Grievance Oversight Committee
Appointed by
The Supreme Court of Texas

Biennial Report
October 1, 2020

Members

Hon. M. Sue Kurita, El Paso, Chair
Meryl Benham, Lubbock, Vice-Chair
William "Jack" Dysart, San Antonio
David Kitner, Dallas
Andra Mulder, Bellaire
Eric J.R. Nichols, Austin
Melody Poole, League City
Jim Ritts, Austin
Jackie Robinson, Fort Worth

2020 REPORT TO THE SUPREME COURT OF TEXAS
BY THE GRIEVANCE OVERSIGHT COMMITTEE

TABLE OF CONTENTS

Page

HISTORICAL PERSPECTIVE 1

BACKGROUND AND DESCRIPTION OF COMMITTEE ACTIVITIES DURING 2019-2020 BIENNIUM 1

SUMMARY OF THE REPORT 3

I. SELECTED ISSUES AFFECTING THE ONGOING OPERATION OF THE ATTORNEY-CLIENT GRIEVANCE PROCESS 4

A. REQUIRING THE GRIEVANCE COMPLAINT FORM TO BE FILED UNDER PENALTY OF PERJURY 4

B. TRAINING AND STAFFING OF GRIEVANCE PANEL MEMBERS 9

C. ENFORCEMENT OF SANCTIONS/PROBATION REVOCATIONS 12

D. ASSUMPTION/CESSATION OF PRACTICE 18

E. THE GRIEVANCE PROCESS AS PART OF LAW SCHOOL CURRICULUM 20

F. ROLE OF THE OMBUDSMAN 22

G. RAISING AWARENESS AND UTILIZATION OF TLAP 25

H. BOARD OF DISCIPLINARY APPEALS 29

II. ANALYSIS OF IMPLEMENTATION OF 2017 LEGISLATIVE CHANGES 31

A. REINSTITUTION OF THE INVESTIGATORY HEARING 31

B. UNIFORM SANCTIONS GUIDELINES 60

C. GRIEVANCE REFERRAL PROGRAM 62

D. CLIENT-ATTORNEY ASSISTANCE PROGRAM 65

CONCLUDING COMMENTS 68

2020 REPORT TO THE SUPREME COURT OF TEXAS BY THE GRIEVANCE OVERSIGHT COMMITTEE

HISTORICAL PERSPECTIVE

This report was to be filed with the Supreme Court on June 1, 2020. As the Committee began preparing its report in March of 2020 (after almost two years of meetings and fact-finding) the COVID-19 virus struck with a vengeance. Stay-in-place and other orders were issued by local, state, and federal authorities. Under such circumstances, submission of a report by June 1, 2020 was not possible. In response, the Supreme Court granted an extension to October 1, 2020. The Committee acknowledges with appreciation this extension.

BACKGROUND AND DESCRIPTION OF COMMITTEE ACTIVITIES DURING 2019-2020 BIENNIUM

The Texas Supreme Court originally established the Grievance Oversight Committee ("the GOC" or "the Committee") in the 1970s and then reconstituted the GOC by Order dated February 22, 2011. The Supreme Court has charged the Committee generally with reviewing the attorney-client grievance process and reporting its observations and recommendations to the Court. The Committtee provides biennial reports to the Supreme Court, as well as reports on specific issues as requested by the Court.[1] The Committee's last report was submitted on June 1, 2018.

The Committee held monthly meetings throughout the state since its last report and has continued to hold virtual meetings during the pandemic. At these general meetings the Committee interviewed on average six to eight persons, usually at 30-minute intervals. The Committee was proactive in reaching out to individuals for these meetings through email, hard-copy letters, and telephone calls in an effort to reach as diverse a group as possible. The Committee also was contacted by several individuals who provided their input on specific topics. Between September 1, 2018 and March 1, 2020, the Committee held meetings in the following cities: Austin, Amarillo, Corpus Christi, Dallas, El Paso, Fort Worth, Houston, San Antonio, Plano, Galveston, Georgetown, Brownsville, and San Angelo. At these meetings, the GOC met with members of the judiciary; attorneys; public officials; members of the public; representatives of public interest groups; law school professors; persons who have been involved in grievance proceedings as grievance panel members, complainants, respondents, and representatives of complainants and respondents; and personnel with the Chief Disciplinary Counsel of the State Bar of Texas ("CDC"), the Commission for Lawyer Discipline ("CLD"), the Client-Attorney Assistance Program ("CAAP"), the Board of Disciplinary Appeals ("BODA"), the Grievance Referral Program ("GRP"), the Ombudsman for Attorney Discipline ("Ombudsman"), and Texas Lawyers Assistance Program ("TLAP").

Individual committee members met on numerous occasions with State Bar and CDC representatives to obtain in depth information on various topics. The Committee also held business meetings to discuss its findings and to determine issues to be addressed in this report. In addition, committee members attended grievance panel training sessions in each of the four State Bar

[1]Additional information on the GOC, as well as links to past reports, may be found at www.txgoc.com.

districts, and during the pandemic various Committee members conducted additional interviews by phone and by Zoom with stakeholders in the Texas attorney-client grievance process.

