



**The Grievance Oversight Committee  
Appointed by  
The Supreme Court of Texas**

**Report 2009**

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**The Grievance Oversight Committee  
Appointed by  
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2008 – 2009**

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# GRIEVANCE OVERSIGHT COMMITTEE

## APPOINTED BY THE SUPREME COURT OF TEXAS

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June 1, 2009

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

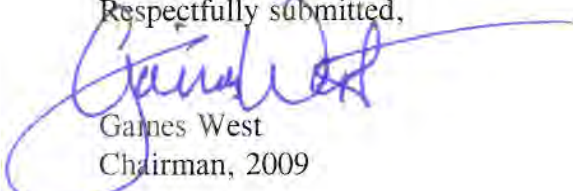
On behalf of the Grievance Oversight Committee, I am pleased to submit the Committee's 2009 Report in response to this Honorable Court's request. This 2009 Report, in addition to our normal review and comments on the grievance governance system, contains, as requested, our review and recommendation concerning Insurance Disclosure requirements for Texas attorneys.

Our Committee again traveled the State throughout this past year in pursuit of input about the grievance governance process. We have found that nothing can replace local visits to understand fully the issues. We visited with members of the judiciary, the public, respondents counsel and representatives of the scores of men and women who work in our system of grievance governance.

On behalf of the Committee, I want to express our thanks for the opportunity to serve the Court. We are honored to serve the Court, the citizens of Texas and the legal profession. We continue to enjoy a close working relationship with the State Bar staff and we are especially indebted to Don Jones for his continued invaluable assistance to the Committee.

Should you require, we will be available to discuss this report with the Court, or answer questions any on the Court might have concerning our comments and recommendations. Again, thank you for the privilege of serving the Court in this important undertaking.

Respectfully submitted,

  
Gaines West  
Chairman, 2009

June 1, 2009

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cc:

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Tom Pitts, Esq., Chair, Board of Disciplinary Appeals

Michelle Cheng, Esq., Chair, State Bar Board Discipline & Client-Attorney Assistance  
Committee



**The Supreme Court of Texas  
Grievance Oversight Committee**

**Report  
2009**

**GRIEVANCE OVERSIGHT COMMITTEE**

**2009 REPORT**

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## **2009 REPORT TO THE SUPREME COURT OF TEXAS**

### **GRIEVANCE OVERSIGHT COMMITTEE**

#### **History and Scope of the Report:**

The Grievance Oversight Committee (the “Committee” or “GOC”) completes its third reporting year since being reconstituted with the filing of this 2009 Report. The history of our Committee is detailed in our 2007 Report, and anyone not familiar with our history may refer to that report. This 2009 Report differs from our two earlier reports in several respects. First, its scope is expanded to subjects beyond what we previously reported on, and the topics covered reflect requests made to the Committee for analysis and review.

Our Committee travels throughout the State each month of the year to meet with local and state bar leaders, grievance governance volunteers, judges and the public. It is an intense process that requires each member to draw on his or her substantial experience in the grievance system to question, then evaluate, the answers that we get. Throughout the year we meet with representatives from every segment of the grievance governance system, as required by our order from the Court. We review annual reports and ask hard questions. We are not an audit committee, and we have no regulatory oversight authority. Our mission is to review and evaluate the grievance system and then report what we see and hear to the Court.

Throughout this process we continue to find that the dialogue that ensues shapes and changes our grievance system for the better. Seeking no credit for changes, our goal is to continue to ask hard questions and evaluate the answers we get and then report on what we see and hear to our one constituent: The Supreme Court of Texas. Our job is to make recommendations to the Court based on our constant review of the grievance system. The Court is tasked with running this grievance system and we enjoy the role, and the privilege, they have given us to inform them.

Two new areas will receive our comments. The Court requested that we review and report on Insurance Disclosure, and this report will contain our review of this topic and our recommendation. We also reviewed the Client Security Fund, and we make our comments about it in this year's report. Lastly, the issue of lawyer advertising, involving the grant of some special descriptor, or term, for a lawyer continues to rise as a concern that the public not be misled when making consumer decisions about who to hire. We will address this issue and examine some of the stated concerns and make our recommendations about this emerging practice of designating lawyers with superlative descriptions which may, or may not, reflect some special knowledge or competence.

#### **COMMENTS TO THE 2007 & 2008 REPORTS**

Our Committee enjoys finding that both volunteer and paid workers in our grievance governance system are committed to the fair processing of complaints. Volunteer attorneys and public members, we have found, spend untold multiple hours making sure the public is protected from unscrupulous practices, while at the same time making sure that a respondent attorney has his or

her voice heard. In this, our third report since being reconstituted, we are convinced more than ever that efforts are underway to streamline the grievance system so that it is more responsive to complainants, and at the same time provide even more appropriate protections for the attorneys about whom a complaint is made.

The Committee has been busy this year analyzing statistics gathered from the regular reports made to us since we were reconstituted in 2006. In these scant three years, even at this early juncture, we are detecting trend lines that need further analysis and review. This has led us into an expanded working relationship with our statistical support function in the Bar. Dr. Mark Mallon has begun the task of compiling our statistical data base and reviewing our report formats so that when we share statistical supporting data it will speak for itself and provide essential details from which further Committee recommendations can be made.

For instance, we recognize that our 2007 and 2008 Reports covered a wide range of issues, some of which we had, at the time, little more than anecdotal proof to support our recommendations. At the time of the writing of our 2009 Report, many of our recommendations in both of our previous reports remain as projects “under construction.” While dialogue has begun and areas of change have emerged, many observations and recommendations the Committee made remain unaddressed. The Committee has turned much of its efforts to now work on our statistical data base to prove, or in some cases, disprove, the anecdotal evidence which supported some areas of concern on which we previously reported. It is the belief of the Committee that as time passes and our reports pile up, that, in addition to dialogue about change, we need to address in more detail the statistical support for our recommendations. Nothing about our first two reports can now be totally archived and marked as “job complete.”

