shall be provided a copy of the Complaint with notice to respond, in writing, to the allegations of the Complaint. The notice shall advise the Respondent that the Chief Disciplinary Counsel may provide appropriate information, including the Respondent's response, to law enforcement agencies as permitted by Rule 6.08. The Respondent shall deliver the response to both the Office of the Chief Disciplinary Counsel and the Complainant within thirty days after receipt of the notice.

Prior to these changes made effective for grievances filed on or after January 1, 2004, this "initial screening" classification process for grievances did not exist. Rather, the screening mechanism for grievances was an "investigatory hearing" or "just cause" hearing conducted by an investigatory panel of a district grievance committee. The rules related to "investigatory" or "just cause" hearings allowed for a situation in which the filer of a grievance (the complainant) and the subject of the grievance (the respondent) would often appear and testify under oath before the investigatory panel about the grievance. Thus, the current practice set out under the State Bar Act and the corresponding Rule of Disciplinary Procedure involves (1) a grievance being subject to dismissal through an internal review process within the CDC, as opposed to through a process conducted through a district grievance committee, and (2) a grievance being subject to dismissal on the face of the grievance and its supporting materials, without opportunity for the complainant or respondent to be heard in person on the underlying factual basis for the grievance.

B. Implementation of Statute and Rule at CDC

The CDC, responding to the Legislative and rules changes in the grievance classification process, established internal procedures for administration of the new process. Initially, the CDC administered classification decisions within the State Bar region in which the grievance was filed. For example, a grievance filed with the CDC's Dallas regional office would be classified

under the State Bar Act and Rule 2.10 by one or more regional CDC counsel located in Dallas. In 2007, as part of a larger reorganization of CDC, the grievance classification process was centralized in CDC's State Bar offices in Austin. This centralization process, according to CDC leadership, was intended in part to "increase consistency" in the grievance classification process. Accordingly, since approximately October 2007, CDC has had two or three attorneys on staff in Austin who are dedicated strictly to the grievance classification function. These "classification attorneys" have been and currently are supervised by the Deputy Counsel for the Austin Regional Office of the State Bar.

Over time, the CDC has promulgated written policies and procedures, titled "Classification and Central Intake Procedures," to be followed in the grievance classification process. These written policies and procedures were most recently amended in May 2011. The written policies and procedures set out intake procedures for CDC staff, including:

- An initial screening of the grievance documentation for proper signature and required information.
- Determination of the county in which alleged misconduct occurred, for purposes of assigning the grievance to a region.
- Verification that the grievance is filed against an attorney licensed by the State Bar.
- Coding the grievance through the CDC's database system so that it can be linked to any grievances previously filed against the attorney.
- Once the requirements of the intake procedure have been met, the policies and procedures provide that the grievance is opened in the CDC database and assigned a case number. An opened grievance is then placed in queue for classification attorneys to review.

The classification attorneys on CDC's Austin staff are each Texas-licensed. Although CDC has experienced turnover in the classification attorney staffing over time,⁷ and qualifications and experience of the classification attorneys has varied accordingly, the current classification attorneys each have at least 10, and in at least one case over 20, years of practice experience. According to CDC leadership, the intent is to hire experienced lawyers who have at least some practical experience in the practice of law. Once hired into the classification attorney position, the classification attorney receives "on the job" training, including an orientation on the classification process and the Disciplinary Rules of Professional Conduct by the CDC Deputy Counsel. Once the classification attorney receives this initial training, he or she is then assigned

⁷According to information provided by CDC, the current combined tenure of the CDC's classification attorneys is less than three years, with the longest-tenured classification attorneys having worked in that role since June 2014.

cases.⁸ For an initial period—approximately three months—the work of the classification attorney (including the internal write-ups of the classification attorney’s analysis as described below) is reviewed by the CDC Deputy Counsel. The CDC Deputy Counsel, an experienced attorney who has worked at CDC for a number of years, then provides contemporaneous feedback and input into the classification attorney’s work. After this initial on-the-job training period, the classification attorney evaluates grievances for classification on his or her own, but in a collaborative environment in which the classification attorney has both the opportunity and is encouraged to seek guidance and input from peers and the CDC Deputy Counsel, especially when in doubt about a particular classification decision. The centralized Austin process obviously permits and fosters this type of collaborative working environment.

In accordance with the State Bar Act and the Rules of Disciplinary Procedure, the CDC’s grievance classification process follows these principles, among others:

- Grievances are to be construed liberally at the classification stage, especially in light of the fact that in many instances grievances are filed by non-lawyers.
- All alleged facts that can be discerned from the grievance and supporting materials are considered to be true for purposes of the grievance classification.
- The classification attorney is required to do his or her own analysis—regardless of what, if any, Disciplinary Rules of Professional Conduct are specifically cited in the grievance and supporting materials—of whether the alleged facts could, if later proven to be true, give rise to a violation of any of the disciplinary rules, as the rules are understood by the classification attorney.

Although the grievance classification attorney is applying his or her individual analysis, that classification attorney has access to his or her peers and supervisors while performing the work. The classification attorney can also seek the input of a “subject matter expert,” either within CDC or an outside resource, on issues that relate to specialized areas of the law: for example, issues that relate to the handling of an immigration matter for a client, or a probate or family law matter.

If the classification attorney determines that the grievance should be classified as an “inquiry,” and thus dismissed through the initial screening process, the classification attorney writes up a brief description of his or her decision and its basis in the CDC database (maintained through a case management software system called “JustWare”). The grievance is then referred back to administrative staff to prepare notification letter to the complainant. Administrative staff maintain templates of notification letters to govern various dispositions, including a template for a notification letter regarding an initial grievance classified as an inquiry, as well as notification

⁸The CDC assigns each classification attorney a portion of the pending queue of grievances, based on organization of the grievances alphabetically by the respondent attorney’s last name. This workload is periodically monitored and adjusted as needed.

letter templates regarding correspondence to the CDC that is not in the form of a grievance and regarding a repeated grievance by a complainant against an attorney that is classified as an inquiry. For example, the CDC's template for a notification letter regarding an initial grievance classified as an inquiry because it does not state facts that, if true, would result in a disciplinary rules violation provides in part:

Lawyers licensed to practice law in Texas are governed by the Texas Disciplinary Rules of Professional Conduct. Texas lawyers may be disciplined only when their conduct violates these disciplinary rules. We have concluded that **the conduct you described is not a violation of the disciplinary rules**. Thus, your grievance has been dismissed.

(Emphasis in original.) The template for this type of notification letter does not contemplate that the letter will include any of the content of the classification attorney's description of his or her decision, as is documented in the CDC's case management software system.