During the past two years, the Committee interacted with the CLD, the CDC, BODA, CAAP, TLAP, the GRP, and other groups related to the State Bar of Texas ("SBOT"). Through this process the Committee not only was able to gather information about the attorney-client disciplinary process but also was able to discuss systemic issues and potential areas for improvement. Representatives of all of these entities were cooperative and candidly expressed a desire to improve the functioning of the attorney-client disciplinary process, where necessary, and, in particular, to maintain transparency of that process.

The Committee bases its observations and recommendations in this report mainly on the input received from this broad base of persons. These individuals provided their observations and recommendations about the grievance process as citizens concerned with the proper operation of the legal profession. The Committee expresses its appreciation for all those persons who took the time to meet with or otherwise provide input to the Committee and share their experiences and insights.

The Committee appreciates the continued opportunity to advise the Court on issues affecting the attorney-client grievance process, and to do so through a process that involves collaboration among a diverse committee membership. The Committee's members are diverse in terms of their professional backgrounds (six lawyers and three non-lawyers), geography, community affiliations, race, gender, and ethnicity. This diversity has allowed the Committee to appreciate the impact that the attorney-client grievance process has on different groups (the public, lawyers, clients, and the State Bar), and to recognize that the attorney-client grievance process may function differently across the state, depending on a particular region's needs and legal system. While the Committee believes that there generally should be uniformity in process, as set forth in this report, it also recognizes that in a state as large and as diverse as Texas, a "one size fits all" rule for many aspects of the attorney-client grievance process would not be feasible or appropriate.

The Committee recognizes that it provides a means for individuals to raise concerns regarding the attorney-client grievance process and appreciates the confidence of the Court in allowing it to fulfill this role. To ensure that the Committee received candid and complete input from all participants, the Committee operated, as in years past, on a "non-attribution" basis. With one exception as noted in the report, this report does not identify by name any individual who provided specific comments or suggestions to the Committee.

The Committee explains to all who raise concerns that its role is not to serve as an appellate or review body with respect to the results of particular grievances. Individual grievances are administered through the CLD, the CDC, BODA, and when called upon, Texas courts.[2] The Committee recognizes and emphasizes to others that its role is only to assist the Court in overseeing the attorney-client disciplinary process as a whole, and to help the Court respond to issues concerning the attorney-client grievance process that are brought to the Court's attention.

[2]For a description of these entities, and their organization and functions, please see the information available at the SBOT website at www.texasbar.com, including the annual reports published by the CLD.

SUMMARY OF THE REPORT

The members who compose the Committee (six lawyers and three non-lawyers) have volunteered their time over the past two years to create this report. The Committee recognizes the amount of detail and length of this report and has organized it in two sections to be more accessible to the reader.

The first section addresses issues affecting the grievance process that came to the Committee's attention during the current biennium, principally through the monthly statewide meeting process.

The second section addresses changes that have occurred in the grievance procedures following the Sunset Review Commission process and subsequent Texas legislative action in 2017.

The Committee identified for discussion a wide range of procedural and substantive issues affecting the grievance process. Two topics, however, generated by far the greatest interest and debate during the Committee's fact-gathering and report development:

1. Whether the grievance complaint form should be required to be signed before a notary under penalty of perjury. A situational analysis and recommendation begins on page 4.

2. The reinstitution of investigatory hearings. This is the most discussed development examined by the Committee. The dominance of this topic is demonstrated by the twenty-nine pages dedicated to the subject, beginning on page 31.

Additional important issues addressed in this report are:

- The training and support of members of grievance panels across the state, and whether there should be an increase in the number of public members;
- The GRP, particularly in connection with recommendations from investigatory panels;
- Discretionary referrals by the CDC to CAAP;
- Enforcement of grievance orders including forms of judgments, collection of restitution and attorneys' fees, and the probation revocation process;
- The inclusion of information about the grievance process in law school ethics classes;
- Cessation of attorney practice and proposed associated rule changes;
- The role of the Ombudsman;
- Implementation of grievance sanction guidelines;
- Raising awareness of TLAP; and
- The impact of rule changes on full utilization of BODA.

I. SELECTED ISSUES AFFECTING THE ONGOING OPERATION OF THE ATTORNEY-CLIENT GRIEVANCE PROCESS

A. REQUIRING THE GRIEVANCE COMPLAINT FORM TO BE FILED UNDER PENALTY OF PERJURY

Background

During the GOC's many discussions across the state, a number of lawyers raised the issue of whether the current Texas grievance complaint form should be revised to require that complainants swear to their allegations under the penalty of perjury when filing a grievance. This proposition has enthusiastic support from members of at least one organized Texas bar group. After this suggestion was raised to the Committee, the GOC solicited opinions on the issue from stakeholders involved in the grievance system during its monthly meetings across the state and in direct communications by Committee members outside of those meetings.

