

The Grievance Oversight Committee
Appointed By
The Supreme Court of Texas

Report 2007

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Appointed By
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2006 - 2007

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GRIEVANCE OVERSIGHT COMMITTEE

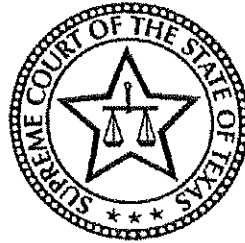
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June 1, 2007

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

On behalf of the Grievance Oversight Committee, I am pleased to submit this report in response to the Order of this Court Reconstituting the Grievance Oversight Committee, Misc. Docket No. 06-9060. The report covers an array of issues that the Committee reviewed this past year. We received information from focus groups around Texas that the perception is that our grievance system does not reflect even the diversity found in our membership in the State Bar. As a result, we reviewed these issues and report on the racial, gender and practice diversity that exists in our grievance system today. Education about our grievance system to the public and attorneys was also mentioned to us as an area in need of improvement. A large portion of the report reviews current educational efforts by various groups in our grievance system. Lawyer advertising issues, a look at the Board of Disciplinary Appeals and a discussion of the very difficult problem of how to interface grievance governance issues with the impaired lawyer, round out our report for this year.

Each section of the report is set up in the following format. First, we discuss the background history of the matter and we then follow with an identification of issues and make conclusions, if appropriate. Finally, each section of the report ends with our recommendation on how we believe that area reported on could be improved.

This report represents many hours, days, weeks and even months of work completed by all of our Committee members. This is a working Committee. The Court has assembled, on this Committee, individuals with a vast and varied experience in the Texas grievance system. All Committee members are high energy types who desire the best system of self governance for our State Bar Association and for the citizens of Texas.

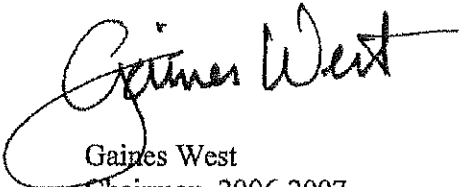
I would like to thank the Court, both personally and on behalf of each Committee member, for the opportunity to serve on the Grievance Oversight Committee. We are honored to serve the Court, the legal profession and the citizens of Texas as members of this Committee.

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Special thanks should be mentioned for the staff support Don Jones has given the Committee this past year. Don is tasked to handle many responsibilities in the Bar Association, and our Committee has had the good fortune to have him as our liaison and assistant. Without his constant help we could not have performed our work for the Court.

We are available to discuss this report with the Court, or answer any questions at your convenience.

Respectfully submitted,



Gaines West
Chairman, 2006-2007

cc:

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Robert A. Black, Esq., Chairman of the Board of the State Bar of Texas
Betty Blackwell, Esq., Chair, Commission for Lawyer Discipline
John Neal, Esq., Chief Disciplinary Counsel
Karen Watkins, Esq., Chair, Board of Disciplinary Appeals
Lisa Tatum, Esq., Chair, State Bar Discipline & Client-Attorney Assistance Program



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

**Report
2007**

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2007 REPORT to the Supreme Court of Texas

I. Grievance Oversight Committee Overview

Background History:

In an order dated June 26, 2006, the Supreme Court reconstituted the Grievance Oversight Committee ("GOC" or "Committee") and stated that the purpose of the GOC is to assist the Supreme Court in its constitutional and statutory responsibility for the lawyer discipline system. In doing this, the Court tasked the GOC to study, review and advise the Court regarding the structure, function and effectiveness of the disciplinary system. Pursuant to this order, the GOC has reviewed statutory and proposed rule changes and prepared analysis concerning areas of recommended improvements in the grievance system. Historically, the GOC has reviewed all aspects of the system and engaged in a series of fact gathering activities to determine how well the system is protecting the public and whether the system is functioning to ensure fairness to all throughout the disciplinary system.

This report to the Supreme Court is made pursuant to the 2006 Order Reconstituting the Grievance Oversight Committee, Misc. Docket No. 06-9060. In conducting our review, Committee members met with leaders of, and/or received reports from, the following statewide disciplinary related groups.

Texas Commission for Lawyer Discipline
Board of Disciplinary Appeals
Chief Disciplinary Counsel, John Neal
State Bar Advertising Review Committee
State Bar Presidents Eduardo Rodriguez and Martha Dickie
Client Attorney Assistance Program
Texas Lawyer Assistance Program

Typically, the GOC meetings include time spent with organized focus groups which are composed of individuals who have had firsthand experience working in, or being a part of, the grievance system. The GOC gathered information from these groups regarding how local disciplinary bodies are functioning and to assess the impact of the 2003 legislative changes on the grievance system, along with determining the impact of associated procedural changes that have occurred. Since the changes in 2003 occurred, the GOC has conducted community focus groups in El Paso, Dallas, Austin, Houston, Lubbock, Midland, and McAllen. At each location the GOC invited local participants, including county bar presidents as well as attorney and public members of local grievance panels, to appear at their meeting and report on local issues as they impact the processing of grievances in their area. Focus group participants also included leaders of minority bar associations and individual attorneys who regularly represent lawyers charged with misconduct.

Additionally, the community focus groups included county and district court judges, as well as appellate court justices. The GOC desires particularly to acknowledge the dedication and

commitment of the hundreds of volunteers and judicial officials for their daily work in their role of public protection in our grievance system. The functioning and effectiveness of our system depends on their efforts and unselfish devotion of their time to ensuring an opportunity for complaints about lawyers' conduct to be heard and to afford lawyers a fair opportunity to respond to complaints.

It is clear that the 2003 legislative amendments to the State Bar Act altered the role of the hearing process and transformed the role of the Commission for Lawyer Discipline into a largely prosecutorial function, taking on the role of complainant. Previously, complaints were heard in two stages with a disciplinary panel reviewing all verified complaints to determine if there was a rule violation. If the local grievance panel made such a determination, the case would either go to an evidentiary panel for resolution and sanctions, or be tried in district court. In the system that existed prior to 2003, the aggrieved complainant was provided a public opportunity to be heard at an investigatory or just cause hearing. The new legislative changes in 2003 eliminated this initial hearing and replaced it with a recommendation prepared by the Office of Chief Disciplinary Counsel, which is now reviewed by a grievance panel in a private "dismissal docket" (that the GOC has discovered is often times conducted by a telephone call).

The changes in disciplinary procedures also necessitated an internal review of staffing by the Chief Disciplinary Counsel and the Commission for Lawyer Discipline. After the 2003 legislation CDC offices were consolidated and staffing was sharply reduced by nearly one million dollars with the virtual elimination of positions held by coordinators for the Professional Enhancement Program, formerly known as PEP. These coordinators had been charged with serving as liaison for the rehabilitation of lawyers needing help with drug and alcohol abuse problems. They would also assist in rehabilitative efforts for lawyers requiring assistance in office management and related skills. The Committee heard participants in all regions of Texas state that the elimination of the investigatory hearing, and the loss of the early intervention by PEP coordinators, was viewed as a loss in the ability of local grievance panels to early on identify problems, protect the complainant, and seek rehabilitation for affected lawyers.

The Grievance Oversight Committee previously recommended to the Court that an independent review be conducted of the Texas lawyer disciplinary system through a peer-based model utilized by the American Bar Association's Standing Committee on Professional Discipline. The ABA Standing Committee uses peer reviewers to compare best practices in other states with the goal of identifying areas for improvement. At the time this recommendation was developed, the former Chief Disciplinary Counsel stated that she viewed the proposal as premature because the disciplinary system was in a transition process due to the implementation of the 2003 legislation and revised procedural rules adopted in December of 2003. With three years of experience operating under these changes, and the "new procedural rules", the Grievance Oversight Committee now renews its recommendation that the Supreme Court approve a thorough system-wide review by the ABA Committee to identify potential areas for improvements in our grievance system. We recommend that the Court task the GOC with arranging the review as soon as practicable and that it receive the ABA report and condense the ABA's findings for further reporting to the Court, as the GOC deems appropriate.

In the sections that follow, in this first report to the Court (after being reconstituted in the June 2006 Order), the format will follow the division by assignment to our Committee members during our initial first year review of the Texas grievance system. The GOC learned early in this process that the kind of review envisioned by the Court in its June 2006 Order would require continuing years of review to cover the depth and breadth of the issues as we review every part of our grievance system. The GOC is committed to this review process and we begin with this first report by touching on diversity issues, education issues, lawyer advertising issues, impaired lawyer issues, issues involving respondent attorneys, and finally a section dealing with what we have uncovered in our review that our grievance system does well. This part of our report is entitled "Ovations." The selection of these first topics reflects, among other things, areas of interest of our Committee members, and a decision that certain topics deserve a first review.

The GOC recognized that the topics selected cannot cover all the vital issues in existence in our grievance system today. The GOC plans in its next year to continue to monitor the issues addressed in this first report and expand its review to other compelling issues in the coming years.