Some grievances are dismissed because they are made against attorneys over whom the State Bar disciplinary system does not have jurisdiction—including lawyers licensed in another jurisdiction, or who may have been at one time licensed in Texas but who have resigned or been disbarred. The attorney-client disciplinary system administered by the State Bar only applies to active members of the bar and attorneys specially admitted by a court in a particular proceeding. TEX. GOV'T CODE § 81.071. When a grievance is dismissed for these reasons, the notification letter specifies that as the reason. For example, a notification on a grievance dismissed because a lawyer has resigned or been disbarred provides in part as follows:

The records of the State Bar indicate that the lawyer has resigned from the practice of law in lieu of discipline [or has been disbarred], and is no longer subject to the disciplinary jurisdiction of the State Bar.

These letters also notify the complainant that the information that has been provided in the grievance will be reviewed to determine if the attorney's resignation order, or alternatively a disbarment judgment, has been violated.

The notification letter goes out under the signature of the classification attorney who made the classification decision.

The notification letter template also includes the following description of the next steps that the complainant might choose to take:

If you would like further review of your grievance, you may choose one of the following two options:

1. Amend your grievance and re-file it. It is not necessary to list the disciplinary rules you believe were violated. You have twenty (20) days from your receipt of this letter to re-file your amended grievance.

OR

2. Appeal this decision to dismiss your grievance to the Board of Disciplinary Appeals. You must submit your appeal directly to the Board of Disciplinary Appeals by using the enclosed form. You have thirty (30) days from your receipt of this letter to appeal this decision.

(Emphasis in original.)

Members of CDC staff will from time to time field telephone calls or correspondence from complainants whose grievances have been classified as inquiries and thus dismissed. According to CDC leadership, these inquiries are routinely handled by directing the complainant to the classification attorney who did the classification. It was reported to the Committee that on occasions classification attorneys will also discuss with complainants the basis for the dismissal. It was also reported to the Committee that on other occasions, such inquiries by complainants will be handled by other CDC personnel, including the CDC's Public Affairs personnel. In any event, complainants whose grievances have been dismissed are directed to a right to appeal the classification process or to amend the grievance, as indicated in the notification letter template.

If the CDC's classification of a grievance as an inquiry is appealed, and BODA reverses that classification as an inquiry, then the CDC classification staff treat such a reversal as a "teaching moment." Each such reversal by BODA is reviewed among the classification attorneys and the CDC Deputy Counsel, in an effort to learn from the reversal and to apply those lessons in the grievance classification process.

In keeping with the mandate to improve efficiency in the processing of grievances, the CDC has for internal purposes set a goal that each grievance should be classified within 30 days of filing. CDC reported to the Committee that under current practice the average length of the classification process from the date of a grievance's filing is 28 days. Given the overall annual volume of approximately 7000 to 7500 grievances filed each year, the average daily workload for each classification attorney is reported by CDC leadership at approximately 15 grievances per workday. CDC leadership reports that it is committed to shortening the 28-day average time period for grievance classification. When asked whether CDC leadership felt like additional attorney resources for the grievance classification process were needed, CDC leadership responded that "we are holding our own with grievances," and that the principal resource issue

occurs when CDC “loses” a classification attorney who retires, moves into another position with CDC, or leaves for alternative employment.

C. Implementation of Statute and Rule Through BODA Appeal Process

As provided in the State Bar Act and Rule of Disciplinary Procedure 2.10, a complainant whose grievance is dismissed as an inquiry through the grievance classification process can seek review of that decision by BODA. As indicated in the above language quoted from the template of the notification letter, the complainant is provided with a copy of a BODA appeal form in the event he or she wants to appeal.⁹ The appeal form may be mailed, faxed, or emailed to BODA to initiate the appeal process.

In the event a complainant files an appeal using the prescribed form, BODA then docketes the appeal and sets it for review by a three-member panel of BODA, as provided for in Rule of Disciplinary Procedure 7.05. In addition to the State Bar Act and Rules of Disciplinary Procedure, BODA maintains its own internal written policies and procedures, which were most recently amended in February 2015. With respect to appeals from CDC grievance classification decisions, those internal rules provide as follows:

Rule 3.01 Notice of Right to Appeal

(a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.

(b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

Rule 3.02 Record on Appeal

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

In a manner consistent with the State Bar Act, the Rules of Disciplinary Procedure, and its internal rules, the BODA members assigned the appeal receive and consider only the

⁹The appeal form is made available in both English and Spanish.

documentation made available to CDC, including the grievance form and supporting material, before the classification decision was made. BODA staff obtain a copy of the grievance and supporting documentation from CDC once a proper appeal notice form is received and processed. Shortly after the documentation is received by BODA, that information is transmitted to the assigned panel members, and the three-member panel will discuss the appeal, at either an in-person meeting or more often by conference call, as provided by the Rules of Disciplinary Procedure. The typical workload for a panel would be approximately 36 grievance classification appeals. A three-member panel has the ability to ask all members of BODA to review a particular appeal and determine the appeal *en banc* if a panel decides that would be appropriate.

BODA members report that grievance classification appeals represent a “heavy, but healthy” portion of their workload.

BODA members report that they believe strongly in the concept that the appellate review of CDC decisions to classify grievances as inquiries is *de novo*, meaning that the assigned BODA members will individually, among panels, and sometimes as an entire board group take a fresh look at the grievance classification issue. BODA members will for themselves review the face of the grievance and supporting materials to determine whether the complainant asserts facts that, if proven, would constitute a violation of the Disciplinary Rules of Professional Conduct. BODA members report that they and BODA staff have access to the computerized record of the explanation provided by the CDC classification attorney of his or her decision, but that they otherwise have no communication with CDC personnel regarding a grievance classification under appeal. BODA members report that they will not hesitate to reverse the classification of a grievance as an inquiry should they feel that the grievance does state a potential disciplinary rules violation, and report that they give the benefit of the doubt to the complainant in close cases.

BODA has full-time professional staff members, including an Executive Director and General Counsel and Deputy Director/Counsel who each have significant experience with BODA and the attorney disciplinary system generally. The Executive Director and General Counsel and/or Deputy Director/Counsel review each appealed grievance classified as an inquiry and provide their input, as requested by the BODA members, on the grievance classification process generally and with respect to particular appeals of classification decisions.

Ultimately, it is BODA that has the authority, under the State Bar Act and the Rules of Disciplinary Procedure, 2.10 and 7.08(C), to affirm or reverse the classification decision made at CDC through the process described above. BODA members believe that the reversal rate on grievance classification appeals commonly runs between 10 and 12 percent. If the CDC’s classification decision is reversed, BODA tries to provide “feedback” information to the CDC about the rationale for its decision, including citation to one or more Disciplinary Rules of Professional Conduct. If the classification decision is reversed, then CDC will proceed to process the grievance through the next stage: notice to the respondent to respond to the allegations in the grievance, followed by an investigation of the grievance by CDC to determine whether there is “just cause” for the grievance to proceed. TEX. RULES DISCIPLINARY P. R. 2.10, 2.12.