The perception among many advocates for the addition of a sworn attestation under penalty of perjury to the grievance form is that an inordinate percentage of complainants file frivolous and false claims against attorneys when they are simply unhappy with the outcome of a legal matter. These advocates point out that a grievance can be filed against a lawyer by anyone, not just current or former clients of that lawyer. Advocates also contend that some complainants seek to use the grievance system as leverage in a separate matter, such as a civil suit involving related parties and/or counsel. Due to the potential threat to an attorney's license and livelihood, having to respond to any grievance is stressful to the attorney and consumes time and resources that could otherwise be dedicated to assisting clients or otherwise serving the public interest. Those supporting the suggested change contend that the number of grievances filed would decrease by about one-third if the grievance form was amended to require a sworn attestation under penalty of perjury. The belief is that imposing such a requirement would cause a complainant to have a second thought before filing a false or frivolous grievance if there might be a repercussion. Some point out that other states require grievances to be sworn under penalty of perjury.

Those opposing any change to a sworn grievance point to the requirement of the profession to protect the public. They cite the Preamble to the Texas Disciplinary Rules of Professional Conduct which outlines the:

> obligation of lawyers [] to maintain the highest standards of ethical conduct . . .[,] seek improvement of . . . the quality of service rendered by the legal profession . . . [and the] responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of this responsibility compromises the independence of the profession and the public interest which it serves.[3]

[3]Tex. Disciplinary Rules Prof'l Conduct preamble ¶¶ 1, 5, 8.

Opponents of such a change argue that access to the grievance process is an important component of the self-regulation of Texas lawyers through the State Bar and that the imposition of a requirement to swear to a grievance under penalty of perjury would be a barrier to the necessary access to the system by the public. Finally, opponents point to the fact that the grievance processing system in place at the CDC incorporates a classification "first step" that results in approximately 70 percent of grievances that fail to state a claim being dismissed before the attorney who is named even knows about the grievance.[4]

Analysis

Currently, the Texas system requires a complainant to sign a grievance form under the following attestation:

> I hereby swear and affirm that I am the person named in Section II, Question 1 of this form (the Complainant) and that the information provided in this Grievance is true and correct to the best of my knowledge.[5]

Complainants may fill out the form in English or Spanish, and may submit the form online or by mail, and the attestation applies under each grievance filing format. None of the formats currently requires a "jurat" or formal sworn attestation under penalty of perjury, before a notary public or otherwise.

Under the Texas Rules of Disciplinary Procedure, a grievance is defined as "a written statement, from whatever source, apparently intended to allege Professional Misconduct by a lawyer, or lawyer Disability, or both, received by the Office of the Chief Disciplinary Counsel."[6] This means that anyone, regardless of standing or privity with the attorney against whom the grievance is filed, may allege any claim, whether or not the allegation involves a violation of the rules.

Roughly two-thirds of grievances that are filed are dismissed at the initial stage of CDC review as "inquiries," on the basis that even if the allegations were true, the grievance does not allege a rule violation.[7] Of the approximate one-third that survive the classification review,[8]

---

[4]See the chart below in Section II(A) (page 36 of the report), which sets out statistics for the last seven State Bar years on grievance filings and dispositions at various stages, including the classification stage.

[5]A copy of the current grievance form is attached to this report at **Tab 1**. The form can be accessed through the Texas State Bar website at https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=46687.

[6]Tex. Rules Disciplinary P. R. 1.06(R).

[7]Statistics over the past seven years of State Bar operation, including statistics regarding the number of grievances filed and filtered out through classification, are set out in Section II(A) below. For a detailed discussion of the classification system, please see the GOC's Report on the Grievance Classification Process at pp. 6-14 (Oct. 1, 2015) [hereinafter "Classification Report"] (copy available as attachment to the Committee's Biennial Report dated June 1, 2016, http://www.txgoc.com/services.html).

[8]Statistics from the CDC show that approximately 20 percent of these complaints are filed by inmates in state and federal prisons and jails.

nearly 75 percent of those are dismissed with a finding of "no just cause" after investigation.[9] It is this group of grievances that attorneys proposing change are most concerned with—those that result in an attorney being required to prepare a response, cooperate with the investigator, and await the outcome for up to several months. In contrast, using these same numbers, a December 2019 Texas Lawyer article reported concerns among members of the Bar about whether *enough* grievances are filed. These members of the Bar point out that despite a nearly 20 percent increase in the number of licensed attorneys in Texas in the last decade, the number of grievances filed in the same time frame remained conspicuously flat.[10]