The GOC must first comment on the good cooperation and welcoming effort it received from all participants in the grievance system as our review of the grievance system continued throughout the year. The Commission for Lawyer Discipline, and Betty Blackwell as its Chair, were always open and willing to provide us information. The same was true of John Neal, the Chief Disciplinary Counsel, his assistant Linda Acevedo, and all the CDC staff. The Board of Disciplinary Appeals was equally helpful and welcoming of any inquiry we had. Karen Watkins, BODA's Chair, was accessible and helpful anytime we sought information and assistance. BODA's staff provided anything needed and its Executive Director and General Counsel, Chris McKeeman, was willing to provide any help we asked for. CAAP and TLAP representatives were helpful and informative too. Martha Dickie, this year's Bar President, encouraged us and provided information when asked, and she also included the GOC in her schedule and attended parts of many of our meetings. Eduardo Rodriguez provided valuable assistance by participating in the process of reconstituting the GOC and by providing historical perspective to many of the issues addressed in this Report. The GOC appreciates each and every participant's willingness to provide the Committee information. Without their assistance our study, review and resulting advice to this Court would have been a much more difficult process. Our experience was positive in this our first year under this Court's June 2006 Order Reconstituting the GOC. We believe a base of information sharing is being established that will ensure that our job for the Court can continue as the Court envisioned it in its Order.

II. Review of Diversity in the Grievance System

A. Background History:

The GOC undertook to review how diverse our grievance system is, since in our travels around Texas we had heard complainants and respondent attorneys assert that our system did not reflect a true diversity and as a result some complainants, and even some respondent attorneys, felt that grievance outcomes were being impacted by this perceived lack of diversity. The GOC heard complaints of imbalances in racial, gender and practice diversity throughout the grievance system that applied to the local grievance panel, up to and through the Commission for Lawyer Discipline, the Chief Disciplinary Counsel's office, staff and counsel and the Board of Disciplinary Appeals.

Lack of diversity as a general complaint was mentioned to the GOC as a concern by respondent attorneys, and by members of the minority bar associations, as it relates to the individuals involved in the various stages of the grievance system. There was a feeling conveyed to the GOC that the people making the decisions are not able to identify with, or understand, their issues—that they are different.

The GOC discovered that information is not currently kept that would allow a complete assessment of what the current reality is concerning diversity issues. The GOC discovered that no information can be obtained presently to fully identify by gender, practice area or ethnicity the people involved in the system as respondent, staff, lawyer, decision-maker or public volunteer.

The GOC sought demographic information on the staff and bodies comprising the Texas disciplinary system. Some data was available from the Commission for Lawyer Discipline, Chief Disciplinary Counsel's office, and the Board of Disciplinary Appeals encompassing their membership since inception. All other data constitute simply a snapshot of current committees or staffs.

B. Issues Reviewed and Conclusions:

1. *Perception* may be different than reality. It must be emphasized that there is no current data available about the practice area of either the respondents, the staff of the various bodies who participate in the grievance system, or for the volunteers who are implementing and working in the grievance system. However, to the extent that data is available on gender and ethnicity, a review of the overall statistics reveal that they fairly mirror the makeup of the membership of the State Bar. There are specific instances of a lack of balance, but overall the perception seems to be more critical than the reality. It must also be stated that a current snapshot would not preclude the reality of these perceptions in other years. The fact that the grievance system now more clearly reflects the diversity makeup of the State Bar is likely helped by the addition of, and increase of, minority directors on the State Bar Board.

2. Dissemination of information about the opportunities for involvement in the grievance system as staff or volunteers could be made broader. Making it known when positions need to be filled, assuring that lawyers know it is acceptable to self-nominate, and educating attorneys and the public about how the positions are filled, are all issues that need to be addressed and better developed. Presently, grievance committee members are appointed by the Bar President on the advice of the Bar Directors who represent all regions in Texas. The Bar Board and Bar President should continue in their efforts to seek diversity on the grievance committees. Diversity should be achieved in race, gender and practice areas as members are recruited for grievance committees around the State. The Bar Board should in the future, by announced policy, seek these goals and the involvement of the Minority Directors who currently have no apparent formal input into the selection of grievance committee members.
3. Lack of special experience on grievance panels when issues, or the practice areas of respondents counsel require specialized knowledge, should be recognized and addressed. It was discovered that instances occur on grievance panels when specialized extra knowledge of a technical nature would be essentially helpful so that the processing of the grievance would not be impaired by the lack of knowledge on the panel.

C. Recommendations:

1. The GOC recommends that some CLE, Pro Bono, and/or State Bar College credit be given for service on a grievance committee or other Board, Committee or Commission. This incentive might serve as an additional reason for a lawyer to serve in the grievance system and encourage finding lawyers with diversity to serve.
2. The State Bar should develop a statewide cadre of resource people who would be readily available to grievance panels to enhance experience or knowledge needed in practice areas that may be lacking on specific grievance panels, or when dealing with specific respondent attorneys. The Bar Board's Discipline & Client-Attorney Assistance Program Committee (DCAAP) could be well positioned to develop this resource.
3. Openings on the Commission, BODA and grievance panels should be more widely publicized, and self-nomination should be better utilized. Nominations could be sought from public interest groups such as the NAACP and LULAC, and from Minority Bar Associations on the local and the State level. A broad-based organization like the League of Women Voters, and state and federal judges, should be enlisted to encourage service by minority attorneys and public volunteers and be asked repeatedly for recommendations of people they know who would be qualified to serve in the grievance system. The Commission, BODA and the CDC should promote wider interest in openings to avoid the appearance to the public, and the Bar, that we re-cycle the same lawyers and public members to serve. The annual Texas Minority Counsel Program and the annual State Bar of Texas Local Bar Leaders Conference could promote the importance of service on grievance panels and explain the appointment process.

4. Use of night panels on grievance committees would allow participation by those who cannot meet during normal office hours, thus opening up the possibility of service to more attorneys from small firms or solo practices and other practice areas, which should encourage finding lawyers with diversity to serve.
5. To the extent possible, the Commission and the CDC should recommend that grievance panels meet at neutral sites, like courthouses or other public buildings, to eliminate any perception that a law firm, whose conference room is being used for grievance panel work, might have influence over the process.
6. Implementation of a summer law clerk program in the CDC could help encourage minority law students to seek State Bar opportunities once they become lawyers.
7. Better statistics should be kept system-wide so that perceptions which may be inaccurate can be addressed with facts. Three years of data on the gender and ethnicity of respondent attorneys, and of those who were sanctioned, compared to the statistics on attorney members of the Bar, could be a worthwhile measure of diversity performance. Statistics kept for three years on the type of practice of respondent attorneys, and of those who were sanctioned, compared to the statistics on other attorney members of the Bar, would clarify the assertion that solo practitioners are more frequently sanctioned. The GOC recognizes that the collection of this data will need to be voluntary and special attention paid to its confidentiality to ensure that the mere collection of these statistics is not interpreted as indicating that such issues could be determinative in the processing of a complaint.

The GOC has concluded that diversity issues are worthy of much more review and study. The GOC has determined that it has just begun to examine the source of accurate concerns, and plausible explanations for those concerns. The Committee anticipates that it will need to revisit the issues identified in this report, in its next reporting year, and it will work to provide better articulated goals and recommendations in its next report to the Court.

III. Education of Attorneys and the Public About the Disciplinary System And Issues and Recommendations Concerning Groups and Programs Affecting Attorney and Public Education

Background History:

There are presently four primary sources of education for and about the Texas grievance system: The Client Attorney Assistance Program, the Office of the Chief Disciplinary Counsel, Local Bar Associations, and the Law Practice Management Office of the State Bar of Texas. It is clear that all parts of the grievance system have the *opportunity* to educate both the public and the bar.

The Texas Center for Legal Ethics and Professionalism (TCLEP) is also a credible educational resource, which, under new direction, should bring additional opportunities to educate Texas lawyers about the grievance system. The GOC intends to review TCLEP during the GOC's next reporting year to address the progress made by this Center to realize its full potential as an educational resource about our attorney grievance system.

There are other groups and subsets of the above bodies which also have an impact on the educational aspects of the overall system and how well it operates. Continuing Legal Education is one of the most important aspects of educating Texas attorneys.

A. Client Attorney Assistance Program

1. Background History:

The Client Attorney Assistance Program (CAAP) is a statewide dispute resolution program and service of the State Bar. CAAP is responsible for answering the Grievance Information Hotline, which is available both to the public and the State Bar members. CAAP compiles statistics monthly and reports to the State Bar leadership. Both the CAAP process and the grievance process are explained to callers, who make the final decision about which option to pursue. Bennie Ramirez is the current attorney/Director for CAAP.

CAAP presently responds to approximately 250 callers per day. Five program associates, two administrative assistants and one program attorney staff the call center, and all are needed to answer the phone calls. All go through an internal two week training course, and all five program associates are certified mediators.

According to recent CAAP statistics reviewed by GOC, CAAP handled approximately 54,152 calls from the public during the 2005-2006 bar year. The top three areas of the law that people complain about are family law, criminal law and personal injury law. The top legal concerns are communication, neglect and safeguarding issues.