Regardless of whether a classification decision is affirmed or reversed, a decision letter is provided to the complainant by mail a day after the BODA panel or en banc conference on the appeal. If CDC's classification decision is affirmed, the letter sets out the decision made by BODA, but does not contain any explanation or analysis underlying BODA's decision in that particular appeal. If CDC's classification decision is reversed, the decision letter states as follows:

After reviewing the grievance as filed with the State Bar Chief Disciplinary Counsel's Office and no other information, the Board grants the appeal, finding that the grievance alleges a possible violation of the following Texas Disciplinary Rules of Professional Conduct:

The letter then lists the disciplinary rules that BODA has found to be potentially implicated by the grievance.

A BODA decision to affirm the CDC's classification of a grievance as an inquiry is final, thus ending review within the attorney-client grievance process of the dismissed grievance. If a complainant exercises his or her right to amend the grievance, and the CDC again classifies the amended grievance as an inquiry, that second classification can then be again taken to BODA for appellate review.

D. Data Regarding the Implementation of the Grievance Classification Process

It is through the grievance classification process as described above that a significant majority of all grievances filed in the State of Texas are now resolved. For example, the data from the last ten State Bar reporting years¹⁰ shows as follows (with percentages rounded to nearest percentage point):

¹⁰A page of statistics provided to the GOC by CDC, listing data regarding the total number of grievances classified as complaints and inquiries, and subsequent BODA appeals and decisions, is attached as **Tab 2**.

State Bar Year	% Grievances Classified As Inquiries	% Appealed	% of Appealed Classifications Reversed
05-06	66	53	<i>Not available</i>
06-07	68	50	<i>Not available</i>
07-08	72	43	<i>Not available</i>
08-09	75	42	<i>Not available</i>
09-10	72	42	<i>Not available</i>
10-11	70	40	8.3
11-12	70	33	6.5
12-13	77	33	7.4
13-14	79	34	7.8
14-15	79	33	11.5

The high rates of grievances classified as inquiries were of obvious interest to the Committee. The Committee also noted that the percentage of grievances dismissed through the classification process has increased from 2010 to present. The Committee asked persons involved in the attorney-client grievance process questions to give their thoughts as to why these rates generally exceeded seventy (70) percent, and at times have approached eighty (80) percent. A list of some of the explanations is set out below:

- Many grievances assert fee dispute issues that are simply not within the scope of the attorney-client grievance process.
- Many grievances assert dissatisfaction with the quality of representation that a person received from an attorney, but do not assert a disciplinary rules violation, just allegations of poor attorney performance.
- Some grievances state rules violations for which a statute of limitations has expired.
- Some grievances state issues that do not involve a lawyer's legal work or issues arising in an attorney-client relationship.
- Some grievances make frivolous complaints of "ineffective assistance of counsel," perhaps to support such claims made in immigration proceedings or criminal proceedings.
- There may be no jurisdiction over the grievance, because the attorney respondent has resigned from the practice of law or has been disbarred.
- There may be no jurisdiction over the grievance, because the attorney respondent is located out of state.

The percentages of dismissals through grievance classifications taken up on appeal to BODA has declined over the reported time period, by a percentage that is not insignificant. Different conclusions can be drawn from the fact that over time, a declining percentage of complainants whose grievances were dismissed have chosen to appeal those dismissals. The most significant fact for the Committee's recommendations about those appeal rates is that there remain a sizeable portion of the dismissals—in the area of two-thirds—that are never subject to review by BODA.

With respect to the dismissals that were appealed to BODA, the Committee evaluated the BODA reversal rates on those CDC classification decisions appealed. (The reversal numbers were made available only for the last five State Bar reporting years.) The data is consistent with the general belief among BODA members that they reverse in the range of 8 to 11 percent of the CDC's dismissals of grievances as inquiries. The Committee noted that the rate of reversals on grievance dismissals by BODA has increased from 2011 to present. When asked about the significance of those reversal rates, at least one BODA representative attributed the 8 to 11 percent rates to the fact that "reasonable minds can differ" on the issue of whether a grievance states a potential disciplinary rules violation.

Committee Findings and Recommendations

1. The Grievance Classification Process is Staffed and Managed at CDC by Talented and Dedicated Professionals.

In any evaluation report, it is part of the process to focus on potential opportunities for improvement, and such a focus can sometimes be interpreted as reflecting negatively on the organization or process being evaluated. The GOC does not want its comments to be interpreted in such a manner. In this case, the Committee, through its interviews and review of materials, found the classification attorneys at the CDC to be hard-working, dedicated professionals who enjoy their work and are committed to “doing the right thing” in their classification work. It was clear to the Committee that grievance classification attorneys are committed to following the law, the Rules of Disciplinary Procedure, and internal CDC policies and procedures relating to grievance classification. The Committee also found CDC leadership focused on managing the classification attorney staff effectively and supporting their work.

Accordingly, any recommendations by the Committee should be considered with the above context in mind.

2. CDC’s Centralization of Grievance Classification Has Provided Benefits.

The Committee found the CDC’s decision to centralize the grievance classification process in CDC’s Austin offices, as implemented in October 2007, to have been beneficial to the process. The centralization has promoted the following:

- Helping to implement a standardized approach to classification decisions.
- Promoting consistency in classification decisions, by assigning responsibility to dedicated professionals working in a collaborative environment.
- Ensuring that grievance classification is a priority by giving that task to dedicated professionals, rather than including it as one of a number of responsibilities held by CDC attorneys in the various regions.
- Giving CDC management a better ability to directly supervise and manage the process and provide feedback during the administration of the grievance classification process.
- Permitting access as needed to “subject matter experts” in specialized areas of law, such as immigration or family law.
- Promoting resource savings and efficiency in human capital.

Although such a centralized system could theoretically provide some drawbacks over a system in which grievance classifications were performed within State Bar regions (such as loss of localized knowledge of particular issues and particular attorneys in the region), the Committee

believes that the benefits of the centralized process outweigh any such potential drawbacks. The CDC reports that the centralized process has worked well and provided benefits over the regionalized approach, and the Committee agrees with that assessment.

3. The BODA Process Provides Effective Oversight of Appealed Classifications.

BODA is comprised of attorneys appointed by the Supreme Court who volunteer their time to internal grievance process appellate functions, including appeals from CDC classification decisions. The Committee found that BODA members are dedicated to providing effective oversight of classification process within the framework of state law and the Rules of Disciplinary Procedure. The panel approach to grievance classification appeals appears to work well, and providing panels with the opportunity to refer a particularly difficult case to the entire BODA membership allows for a worthwhile exercise of discretion to involve more input as needed.

The Committee further found that these BODA members are ably assisted by staff who have a great deal of experience in the grievance process generally and specifically with respect to the review of classification decisions on appeal to BODA.

The mere fact that reversal rates on appeals from CDC classification decisions run in the range of seven (7) or eight (8) to eleven (11) percent, as they have over the last five years, indicates that those classification decisions are subject to serious, thorough, and thoughtful review. This fact was corroborated by the Committee's observations of the manner in which BODA approaches the appellate review process on grievance classification cases.