#### **Professional Liability Insurance Disclosure:**

At the request of the Court, the Committee submits this, its recommendation for insurance disclosure by Texas attorneys. This recommendation is based upon our study of the growing effort among states to provide a greater level of transparency and public protection for persons who have been harmed through the negligent acts of lawyers.

In developing this recommendation, members of the Committee first conferred with the original proponent of disclosure in Texas, Charles Herring, who first suggested the need for a review in a detailed submission to the Supreme Court. Committee members also conferred with the Chief Disciplinary Counsel, the Commission for Lawyer Discipline, the Board of Disciplinary Appeals, local Bar leaders, and members of the public. We spoke with Bar leaders in each of the three states that did not adopt the ABA proposal, (see page 3), and we reviewed correspondence sent to the State Bar by a few lawyers who expressed strong opposition to the proposal. We wish to express our appreciation to ABA Client Protection Counsel, John Holtaway, who participated in our November 2008 meeting and discussed the issues from a national perspective. A copy of the national survey prepared by Mr. Holtaway is attached to this recommendation. A member of the Committee attended the final meeting of the State Bar Task Force on Professional Liability Disclosure and later attended the State Bar Board of Directors meeting on April 25, 2008, where the report was reviewed.



## Background Information:

The Committee understands that after the Court received a request by Austin attorney Charles Herring, the Court requested that the State Bar study the issue and recommend what action, if any, should be taken in response to the ABA recommendation and the movement in many states to adopt such requirements. Then State Bar President, Gib Walton, named a special Task Force that included a cross section of lawyers by practice area, and included a member of the public who served on the Bar Board. The Task Force was chaired by former State Bar President, David Beck. With financial support from the State Bar, independent polling surveys were conducted of the public at large, and of individual attorneys on the question of whether Bar rules should require advance disclosure (prior to the representation of a client) by lawyers as to whether or not they maintain professional liability insurance coverage. As reported in a May 2008 article from the Austin American Statesman, 80% of the public felt that disclosures should be required. By nearly the same margin, approximately 70% of the lawyers polled felt that disclosure should not be required.

It should be noted, however, that before the polling was completed it appeared that the leadership of one Bar section lobbied its membership to oppose any effort to compel disclosure and urged its members to write Mr. Walton and the Task Force members to oppose, in the strongest of terms, the adoption of the proposal. Copies of a sample document complete with Talking Points were distributed electronically by that section. Copies of those letters were later made available to the Grievance Oversight Committee. No similar lobbying effort was apparently made by consumer or public interest organizations, although one speaker, Mr. Tom "Smitty" Smith of Public Citizen, was invited to speak at the final Task Force meeting.

The recommendations of the Task Force were presented to the Board of Directors of the State Bar in their Galveston meeting in 2008. There was no debate, and the Bar Board took no substantive position on the Task Force recommendation. Instead, the Board simply approved its submittal to the Court.

In their study and deliberations, the American Bar Association recommended the adoption of requirements for attorneys to disclose to potential clients whether the attorney maintains professional liability insurance coverage. As of December 2008, 24 states have adopted such a requirement, while leadership entities in three states have studied the issue and rejected such a requirement. According to an article published by Texas Lawyer's sister publication, Law.com, the Board of the State Bar of California recommended the adoption of their disclosure rule (16-4) in May 2008 only after an agreement was struck that provided a *de minimus* exception for attorneys who would bill a client for less than four hours of legal services.

Organizations in two states studied and rejected recommendations for disclosure. In Arkansas, the Board of Governors of the Bar recommended the adoption but their House of Delegates subsequently rejected adoption by a vote of 29-14 with 12 abstentions. The Kentucky Bar Association twice recommended the adoption of disclosure requirements directly to clients, but those recommendations were ultimately rejected by their Court. However, in the Kentucky example, attorneys practicing as LLC's are required to make public disclosure. An alternative proposal is now under review.

According to ABA statistics, five states (PA, AK, NH, OH, SD) require disclosure directly to clients. Nineteen other states require attorneys to disclose their lack of malpractice insurance on annual registration statements (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA, and WV).

In the final meeting of the State Bar Task Force, the proposal, together with implementing rule language as drafted by Mr. Herring, was narrowly rejected in a 6-5 vote with the Chair having voted last, but having voted in support of the proposal. The June 11, 2008, Memorandum from Task Force Chair David Beck fairly describes the review process and summarizes the policy alternatives for supporters and for opponents of the disclosure requirement.

#### Issues Regarding Disclosure:

There is considerable literature available through the ABA Center on Professionalism on the pros and cons of insurance disclosure. Indeed, in recommending a model rule, the ABA House of Delegates heard considerable debate on the topic before a model rule was approved in August of 2004. While the Grievance Oversight Committee conferred with members of the public, the State Bar's research is the only known independent survey of public attitudes on the requirements of disclosure (80% of Texans favor disclosure).

When reviewing the professional literature and the internal debate of the Task Force, the topic quickly diverts to the question of how should disclosure be conducted, how should it be monitored, and what sanctions should be imposed if a lawyer fails to follow the rules.

Furthermore, a number of technical questions arise as to what protections are in fact available to the public when a lawyer claims to be "fully covered." For example, does a policy that has a very high deductible, or that has a low ceiling on maximum claims, count as coverage? Should the attorney who drops coverage be required to timely notify the State Bar and potentially affected clients? Should disclosure requirements extend to lawyers who are not primarily engaged in private practice, such as government lawyers or the law professor who might offer a courtesy opinion at a cocktail party or to a friend or former student?