Based on the GOC's limited review of the grievance procedures in place in 50 states and the District of Columbia, at least five state systems appear to currently require complainants to swear under penalty of perjury or false statement. On the other hand, approximately 30 percent of states do not require any verification at all—much less one sworn under penalty of perjury—on grievances. Of the five state disciplinary systems that require sworn complaints, four of those specifically offer complainants immunity from suit for anything stated during the grievance process. Comparing the number of grievances filed per population, the ABA's 2017 Survey on Lawyer Discipline Systems data shows Texas had the highest population of attorneys (of those states reporting) at 100,000. The next highest attorney population was Florida, at 87,893. In looking at the number of grievances filed, Texas was still the highest at 7,640, but Illinois was second with 5,199 (attorney population 72,062). Florida, which requires complainants to attest that "[u]nder penalties of perjury, I declare that the foregoing facts are true, correct and complete," reported 3,976 grievances, about 3 percent fewer per attorney than Texas. When looking at the other states that require a sworn complaint (one state did not participate), Texas falls in the middle of the pack, with two states receiving more grievances per attorney and two receiving fewer.[11]

Over half of states make disciplinary hearings public.[12] At least one state requiring sworn complaints makes the grievance record public once resolved; available for one year if no violation was found; and 10 years otherwise.[13] In Texas, the CDC is required to maintain confidentiality over the grievance process through a sanction of a private reprimand or less for those matters resolved through agreement or evidentiary hearing, and until an election to district court if such an election is made.[14] Thus, there is less risk of negative publicity from meritless grievances in Texas than in a state that makes disciplinary proceedings more public. In addition, grievances that are classified as inquiries—approximately three-fourths of all those filed—are not maintained as part of an attorney's disciplinary record in Texas and do not count against an attorney as a filed grievance.

---

[9]See Classification Report, *supra* note 7, at p. 15 and Tab 2, which sets out data on grievance filings and dispositions at various stages of the grievance process.

[10]Morris, A., "Is Texas' Ethics Authority Outnumbered?", *Texas Lawyer*, pp. 13-15 (Dec. 2019.).

[11]ABA Standing Committee on Professional Regulation,. "2017 Survey on Lawyer Discipline Systems (S.O.L.D)," Chart I – Part A (July 2019).

[12]ABA Commission on Evaluation of Disciplinary Enforcement,. "Lawyer Regulation for a New Century" (Jan. 1, 1992) [hereinafter Lawyer Regulation].

[13]https://www.floridabar.org/public/acap/acap001/.

[14]Tex. Disciplinary Rules Prof'l Conduct R. 2.16.

The American Bar Association ("ABA"), concerned with maintaining the independence of counsel, integrity of the profession, and the proper and efficient administration of justice, studies and reports on regulation of the Bar through various committees. In their report "Lawyer Regulation for a New Century," the ABA recommended judicial regulation of the profession be strengthened and the scope of public protection expanded. The ABA asserts that the thousands of complaints summarily dismissed each year point to a gap between client expectations and existing regulation, suggesting the gap be somewhat narrowed by expanding the types of attorney behavior regulated to include the minor infractions, complaints of quality, and fee disputes that are currently dismissed.[15] The ABA's report was an update following a similarly comprehensive report in 1970. The 1970 report called for the end of unnecessary formalities in grievances, including the verification of complaints.[16] That report commented that the usual justification for requiring such formalities was to make the complainant "aware of the gravity of filing a complaint" and "weigh seriously the accuracy of his allegations," but expressed concern that it might cause the withholding of legitimate complaints. The report further stated that any justification for a verification be weighed against the factors of an unsophisticated complainant asking a group of lawyers to take action against one of their own; having limited knowledge of the standards of the profession and applicable laws; being concerned about his ability to state his complaint adequately; and being reasonably frightened out of complaining if the complainant also had to swear that the allegations were true and correct. Picturing the uneasy complainant concerned with possible criminal prosecution for errors in their complaint, the ABA committee concluded, "the policy of accepting only verified complaints intimidates not only the malicious complainant but also the sincere complainant."[17] The ABA committee called for absolute immunity for complainants, noting that generally attorneys have better protection in a disciplinary proceeding than a party in an ordinary lawsuit.[18]

The State Bar of Texas Sunset Advisory Commission Report of 1978 similarly stated that reasonable information requested of a complainant includes "only general information which identifies the individual, the nature of the reported grievance, and procedures which may be used if further contact with the complainant is necessitated during the investigation."[19] The report noted that, "formalities […], when closely scrutinized, may be found to have potentially restrictive effects on the interest of the public in seeking answers to questions related to the professional conduct of attorney practitioners."[20]

Florida, which requires sworn complaints, provides immunity to complainants for statements made within the grievance system. In upholding such immunity, the Florida Supreme Court cited the imbalance of power and risk of chilling valid complaints. "We acknowledge the possibility that groundless or baseless complaints against attorneys may sometimes be filed by

---

[15]Lawyer Regulation, *supra* note 13, at comments to recommendations 2 and 3.

[16]ABA Special Committee on Evaluation of Disciplinary Enforcement, "Problems and Recommendations in Disciplinary Enforcement," p. 71 (June 1970.).

[17]*Id.* at 72.

[18]*Id.* at 74-76.

[19]State Bar of Texas Staff Report to the Sunset Advisory Commission, p. 92 (July 28, 1978)..