2. Issues Reviewed and Conclusion:

The members of the CAAP staff who answer the phone seem to have sufficient training, but the number of calls per person per day appears large—perhaps too large for all calls to be handled consistently and effectively.

The Commission last year announced plans to refer specific kinds of cases, at the summary disposition panel stage, to CAAP and have the disposition panel maintain “jurisdiction” over the case pending an attempt at mediation. The issue is whether the current rules of disciplinary procedure would allow an abrogation of the time deadlines in the rules. The GOC recognizes that this issue is not entirely an educational one, however, any discussion of CAAP, the GOC felt, must necessarily, include a mention of this issue.

The intake form completed by complainants now inquires as to whether the person has contacted CAAP before filing the complaint. The statistics reveal that since this change was implemented (adding this inquiry on the complaint form) that the number of complaints filed has decreased while the number of calls to

CAAP has actually increased. Since this inquiry was added to the complaint form only recently there is not enough of a history developed to make any firm conclusions.

3. Recommendations:

a) The GOC will monitor CAAP statistics carefully during its next reporting year, as well as the script/guidelines which those who answer the phone regularly use. In the long term, staffing numbers must be regularly re-evaluated. The GOC intends to monitor CAAP statistics and report next year our recommendations on how this resource may be better used.

b) The GOC also intends to review CAAP's operational guidelines and practices to be certain that the staff of CAAP has clear direction on what services they are capable of providing.

c) The GOC intends to encourage the CDC and the Commission to find ways to involve the complainant and respondent attorney at an early stage to resolve issues and to involve the local grievance committees in facilitating that process. The GOC heard repeatedly from local grievance committees around the State that they missed the just cause/investigatory hearings since it gave them the opportunity to deal with the complainant and the respondent attorney and attempt an early resolution of the matter. The GOC intends, during its next reporting year, to review what options can be used within the existing rules to encourage the use of this type of alternate dispute resolution program, or discover what rule changes might be required to broadly implement such a referral program.

d) The GOC intends to track statistical trends noted to determine if there is in fact a corollary between asking on the complaint form if CAAP was first consulted, with the number of complaints actually filed and calls made to CAAP.

B. Office of the Chief Disciplinary Counsel

1. Background History:

The Chief Disciplinary Counsel, John Neal, administers the attorney grievance system in accordance with the Rules of Disciplinary Procedure. The Chief Disciplinary Counsel's Office has three regional offices - Houston, Dallas and San Antonio - and the main office in Austin, each overseeing a geographical region of the state. Each office, headed by a Regional Counsel or Field Counsel, houses an investigative attorney, and support staff to assist grievance committees and prosecute disciplinary actions.

2. Issues Reviewed and Conclusions:

a) The GOC has heard from its focus groups that filing a complaint can be burdensome to the person complaining about a lawyer's conduct. In addition, some complainants are unsophisticated, uneducated and perhaps even incarcerated and simply don't know how to document, or even clearly explain in writing, the basic facts concerning the complaint.

b) Complaints are now received in all the regions. An issue exists as to whether a central complaint filing location in Austin would facilitate complaint filing and help processing of complaints.

c) Identification and reporting of compulsory discipline, reciprocal discipline and revocation of probation matters needs better and earlier detection. Our present disciplinary rules do not have an attorney self-reporting requirement which sometimes results in much delayed grievance processing, or in some cases no grievance processing at all.

3. Recommendations:

a) The GOC recommends greater web access for complaint filing so that a potential complainant can complete his/her confidential complaint completely on-line. Since making a complaint is a confidential process, special consideration must be made to make certain that the on-line complaint capability incorporates protections for confidentiality.

b) The GOC recommends that an Ombudsman office, or position, be created to help complainants with issues involving complaint filing. The Ombudsman should not be in a reporting line of responsibility to the CDC, Commission for Lawyer Discipline or BODA. The GOC recommends that perhaps the DCAAP Committee of the Bar Board should explore the creation and staffing of an Ombudsman office or position. The GOC notes that DCAAP has been intermittently active over the last decade and focusing on an Ombudsman's role could bring a much needed focus for the DCAAP Committee's work.

c) The GOC recommends that with greater web access a central complaint filing and processing point in one location would add continuity to complaint processing and greater opportunities to educate the public on complaint filing.

d) The GOC recommends a rule change requiring lawyers to self report to the State Bar any criminal adjudications against the lawyer and any discipline ordered against the lawyer in another jurisdiction.

C. District Grievance Committees

1. Background History:

The District Grievance Committees are composed of volunteer lawyers and members of the public who serve in seventeen districts across the State. Each committee is composed of two thirds lawyer members and one third public members. Each State Bar district has one or more grievance committees.

The training of each local grievance committee is normally done each June and July. Last year there were 38 total training sessions conducted by the CDC's Regional Counsels. The training emphasis is on the procedural and substantive rules governing the attorney discipline system, duties and authority of the grievance committees, and the importance of attendance and participation at scheduled hearings. Materials vary somewhat in quantity and quality, and are currently mostly in paper form only. The CDC Regional Counsel and staff lawyers typically conduct the training seminars. The CDC has drafted an evidentiary hearing procedural guide.

2. Issues Reviewed and Conclusions:

The training for the many local grievance committees is not consistent. When the GOC met with local grievance committee members around the State, those local participants reported quite different experiences with training, and viewpoints about their training, and their understanding of the grievance system.

3. Recommendations:

a) The procedural guide that is currently being further revised for evidentiary hearings is a good step toward achieving better consistency and educating an ever changing array of panel members. The GOC believes this guide should become an on-line web based manual that could be easily accessed and updated. The GOC, with the CDC, is in the process of gathering more information about the statistics which show who participated in training (and those who did not) and the differences in training material from region to region.

b) In addition, again holding the Statewide leadership conference for grievance committee members, which was done some years ago, should be seriously considered. The GOC believes that web based distance education would be helpful as well. The GOC believes that there must be a better job done of a "basics education" for grievance committee members. A comprehensive and a basic "This is the Grievance System" notebook type presentation should be developed for all grievance committee members that is thorough, interactive and web based so that training could be relatively inexpensive, easily updated and readily available for lawyers and public members. The GOC recommends the immediate development of this web based training program for grievance

committee members. The size of our State can easily impact training resources in a way that one on one training, or even group training, can be prohibitively expensive. However, with the use of the internet as a relatively inexpensive resource to distribute procedural guides, and even web cast seminars expressly designed for grievance panel members, education of panel members could be a less expensive reality. The GOC recommends that the CDC, in cooperation with, and input from, the DCAAP Committee of the Bar Board, work to implement a comprehensive web based training program for grievance panels.

D. The Commission for Lawyer Discipline

1. Background History:

The Texas Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas and is composed of six (6) attorney members appointed by the State Bar President and six (6) public, non-attorney members appointed by the Supreme Court of Texas. The Commission for Lawyer Discipline serves as the client for the Chief Disciplinary Counsel. The Commission has general oversight responsibilities of the disciplinary system.

2. Issues Revealed and Conclusions:

After considerable review and interviews, the GOC has found that some judges in Texas do not have even a basic understanding of our grievance system. The GOC further discovered that few judges make referrals to the CDC concerning attorneys who have obvious impairments including alcohol and substance abuse issues, or who clearly are not competently representing their clients in court. Some judges are referring impaired attorneys to TLAP. However, there appears to be little direction to the judiciary on when, how and to which part of the grievance system an impaired lawyer should be referred.

3. Recommendations:

- a) The GOC believes that the Commission should be encouraged to work with the Texas Center for the Judiciary and the Commission for Judicial Conduct to initiate more training for judges related to the grievance system.
- b) Consistent with our earlier recommendation about web based training programs, the GOC recommends that the Commission and the CDC implement a web based training program specifically for judges to explore issues that are unique to the judiciary and its interaction with attorneys practicing in their courts and the disciplinary system.

E. The Ethics Hotline

1. Background History:

The Chief Disciplinary Counsel's Office maintains a toll-free Attorney Ethics Hotline (Helpline). The helpline is designed to give attorneys guidance on how to access the rules, ethical opinions and case law so that an attorney can make an informed ethical decision. The Chief Disciplinary Counsel and his staff are not permitted to issue written opinions or legal advice. The helpline does not provide legal assistance to the general public and cannot address questions concerning pending grievances.

2. Issues Revealed and Conclusions:

There does not seem to be widespread knowledge about, and/or use of, the ethics helpline. In fact, the need for it seems to be exacerbated by the inconsistent quality of presentation in the ethics portion of CLE programs. In addition, it appears that only one person answers the helpline for all of Texas, and Texas is one of the states with the largest number of licensed attorneys. Compared to other states, Texas' helpline seems to be significantly understaffed.