From the public perspective, the question is asked why the public is mandated to maintain insurance for public protection if they own and drive a car and why lawyers should not be held to the same standard. From a consumer viewpoint, businesses are regularly required to disclose financial status under SEC requirements. Insurance companies are required to disclose information on claims paid experience ([www.tdi.state.tx.us](http://www.tdi.state.tx.us)), and Medicare has recently simplified comparison shopping of hospitals and care facilities by requiring disclosures on costs, treatment effectiveness, and risks for individual institutions ([www.medicare.gov](http://www.medicare.gov)). In informal anecdotal surveys, many members of the public seem to presume that because lawyers are licensed they are protected, because they assume lawyers have adequate malpractice insurance coverage.

One of the talking points submitted by a few lawyers to the Task Force was that other professions are not held to the same standards as lawyers, if lawyers were made to disclose. It

was noted that no professional liability insurance, or disclosure, is mandated of plumbers, dentists, accountants, or similar trades or professions. The Committee notes that while physicians are not mandated by law in Texas to have coverage, or disclose whether they do or do not have coverage, the requirements for staffing privileges in hospitals in fact reach a higher requirement for public protection. Those doctors who admit patients are normally mandated by the hospitals to maintain professional liability coverage (see standardized credentialing requirements set forth by TDI at [www.tdi.state.tx.us/forms/lhlmho/lhl396credihep.pdf](http://www.tdi.state.tx.us/forms/lhlmho/lhl396credihep.pdf)).

Opponents of disclosure sometimes suggest that they would be obligated to inform the client of their liability coverage if the new client were to ask the question. They then acknowledge that it is a rarity, if ever, that the client asks about it, and that by the time the retainer agreement is prepared, the client has typically already incurred fees.

Disclosure requirements vary among the states. Those states with the most effective disclosures require that it either be posted in the lawyer's office or in a retainer agreement (much like the Texas Bar requires disclosure to clients for lawyer grievances relief). One state, South Dakota, requires that the information be published on the lawyer's letterhead. Several states require disclosure on websites and on the Bar's website *if the lawyer does not have minimal coverage*. Most proponents of disclosure readily admit that they believe that disclosure requirements will lead to greater public protection by providing lawyers with an incentive to maintain liability protection. Only the state of Oregon has a comprehensive rule that mandates actual insurance coverage in order to practice law (similar to MCLE requirements).

#### Types of Coverage for Disclosure and Affordability:

One of the concerns raised by a few lawyers is that the insurance may not be affordable, particularly by new members of the Bar who are not part of a large practice group. While the business of the Bar's disciplinary arm is public protection consistent with ethical conduct, and not trade protection, we reviewed the policies that are available and considered whether a risk-pool or similar entity should be created to ensure uniform access to liability coverage. We also observed a very informal survey of Task Force members each of whom were asked what they pay for coverage. From that informal survey, it appeared that those lawyers (at the table) each paid approximately \$4000 per year.

Following up on that topic of coverage and insurability, a committee member interviewed the Texas Lawyers Insurance Exchange President, John Randolph, about standard policies and costs. TLIE is the largest insurer in Texas of solo and small firm practitioners and has been insuring Texas lawyers for over 25 years. We were told that policy premiums vary based on practice area and whether the attorney is practicing on a full time basis. The highest premiums are charged for lawyers who engage in securities work, intellectual property law, and personal injury law (areas that often require some significant post law school experience, or work in a large firm setting).

As a non-profit insurer with its board elected by the policyholders, TLIE makes available special rates for new lawyers with first year policies at \$500 yearly for coverage of \$100,000 per claim, to a maximum policy level of \$300,000 for multiple claims. The TLIE new lawyer program ramps up to the rates over time so that by year four of the attorney's practice, the standard

premium would be \$1750, or about \$7 per workday. Mr. Randolph stated for the lawyer with a record of multiple disciplinary actions, or malpractice claims, TLIE would not extend coverage, but other companies are available. He added in his response that premiums for those lawyers could be costly.

The Committee also learned that the Membership Committee of the State Bar Board of Directors is reviewing the potential for the procurement of a preferred provider for professional liability insurance. This would presumably be accomplished through some type of bidding process, and that a preferred provider would be promoted by the Bar and offer favorable underwriting policies at very competitive rates. As one apparent measure of affordability, all attorneys in Oregon have been required to maintain malpractice coverage at minimum limits through a Bar sponsored pooling arrangement known as the Oregon Professional Liability Fund. The average premium per lawyer in 2003 was \$2000 annually.

Lastly, we examined malpractice premiums for lawyers who are covered under the State Bar's insurance plan, offered free to lawyers who are employed full time by Legal Aid organizations. While nearly half their practice is in the field of family law, Legal Aid attorneys work in many forums and practice in complex fields including consumer law, public benefit law, mortgage foreclosure, and public utility law. The State Bar maintains a master policy for covering Legal Aid organizations and pays the premiums after seeking competitive bids.

Based on the above review, the Committee believes the State Bar should proceed with its efforts to seek better terms through competitive solicitations. In light of the above research, we challenge that the mere addition of a disclosure requirement would force lawyers out of business.