4. That the Current Structure of Grievance Classification Screening Results in the Vast Majority of Grievances Being Dismissed Before Factual Evaluation Requires an Evaluation of Whether Increased Transparency, Resources, and Systematic Review of Classification Decisions Would Be Beneficial.

Some observers have expressed to the Committee that the fact that a large percentage of all attorney grievances filed in the State of Texas are dismissed prior to any determination of whether the facts of the grievances have any merit shows that the pendulum may have swung too far in favor of efficiency.

On the first point—that a large percentage of all attorney grievances are disposed of in this way through the classification process—these observers are spot on. Seventy (70) percent or more of all grievances filed are classified as inquiries by the CDC, and 100-200 reversals of such classifications at BODA each year do not significantly change the fact that the system as currently structured filters out the vast majority of filed grievances at the first, pre-hearing stage of the process. However, the Committee has kept in mind that the 2003 legislative changes to the State Bar Act were intended to promote efficiency, and address concerns that grievances against attorneys would languish in an inefficient system. Accordingly, the current system seeks to up front filter the “wheat” of potentially actionable grievances from the “chaff” of complaints against Texas-licensed lawyers that, even if true, would not result in a finding of a disciplinary

rules violation. This efficiency, the argument goes, allows the grievance system to focus on the merits of grievances that have some potential to be actionable. To achieve this efficiency, the changes have done away with the prior process through which—as one grievance panel member put it—“we got everything,” including the responsibility to conduct the initial screening of grievances through the “investigatory hearings” or “just cause” hearings described previously in this report.

For this report, the Committee was not charged with weighing in on the comparative advantages and disadvantages of the pre-2004 and post-2004 screening processes. Instead, the Committee was charged with taking the post-2004 system as it is structured and evaluating it for any potential areas of improvement. The fact that the current system undeniably disposes of a vast majority of grievances up front, through a process that is internal to the CDC with BODA appellate review to those complainants who opt for it, caused the Committee to look for potential ways in which the transparency and rigor of the classification process could be improved over and above the improvements that have been made over time.

The need for transparency and rigor in the classification process is especially true given that there is undeniably a certain amount of subjective judgment every time anyone looks at a grievance and its supporting materials and asks: “If what is said in here is true, would this grievance state a disciplinary rules violation?” Such a judgment involves not only qualitative judgments about the assertions made in a grievance, but also can involve interpretation of disciplinary rules that often require interpretation in light of particular facts and circumstances. As more than one BODA member remarked in commenting on the rate at which BODA reverses CDC classification decisions, “reasonable minds can differ” on the question of whether a particular grievance contains allegations of a potential disciplinary rules violation. This is undoubtedly true: reasonable minds can often differ, at least as to some percentage of the grievances dismissed as inquiries through the classification process.

Accordingly, the Committee believes that to promote not only the confidence of a particular complainant whose grievance is dismissed, but also the confidence of the public at large as to the strength and rigor of the attorney-client grievance process, the following points are critical:

- Each complainant (and not just those who have sufficient resources and initiative to raise issues concerning a classification decision) should be provided with a level of assurance that his or her grievance has been subject to a rigorous review under the law and procedures established by law.
- In the interests of transparency and promoting confidence in the system, the specific basis of the grievance classification decision should be described to the complainant in writing.
- All notifications to the complainant regarding dismissal of a grievance, from CDC and BODA, should provide information about the process, including the classification appeal and grievance amendment processes, in a manner that is consistent with the statute and rules.

- If seventy (70) percent of the grievance intake workload is dismissed through the classification process, then sufficient State Bar resources should be dedicated to that intake workload, not only to in the processing of the grievances, but also in terms of internal “quality control” review of those classification decisions.
- Given the level of subjectivity that may come into play in classification decisions, and the level of interpretation that can be afforded many of the Disciplinary Rules of Professional Conduct, the CDC should constantly evaluate its policies and procedures and training for those involved in classification decisions.

5. As With Any System, Opportunities to Evaluate Potential Improvements to the Grievance Classification Process Exist.

Especially in light of the respect that the Committee has developed for the work done by professionals at both CDC and BODA in the grievance classification process, the GOC has carefully evaluated proposed improvements suggested both within the Committee and by persons whom the Committee has interviewed. The Committee believes that any human process—including a judgment-based process such as the grievance classification system—can and should be evaluated for continuous improvement and adherence to best practices. This is especially true in light of the needs for transparency and public confidence discussed in the previous section. In that spirit, the Committee puts forth the following as areas that could be evaluated for potential continuous improvement efforts:

- a. *In the interests of transparency and improving public confidence in the grievance classification process, CDC should consider providing grievance-specific explanations in writing to a person whose grievance is classified by CDC as an inquiry.*

As described above, the notification letters sent to persons whose grievances are dismissed at initial classification because a lawyer is no longer subject to the State Bar disciplinary system set out that explicit rationale behind the dismissal. On the other hand, when a classification attorney reviews a grievance filed against an attorney who is subject to the disciplinary system, and determines the grievance does not state allegations, that if true, state a disciplinary rules violation, the corresponding notification letter simply states that “the conduct you described is not a violation of the disciplinary rules.” This generic description has been the subject of questions, and in some instances frustration, by complainants whose grievances are dismissed. Such a generic description by itself does not provide the complainant with any level of confidence that the grievance has been the subject of meaningful review. Such generic descriptions can and have caused complainants with sufficient initiative to raise questions with the CDC about whether their grievances have been thoroughly reviewed. These questions, through calls and correspondence, have sometimes resulted in lengthy and contentious exchanges between CDC staff and complainants or their representatives. The generic notification letters thus contribute to a perception among some—which the Committee believes is not warranted—that dismissals are “rubber stamped.” Other complainants observed that if they received

feedback on the deficiencies of their grievance, that feedback from the CDC might help them in the exercise of their right, under the rules, to amend the grievance in an effort to make it state an actionable disciplinary rules violation.

As described above, whenever a classification attorney dismisses a grievance for failure to allege a potential disciplinary rules violation, the classification attorney documents his or her rationale for that decision in the CDC's "JustWare" system. This rationale is available for review by CDC management or, as described above, by BODA on a grievance classification appeal.

Especially in light of the fact that this written rationale by the classification attorney already exists in the system, it would not appear to present a significant increased burden on the CDC to provide grievance-specific feedback to the complainant. Any incremental burden, in the GOC's view, would be far outweighed by the increased transparency to the complainant and by the potential increases in confidence in the classification process that such explanations would provide. In fact, providing such explanations "up front" might well reduce the number of questions that are raised to the CDC by complainants and their representatives after the notification letters are received. Finally, it may not be the "job" of the CDC to educate complainants on how to craft actionable grievances. However, full and unfettered access to the attorney disciplinary process would be aided by complainants receiving grievance-specific feedback. A complainant could evaluate that grievance-specific feedback and determine whether the grievance and its supporting information could be amended or supplemented to cure its defects.