3. Recommendations:

a) The GOC recommends that the Commission, perhaps with help from TCLEP, develop a recommended curriculum for ethics presentations in CLE approved programs. The training could be specially marked with a Commission and/or TCLEP "seal" of approval showing that the ethics portion of the training has passed a review of its contents and it is a "recommended" ethics training course.

b) Staffing numbers for the hotline should be re-evaluated and if the ethics helpline is to remain, it should be more adequately publicized and properly staffed. A review should be made of comparative programs from other states to properly evaluate the correct level of staffing needed for Texas' program. Also, such a comparative review should include a question to other states ethics counsel to get information on the average response time experienced for each inquiry. The purpose of such a review would be to ensure that Texas' response time is not on average too lengthy.

c) The GOC recommends that State Bar Section websites add links to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, along with appropriate links to CAAP, TLAP, BODA, the Commission and the CDC. Making these links readily available to all Section members will promote accessibility and education about our grievance system. The GOC recommends that the State Bar President and the State Bar Board of Directors, and the Council of Chairs endorse a recommendation that all Sections

immediately implement the posting of at least the above mentioned links on their websites.

F. Local Bar Associations

1. Background History:

There are more than three hundred local bar associations that provide education to their members. Since they are, in their very essence, "local" bars dealing with special interests of a group which often shares common interests, their organization and meeting schedules vary. A small local bar may meet only once a year and have two officers; a large one, in addition to numerous officers and committee chairs sometimes has a staff, sometimes even its own building and may offer CLE every day. Most local bars fall somewhere in between these two extremes.

The Local Bar Services Coordinator for the State Bar maintains a list of visits to local bars by bar leaders, but there is no record of the number in attendance at the meeting, nor are there records of CLE which the local bars provide and no list of speakers or panelists for the training. In sum, there is inconsistent and variable information concerning educational opportunities available from local bar associations. As a result, it is difficult to quantify with any degree of certainty what, if any, education about our grievance system is accomplished by local bars.

CAAP and the TLAP are discussed at Bar Leaders Conferences and are regularly mentioned when state bar leaders speak to local bars, but little else appears being done to integrate CAAP's or TLAP's services into a real resource for local bar associations to use.

2. Issues Reviewed and Conclusions:

a) The large number of local bar associations pose a particular challenge when gathering data about what kind of education efforts are sponsored by the more than 300 entities who make up the local bar associations. Of the education efforts that are underway in local bars, it is difficult to tell which ones attempt to educate their members about the grievance system.

b) The apparent lack of a regularly updated central registry of what educational opportunities exist in local bars underscores the perception that too much is being done for too few.

3. Recommendations:

a) The GOC intends to continue to review local bar training activities in the GOC's next reporting year to determine how best to integrate them into educating lawyers about our grievance system. A central web based registry of educational

training opportunities being offered by local bars would enhance educational options for a broader group of lawyers and make it easier to encourage local bars to include grievance training in their CLE offerings, thus opening up educational opportunities about our grievance system to more lawyers.

b) The GOC believes local bars, with lawyers coming together for local interest issues, provide a unique opportunity for training and education concerning our grievance system. These gatherings may also provide a rich resource for new volunteers to work within the grievance system. As it presently exists, information gathering from, and communication with, local bars is so sporadic that the opportunities to capture new recruits to work in the system and train attendees in grievance issues has gone largely unrealized. The GOC will continue to monitor these issues and further report in its next reporting year on how to better identify and harness the synergy of these groups. Local bars are well positioned to educate an expanding base of members about our grievance system.

G. Law Practice Management

1. Background History:

Law Practice Management (LPM) offers services to lawyers that impact the grievance system, including CLE that focuses specifically on practice management issues, joint CLE programs with local bar associations and live web casts, legal support staff training, online self-assessment tools, and a library of videos and publications.

The LPM CLE focuses on communication and financial management tools since a large percent of the grievances filed in the system stem from those issues. These educational opportunities are meant as pre-emptive measures to help educate attorneys and reduce the number of grievances filed. These topics are also covered if a respondent is referred from the grievance system for remedial education.

Attorneys may request training for their staff, go online for a self-audit which poses questions and gives potential challenges, or access the comprehensive library either to check out or purchase the videos and publications.

Attorneys can learn about these services from several sources: informational brochures distributed at Texas Bar CLE courses and LPM courses; local bar association contacts; monthly email newsletters which are posted on the LPM website; emails to targeted geographical areas which notify of sites for upcoming LPM courses and the State Bar's home page with a link to LPM.

2. Issues Revealed and Conclusions:

The GOC found the LPM series to be innovative and responsive in meeting the law practice management needs of practitioners. The challenge that still exists is improving lawyer utilization of the available resources.

3. Recommendations:

The GOC recommends that all State Bar Sections provide a link on their websites to the LPM website. The use of testimonials from lawyers who have used the LPM series of resources would also be helpful in promoting more use of these valuable resources. The GOC recommends that the TYLA focus some of its energies on further promoting the use of the LPM series among its members, particularly for the reason that younger lawyers can benefit greatly from focusing on communication and financial management issues, topics that are recurrent themes in grievance filings.

The GOC believes that efforts to educate and help clients, complainants, and lawyers about our grievance system are better today than they have been in the past, but that our system as a whole is still in need of better ethics guidance. The GOC recommends that the State Bar initiate rule changes to require that at least one of the three required ethics hours be devoted to training on the disciplinary rules of professional conduct and/or the disciplinary system.

IV. Lawyer Advertising

A. Background History:

The Supreme Court of the United States held in the case of *Bates and O'Steen v. State Bar of Arizona*, 433 U.S. 350 (1977), that it is unconstitutional to prohibit lawyers from advertising so long as the advertising is not false, deceptive or misleading. Prior to that decision, Texas Disciplinary Rules 2-101 and 2-102, Article XII, Section 8 of the Rules Governing the State Bar of Texas severely restricted lawyer advertising. Based on the U.S. Supreme Court decision, the Texas Supreme Court, by Order dated December 13, 1978, suspended these rules to the extent they conflicted with *Bates*.

Immediately after *Bates*, then President of the State Bar of Texas, Travis Shelton, appointed a Board committee of five members, chaired by Kleber Miller, to address lawyer advertising. After months of work, the committee submitted several alternative proposals for new advertising rules. The State Bar Board of Directors chose a highly restrictive plan as to the means and methods by which Texas lawyers could advertise.

In June 1978, at the request of the State Bar Board of Directors, the Texas Supreme Court ordered that a referendum be submitted to the membership of the State Bar seeking approval of new advertising rules. The referendum failed because less than the required 51% of the

membership voted. A similar, second referendum met the same fate and failed in April 1980. Thereafter, and again at the request of the State Bar Board of Directors, the Texas Supreme Court, by Order dated July 21, 1982, repealed Rules 2-101, 2-102, 2-103, 2-104 and 2-105 and adopted new rules for lawyer advertising.

1. The Lawyer Advertising Committee:

Since the new rules on lawyer advertising were adopted in 1982, District Grievance committees have struggled with enforcement. During the next decade, District Grievance committees developed a backlog of cases involving allegations of improper or impermissible advertising by lawyers. Tension developed between the need for speedy resolution and uncertainty over what forms of advertising were legal and ethically permissible. A special committee called the Lawyer Advertising Committee was created by the State Bar Board of Directors to "prepare, assemble and present helpful information pertaining to appropriate advertising by Texas lawyers."

In the late 1980's, the Lawyer Advertising Committee met with Grievance Committees from around the State and found they needed guidance on advertising rules. The committees were constantly struggling with what kinds of advertisements are "false and misleading." In response, the committee adopted certain Advertising Guidelines for use by lawyers and Grievance Committees describing the specific kinds of advertising the Lawyer Advertising Committee believed would likely be false and misleading. In June 1990, the State Bar Board of Directors approved the Advertising Guidelines.

By October 1990, the Lawyer Advertising Committee noted continuing problems implementing the advertising rules, finding that the district Grievance Committees were generally not enforcing the advertising rules.

2. The Advertising Review Committee (ARC):

In November 1993, the membership of the State Bar adopted a new set of rules for lawyer advertising, to become effective July 1, 1995. The Lawyer Advertising Committee was abolished and a new committee with a new charge was created. In 1994, the Advertising and Solicitation Review Committee was created (the name of the committee was later changed to the Advertising Review Committee, its present name). Richard C. Hile was appointed as the committee's first Chair. The charge of the committee was to educate and communicate the new advertising rules to lawyers, serve advertising lawyers, and handle rules violations. By September 1994, the State Bar Board of Directors approved Internal Operating Rules and Procedures drafted by the new committee.

During the first few years, the ARC spent its time collecting advertising guidelines from other states, the American Bar Association and other Texas professions; developing standards and rules for enforcement and sanctions; and developing education programs.

At the present time, the ARC's primary goal is to ensure compliance with the advertising rules, now found in Part VII of the Texas Disciplinary Rules of Professional Conduct. In

general, the committee seeks to enforce the rules by monitoring compliance, reviewing attorneys' submissions, and making disciplinary referrals when appropriate.

To carry out its function, the ARC meets monthly to review filings, pre-approve filings, review cases of non-filings, and make appropriate disciplinary referrals. The Committee also seeks to educate lawyers about the advertising rules by conducting CLE seminars, and developing and publishing educational materials on the committee website. The committee also publishes commentary and interpretive comments to the rules. The committee actively maintains a website. The committee is a permanent committee of the State Bar. It covers some of its costs by charging a fee for the applications it reviews, and higher fees for late filers.