#### Recommendation:

The Committee, having studied the recommendations of the State Bar's Task Force on insurance disclosure, and having reviewed how other states have addressed these same issues, and after having studied the cost and availability of professional liability insurance in Texas, recommends that the State Bar of Texas, at the direction of the Texas Supreme Court, implement a Professional Liability Insurance Disclosure rule. The rule, the Committee believes, should be made a part of the Disciplinary Rules of Professional Conduct so that any violation of the rule will be handled through the grievance process, and any such rule should embody at least the following provisions:

- At the time a client engages a lawyer, the lawyer should have a duty, if the lawyer does not have a professional liability insurance policy with limits acceptable to the Bar {for instance insurance in an amount of at least \$100,000 per claim and \$300,000 in the aggregate} to inform the client in writing of this fact.
- If during the representation an insurance policy in effect with the prescribed limit lapses, or is terminated, the lawyer should have the same duty to supply notice to the client of this fact.

- The Bar, as approved by the Supreme Court, should prescribe the form of notice in these circumstances so that clients get standardized notices.
- The rule should only apply to a lawyer practicing for the public (e.g. not a full-time judge, in house corporate counsel, or lawyers working full-time for a government agency, etc.).
- The rule should prescribe that the required written notice should be signed and acknowledged by the client and that the acknowledgement should be kept by the lawyer for a term of years specified by the Bar.
- The rule should prescribe that the minimum limits of insurance specified by the rule include any deductible or self-insured retention amounts which must be paid as a precondition to the payment of coverage available under the professional liability insurance policy.
- The rule should also specify that the rule would be violated if a lawyer, or firm employing a lawyer, either knows, or has reason to know, that the deductible or self-insured retention amount cannot be paid in the event of loss.\*

In making this recommendation, the GOC considered not only the issues raised and comments made by the State Bar's Task Force on Insurance Disclosure, but also obtained added input from both the public at large and grievance governance volunteers, as the Committee traveled around the State in its efforts to compile its annual report to the Texas Supreme Court. The recommended procedure will allow lawyers the confidentiality of the client conference to disclose to the client why the lawyer does not maintain a minimum amount of professional liability insurance. No public posting will be required and each lawyer will have the opportunity to explain to his or her client the reason that such minimums are not carried. The lawyer who carries, and maintains, the insurance minimums {including deductible and self-insured retention amounts} will have no disclosure requirements or form retention requirements.

To implement new specific rules for insurance disclosure that will work for Texas attorneys, the Committee recommends that the Supreme Court appoint a Professional Liability Insurance Disclosure Rule Committee {PLIDRC}. The GOC believes that this insurance disclosure rule drafting committee should minimally contain representatives from the Commission for Lawyer Discipline, the Chief Disciplinary Counsel's office, the Board of Disciplinary Appeals, the State Bar Board and the President and President Elect of the Bar. The GOC also believes there should be an appropriate number of public members appointed to ensure that the interest of the public in

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\* The Committee acknowledges that the state of New Mexico has proposed a plan that contains similar requirements to the ones outlined in the Committee's recommendation. See New Mexico Bar Bulletin, March 2, 2009, Volume 48, No. 9, at pages 19 & 20. The Committee also found helpful the Q&A section discussion of the New Mexico disclosure rule in the same Bar Bulletin at page 7, et. seq. In fact almost every question posed by both the Texas State Bar's Task Force, and those additionally considered by the Committee, were satisfactorily addressed in this Q&A section.

such disclosure will be appropriately considered. The GOC believes in addition to drafting rules to specify disclosure as outlined in our recommendation, PLIDRC should recommend to the Court the appropriate minimums of insurance coverage and explore the possibility of the State Bar making affordable professional liability insurance available for small firm and solo practitioners. The GOC believes that the proposed disclosures take into consideration the special needs of the small firm and solo practitioners. These disclosure requirements will effectively preserve and protect each attorney's opportunity to discuss privately with a prospective client the availability, or necessity of, insurance protection without creating a marketing disadvantage for those attorneys who may choose not to obtain professional liability insurance coverage.

Every member of the GOC, while not unanimously supporting every facet of this recommendation, agrees that it best captures the Committee's desire to effect a change that can have a positive impact on the delivery of information to the consuming public about legal services.

### **The Client Security Fund Of The State Bar Of Texas:**

The Texas Client Security Fund (CSF) was established in 1975. The purpose of the fund is to protect the integrity of the legal profession through discretionary grants to clients who have been harmed by their lawyer's dishonest conduct. The CSF is funded from appropriations made annually from the State Bar's general fund (currently in the amount of \$300,000), interest earned on the Fund corpus, and restitution to the Fund from disciplined lawyers. The State Bar Policy requires the Fund to be maintained at a minimum of \$3,000,000. The CSF pays approximately \$450,000 a year in claims. The Fund reimburses eligible applicants up to \$30,000 after the Client Security Fund Committee reviews and approves the application. The CSF committee is a subcommittee of the State Bar Board of Directors DCAAP Committee. The current chair is State Bar Board of Director, Michelle Cheng, and the CSF administrator and legal counsel is Maureen Ray of the CDC. Neither the medical, dental, accounting nor any other profession in Texas has anything similar to the CSF.

Notwithstanding the gratuitous and discretionary payment of claims in the amount of approximately \$450,000 a year to the client victims of lawyer theft and unearned fees, knowledge of the CSF and the admirable work of the CSF committee goes unheralded and unknown. The CSF is a pledge of trust by attorneys of Texas that goes largely untold. In recent years, State Bar Presidents have expended great capital and human resources to uplift the image of lawyers and salute their many humanitarian accomplishments. As our Committee traveled the state, we routinely asked local bar leaders, State Bar directors, judges, grievance system veterans and the public of their knowledge of the CSF. Sadly, few of the people we visited were aware of the tremendous service provided by the CSF and those who were aware often had only cursory knowledge. Likewise, with the multitude of experience within the grievance governance system of our Committee, we too were similarly in the dark as to the existence, purpose and the goodwill provided by the CSF.