- b. CDC should revise the notification letters it sends to a person whose grievance is classified as an inquiry to clarify the process currently provided under the Rules of Disciplinary Procedure by which that person may appeal that classification, and later amend the grievance as provided by the rules.*

As discussed above, the notification letters sent to complainants whose grievances are dismissed in the classification process receive a description about the options available to them in light of the dismissal. The CDC's standard language for the notification letter indicates that the person filing the grievance has two options: (1) file an appeal with BODA or (2) amend the grievance once within 20 days of receiving the CDC's notification letter.

The CDC's standard notification language appears to conflict with Rule 2.10 of the Rules of Disciplinary Procedure. The language of the rule provides:

The Complainant may, within thirty days from notification of the dismissal, appeal the determination to the Board of Disciplinary Appeals. *If the Board of Disciplinary Appeals affirms the classification as an Inquiry*, the Complainant will be so notified and may within twenty days amend the Grievance one time only by providing new or additional evidence.

(Emphasis added.) The language of the Rules of Disciplinary Procedure appear to specify that the only option available to the complainant whose complaint is dismissed is an appeal to BODA, and that the one-time right to amend the grievance only arises once BODA affirms the dismissal. The rule does not appear to contemplate that the complainant has the two options (BODA appeal *or* amendment) described in the CDC's notification letters.

As discussed below, Rule 2.10 is not necessarily consistent with the State Bar Act, which provides as follows:

A complainant may appeal the classification of a grievance as an inquiry to the Board of Disciplinary Appeals, *or* the complainant may amend and resubmit the grievance.

TEX. GOV'T CODE § 81.073(b) (emphasis added). This apparent disconnect between the statute and Disciplinary Rule should be addressed. In the meantime, however, the CDC's notification letter description of the options available to a complainant whose grievance has been dismissed through the classification process should be amended to conform to the disciplinary rule, which on its face provides for a right to amend the grievance once within twenty (20) days of notification of the BODA decision affirming the dismissal.

c. The Court should consider whether the Rules of Disciplinary Procedure should be clarified, in a manner consistent with the State Bar Act, to allow a complainant to attempt to amend a grievance once before the CDC within 20 days of receiving a CDC notification letter, in lieu of the complainant taking an appeal to the BODA.

Consistent with the discussion in the prior section, the Committee recommends that the Court evaluate a potential change to Rule 2.10 of the Rules of Disciplinary Procedure to better correspond the language of the rule to the applicable statute (section 81.073(b) of the Texas Government Code).

The Committee's view that such a change to the rule would benefit all parties and the institutions involved. First, the change would appear to bring the rule in line with the plain meaning of the statute, which allows the complainant to choose between two options: a BODA appeal or an effort to amend a grievance. Second, especially if the CDC amends its notification letters to provide to the complainant an increased rationale for the dismissal, a complainant may choose to remedy such a defect before the CDC rather than pursue a BODA appeal, thus lessening the number of appeals.

Should the Court engage in consideration of such a potential rule change, the Committee also recommends that the language of the current rule, which provides that an amendment can be made "only by providing new or additional evidence," be removed. Such a restriction on the complainant's right to amend appears to go beyond the statutory language of the State Bar Act, which says flatly "the complainant may amend and resubmit the grievance." In the Committee's view, the right to amend should include the right, for example, to allege additional or different

rule violations based on the evidence collected and submitted by the complainant, in addition to the ability to submit new evidence.

- d. Appeals to BODA from dismissals of grievances on grounds that the respondent attorney is not a member of the State Bar, or has been disbarred or resigned, are not necessary, and the applicable rules should be amended as a result.*

Through discussions with the CDC, it became apparent to the Committee that the CDC was appropriately notifying complainants of a right to appeal when grievances were dismissed because they were filed against persons who were never or who were no longer members of the State Bar. The CDC's notification in this regard is appropriate, because the current statute and rules do not exclude grievances dismissed for these reasons from the right to appeal.

Given that the status of a member of the State Bar will be determined by the CDC as a preliminary matter, as part of the CDC's processing of grievances described above, it would not appear that there would be any need for appeal to BODA of grievance dismissals on the basis that the respondent is not a member of the State Bar. Even though it is theoretically possible that an administrative error could occur in the CDC's determination of whether an attorney named in a grievance is a current member of the State Bar, such an error is extremely unlikely. The CDC has access to the most up to date records available on State Bar membership and disciplinary proceedings taken against those members.

Furthermore, even if such an error did occur, it is not clear to the Committee how BODA would be in a better position than the CDC to determine a member's status, much less correct any error. Accordingly, the Committee recommends that the Rules of Disciplinary Procedure be amended to provide that a complainant does not have a right to appeal the dismissal of a grievance on grounds that the grievance is filed against a non-member of the State Bar. Instead, the rules could provide for a separate mechanism by which a complainant could notify CDC and provide evidence, if any exists, that a respondent attorney is—despite the CDC's verification to the contrary through State Bar records—an attorney currently licensed in Texas or admitted by a Texas court on a particular matter.

- e. Given the large number of grievances dismissed through the grievance classification process, the State Bar of Texas, in consultation with the Commission for Lawyer Discipline and the CDC, should consider whether additional attorney resources and qualified Spanish language/translation services should be dedicated specifically to the grievance classification process.*

As discussed above, the percentage of grievances dismissed through the classification process is high—and some contend too high. As stated previously, the Committee believes that the current CDC staff is dedicated and highly professional, and strives to do the work of classification diligently and in a manner consistent with the governing rules. However, the Committee is concerned that too few resources are dedicated to a classification process that involves the evaluation—and potentially the only evaluation—of 7000 to 7500 grievances each year. As represented to the Committee, classification attorneys are at times asked to process as

many as 15 grievances per day. Factoring in time spent in retrieving the grievances for internal review, work downtime, administrative duties, and breaks, the Committee is concerned that some grievances may be receiving 30 minutes or less of review. Although it is certainly possible that some grievances can be reviewed for substance in such a short period of time, such a limited time period for review is not necessarily consistent with the mandate that the alleged facts of each grievance be evaluated carefully, not just against the rules (if any) cited by the complainant, but against the classification attorney's own understanding and knowledge of the disciplinary rules.

The Committee wishes to reiterate that the CDC staff admirably took the position that it is capable of achieving the grievance classification task with current resources. The Committee appreciates the resolve of CDC staff to accomplish the goal of efficient review of grievances for classification within a time period of 30 days from filing. It is the GOC's view, however, that if 70 percent or more of grievances are being resolved by dismissal at the classification stage, and the justifiable emphasis is on not allowing grievances to languish without prompt review, then more resources ought to be dedicated to the grievance classification function. Accordingly, the Committee recommends that the State Bar evaluate this issue as part of its annual budgeting, to determine whether additional resources, in the form of additional classification attorneys and support, should be dedicated to this part of the process.