Statistically, the committee has reviewed 30,605 submissions from 1995 to 2006, and seems to be averaging 2,500 submissions per year since 2001. The vast majority of advertisements and solicitation letters are administratively handled by the committee. An average of 2% of all submissions is referred to the disciplinary system.

B. Issues Reviewed and Conclusions:

1. The GOC believes that there appears to be insufficient resources dedicated to enforcement of the advertising rules based on the large volume of submissions/calls/complaints the ARC receives. In particular, the time and resources required to track down non-filers to compel filing is prohibitive.
2. The GOC also found that it is widely believed that violations of lawyer advertising rules are rampant. Public perception of the legal profession is impacted. Lawyers who advertise, and who comply with the rules, complain that they are at a competitive disadvantage with those lawyers who don't comply with the rules.
3. It was reported to the GOC that the ARC has historically had some difficulty with the CDC. According to former members of the ARC, the CDC staff was viewed by them as either being unwilling or unable to effectively deal with referrals from the ARC. Part of this problem appears to be a perception among CDC staff that advertising violations are difficult to prosecute and/or enforcement of advertising violations is not the best use of limited resources. It is generally believed that strict enforcement of advertising rules would require a larger administrative staff of both the ARC and CDC.
4. The GOC has found that there is no uniformity on advertising prosecutions. There are very disparate penalties that have been given out for similar violations. No uniformity in the process, nor in treatment of referrals, seems to be occurring
5. Another problem that the GOC noted related to what appears to be a lack of communication and coordination between the CDC and ARC. The ARC carefully investigates, deliberates and compiles a case before it votes to refer the matter to the CDC, but according to past ARC members the CDC staff will sometimes treat the referral as a new complaint and start the investigation over, resulting in duplication of efforts and other inefficiencies.

6. The GOC found that the ARC has little experience dealing with internet advertising issues. Jurisdictional and enforcement issues abound in this emerging area of lawyer advertising and so far the ARC appears to have few resources and limited experience in dealing with what may be a “tsunami” of issues that it is not prepared or staffed to handle.

C. Recommendations:

1. The GOC recommends that the State Bar, with the CDC, adopt rules to establish a special Grievance Committee that deals only with advertising and solicitation related complaints. Members of this committee would be specially trained and experienced to handle referrals efficiently from the Advertising Review Committee.

2. The GOC recommends that both the ARC and CDC staff work to communicate better on advertising issues in order to encourage better efficiency in dealing with an exploding area of issues. To this end the GOC suggests that the Commission set this concern as a priority during the next bar year.

3. The GOC recommends that the ARC examine the experience of other states in regulating internet advertising. To this end the GOC recommends that the ARC utilize the resources of the National Council of Lawyer Disciplinary Boards currently chaired by Karen Watkins, the current BODA chair. The GOC recommends that the ARC be vigilant to be prepared to deal with the plethora of issues that will likely arise in this area.

The GOC found that education about our grievance system to complainants and attorneys is improving, but that there still needs to be more improvement. The GOC intends during its next reporting year to monitor its first year’s observations and recommendations and further focus on what specifically could be done to accomplish better education for complainants and lawyers about the grievance process and system. The GOC will also monitor what other groups reporting to the Court may recommend regarding various rule changes. During the GOC’s next reporting year, if appropriate rule changes are not recommended, the GOC will author its own recommended rule changes.

V. The Board of Disciplinary Appeals

A. Background History:

The Board of Disciplinary Appeals is a statewide independent adjudicatory body of 12 attorneys appointed by the Supreme Court of Texas to hear certain attorney discipline cases and to promote consistency in interpretation and application of the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure.

Since 1992 the Board has heard and decided over 38,000 disciplinary matters including grievance screening decisions (classification appeals) by the State Bar of Texas Chief Disciplinary Counsel’s Office, appeals from District Grievance Committee evidentiary panels,

petitions to revoke probated license suspensions, compulsory discipline cases reciprocal discipline cases, and disability cases.

The GOC notes that BODA's 2006 report to the Court provides an appropriate and extensive background on this organization and is easily found on BODA's website. The GOC believes, after review of BODA's website, that it provides excellent education and access opportunities for information that could impact either the public or respondent attorneys.

Additionally, after reviewing BODA's census of its members considering diversity concerns, the GOC believes that race, gender and practice areas have been appropriately considered and represented on BODA through the years since its inception. The GOC would encourage BODA to continue to recommend practitioners to the Court for future BODA appointments who reflect the balance they have achieved through the years.

B. Issues Reviewed and Conclusions:

1. The 2003 system wide legislative changes resulted in Respondent attorneys no longer having the opportunity to appeal a classification decision to BODA. As a result, appeals are now made up primarily of complaints from the prison population. BODA is the last authority on what constitutes a written complaint, but now only the complaining person gets to appeal the classification decision.
2. Classification decisions made by BODA are confidential because of the stage in the grievance process that these decisions are considered. No reporting mechanism has been adopted by BODA to inform or educate either the public or lawyers concerning the classification decisions that BODA regularly makes. Lawyers have little public guidance from BODA on the grievance law BODA is making when they make classification appeal decisions.
3. In exercising its compulsory jurisdiction, BODA continues to deal with cumbersome definitions of Intentional and Serious crimes. Lawyers have argued the definitional boundaries of these issues for years and this Court has considered guidance on these issues in several cases that have come before it.
4. In exercising BODA's disability jurisdiction, the GOC notes that most disability panels originate, and are impaneled, in only one region of the State. This would appear to be somewhat of an anomaly since it is generally recognized that disability concerns exist throughout the general population and that lawyers in particular suffer from alcohol and substance abuse.
5. There is presently no reporting requirement that a lawyer keep the Bar informed of the street address where he or she can receive notices. This lack of notice requirement often results in service issues in cases coming before BODA.

C. Recommendations:

1. The GOC recommends that there be further consideration for restoring the respondent attorney's right to appeal a classification decision by the CDC. The 2003 change, which removed respondent attorneys appeal rights, has resulted in a somewhat lopsided approach to grievance governance so that BODA's decisions on classification appeals seem to have less impact on the grievance system. As a result, BODA's time spent processing and deciding classification appeals is spent reviewing only one side of important issues. The result of the 2003 change seems to be that the CDC, the prosecutorial branch of the grievance system, by default, has more input to shape what conduct constitutes grievable complaints. This use of prosecutorial discretion alone in deciding what conduct constitutes a grievance has more room for potential abuse than a system that would be tempered and guided by BODA decisions. While the GOC is not suggesting that the current Commission or CDC is presently abusing this use of prosecutorial discretion, the GOC believes that BODA is better situated to guide the system, so long as it is reviewing appeals of both complainants and respondent attorneys. If no change is made to restore the respondent attorney's appeal rights, the GOC believes that reviewing only complainant appeals appears to result in an inordinate expenditure of time and resources by BODA processing these appeals, especially when their decisions apparently go largely unnoticed. The GOC will closely monitor these trends in its next reporting year and make further recommendations in its next report.
2. The GOC encourages BODA to continue to write more opinions and publish abstracts of confidential classification decisions so that lawyers in Texas will be able to get guidance on how to formulate ethical conduct. In addition, the GOC recommends that the Court consider placing a link on its website to the BODA website so that BODA's opinions can be more easily located, and that the Court also authorize West Publishing to publish BODA's opinions in the Southwestern Reporter series so that the opinions are more accessible.
3. The GOC once again recommends to the Court a re-write of the Texas Rules of Disciplinary Procedure in the area of compulsory discipline to clarify the legal conundrum presented by the definitions that exist in the rules presently. Taking into consideration opinions written by this Court on these rules, and experience practicing with these rules, the GOC believes that more clarity should immediately be brought to this area. During the GOC's next reporting year, the GOC will continue to monitor this issue and consider again urging its own recommendation for a change if the current groups studying these issues do not offer a recommendation.
4. The GOC recommends that the CDC, in connection with BODA, continue to explore disability issues that impact all of our State. The GOC recommends that the Court specifically express an interest to BODA, the Commission for Lawyer Discipline, and the CDC to report in their next reports to the Court the progress being made in the use of disability panels in dealing with impaired lawyers. Specifically, the CDC should report concerning the consistency, or inconsistency, of disability certifications by region.

5. The GOC recommends a rule change requiring that all Texas licensed attorneys be required to inform the State Bar of a street address at which they can receive notices. This new rule should also provide for substituted service. These changes will improve both the time and efficiency of the CDC and BODA.

VI. The Impaired Lawyer

A. Background History:

The State Bar of Texas, local bar associations and the Texas judicial system have always been concerned about the impaired attorney. In fact, in 1989, almost 20 years ago, the State Bar of Texas formed and funded the Texas Lawyers Assistance Program (“TLAP”). The focus of this program was to assist members of the legal community who are suffering from mental or physical conditions that may impair their ability to practice law. By statute, the program establishes a confidential way for impaired lawyers to receive assistance for addiction and other disorders.