A complete review of the CSF along with the policies of the CSF committee is beyond the current resources of the GOC. There are a myriad of subjects such as level of funding, source of funding, structure of the CSF committee, limits on payments, staffing and budgeting support for

the CSF, etc., which the GOC could not timely address within the confines of this annual report to the Court. In this 2009 report, the GOC will limit its review of the CSF and reserve for future reports more in-depth studies and comments on some of the topics referenced above.

The Committee strongly recommends that the State Bar increase the publicity and education of lawyers and the public as to the CSF. The CSF is a great untold success story. The CSF promotes public confidence in the legal profession. Those reading this report are knowledgeable and interested in the grievance and discipline system; however, few will have a working knowledge of the CSF. Typically, an applicant is made aware of the CSF as a part of the grievance process. An applicant must file and complete a grievance to apply to the Fund. The few exceptions in which applicants can file a claim with the CSF committee without first filing a grievance against their attorney are those limited situations in which the lawyer has already been disbarred, the lawyer is deceased or the lawyer has resigned in lieu of discipline. Consequently, a client may never learn about the existence of the CSF. This is especially true in small communities where the stature of an attorney may intimidate and in communities where language or cultural barriers hamper a client's opportunity to learn of the fund.

The State Bar should renew its efforts and aggressively seek ways to inform the public and attorneys of this valuable client protection resource. Currently, information about the CSF can be found on State Bar web pages or by contacting the CDC. However, without knowledge of its existence even a prudent person would fail to discover information on the CSF. The State Bar should systematically educate and publicize to local bar leaders, victim assistance groups, the courts, law enforcement agencies and the general lawyer population information about the CSF. At a minimum, every lawyer should realize and appreciate that a portion of his or her dues is compensating victims of the worst cases of lawyer malfeasance. The Committee further recommends that information about the CSF should be made a part of all State Bar sponsored CLE courses. Enhanced knowledge of the CSF might increase claims; however, all victims of attorney dishonesty should be justly and equitably compensated.

The Committee extends praise to the CSF committee in conjunction with the State Bar leadership in the huge steps taken this bar year to improve procedures and funding for the CSF. This year, the CSF committee has made substantial changes and suggestions to improve the Fund. The CSF committee, with help from the State Bar Board of Directors, completely overhauled the rules governing the CSF. The overhaul amounted to clarifying and organizing current operating rules. This was a large and overdue accomplishment. Additionally, the CSF committee working with the State Bar Board of Directors approved the transfer of an additional \$1,000,000 to the CSF from the general fund of the State Bar of Texas. The immediate and substantive impact is that the CSF will have \$1,300,000 available in next year's budget to pay claims and enlarge the Fund. This additional reserve will strengthen the Fund and provide the CSF the revenue to eliminate the backlog in payment of claims. Additionally, the State Bar Board of Directors approved a resolution to the State Board of Insurance recommending a payee notification requirement. Should this initiative be approved by the State Board of Insurance, it would virtually eliminate one method dishonest attorneys use to steal from their clients. Payee notifications would require insurance companies to notify the clients that a settlement has been reached and that funds have been disbursed to their attorney.

The Committee has met twice with Michelle Cheng, Chair of the CSF committee, as well as reached out on numerous occasions to Maureen Ray, the administrator and legal counsel to the Fund. We found the CSF committee and its administrator to be diligent stewards of this public trust and continue to provide a great service to the State Bar of Texas and the public. The Committee extends its thanks for the professionalism, courtesy and education extended to us during our review. The Committee looks forward to providing additional dialogue on some of the more controversial and complex issues associated with administering this public good will effort by Texas attorneys.

### **Lawyer Advertising:**

Advertising by Texas lawyers seems to be growing with an ever expanding list of superlatives describing the lawyer as being something special or different, or appearing to have some special knowledge or competence, that is recognized by some group, organization or service. These descriptions are in addition to the ones sanctioned by the Texas Board of Legal Specialization. "Super," "Rising Star," "Go To," "Texas Best," "Lawyers of Distinction," "Extraordinary" and "Reader's Choice" are but a few designations the Committee notes as a list of descriptors in current use. These "handles," descriptions or adjectives, seem to be only limited by the scope of the English language (and we presume there are some Texas lawyers using other languages that have similar words, or even more adjectives, to describe the lawyer - and they are using this advertising in and near areas that have concentrated populations who don't use English as their first language).

Implicated in responding to the issue are several provisions of the Texas Disciplinary Rules of Professional Conduct governing communications concerning a lawyer's services. Rule 7.02 prohibits false or misleading communication about the qualifications of a lawyer. The rule goes on to state that a communication is false or misleading if it compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data, or if the communication is likely to create an unjustified expectation about the results the lawyer can achieve. Further, lawyers in Texas are not to advertise that the lawyer is a specialist except under Rule 7.04. Comment 7 to Rule 7.04 explains that, "sometimes lawyers choose to advertise in the public media the fact that they have been certified or designated by a particular organization or that they are members of a particular organization. Such statements naturally lead the public to believe that the lawyer possesses special competence in the area of law mentioned." In order to ensure that the public will not be misled by such statements, under 7.04(b)(2), lawyers who possess certificates of specialization from the Texas Board of Legal Specialization or other meritorious credentials from organizations approved by the Board have the option of stating that fact.

The Committee's concern with the use of these descriptive titles in advertisements, in blogs, or web sites, without reference to the entity making the designation, its purpose, and the methodology used is its potential to be misleading to the consuming public. For example, use of "Super Lawyer" to imply the attorney is one of the top 5% of attorneys in a magazine's geographic circulation, is comparative in nature. A question further confronting the Committee, however, is whether simply stating that one has been recognized as a "Super Lawyer" by the magazine *Super Lawyers of Texas*, in the context of advertising is comparative since the only



purpose is to communicate that assessment. Likewise, attorney advertising that touts the inclusion and ranking of attorneys based on opinions of competence in a peer review survey of other attorneys is a quality-of-service claim. Inclusion on the list of “*Super Lawyers*,” is an objective fact, but the basis for the ranking is mostly the subjective opinions of those attorneys polled, like in other publications.