Furthermore, the CDC fully recognizes that a significant portion of the grievances and supporting materials filed, and which may increasingly be filed, include Spanish language. The CDC currently has a qualified Spanish speaker in-house who can help the classification attorneys with translation services as needed. The Committee recommends that as part of any re-evaluation of resource allotment by the State Bar, consideration be given to whether current Spanish-language resources within the CDC are sufficient. Again, if classification attorneys are to review all materials filed with a grievance, in order to determine whether the underlying facts as stated could give rise to a violation of the full range of disciplinary rules, such translation services and support is critical.

In the GOC's view, dedicating more resources to the grievance classification process would not only increase the robustness of the process but also help to promote confidence in members of the public that although 70 percent or more of all grievances are resolved early in the process, those dismissals result from a thorough, intensive, and comprehensive review of those grievances and their supporting materials.

- f. Given the large number of grievances dismissed through the grievance classification process, and as a mechanism for providing additional training and support to classification attorneys on CDC staff, the CDC should consider whether any portion of these additional attorney resources should be dedicated to an internal "quality control" review of classification decisions, under which a random sample of grievance classification decisions would be periodically reviewed.*

Under the current systems in place at the CDC, the work of the classification attorneys is monitored and evaluated in the following ways: (1) the classification attorneys have full access

to peers and “subject matter experts” during their evaluations; (2) the BODA appeal process provides an avenue for a “second look” at the grievance classification for those persons who choose to invoke it; and (3) the CDC staff treats each BODA reversal of a grievance classification dismissal as a “teaching moment,” with discussion and feedback following each such reversal. As indicated above, these methods are all indications of the professionalism and diligence with which the CDC approaches grievance classification.

The Committee is mindful of the fact that, as described above, in recent years only about one-third of grievance dismissals are appealed to BODA. Thus, a significant number of grievance dismissals on classification are never subject to secondary review by anyone other than the classification attorney who determined that the grievance should be dismissed as an inquiry. In light of these numbers, the Committee believes it would be beneficial for the CDC to consider adding a level of “quality control” review for those grievance dismissals that are not made the subject of an appeal to BODA. Such a quality control measure could be accomplished by a periodic internal review of such grievance dismissals by CDC management, or potentially even by peers. Such a reviewer could take an independent look at a random set of such dismissals and the corresponding entries in the “JustWare” system made by the classification attorneys in support of that decision. Of course, any such additional quality control measure may well be dependent on the allocation of additional resources to the grievance classification process, as discussed above.

Such an internal review of non-appealed dismissals would not be for the purpose of “reversing” dismissal decisions by classification attorneys—that is the purpose of the BODA appeal process. Instead, this internal review would allow a CDC manager or peer to provide feedback to classification attorneys on their evaluation of grievances and the corresponding interpretation of whether any disciplinary rules potentially apply to the facts as stated. Such discussions would help in turn to promote the type of healthy exchange of ideas and knowledge in which the CDC classification attorneys and their manager already engage. The presence of such an internal review process, with respect to the large number of grievances that are never made the subject of a BODA appeal, would also serve to promote public confidence in the rigor and thoroughness of the process.

- g. The CDC should review its internal operational policies, procedures, and training to reaffirm in writing certain core principles that the CDC currently applies to the grievance classification process, such as the liberal reading of grievances at the classification stage; the need to analyze, independently of how issues are phrased in what may be a “lay person’s” grievance, whether the asserted facts could, if proved, constitute a violation of the Disciplinary Rules of Professional Conduct; and the need for individual classification attorneys, in cases of doubt, to seek additional input from peers or a supervisor.*

As indicated above, the CDC has written policies and procedures that it supplies to classification attorneys and staff who are involved with the grievance classification process. Having such written policies and procedures is beneficial, and the Committee encourages the CDC to periodically update the policies and procedures. The Committee also encourages the

CDC to consider whether it would be helpful to memorialize in the written policies and procedures the principles by which grievances are reviewed internally at the CDC, including:

- Grievances are to be read and construed liberally.
- The classification attorney is to review the facts stated and make an independent determination, regardless of any citation of disciplinary rules by the grievance itself, of whether the facts as stated could, if true, constitute a violation of any of the disciplinary rules.
- Peer and supervisor input, feedback, and support, as well as input from “subject matter experts” in such areas of the law as family and immigration law, is available to the classification attorney upon request.
- “Close calls” or difficult disciplinary rules interpretations based on a given set of facts are very appropriate for peer and supervisor input, feedback, and support.

The Committee believes that each of these principles is already in place within the CDC. Adding them (and potentially others) to the written policies and procedures will only serve to reinforce them and raise public confidence that such principles are very much in place.

h. The CDC should continuously review the training provided to classification attorneys on the CDC’s Austin staff, on the classification process procedures employed at CDC as well as on the Disciplinary Rules of Professional Conduct.

As discussed above, each classification attorney receives “on the job” training when he or she takes on this role. As part of this training, a CDC supervisor will review the casework of each classification attorney in training until the supervisor is confident that the classification attorney is sufficiently trained to work on his or her own.

The Committee recommends that the CDC continuously evaluate the level and methods of training—both on an initial and continuing basis—that classification attorneys receive. The Committee is mindful that classification attorneys are required to evaluate grievances that arise in many different aspects of the law, and thus it might be helpful to have specialists in various practice areas (such as family law, immigration law, and criminal law) provide periodic updates or overviews to classification attorneys on those practice areas. The Committee is also mindful of the fact that many of the disciplinary rules are subject to broad interpretation, and it might be helpful to have both (1) an initial orientation and training of classification attorneys on the disciplinary rules and their historical interpretation and (2) periodic updates provided to the classification attorneys on how the rules have been interpreted by courts, grievance panels, and even commentators.

Of course, the ability to do such structured training will be dependent on workload, and the Committee believes that this initial and continued training should also be factored into a re-assessment of the resources dedicated by the State Bar to the grievance classification process.

6. Clarification on the Scope and Application of Disciplinary Rule of Professional Responsibility 8.04(a)(3) Is Needed For the Benefit of Complainants, the Public, and the Attorney Discipline System as a Whole.

Although the scope of various Disciplinary Rules of Professional Conduct was not explicitly within the Court's request to the GOC, it came to the GOC's attention during its review of the grievance classification process that the scope of one such rule, Rule 8.04(a)(3), has been the subject of a fair amount of discussion in the context of the classification process.