This bar year State Bar President Martha Dickie worked with TLAP to produce and distribute a compelling video dealing with depression and the legal profession entitled “Practicing from the Shadows”. This video presentation brings a much needed emphasis to an area of impairment that has heretofore been overshadowed by lawyers who suffered impairment from alcohol or drug abuse.

Also, this past year Chris Long, who was formerly with TLAP, has moved to the CDC and among her other duties now administers a new program, the Grievance Referral Program. This program identifies misconduct at an early stage in the grievance process, and, if the alleged misconduct meets the program parameters, refers the attorney for special monitoring and potential ultimate resolution of the grievance if the attorney under review completes a period of supervision successfully. Impairment issues can be better identified and confronted in this monitoring process.

Today we are ever more besieged with issues dealing with the impaired lawyer and the tough decision on how to get them help and at the same time protect the public. This Court in 2001 expressed the difficulty in dealing with some of these concerns when it explored the issues in the Paula Locke case. When an impairment issue arises, how to intervene, and when and how to do it to protect the public, and get timely help to the lawyer, yet hold him or her responsible for their professional conduct, is a recurring problem with no easy solutions. Lawyers, the GOC recognize, are called to positions which require great care, confidence, and in many cases, call on the lawyer to assume the role of counselor and advisor. Impaired lawyers commonly fail to fulfill all of their professional responsibilities. The GOC recognizes that *any* effort to shed light on these problems should be welcomed by all in the processing of grievances in our system. The GOC can report to the Court that presently there appears to be a concerted effort by all entities in our grievance system to do everything practicable to address these issues.

B. Issues Reviewed and Conclusions:

Impairments, including depression and alcohol and substance abuse, are no respecter of person or positions. Young attorneys and mature attorneys, corporate counsel and law professors, litigators and judges have all been touched by these problems. Impairments, of course, can claim lives, and not just have only an effect on the representation of a client's interest. The GOC believes the Bar has heightened awareness of these issues because impairments have invaded the lives of so many of our lawyers and judges. This heightened awareness presents an opportunity for more dialogue and problem solving in an area that needs the efforts of many to effectuate real change.

C. Recommendations:

1. The GOC believes there should be an effort to create more awareness of TLAP and its programs. This could be accomplished by, among other things, urging that CLE sponsored events seek ethics credit for TLAP presentations (which is presently allowed). Recognizing that impaired lawyers can create ethical problems, because their actions sometimes violate the rules of conduct, is essential to addressing the solution. Broader awareness of these issues will encourage problem solving efforts. The GOC encourages more awareness of the issues and challenges every group in our grievance system to promote awareness and the benefits of early detection and intervention. This effect will save more lives and protect the public.
2. The GOC believes that Local Bars should be well positioned to work to provide financial assistance for treatment options for the impaired lawyer and to assist in early detection, intervention and treatment. The GOC believes that DCAAP could be best positioned to work to coordinate these efforts. The GOC is encouraged that the Houston Bar Association distributes laminated cards to lawyers describing the availability of depression and substance abuse services in Houston. The GOC also recognized the good work of the Austin Bar Association in creating the Justice Mack Kidd Fund which provides financial assistance to attorneys impaired by mental health issues, by assisting with the cost of treatment. The GOC notes that the Pat Sheeran Trust also provides financial assistance for impaired lawyers. The GOC continues to discover programs, and other assistance available for the impaired lawyer, but noted there appears to be no central registry for such services. The GOC recommends that the State Bar Board continue the efforts begun by Martha Dickie by coordinating a public central registry of services available to the impaired lawyer and make this registry available through TLAP.
3. Lastly, the GOC recommends that the Commission for Lawyer Discipline, with the CDC, coordinate efforts to better understand how the disciplinary system identifies and treats impaired lawyers. The GOC believes that in the past prosecutorial zeal has suppressed both the identification of, and treatment of, impairment issues in attorneys being processed through the grievance system. Better awareness of the issues, and clearer instruction and training of the CDC staff and attorneys, would ensure better early detection of problems and protection of the public, and get essential early help for the impaired lawyer. The GOC is not suggesting that these efforts are not presently being pursued by the Commission or the CDC.

The addition of Chris Long to the CDC staff, with her TLAP experience, is a good effort beginning to identify and get help for the impaired lawyer. A mention is made of this issue here to report to the Court that the GOC intends to again monitor and report to the Court in its next reporting year the progress made by each entity in establishing a greater awareness of these difficult impairment issues.

VII. Respondents Counsel

In 2006 long time GOC member Xavier Medina was honored for his years of service on the GOC at a banquet in October where Fifth Circuit Justice Priscilla Owens honored Mr. Medina with a keynote address.

To capture Mr. Medina's respondents counsel perspective, the GOC asked Mr. Medina to prepare a brief report addressing issues of particular concern to the lawyer who finds him or herself in the grievance system. His letter to the GOC is attached to this report in its entirety (see Attachment 1). It is the intent of the GOC to review further the issues raised by Mr. Medina in our next reporting year and ask Mr. Medina to provide further input on these issues.

VIII. Ovations

In every review action in which the GOC was involved the Committee encountered various efforts, programs and people who make a difference every day in the administration of our attorney grievance system. This section of our report is included to recognize for the Court exemplary efforts that the GOC recognized in its review of the attorney grievance system.

Our first ovation is to report that Betty Blackwell, the Chair of the Commission, Karen Watkins, the Chair of BODA, and John Neal, the Chief Disciplinary Counsel, are all superlative individuals who care about their respective responsibilities and who gave unselfishly of their time in responding to our questions. Commission Members, BODA Members and John Neal's staff, especially Linda Acevedo and Anne McKenna, have been exceedingly helpful and professional in all efforts we observed. The good news to report to the Court is that we have lawyers and staff in all the grievance system who care deeply and daily that the public is protected from lawyers who engage in conduct violative of our rules, and that lawyers against whom allegations have been made, are treated fairly. The issue of lawyer impairment concerns all with whom we made contact. TLAP and CAAP provide invaluable resources for the attorney discipline system. Ann Foster, the TLAP Director and Bennie Ramirez the Director of CAAP are consummate professionals who care that they not only do their jobs well, but they care that they are making a difference in peoples' lives.

The GOC wants to salute especially Betty Blackwell and the Commission for Lawyer Discipline, and John Neal, and his CDC staff, for beginning the Grievance Referral program reported on page 232 of the March 2007 issue of the Texas Bar Journal. Chris Long, who recently joined the CDC staff from TLAP, will bring valuable resources to the implementation of this referral program. The GOC believes this new referral program is a positive approach to address problems at an early stage.

The GOC also salutes Karen Watkins, current Chair of BODA and Chris McKeeman, its Executive Director and General Counsel of BODA, for their continued involvement in, and taking leadership roles in, the National Council of Lawyer Disciplinary Boards. Already over twenty states are now members of this organization that was begun based on inquiries from BODA, here in Texas, just a few years ago. Already this resource is adding ideas and information sharing between states, most of whom are dealing with exactly the same problems we are dealing with here in Texas. The collaborative synergy gained from BODA's leadership in this organization should keep Texas on the forefront of ideas as we all grapple with how to improve the attorney discipline system.

The GOC also wants to salute the many volunteer lawyers and public members throughout the grievance system, and on our own Committee, the GOC, who serve in the largely thankless task of helping this system run as smoothly as it does.

Anytime anyone sets out to salute some who are easiest to spot for ovations and acclaim, the danger is that others equally deserving of such attention are inadvertently overlooked and left out. The GOC recognizes that in this its first report to the Court since being reconstituted, it may have overlooked many who are deserving of accolades. The good thing is we will get another chance next year to do this very thing again, and it is our sincere hope that anyone we have left out for this special distinction of an "ovation" this year will be added for your notice and review next year. Any person or organization who was overlooked this year was due to the enormous undertaking this project has taken this first year.

Finally, the GOC feels compelled to salute Martha Dickie, our current State Bar President for making the issue of impaired lawyers the concern of our Bar. President Dickie's efforts and attendance at many of our GOC meetings brought an urgency to this largely overlooked area of concern. As mentioned earlier in our report, never enough can be done to help sort through the issues of identifying and getting help for the impaired lawyer while at the same time be involved in protecting the public from actions that the impaired lawyer may engage that could violate our rules of conduct. The GOC believes that Martha Dickie has raised the urgency of these issues so that the good and talented lawyers, and public members, who populate the administration of the attorney grievance system in Texas can work towards a more immediate plan of action to effectuate real change.

IX. Looking Ahead

The GOC believes its work has truly just begun. The Texas grievance system has grown through the years to accommodate our ever expanding number of licensed attorneys and a growing need for better protections for the public. Great strides have been made in the Texas grievance system to ensure that a fair response process is in place for an attorney charged with misconduct. The GOC believes however, that more must be accomplished in every area. In this next year the GOC will continue to pursue the issues identified in this report, and further report on them, and review and report on new areas of concern. For instance, a consistent and equal application of our rules of conduct to all lawyers, no matter where they practice in our State, needs further review and attention. New initiatives should be considered in the areas of identifying probation revocation and reciprocal discipline. As new advertising venues emerge we will challenge our

system of self governance to stay on pace to meet the changing new technology. Document retention policies of the CDC will be examined to see whether, and/or to what extent, the early destruction of complaint files is impacting the ability of the GOC to review complaints about the grievance process. These are only a few examples of the emerging issues about which the GOC intends to further investigate and report.