[20]*Id.* at p. 92.

individuals. However, Bar complainants must be encouraged to step forward with legitimate complaints, which will further the important public policy of disciplining attorney misconduct."[21] Likewise, the Texas Disciplinary Rules of Professional Conduct presuppose that "the purpose of [the] rules can be abused when they are invoked by opposing parties as procedural weapons."[22] Yet they also anticipate that "the existence of a violation cannot be established with certainty until a disciplinary investigation has been undertaken. Similarly, an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."[23]

Recommendation:

There is no doubt that an attorney's reputation plays a critical role in defining the value of his or her services to clients and community, and that from time to time attorneys are required to divert time and resources to responding to a grievance. The CDC believes that very few false or frivolous grievances are filed. There is also no doubt that the grievance process should include efficient and effective mechanisms to weed out and dispose of meritless grievances, to minimize the impact of such grievances on attorneys and the attorney-client grievance system as a whole. However, following consideration of the comments received by the Committee in its meetings around the state and its additional research, the GOC concludes that adding a sworn attestation under penalty of perjury to the grievance form would be inadvisable. There is insufficient evidence to suggest that the addition of such a sworn attestation would deter any false or frivolous claims in such a way that would not also hinder the necessary public access to the grievance process. There should always be focus on continuously improving the manner and timing by which meritless grievances are dismissed so that system resources are not depleted unnecessarily. The CDC has recognized this need for continuous improvement and has made improvements over time, including by putting in place procedures that incorporate time limits on the CDC's classification and "just cause" decisions. Given the profession's responsibility "to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar" and the public interest which it serves, imposition of a sworn attestation requirement in the Committee's view would not only be an unnecessary step but also a means of causing harm to the public interest in ensuring that the system of attorney self-regulation is working effectively.

[21] *Tobkin v. Jarboe*, 710 So.2d. 975 (Fla. 1998).

[22] Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 15.

[23] Tex. Disciplinary Rules Prof'l Conduct R. 8.03 comment 1.

B. TRAINING AND STAFFING OF GRIEVANCE PANEL MEMBERS

Background

As set forth in prior Committee biennial reports (2014, 2016, and 2018), the training of panel members is vital to the grievance system. Panel members must be well versed in the grievance system and qualified to serve; otherwise, the parties may not receive a fair grievance disposition.

Given the recent changes in the grievance process, particularly the reinstitution of investigatory hearings addressed in Section II(A) of this report, the need for additional training was a frequent comment. The Committee heard from a number of panel members who expressed the desire for video training (such as mock investigatory and evidentiary hearing videos) on an annual basis. Such training would particularly benefit new panel members.

Panel members generally meet once a month—usually on the same day each month. The panels can hear several matters in one session, particularly now that investigatory hearings are so prevalent. The hearings often last all day. At least 20 days in advance of the hearing the CDC sends material on each matter to panel members. These packets can be voluminous and take several hours or more to review in order for the panel member to be prepared for the hearing. In terms of overall commitment, each month a panel member could spend two days or more of time in preparation and actual hearings.

Some panel members—both lawyers and public members—voiced concern that public members are often overwhelmed by the time commitment of grievance panel service, particularly as a result of the reinstitution of investigatory hearings. Because public members do not have a legal background, review and comprehension of materials may take them more time.

The current annual training given by the local CDC offices was considered by most panel members to be sufficient. Training sessions usually begin during a lunch and extend into the mid-afternoon. An average training session is two to three hours. The presentations used in trainings have been developed in both book and flash drive format; are comprehensive; and can be utilized for uniform training throughout the state.

It was suggested that the CDC should consider training on issues specific in certain areas of the law, such as immigration law for panels in South Texas. This was not a statewide issue.

Recommendations:

1. The CDC has created mock evidentiary panel videos for use in training of panel members. The CDC has also recorded investigatory hearings for use in training. The CDC should consider incorporating these videos as part of its annual training. These videos should include demonstrations of proceedings and comments by experienced panel members utilizing anonymous examples from prior hearings. These videos would also make the training more consistent and uniform across the state.

2. The CDC should consider making the training videos available on a website in order to allow prospective respondent attorneys and their counsel to better understand the general processes and procedures of investigatory and evidentiary hearings. Similarly, a video with frequently asked questions and answers would be helpful to respondents, for most of whom the process is a new experience.

3. With the reinstitution of investigatory hearings and the fact that such hearings now constitute a major component of the work of panels, a video training module on those hearings would serve the stated goal of making those hearings less adversarial.[24]

4. Training should be mandatory and is best conducted when feasible in person (or, during the time of the current pandemic, by video conference) for new panel members to emphasize the importance and the commitment made in joining a panel. In the alternative, a separate and more intensive orientation and training for new members only could be considered in lieu of the annual training session.

5. Consideration should be given to adding an additional public member to each panel so as to distribute workload and help ensure that sufficient public members have gone through the requisite training and that panel quorums can be achieved. If a public member cannot attend, for quorum purposes, at least one attorney member must be excluded from a hearing. Adding extra public members would increase the likelihood of a full panel available to hear each matter.