Rule 8.04(a)(3) provides as follows:

A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

As stated, the rule is obviously very broad. The face of the rule does not limit the prohibition against "dishonesty, fraud, deceit or misrepresentation" to conduct relating directly to an attorney's acts as a lawyer. The issue arises, for example, when an attorney licensed by the State Bar engages in acts in a "personal" capacity—such as a business transaction in which the attorney is not *representing* a party to the transaction, but instead *is* a party to the transaction. In that circumstance, does Rule 8.04(a)(3) apply?¹¹ This is an issue that has come up during the grievance classification process, and is likely to come up again. As has been pointed out in the context of grievance classification, on its face the rule is simply, but broadly, stated. All participants in the process, from complainants raising the rule to CDC personnel, agree that the rule language is broad. On its face, the rule applies to any conduct by any Texas-licensed lawyer involving dishonesty, fraud, deceit or misrepresentation.

The CDC has done extensive research on the issue of how Rule 8.04(a)(3) has been applied over time within Texas, and also how other bar associations in other states, and professional licensing agencies with similar disciplinary rules, apply such rules. As the Court knows, the CDC has reported the results of that research previously, directly to the Court.¹² As stated in the letter and as discussed with the Committee, based on its research, the CDC currently "generally utilizes 8.04(a)(3) in combination with more specific rules involved in the disciplinary litigation and for misconduct involving a lawyer's practice or professional obligations." CDC has thus interpreted the rule as relating strictly to dishonest, fraudulent, or deceitful conduct that occurs in the course of the attorney-client relationship, or in the course of an attorney carrying out duties or responsibilities as a lawyer. As indicated in the CDC's letter to the Court, however, the CDC has also applied the rule in contexts in which the lawyer is not acting directly as a lawyer in the fact pattern described by a grievance, such as instances where a lawyer is alleged to have falsified insurance claims or personal financial statements. At the end of the day, all

¹¹Of course, there is a disciplinary rule that applies to a lawyer engaging as a party to a business transaction, when the transaction involves that lawyer's client. TEX. R. PROF. CONDUCT Rule 1.08. But Rule 1.08 does not apply to a lawyer's conduct as a party to a transaction with non-clients.

¹²A copy of CDC's letter to the Court on this issue is attached as **Tab 3**.

parties—including the CDC and persons who have filed grievances that have been dismissed on classification—appear to agree that the disciplinary rule is not being applied to the full scope of the language of the rule on its face.

This interpretation has led to the perception among some persons who have filed grievances that the CDC would never consider an alleged violation of 8.04(a)(3) standing alone, with no other potential disciplinary rules violation. The CDC has not taken the position that it will never consider a free-standing alleged violation of the rule. Instead, as indicated above, the CDC has indicated a willingness and commitment to enforcing Rule 8.04(a)(3) when a grievance alleges dishonest, fraudulent, or deceitful conduct by a lawyer in carrying out professional obligations. For example, the CDC interprets the rule as covering a situation in which a lawyer lies to a client or court about a pending legal matter. Still, this perception continues to exist among some.

Furthermore, the issue remains about whether the CDC's interpretation of the rule, as not applying generally to a lawyer's involvement as a party to business, social, or other affairs, is correct—and if so, how to provide additional clarity on the scope and application of the rule.

The current comments to Rule 8.04 are silent on the scope and application of subsection (a)(3). They do not provide any explicit guidance indicating that Rule 8.04(a)(3) is to be applied only to a lawyer's conduct as a lawyer. The CDC has articulated a potential clarification to the rule's comments section as follows:

In addition to his professional obligations, a lawyer may also be subject to discipline for dishonest, deceitful or fraudulent conduct in personal dealings when he utilizes his position as a lawyer to engage in such conduct, or where the conduct demonstrates a lack of characteristics bearing on this fitness to practice. See Rule 8.04(a)(3).

Such commentary language would help to institutionalize the CDC's current interpretation of Rule 8.04(a)(3). However, even the proposed commentary language is subject to interpretation, and does not appear to set a defined scope for the application of the rule. The proposed commentary does not address the fundamental question of when a lawyer's conduct that is performed in a personal capacity (for example, preparing or submitting financial statements for the lawyer's own loan) falls within the scope of the rule.

Such uncertainty has generated a great deal of discussion in the attorney disciplinary system, in the context of grievance classifications and beyond. The Committee does not interpret its charge as including making a recommendation on what the proper scope and application of the rule should be. However, the Committee does believe that this issue of the scope and application of Rule 8.04(a)(3) needs to be addressed, in whatever manner the Court sees fit to address it.

The importance of addressing this uncertainty is self-evident, in light of the discussion and controversy caused by the uncertainty. For example, the disciplinary rules provide that a

Texas-licensed attorney is required to file a grievance against another Texas-licensed attorney when he or she becomes aware of “a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.03(a). With the current uncertainty in the scope and application of Rule 8.04(a)(3), and to what aspect of a lawyer’s personal conduct it applies, other lawyers will face uncertainty about their reporting obligations. In this sense, the issues of the application of Rule 8.03 and Rule 8.04(a)(3) are intertwined.

Thus, clarification as to the application of Rule 8.04(a)(3), and its relationship to Rule 8.03, is recommended—specifically, the rule’s application to lawyer conduct as lawyers (such as fraud or deceit committed in the course and scope of an attorney-client relationship or in a legal case or proceeding) versus an attorney’s conduct outside of an “attorney-client” relationship or legal case or proceeding.

Concluding Comments

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



The Supreme Court of Texas

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NATHAN L. HECHT

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April 16, 2015

Ms. Catherine N. Wylie, Chair
Grievance Oversight Committee
The Wylie Law Firm
2211 Norfolk Street, Suite 440
Houston, Texas 77098-4096

via regular and electronic mail

Dear Ms. Wylie:

The Supreme Court requests the Grievance Oversight Committee's assistance with a matter relating to the operation of the grievance process. The Court has in the past year received a petition for administrative relief and several letters raising a systemic concern with the grievance classification process. This concern relates to the process by which grievances are classified as "inquiries" and dismissed without further investigation or action in instances where the face of the grievance alleges that an attorney has violated one or more of the Texas Rules of Disciplinary Procedure. Attached are several examples of these communications that reflect the areas of concern.

Please investigate this matter and report your findings and recommendations by October 1, 2015. As always, the Court appreciates the Committee members' service as volunteers. You may contact the Court through your liaison, Justice Jeff Brown, and the Court's General Counsel, Nina Hess Hsu.

Sincerely,

A handwritten signature in black ink that reads "Nathan L. Hecht".