We complete this report with a final thanks to the men and women who give of themselves daily to ensure that the public is protected and that lawyers are given a fair chance to respond to complaints about their conduct. These goals were evident in all whom we interviewed throughout this reporting year.

The GOC will continue in its efforts to fairly review and report on how our grievance system functions, on its efficiencies, inefficiencies, its effectiveness and its challenges.



MEMORANDUM

TO: GRIEVANCE OVERSIGHT COMMITTEE
FROM: XAVIER G. MEDINA
SUBJECT: RECOMMENDATIONS FROM DEFENSE COUNSEL PERSPECTIVE
DATE: 2/23/2007

Dear Members of the Grievance Oversight Committee,

Thank you for the opportunity to present some suggestions from the perspective of respondent's and respondent's counsel. The following observations are offered in the hope that they will help in fostering both the perception and the reality of a fair and impartial system. In some instances, the suggestions are therefore directed more at correcting erroneous perceptions than in any inherent flaws in the process.

As you are not doubt aware, the grievance process is as unfamiliar to many respondents as it is to the public. First-time respondents are often shocked to learn that they cannot recover attorney's fees even if they are successful, that there is no "standing" required to file an inquiry, that the opposing party is the Chief Disciplinary Counsel's Office ("CDC") rather than the complainant and that satisfying the complainant does not necessarily resolve the grievance. In addition, since the complainant does not have to expend any financial resources in the process, while the respondent does, respondents view the entire process as being heavily, and unfairly, weighted against them. Accepting this burden may be a necessary incident to the privilege of practicing law but the result is that even (and perhaps especially) innocent respondents become quickly entrenched in a siege mentality. At the same time, the complainant's consumer complaints are subordinated to the prosecutorial function and priorities of the CDC. Inevitably, complainants and respondents feel that they have been victimized, rather than served, by the grievance process. Hopefully, at least some of the following suggestions will be viewed as serving the interests of both complainants and respondents.

ISSUE: MEDIATION CAN BE MORE EFFECTIVELY UTILIZED

The procedural rules currently provide for mediation at the end of the grievance process or once an election has been made to the court or evidentiary panel but, almost paradoxically, exempt the Commission from mandatory mediation (TRDP 3.08G). Mediation during court or evidentiary panel proceedings are problematic since the issues at that point are focused around the range of sanctions sought by the CDC rather than satisfying the complainant's consumer issues. Once the matter has been resolved by dismissal or adjudication, there is also little incentive and a great amount of disincentive for either complainant or respondent to participate in mediation.

- **RECOMMENATION:** Offer mediation between complainant and the respondent at the intake level, after the just cause determination but before the summary panel's review. Mediation at the level would address the complainant's concerns, rather than the CDC's

prosecution priorities, and respondents would have a significant incentive to participate. As an added benefit, agreed resolutions early in the process would save resources for everyone. In order to address concerns that respondents not use this alternative to “buy” their way out of an otherwise valid complaint, guidelines could be implemented to permit dismissal if the complainant joins in the request but either make such dismissals subject to the discretion of the CDC or exclusive of certain types of grievances or repeat offenses. This option has been tried out successfully in a few instances of which I am aware but there are no uniform guidelines.

ISSUE: THE INITIAL NOTICE TO RESPONDENT FAILS TO PROVIDE ADEQUATE NOTICE. The initial Complaint to the Respondent currently provides only a copy of the writing upon which the complaint is based, is the Respondent’s only opportunity to address the issues prior to review by the summary disposition panel and is Respondent’s only opportunity to avoid the expense of an evidentiary hearing or court proceeding. The writings are often rambling and unfocused and contained an assortment of allegations which could, but do not necessarily, form the basis for the just cause determination. Since the CDC must make a determination as to the facts and rules which it believes constitute a violation prior to sending such notice, it should be a relatively simple matter to provide a short statement setting forth the specific facts and rules upon which the CDC has based its determination. The respondent can then address the issues responsive to the CDC’s concerns rather than having to guess or rely upon the good graces of CDC to help focus the response.

- **RECOMMENATION:** Incorporate the notice provisions which currently exist at TRDP 2.14 D. into TRDP 2.10.

ISSUE: TRDP 2.06 FAILS TO DISTINGUISH BETWEEN DISQUALIFICATION AND RECUSAL. While recusal may be waived, generally, disqualification is not a waiveable matter. In addition, the burden for asserting either grounds for recusal or disqualification is placed on the respondent.

- **RECOMMENDATION:** Amend the rule to clarify that grounds for disqualification are not waiveable and require committee members to affirmatively recuse or disqualify themselves if they are aware of circumstances which require such action.

ISSUE: PERCEIVED LACK OF DIVERSITY IN THE GRIEVANCE PROCESS The process for appointment to grievance panels is largely a mystery to those not involved in the administration of the grievance process. Panels are perceived to be loaded with attorneys from large, predominantly white male firms; similarly, there is a perception that any ethnics minorities present among the CDC support staff are in support staff capacities rather than among the staff attorneys. As a result, solo practitioners and ethnic minority attorneys who appear in the grievance process believe that the panels and staff are unfamiliar with or unappreciative of the issues unique to small firm practice. Conversely, it is often difficult to secure commitments to serve on panels from these groups because of the resource demands on small firm practitioners.

- **RECOMMENDATION:** Publicize openings on panels in local bar journals, web sites and by outreach to minority bars, permit lawyers to self-nominate to panels and provide CLE ethics credit for participation as an economic incentive.

ISSUE: NO MECHANISM EXISTS TO ADDRESS PROSECUTORIAL OR PANEL MEMBER MISCONDUCT. There is no formal system to address complaints of improper conduct by CDC staff or committee members in the course of the grievance process either directly to the Commission or through an ombudsman. TRDP 5.03 provides that the CDC is accountable only to the Commission. Even if a complaint of prosecutorial or committee member misconduct is submitted directly to the Commission, at least a question of perception arises as to whether the Commission can impartially investigate the complaint while also serving as the CDC's client in the grievance matter.

- **RECOMMENDATION:** Establish an ombudsman to review and act upon complaints of misconduct.

ISSUE: TRDP 2.16 B. IS AMBIGUOUS AND SUBJECT TO ABUSE. There is no clear understanding as to whether the purpose of TRDP 2.16 B. Some respondents fear that it prohibits them from discussing the allegations against them with potential witnesses in the course of preparing their defense. If the purpose of TRDP 2.16 B is to protect the respondent, then the rule should clarify that the respondent may discuss the case with witnesses without necessarily waiving confidentiality generally. A related issue is that in the event information is leaked, the respondent has no effective recourse and cannot defend himself or herself publicly against such allegations. This problem is particularly troublesome when a complaint is filed in the course of a public election or while a political appointment is pending.

- **RECOMMENDATION:** If the proposal for an ombudsman is adopted, give the ombudsman authority to investigate such incidents and initiate complaints against any lawyer violating such rule. If a non-lawyer complainant is the source of the improper disclosure, permit the evidentiary panel or court to consider that information as part of the grievance process.

ISSUE: SUPPORT STAFF FOR RESPONDENT COUNSEL HAVE BEEN EXCLUDED FROM DISCIPLINARY PROCEEDINGS. TRDP 2.17 J provides that the Respondent and Complainant may have counsel present during any evidentiary hearing. The rule does not clarify that the counsel's staff may also be present and assist in the presentation. On occasion, the rule has been applied so as to exclude counsel support staff.

- **RECOMMENDATION:** Amend the rule to provide that counsel's support staff may be present and assist counsel.

ISSUE: TRDP 2.17 P and TRDP 3.09 ARE AMBIGUOUS.

TRDP 2.17 P provides that "The Evidentiary Panel may: 3. find that Professional Misconduct occurred and impose Sanctions."

TRDP 3.09 provides that "If the Court finds that the Respondent's conduct does constitute Professional Misconduct, the court shall determine the appropriate Sanction or Sanctions to be imposed."

TRDP 3.10 provides that the Court may not impose a private reprimand but may consider any prior private reprimands.

There is no uniform understanding as to whether these rules require the imposition of a sanction if there is a rule violation or whether the imposition of a sanction is permissive. For example, can an evidentiary panel determine that while a technical violation has occurred that the misconduct was too minor to warrant a sanction? Similarly, if the purpose of prohibiting a Court from imposing a private reprimand is because the proceedings are public, is that purpose contradicted by the admission of prior private reprimands? If private reprimands can be considered by the Court, and are therefore, presumptively part of the public record, what purpose is served by eliminating the private reprimand as an option when an election is made to district court rather than to the evidentiary panel?