To illustrate, the committee looked at the publisher of *Texas Super Lawyers* who is the parent company of *Law & Politics*, Key Professional Media, Inc. (“Key”). Key publishes a group of magazines throughout the country which contain articles of interest to lawyers. The magazines, titled “*Super Lawyer*,” also contain lists of attorneys within the geographic circulation of each magazine who have been designated as a “*Super Lawyer*” within various fields of practice. The attorneys are also listed alphabetically. The magazines are free to lawyers and may also be included as inserts or special advertising sections in newspapers or periodicals. Key reports that it performs the polling, research and selection of the “*Super Lawyers*.” The selection process is explained in the *Texas Super Lawyers* magazine and at their website, [superlawyers.com](http://superlawyers.com). The methodology indicates that lawyers within the geographic area were invited to participate in nominating lawyers for inclusion in the creation of the candidate pool. However, as mentioned by Emily M. Feuerborn in her paper presented at the Houston Law Review Symposium 2008, 45 *Houston L. Rev.* 189 n.83, 30,000 lawyers received ballots for the “*Super Lawyer*” nomination process in New Jersey and only 4.8% completed the ballot and responded. The question then becomes, can that methodology be substantiated or sufficiently disclaimed to render the statement neither false nor misleading?

States vary widely with regard to how they regulate attorney advertising. The American Bar Association’s website, [www.abanet.org/cpr/mrpe/rule\\_7\\_1.html](http://www.abanet.org/cpr/mrpe/rule_7_1.html) contains a comparison of these differences. Some states absolutely ban the use of self-laudatory statements in attorney advertisements. Other states attempt to determine whether the advertising is of benefit to the public interest. At least one state, Iowa, determines compliance with their rule based on whether the primary audience for the advertisement is the legal profession or the public at large. The State Bar of Texas website, under its Professional Requirements/Advertising Review tab, in January 2009, had a “Focus on the Rules” section that dealt with violations of Rule 7.02(a)(4). The statement was as follows:

“A lawyer or law firm cannot compare their legal services without the appropriate substantiation information in the material, such as the name of the organization recognizing the lawyer or firm and the year of the recognition. An example is the following: ‘George Ampersand of Ampersand & Ampersand PC was recognized as a Great Lawyer for 2007 by the Great Lawyers in Texas Organization.’”

Based on our review, including discussions with Gene Majors, Director of the Advertising Review Department of the State Bar, and Linda Acevedo, Chief Disciplinary Counsel, the Committee understands that the current instructions to Texas lawyers choosing to advertise his or her inclusion in lists such as “*Super Lawyer*,” “*Rising Star*,” or other similar descriptors, are that the Texas Disciplinary Rules of Professional Conduct would require a qualifying statement

indicating his or her selection was through a peer review process or other stated methodology conducted by the publishers, giving the year of selection, with a disclaimer of some kind indicating that inclusion in the list does not imply a certification by the State Bar of Texas, or an organization accredited by the Texas Board of Legal Specialization. The lawyer in Texas is then challenged to consider a type of disclaimer that would contain the necessary facts, "to make the statement considered as a whole not materially misleading."

While the Committee applauds the State Bar for its "Focus on the Rules" segment on the Bar website, the example that is provided, without addressing the methodology behind such descriptors, may still not provide the public all that it needs to understand what the descriptions mean in relation to the decision being made to hire a lawyer. Moreover, the Committee encourages both the Advertising Review Committee and the Chief Disciplinary Counsel to continue to alert Texas attorneys through seminars (live and through other forms of media), State Bar publications, including its website, and any other reasonable means, concerning what appropriate qualifications and disclaimers would be necessary for such descriptors in advertising to comply with the disciplinary rules on advertising. How attorneys in Texas successfully navigate these sometimes confusing requirements, the Committee believes, needs more, and constant attention.

The Committee intends to continue reviewing these emerging issues. The interplay between free speech protection in advertising, not engaging in misleading advertising to the public, and disciplinary regulation of Texas lawyers will necessitate further monitoring and reporting.

#### **Accolades:**

In both our previous reports we recognized many who have been an exemplary part of our system of grievance review and processing. This year we want to say a special "good bye" and another "thank you," to Justice Scott Brister, who always made himself available for expert comment and encouragement to the Committee. We will miss his guidance. We are, however, very pleased that Justice David Medina is our new liaison on the Court. We appreciate his interest in our grievance system and the smooth hand-off of liaison responsibilities that was accomplished between Justice Brister and Justice Medina in the early Spring of this year.

We also noted the change of Chief Disciplinary Counsel during this Bar year. John Neal was that special talent who came to our grievance system at just the right time. While Travis County did not lose his special capabilities, we in the grievance system did, and we will miss him. Our many thanks go to John Neal for his innovations and openness to explore and consider any option to make our grievance system better for the public and respondent attorneys alike. He was a class act who would be hard for anyone to follow. The Commission for Lawyer Discipline, we believe, has found just that right person to build on what John Neal started. The Committee was delighted to learn that Linda Acevedo is the new Chief Disciplinary Counsel. Linda Acevedo has risen through the ranks of our grievance system for many years and has matured into a truly consummate professional. We look forward to working with her as she continues the fine work on which she and John Neal collaborated. We are especially pleased that James Ehler and Laura Popps will assume senior support roles with the CDC. The Committee has met with each of these fine lawyers and feels that because of them, the direction of the

CDC will continue to be responsive to the needs of an ever growing and changing grievance system.