6. Training should stress the availability of TLAP as an option to address situations potentially involving mental health issues or substance abuse.[25]

7. Panels are the backbone of the grievance system. Those who serve must be committed to the process and consider it of the highest priority. The CDC should consider presenting panel members with a commitment memorandum to evidence their agreement. (A suggested form is set out below for consideration.)

8. All panel members should complete a questionnaire at the end of orientation training so that the effectiveness of the training can be evaluated. (A suggested form is set out below for consideration.)

[24]This report contains additional discussion regarding panel training in the context of investigatory hearings in Section II(A).

[25]See discussion regarding TLAP recommendations at pages 27-28 of this report.

Commitment Memorandum

Panels meet one full day each month (usually the same day each month).

Conflicts can occur that prevent a panel member from attending but service on a panel should be considered a priority.

If a member cannot attend, this absence may cause a loss of a quorum and a hearing may need to be postponed. This will result in the CDC incurring costs, such as rental fees for the hearing location, security, travel and other expenses. Hearings that are postponed cause a delay in resolution.

Prior to each meeting panel members will receive a packet of materials from the CDC relating to each matter to be heard. These materials should be reviewed prior to the hearing. The materials are often voluminous and may require several hours or more to review. Being prepared for each hearing is essential to a fair hearing for all parties.

Proposed Questions For Annual Panel Member Training:

Date:
Region:
Attorney or public member?

1. How were you recruited to serve on a grievance panel?

2. Was the information presented at the training clear and concise?

3. Was there a question/answer session during the training?

4. Should there be a separate orientation training for new members only ?

5. Will, or have you, used the training packet/procedural guide as a reference?

6. Would additional training such as Continuing Legal Education be helpful if made available to you while serving as a panel member?

7. What recommendations do you have to improve training?

C. ENFORCEMENT OF SANCTIONS/PROBATION REVOCATIONS

Background

In its 2014 biennial report, the GOC made the following recommendations:

> The CDC should develop an online database that grievance panel members across the state can access, when and if they want to do so, listing the public sanctions assessed by grievance panels, categorized by general types of professional misconduct.[26]

That proposed online database has not been implemented. This caused the GOC to consider how orders such as suspensions, fines, and audit/verification of client accounts are monitored and enforced. The GOC requested information from the CDC to address the following areas:

How the Probation Revocation Process Works

CDC statistics for revocation have remained steady for the past five years (see Active Complaints Cases by Hearing Type chart at page 15). The CDC compliance department internal guidelines and policies based on longtime practice for revocation referrals are as follows.

1. The CDC seeks revocations for only certain types of sanctions: For example, the CDC refers for revocation judgments of probated suspensions and judgments of partially probated suspensions, if a respondent has been reinstated to active membership rolls and is currently serving out their probated suspension and then violates a term of the probation. However, most judgments of partially probated suspensions contain "built-in" discipline where the respondent remains actively suspended until they have complied with certain terms and conditions. Such provisions provide the CDC with its most effective enforcement mechanism and require the least amount of enforcement follow-up because the lawyer remains suspended until all required terms have been met.

2. Probation revocations are filed with BODA. The CDC works on the basis that BODA will revoke or suspend a law license only if there is unpaid restitution or if there is evidence of an attorney practicing law while actively suspended. The CDC's longtime practice has been to not refer cases to BODA for revocations involving incomplete CLE, incomplete affidavits, noncompliance with mental health terms, rehabilitation terms, and/or unpaid attorneys' fees.[27]

3. Some judgments only require payment of restitution or attorneys' fees by the end date of the judgment. If the payments have not been made by that date the CDC no longer has jurisdiction. Its remedy is to file what the CDC characterizes as a SBOT-

[26]Committee's Biennial Report dated June 1, 2014, http://www.txgoc.com/services.html.

[27]If attorney fees are not paid, the CDC files a SBOT grievance.

initiated grievance referral, which is a new grievance based on the failure to comply with the judgment.

4. The CDC provided the GOC with several forms of judgment which are used by grievance panels. For example, some judgments state that restitution must be made by the date the suspension or probation ends. Other judgments require that payment be made well in advance (e.g., six months) of the end date of the suspension or probation. The length of the suspension or probation dictates whether such a provision would be feasible in any particular judgment. The CDC advised it is seeking to implement a standard form of judgment and, in particular, inclusion of provisions regarding payment of restitution that would allow for sufficient time to do a probation revocation with BODA if necessary.

Enforcement of Sanctions

The CDC views enforcement of compliance with the terms of its agreements and/or judgments with two goals in mind: (1) to protect the public and the profession by ensuring that respondents adhere to rehabilitative and remedial terms, and (2) to support respondents in their efforts to change their lives and recover their dignity and investment in their profession.[28] Both are desired goals.