- **RECOMMENDATION:** Amend the rules to eliminate any ambiguity

Thank you again for the opportunity to present the foregoing observations. While I consulted with some respondents and respondent's counsel, I did not have access to statistical data. The recommendations therefore necessarily rely upon personal recollections and anecdotal information and the resulting limitations of such information.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 06-9060

ORDER RECONSTITUTING THE GRIEVANCE OVERSIGHT COMMITTEE

The purpose of the Grievance Oversight Committee is "to assist the Supreme Court in its constitutional and statutory responsibility for the lawyer discipline system." See Order of the Supreme Court of Texas, *Grievance Oversight Committee*, Misc. Docket No. 97-9066 (April 2, 1997). Originally created by statute, in recent years the Committee has been continued by Court Order to study, review, and advise the Court regarding the structure, function, and effectiveness of the disciplinary system.

Recent statutory changes and concerns expressed by other participants in the grievance process have provided the Court with an opportunity to reevaluate and reassess the scope of the Committee's duties. The Court gratefully acknowledges the contributions of those who have participated in this process, especially Jack Balagia, Jr. for his recommendations regarding the interaction between the Committee and the Commission for Lawyer Discipline.

The Court has concluded that the duties of the Grievance Oversight Committee should be continued as provided in this Order. Balancing the Court's administrative responsibility for oversight of the lawyer discipline system with its judicial responsibility to remain neutral in finally deciding many grievance disputes, the Court needs the assistance and recommendations of a body that is both independent of the State Bar of Texas and a non-participant in the grievance process. While we recognize this independent oversight, like other checks and balances, will result in some duplication of effort, we believe the goodwill and cooperation of those involved in the process can reduce unnecessary duplication while still providing proper guidance and direction necessary to maintain a self-regulated bar.

COMPOSITION OF THE COMMITTEE

The Committee is composed of nine members appointed by the Court. At least three members must be members of the State Bar of Texas. At least three members must be public members who have, other than consumers, no interest, direct or indirect, in the legal profession. At least three members must have previously served on the District Grievance committees, the Commission for Lawyer Discipline, or the Board of Disciplinary Appeals. No member may concurrently serve as a member of the Board of Directors of the State Bar, the Commission for Lawyer Discipline, the Board of Disciplinary Appeals, a District Grievance Committee, or an employee of the State Bar of Texas.

Members serve staggered three year terms with three members' terms expiring each year. Members must serve no more than two consecutive terms, except for the current members, who may complete their current term and serve one more term.

The following members are reappointed to the Committee, for terms expiring on March 31 of the year designated in parentheses:

Ms. Virginia Bowers (2008)
Mr. Randall Chapman (2009)
Ms. Josephine V. Dye (2007)
Professor Susan Saab Fortney (2008)
Ms. Karen Nicholson (2009)
Ms. Velva Price (2009)
Ms. Judy Sebesta (2008)
Mr. Raymond Thomas (2007)
Mr. Gaines West (2007)

Mr. Gaines West chairs the Committee. The Court's liaison, subject to reassignment from time to time, is currently Justice Scott Brister.

RESPONSIBILITY & AUTHORITY

The Committee is charged with the following responsibilities:

- Review any public reports, including budgetary and statistical reports, or recommendations submitted to the Supreme Court of Texas, the State Bar of Texas, its Board of Directors, or

any of its committees by the Commission for Lawyer Discipline, the Office of the Chief Disciplinary Counsel, the Board of Disciplinary Appeals, or the State Bar Discipline & Client-Attorney Assistance Program Subcommittee, or their agents and representatives. A copy of this information must be provided to the Committee at the same time the information is disseminated to any of these entities.

- Meet at least annually with representatives of the Commission for Lawyer Discipline, the Office of the Chief Disciplinary Counsel, the Board of Disciplinary Appeals, the State Bar Discipline & Client-Attorney Assistance Program Subcommittee and representatives of the public and the bar to discuss the work of each entity and any concerns about or recommendations for improvements to the disciplinary system and the rules governing the system. To fulfill this charge, the Committee may solicit evaluative feedback from actual participants in the grievance process.
- Respond to letters from members of the bar or the public that are addressed to justices of the Court concerning complaints about the handling of their grievance cases, always mindful that the purpose of such review is not to change or influence the outcome of any particular case, but to answer questions or concerns from the individual and to aid the Committee in evaluating the system.
- Periodically review the Rules of Disciplinary Procedure and determine whether any changes or improvements in the rules should be recommended to the Court, and to comment to the Court on changes to those rules proposed by other disciplinary bodies.
- Consider whether lawyers and the public need more education about the disciplinary system and, if so, make recommendations about how the State Bar and the Court may address that need.
- Handle any specific requests related to the disciplinary system that the Court refers to the Committee.
- Submit an annual report to the Court with recommendations for any changes or improvements in the attorney disciplinary system. Eleven copies of the annual report must be filed with the Clerk of the Court no later than June 1 of each year. A copy of the report must also be delivered to the State Bar of Texas, its Board of Directors, the Commission for Lawyer Discipline, the Office of the Chief Disciplinary Counsel, the Board of Disciplinary Appeals, and the State Bar Discipline & Client-Attorney Assistance Program Subcommittee

at the same time the report is filed with the Court.

The Committee is further authorized to do the following, to the extent necessary to further the purpose and the goals of this order:

- Request non-case-specific information from the Commission for Lawyer Discipline, the Office of the Chief Disciplinary Counsel, the Board of Disciplinary Appeals, and the State Bar Discipline & Client-Attorney Assistance Program Subcommittee to determine such issues as whether the entities are conducting regular meetings; whether complainants are given an opportunity to present, and have resolved, their complaints within a reasonable time; whether respondents are given a fair opportunity to present their defense; whether complainants and respondents are given prompt information about the action taken on complaints; whether the bar and the public are being timely advised about decisions made in the disciplinary system; and whether staff and volunteers are receiving proper training.
- Designate a member to attend and observe meetings of the District Grievance committees, the Commission for Lawyer Discipline, the Chief Disciplinary Counsel, the Board of Disciplinary Appeals or the State Bar Board of Directors, or any subcommittees of these entities, except portions of meetings in which a complaint or case-specific information is being discussed. Attendance by Committee members to these meetings does not waive any attorney-client or attorney work-product privileges.
- Request and conduct a confidential review of closed case files for purposes of responding to specific complaints or types of complaints on behalf of the Court. This review does not waive any attorney-client or attorney work-product privileges.


The Court believes these duties and authority will compliment—not distract from—the duties other entities have in improving the grievance process in Texas. Further, to assist the Commission in carrying out its duties, the Commission must provide the following non-privileged information that the Committee has recently requested:

- ▶ Quarterly caseload reports showing breakdowns of disciplinary actions by office and rule violation, as well as the case's disposition or procedural history, *e.g.*, whether the case was dismissed by a summary disposition panel or an evidentiary panel, whether the respondent elected to go to district court, or whether some type of dispute resolution procedure was employed;
- ▶ A listing of all staff positions of the Commission or in the Chief Disciplinary Council's


- office by office and gender and ethnicity;
- ▶ Meeting agendas and portions of minutes that discuss policy issues and panel training;
 - ▶ Copies of all amendments to standard form letters and brochures sent to the public;
 - ▶ Copies of all complaints and responses about the mishandling of cases;
 - ▶ Information that would allow the Committee to track grievance outcomes by ethnicity or gender by and in 27 different U.S. District Court divisions in Texas.
 - ▶ Any other information requested by the Grievance Oversight Committee that may be needed to reasonably carry out its purpose.

The Court trusts that the Committee's work will continue to bolster public confidence in the system and ensure that the grievance process remains both fair and efficient, without transforming the Committee into an unwelcome auditor of the other disciplinary bodies.

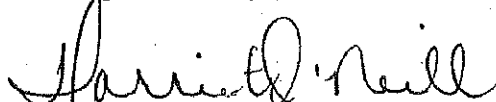
SO ORDERED, in Chambers, this 26th day of June, 2006.



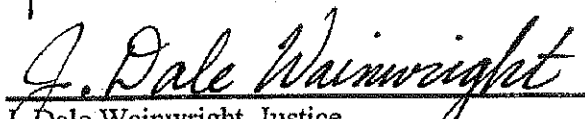
Wallace B. Jefferson, Chief Justice



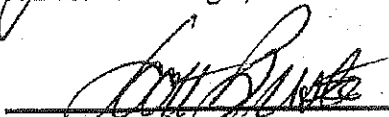
Nathan L. Hecht, Justice



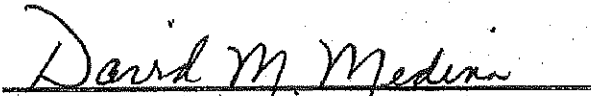
Harriet O'Neill, Justice




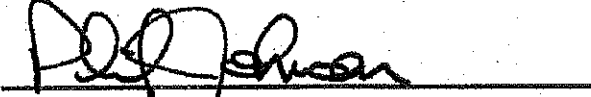
J. Dale Wainwright, Justice



Scott Brister, Justice


David M. Medina, Justice


Paul W. Green, Justice


Phil Johnson, Justice


Don R. Willett, Justice