Nathan L. Hecht
Chief Justice

Enclosures

cc: Michelle Hunter, Executive Director, State Bar of Texas *via electronic mail*
Guy Harrison, Chair, Commission for Lawyer Discipline *via electronic mail*
Linda Acevedo, Chief Disciplinary Counsel *via electronic mail*
Trey Apffel, President, State Bar of Texas *via electronic mail*
Allan DuBois, President-elect, State Bar of Texas *via electronic mail*

Tab

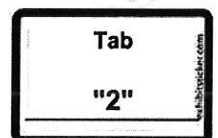
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2005-2015
State Bar of Texas Attorney Grievance System

	14-15	13-14	12-13	11-12	10-11	09-10	08-09	07-08	06-07	05-06
Grievances Classified	7,071	7,394	7,123	7,647	6,825	6,970	6,929	7,126	6,397	6,941
Classified as complaints	1,495	1,567	1,628	2,296	2,047	1,970	1,761	1,966	2,027	2,357
Dismissed as inquiries	5,576	5,827	5,495	5,351	4,778	5,000	5,168	5,160	4,370	4,584
BODA Appeals	1,854	1,959	1,809	1,773	1,902	2,095	2,149	2,235	2,191	2,413
BODA Decisions	1,984	1,842	2,021	1,761	2,028					
Affirmed	1,756	1,698	1,871	1,659	1,859					
Reversed	228	144	150	114	169	232	205	181	205	207

Five Year Reversal Rate 8.3%



STATE BAR OF TEXAS



Office of the Chief Disciplinary Counsel

December 3, 2014

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

**Re: Resource Information
TEX. DISCIPLINARY RULE PROF'L COND. 8.04(a)(3)**

Dear Ms. Hsu:

The Court has requested information regarding the application of TEX. DISCIPLINARY RULE PROF'L COND. 8.04(a)(3) by the Office of Chief Disciplinary Counsel; the application of the Rule's equivalent by disciplinary offices in other jurisdictions; and the extent to which other professions discipline its members for conduct outside professional obligations.

APPLICATION OF RULE BY THE OFFICE OF CHIEF DISCIPLINARY COUNSEL (CDC)

Rule 8.04(a)(3) provides: "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

CDC generally utilizes 8.04(a)(3) in combination with more specific rules at issue in the disciplinary litigation and for misconduct involving a lawyer's practice or professional obligations. For example, if a lawyer fails to pursue a client matter and lies to the client about the progress of the case, CDC would pursue neglect and misrepresentation rule violations. CDC also has utilized the rule when a lawyer uses his or her position as a lawyer to engage in dishonesty, fraud, deceit or misrepresentation.

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An example includes a lawyer who induced individuals to lend him money based on fraudulent representations regarding non-existent personal injury cases.

CDC also has exercised discretion in pursuing this rule violation for conduct that is not strictly within the professional parameters. Examples include lawyers who have filed false insurance claims or made misrepresentations in obtaining financial loans related to the lawyer's personal situation; lawyer-owned companies engaged in Ponzi-like schemes; and lawyers who have engaged in fraud during the course of a personal bankruptcy. These cases are typically triggered by parallel criminal/civil investigations, notification by the affected financial or insurance company, or notification and/or findings by civil or criminal courts.¹

APPLICATION OF RULE BY DISCIPLINARY AUTHORITIES IN OTHER JURISDICTIONS²

All of the responding jurisdictions have an identical or comparable rule of professional conduct and utilize it in a similar manner as Texas. All exercise discretion when applying it outside the parameters of a lawyer's professional capacity.³ No jurisdiction accepted any and all allegations involving dishonesty, fraud, deceit or misrepresentation.

In its application outside professional parameters, examples included deceitful conduct in personal dealings with financial institutions, insurance companies or other governmental entities, as well as conduct involving some aspect of criminal conduct, such as failing to file a personal income tax return, lying on an income tax return, and retail theft (shoplifting). Other examples included cashing another's social security checks, theft from the neighborhood swim club, theft from law partners, misrepresentations during personal legal proceedings, misrepresentations to obtain a non-

¹ In addition, if a lawyer is convicted of a crime and, depending on the nature of the offense, CDC can pursue discipline through the compulsory discipline process or pursuant to Rule 8.04(a)(2) ["A lawyer shall not commit any other criminal act that reflects adversely on the lawyer's fitness as a lawyer in other respects"].

² The following jurisdictions responded to inquiries on this issue: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Idaho, Iowa, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York (2nd Jud. Dept), North Carolina, Oklahoma, Pennsylvania, South Dakota, Vermont, Virginia, Washington, Wisconsin, Wyoming.

³ Georgia's rule requires that the conduct be committed in a professional capacity.

professional license, accepting unemployment benefits while fully employed, lying to police in personal matters, stealing from law partners, and misdemeanor gaming violations. The focus of these actions tended to be on whether the conduct bore on the lawyer's fitness to practice or demonstrated the lack of a necessary character trait expected from a lawyer.

When presented with how the disciplinary jurisdiction would handle a grievance with facts similar to those alleged in the Stanley administrative petition, the responses comprised: (1) rejecting the grievance; (2) accepting the grievance only if a finding of civil fraud had been made or a criminal investigation was pending; (3) accepting the grievance, but abating it until the outcome of civil litigation; (4) advising the complainant of possible civil remedies and inviting the complainant to return if a finding of fraud were made; (5) declining to allow the discipline process to be utilized as discovery in a civil suit; and (6) accepting the grievance to determine the seriousness of the alleged fraud. Universally, the need for discretion to pursue a matter was stressed, and relevant factors included whether civil remedies had been pursued, whether a finding of fraud or similar finding by a court had been made, and/or whether the disciplinary authority was being asked to litigate an issue that could be obtained in civil litigation.

HANDLING OF CONDUCT OUTSIDE PROFESSIONAL CAPACITY BY OTHER PROFESSIONS

Representatives in the enforcement divisions of the Texas Medical Board, Texas State Board of Dental Examiners and Texas State Board of Public Accountants were contacted. As expected, the primary focus for each agency was on the standard of care and all pursued criminal convictions or conduct to varying degrees. The Board of Dental Examiners does not pursue fee disputes or seek damages on behalf of patients harmed by a dentist, but will pursue fraud in connection with services not rendered.

Outside pursuing complaints related to the standard of care, the Medical Board's primary focus appeared to involve criminal conduct. Because all of its members are required to be fingerprinted, the Board receives automatic notification whenever a doctor is arrested and fingerprinted. The Board will then exercise discretion as to whether to pursue an investigation depending on the criminal conduct at issue. Doctors also are required to self-report criminal infractions.

The Board of Public Accountants has a "discreditable acts rule" which prohibits acts that reflect adversely on the accountant's fitness to engage in the practice of accountancy and includes fraud or deceit in obtaining a CPA certificate, registration, or a license to practice, as well as fraud or gross negligence in the practice of public


Ms. Nina Hess Iisu

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accountancy. The Board also has a self-reporting rule which includes certain convictions, adverse action by another jurisdiction or agency, and adverse findings by a state or federal court or an agreed settlement in a civil action concerning professional accounting services or work, or a finding of breach of fiduciary duty, fraud or misappropriation.

Please let me know whether the Court requires any further information regarding the CDC's application of 8.04(a)(3), its application in other jurisdictions, or the handling of conduct outside professional obligations by other professions.

Sincerely,



Linda A. Acevedo
Chief Disciplinary Counsel
State Bar of Texas

c: Guy Harrison, Chair
Commission for Lawyer Discipline