Suspension for Failure to Pay Bar Dues

Bar dues are required to be paid by September 1 of each year. The Membership Department of the SBOT takes several steps each year to help attorneys avoid suspension and late penalties. In early March, the SBOT opens the firm billing portal and sends login information to the firm coordinators. In late April, it opens the online payment system for individual active and inactive attorneys and sends dues notifications to all active and inactive attorneys by email. On May 1, it mails a dues notification to active and inactive attorneys. In mid-June, the Membership Department mails a reminder notice to any active and inactive attorneys with an outstanding balance. On July 1, it mails a reminder letter to active and inactive attorneys with an unpaid balance. In mid-July, it sends the second reminder email. In mid-August, the Membership Department sends a third and final reminder email. Suspension notices are mailed and emailed on September 1.[29] In mid-October the Membership Department notifies all attorneys who are on suspended status that they can reinstate at any time.

Most attorneys pay their bar dues by September 1. Yet a number of attorneys are suspended each year for late or no payment (see following chart). Most suspended lawyers eventually pay their dues, usually in the same fiscal year. But each year several hundred lawyers never pay their dues. Of some concern, there was a significant increase in the number of attorneys who remain suspended (no payment at all) from bar year 2018/2019 to bar year 2019/2020 (388 attorneys

[28]CDC creates and provides respondents with individualized resources and information and actively works with other departments of the SBOT, as well as other agencies, as needed and appropriate.

[29]The September 1 deadline has been extended by the Texas Supreme Court this year due to the pandemic. Misc. Docket No. 20-9096 (Tex. S. Ct. Aug. 7, 2020).

versus 597 attorneys, or an increase of almost 54 percent). This may be a one-time event but the CDC should monitor to determine if there is any cause for the increase that needs to be addressed.

Dues Delinquent Suspension History – 5 years

	FY15-16	FY1617	FY17-18	FY18-19	FY19-20
Number of Dues Statements/Notifications Sent	101864	102772	102474	103637	105412
Number of Suspensions – Active	1112	1840	1821	2283	2076
Number of Suspensions – Inactive	445	546	588	603	858
Total Suspensions – Active and Inactive	1557	2386	2409	2886	2934
Attorneys Reinstated in the same fiscal year*	1127	1848	1898	2378	2320
Attorneys Reinstated in future fiscal years	133	173	144	33	17
Attorneys That Remain Suspended	297	365	367	388	597
% of Compliance by the 9/1 Suspension Date	98.47%	97.68%	97.65%	97.22%	97.22%
% of Non-Compliance/Dues Delinquent	1.53%	2.32%	2.35%	2.78%	2.78%

The failure to pay dues raises the issue of practicing law while suspended. Article III/Section 10A of the State Bar Rules provides as follows for those lawyers who pay after being suspended for non-payment:

> A. When a member who has been suspended for nonpayment of fees or assessments removes the default by payment of fees or assessments then owing plus an additional amount equivalent to one-half the delinquency, the suspension will automatically be lifted, and the member restored to former status. Return to former status is retroactive to inception of suspension but does not affect any proceeding for discipline of the member for professional misconduct.

The Membership Department believes that some lawyers do not pay dues because they are not practicing law in Texas and do not care if their license is suspended. This leaves open the question of why other lawyers do not pay and what can or should be done to monitor those other lawyers who do not pay their dues to prevent their practice of law while suspended. SBOT has no mechanism to actively monitor those lawyers, but the Membership Department does send an ineligible list to the court clerks and judges in October of each year. The Membership Department also updates that list on the website every night.[30] Furthermore, all attorneys have online profiles showing their current status: 1. Eligible to Practice (Active); 2. Inactive; 3. Non-Practicing (Active w/ an MCLE non-practicing exemption); or 4. Not Eligible to Practice (Administratively or disciplinary suspended or resigned voluntarily or in lieu of discipline). Finally, the SBOT will also verify status in the Membership Department when calls are received from courts, attorneys, or the general public.

Potential Practice of Law by Suspended Lawyers

There have been reports of suspended lawyers acting under the guise of work as a paralegal, ostensibly under the supervision of a non-suspended attorney. Unless such an employment arrangement is brought to the CDC's attention (through a complaint), according to the CDC it is virtually impossible to police this activity. There is no prohibition against a suspended attorney

[30] https://www.texasbar.com/AM/Template.cfm?Section=ineligible_Attorney_List1.

working in a particular industry, including the legal field, provided they do not engage in the practice of law or hold themselves out to be an attorney. If the employment arrangement is, in fact, just a guise (as opposed to a legitimate way for the suspended attorney to earn a living without violating the order of suspension), the CDC will pursue a grievance against the supervising attorney and will seek enforcement of the suspension order against the suspended attorney through an injunction or additional discipline.