The Committee continues to be pleased with the growing good relationship it shares with the Commission for Lawyer Discipline. Betty Blackwell, as its Chair, continues to provide great leadership and unselfish devotion to the task of making the Commission run smoothly. Orin Harrison, Vice Chair of the Commission, has met with the Committee at many different times to foster this continuing effort to ensure that our relationship is open and growing better.

Lastly, this year Randy Chapman retired from Committee service. Our special thanks are reserved for his years of unselfish service to the Committee, as its one time Chair and always committed member. This year's section dealing with Insurance Disclosure was researched extensively by Randy. While his name does not appear on this Report, because of his retirement from Committee service during the year, we wanted all to know that Randy's effort and commitment to excellence can be found in all that we do and in all that we write. The Committee, and the Bar, owe a special debt of thanks to Randy Chapman for his unselfish service and his passion in wanting to make lawyering better for the public we serve.

Also, to all who met with us during the year from around our great State, thank you for giving of yourselves in this important undertaking of policing our own. The Committee will continue to be in pursuit of a better grievance governance system, and it is to this goal that the Grievance Oversight Committee will continue to dedicate itself.

AMERICAN BAR ASSOCIATION  
 STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF  
 ABA MODEL COURT RULE ON INSURANCE DISCLOSURE

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	Considering Adoption (5) (CA, NY, TX, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)  (AR and KY have decided not to adopt the Model Court Rule)
AL					
AK	Alaska Rules of Professional Conduct, Rule 1.4			N/A	
AZ		Supreme Court Rule 32(c), effective January 1, 2007. <a href="http://www.supreme.state.az.us/rules/ramd_pdf/R-04-0025.pdf">http://www.supreme.state.az.us/rules/ramd_pdf/R-04-0025.pdf</a>		Yes. State Bar of Arizona website.	
AR					On January 21, 2006 the House of Delegates of the Arkansas Bar Association voted not to adopt a disclosure rule.
CA			X		On May 20, 2008 the California State Bar's Board of Governors voted 16-4 to approve new rules on coverage disclosure. Under the compromise -- which still must be approved by the state Supreme Court -- lawyers for more than four hours must disclose to the client if they are not covered by malpractice insurance.

	<b>Requires Disclosure Directly to Client</b> (5) (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup></b> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	<b>Considering Adoption</b> (5) (CA, NY, TX, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> <i>(See also, Oregon: Professional liability insurance mandated)</i>  (AR and KY have decided not to adopt the Model Court Rule)
					<a href="http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis-Clean_3-410.pdf">http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis-Clean_3-410.pdf</a>
CU		X  <a href="http://www.courts.state.co.us/Media/Press_Docs/attorney%20reg%20insurance%20disclosure%20FINAL.pdf">http://www.courts.state.co.us/Media/Press_Docs/attorney%20reg%20insurance%20disclosure%20FINAL.pdf</a>			
CT					
DE		Registration Form		Yes. <a href="http://courts.delaware.gov/Courts/Courts/Supreme%20Court/2007AnnualRegistration.doc">http://courts.delaware.gov/Courts/Courts/Supreme%20Court/2007AnnualRegistration.doc</a>	

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	Considering Adoption (5) (CA, NY, TX, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)  (AR and KY have decided not to adopt the Model Court Rule)
DC					
FL					
GA					
HI		RSCH 2.17(d) <a href="http://www.state.hi.us/jud/ctrules/rsch17(d)am.htm">http://www.state.hi.us/jud/ctrules/rsch17(d)am.htm</a> (Effective 12/1/07)		N/A	
ID		Idaho Bar Commission Rule 302(7), effective October 1, 2006		Available to the public upon request.	
IL		Amended Illinois Supreme Court Rule 756		Yes <a href="http://www.iardc.org/malpracticeinfo.html">http://www.iardc.org/malpracticeinfo.html</a>	
KS		Supreme Court Rule 208A		Yes, by means designated by the Court.	

	<b>Requires Disclosure Directly to Client</b> (5) (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup></b> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	<b>Considering Adoption</b> (5) (CA, NY, TX, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> ( <i>See also, Oregon:</i> Professional liability insurance mandated)  (AR and KY have decided not to adopt the Model Court Rule)
KY					On or about November 14, 2006 the KY Sup. Ct. rejected the adoption of a disclosure rule.
MA		Rule 4:02 Effective Sept. 1, 2006. <a href="http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/rule402amend.pdf">http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/rule402amend.pdf</a>		Yes.	
MI		Administrative Order No. 2003-5, dated August 6, 2003			
MN		Rule 6 of the Rules of the Supreme Court on Lawyer Registration. Annual Reporting of Professional Liability Insurance Coverage (Effective October 1, 2006) <a href="http://www.courts.state.mn.us/documents/0/Public/Clerks_Office/July%202006%20Lawyer%20Registration%20Amend.doc">http://www.courts.state.mn.us/documents/0/Public/Clerks_Office/July%202006%20Lawyer%20Registration%20Amend.doc</a>		Yes.  Rule 7. Access to Lawyer Registration Records	
MO					Not currently being considered.
NE		Rules Creating, Controlling, and		Shall be made available to the	

	<b>Requires Disclosure Directly to Client</b> (5) (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup></b> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	<b>Considering Adoption</b> (5) (CA, NY, TX, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> ( <i>See also, Oregon:</i> Professional liability insurance mandated)  (AR and KY have decided not to adopt the Model Court Rule)
		Regulating Nebraska State Bar Association, Article III, Membership, paragraph (f).		public.	
NV		Amended Supreme Court Rule 79 (Adopted September 13, 2005 and effective November 13, 2005)		Yes. It will be part of the lawyer's public record available by phone or email inquiry.	
NH	New Hampshire Rules of Professional Conduct, Rule 1.19. (Disclosure of Information to the Client) <a href="http://www.courts.state.nh.us/supreme/orders/20072507.pdf">http://www.courts.state.nh.us/supreme/orders/20072507.pdf</a>			N/A	
NM		Amended Rule 17-202(A) of the NMRA of the Rules Governing Discipline		No: for internal use by the NM Bar and Supreme Court only.	
NY			Under consideration.		
NC		North Carolina-Rules and Regulations, Subchapter A, Organization of		On the Bar's website: <a href="http://www.ncbar.com/home/member_directory.asp">http://www.ncbar.com/home/member_directory.asp</a> and <a href="http://www.ncbar.co">http://www.ncbar.co</a>	



	<b>Requires Disclosure Directly to Client</b> (5) (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup></b> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	<b>Considering Adoption</b> (5) (CA, NY, TX, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> <i>(See also, Oregon: Professional liability insurance mandated)</i>  (AR and KY have decided not to adopt the Model Court Rule)
		the North Carolina State Bar, Section .0204, Certificate of Insurance Coverage		<a href="http://www.ncbar.org/m/InsuranceDisclosure.asp">m/InsuranceDisclosure.asp</a>	
<b>ND</b>		Amended Rule 1.15 of the North Dakota Rules of Professional Conduct  <a href="http://www.courts.state.nd.us/">http://www.courts.state.nd.us/</a>		Yes	
<b>OH</b>	Ohio Rules of Professional Conduct, Rule 1.4(c) <a href="http://www.scone.state.oh.us/Atty-Svcs/ProfConduct/rules/default.asp#Rule1_4">http://www.scone.state.oh.us/Atty-Svcs/ProfConduct/rules/default.asp#Rule1_4</a>			N/A	Lawyers who hire themselves out to do research and writing for other lawyers need not comply. (Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Op. 2005-1, 2/4/05).
<b>OR</b>					All lawyers required to maintain professional liability insurance.
<b>PA</b>	Pennsylvania adopted RPC 1.4(c), effective 7/1/2006. <a href="http://www.aopc.org/OpPosting/Supreme/out/50drd.lattach.pdf">http://www.aopc.org/OpPosting/Supreme/out/50drd.lattach.pdf</a>			N/A	
<b>RI</b>		Rule 1(b) of Article IV "Periodic Registration of Attorneys".		Available to the public upon request.	

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	Considering Adoption (5) (CA, NY, TX, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)  (AR and KY have decided not to adopt the Model Court Rule)
		(Effective April 15, 2007)			
SC					
SD	South Dakota Model Rules of Professional Conduct, Rule 1.4 (Communication)	(SD also requires lawyers to disclose on their annual registration statements.)  <a href="http://www.sdbar.org/memberspublic/Information/2007_Certificate.pdf">http://www.sdbar.org/memberspublic/Information/2007_Certificate.pdf</a>		N/A	SD has 7 years of certification to the Supreme Court - 97% have at least \$100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year.
TX			X		On May 21, 2008, a task force, authorized by the Texas Supreme Court, voted 6-5 to reject mandatory disclosure of insurance. On or about June 26, 2008, that recommendation was presented to the Board of Governors of the State Bar of Texas who sent the recommendation to the Texas Supreme Court.
UT			Rule 1.4 Proposed Amendment - Disclosure of Malpractice Insurance Rule 1.4. Communication.  <a href="http://www.utahbar.org/news/archives/2005/07/index.html">http://www.utahbar.org/news/archives/2005/07/index.html</a>		Required to disclose on registration statement for 07-08 but no Rule enacted. <a href="https://utahbar.org/licensing/malpractice_questions.html">https://utahbar.org/licensing/malpractice_questions.html</a>
			On December 28, 2006 the Civil Rules Committee proposed that the Vermont		

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	Considering Adoption (5) (CA, NY, TX, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)  (AR and KY have decided not to adopt the Model Court Rule)
VI			Supreme Court consider adoption of a rule requiring insurance disclosure, not in the Vermont Rules of Professional Conduct, but as part of the Rules for Licensing of Attorneys. In adopting the rule, consideration should be given to requiring disclosure of the liability limits and deductibles of the coverage.		
VA		Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility		Yes, on Bar's website: (See, <a href="http://www.vsb.org">www.vsb.org</a> , under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance).  Total Members Answering PL Questions: 25,921 - FY2005 Private Practice – No Insurance: 1,892 (11%) Private Practice – With Insurance: 14,703 (89%)	Virginia State Bar is seeking comments on a proposed Rule requiring legal malpractice insurance. Comments are due by September 26, 2008. <a href="http://www.vsb.org/site/news/item/proposed-insurance-requirement/">http://www.vsb.org/site/news/item/proposed-insurance-requirement/</a>
WA		Admission to Practice Rule 26 - Insurance Disclosure. (Effective July 1, 2007) <a href="http://www.courts.wa.gov/court">http://www.courts.wa.gov/court</a> Rule		Yes.	

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (19) (AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV)	Considering Adoption (5) (CA, NY, TX, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)  (AR and KY have decided not to adopt the Model Court Rule)
		<a href="#">s/proposed/2005Dec/APR26.doc.</a>			
WV		State Bar By-Laws – Article III (A) - Financial Responsibility Disclosure <a href="http://www.state.wv.us/wvsca/rules/ArticleIII.htm">http://www.state.wv.us/wvsca/rules/ArticleIII.htm</a>		Yes.  ... shall be made available to the public by such means as may be designated by the West Virginia State Bar.	
WI					
WY					

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