In assessing the above issues, the GOC received the following data from the CDC:

Active Compliance Cases by Hearing Type

Bar Year	**15-16**	**16-17**	**17-18**	**18-19**	**19-20**
Investigatory	N/A	N/A	N/A	18	100
Evidentiary (**includes BODA)*	261	396	367	336	210
District Court	32	30	36	28	13

Compliance Case Outcomes and Fees Collected

Bar Year	**15-16**	**16-17**	**17-18**	**18-19**	**19-20**
Complete Compliance Cases	100	148	169	136	106
Closed Compliance Cases	167	332	338	231	123
Attorneys' Fees Ordered	$672,509	$531,643	$410,697	$391,472	$340,584
Attorneys' Fees Collected	$121,458	$147,389	$164,511	$260,137	$164.907
Restitution Ordered	$2,175,391	$3,703,072	$1,561,712	$421,873	$882,145
Restitution Collected	$132,376	$107,342.32	$124,450	$170,335	$242,927

Compliance Referrals

Bar Year	15-16	16-17	17-18	18-19	19-20
Revocation Referrals	4	2	5	3	1*
SBOT Referrals	5	3	7	6	3*
Testimony to be used in sanctions	6	5	6	9	6

**Additional cases are pending referral until the Emergency Supreme Court Orders related to COVID-19 pandemic have been lifted.*

Restitution/Attorney's Fees/Owed/Remaining

Bar Year	Sanction Type	# of Attorneys	Restitution Owed	Restitution Remaining	Attorney Fees Owed	Attorney Fees Remaining
15-16		**293**	**$ 1,356,775.73**	**$ 1,154,721.75**	**$ 591,468.64**	**$ 270,893.86**
	Agreed	221	$ 672,074.14	$ 562,074.15	$ 233,948.83	$ 26,954.37
	Contested	74	$ 649,062.56	$ 566,108.57	$ 333,589.41	$ 226,393.09
	Default	16	$ 35,639.03	$ 26,539.03	$ 23,930.40	$ 17,546.40
16-17		**318**	**$ 1,026,893.96**	**$ 788,404.59**	**$ 466,521.22**	**$ 151,691.19**
	Agreed	252	$ 217,608.65	$ 53,988.00	$ 289,870.94	$ 42,969.43
	Contested	49	$ 711,458.89	$ 637,234.37	$ 147,720.37	$ 85,731.82
	Default	22	$ 97,826.42	$ 97,182.22	$ 28,929.91	$ 22,989.94
17-18		**312**	**$ 823,188.24**	**$ 667,643.52**	**$ 563,347.64**	**$ 285,440.91**
	Agreed	239	$ 431,753.24	$ 342,093.52	$ 251,113.56	$ 55,630.44
	Contested	70	$ 335,235.00	$ 270,850.00	$ 293,425.51	$ 212,301.90
	Default	12	$ 56,200.00	$ 54,700.00	$ 18,808.57	$ 17,508.57
18-19		**348**	**$ 371,199.76**	**$ 139,670.00**	**$ 485,713.14**	**$ 171,510.42**
	Agreed	276	$ 238,292.02	$ 40,530.00	$ 281,967.43	$ 45,309.14
	Contested	70	$ 122,867.74	$ 89,100.00	$ 193,712.21	$ 117,767.78
	Default	14	$ 10,040.00	$ 10,040.00	$ 10,033.50	$ 8,433.50
19-20		**317**	**$ 916,213.75**	**$ 674,453.05**	**$ 426,511.15**	**$ 227,402.73**
	Agreed	271	$ 246,278.21	$ 81,261.96	$ 239,790.06	$ 57,244.14
	Contested	43	$ 541,434.42	$ 510,787.09	$ 169,672.73	$ 154,590.23
	Default	8	$ 128,501.12	$ 82,404.00	$ 17,048.36	$ 15,568.36
Grand Total		**1321**	**$ 4,494,271.44**	**$ 3,424,892.91**	**$ 2,533,561.79**	**$ 1,106,939.11**

Recommendations:

1. The GOC believes that the compiling and evaluation of data regarding collection and enforcement of judgments will assist the SBOT and the CDC in assessing the

effectiveness of enforcement actions. In essence, unless the CDC has the ability to verify the actual enforcement of sanctions and, in particular, the assurance that restitution is being made in those cases that imposed a monetary payment, the grievance process will be perceived as lacking "teeth" (short of disbarment) by the public and general bar population. For many complainants, restitution is often the most significant indicator to them that the grievance process works—even if the restitution is "only" a few thousand dollars or less. In total, however, the amounts as shown in the chart above are significant to both the public and the SBOT, and collection should be a priority for perception and economic reasons.

2. Judgments should be made uniform so as to require compliance with all terms of the suspension (whether served or probated) before the suspension will be completed or the probation considered to have been served. In the alternative, judgments should require that restitution be paid in a sufficient period of time prior to the completion date of the suspension or probation so as to allow for time, if necessary, to file for revocation with BODA.

3. The CDC should monitor the enforcement of orders, tracking of payments for restitution and attorneys' fees, and the practice of law by attorneys suspended for non-payment of dues.

D. ASSUMPTION/CESSATION OF PRACTICE

Background

Several developments have occurred in the area of "attorney assumption" since GOC's last report in 2018.

The CDC has made significant strides in encouraging attorneys to appoint a "custodian attorney" to assume responsibility for their files when the attorney passes away or becomes unable to continue the attorney's practice, and by providing valuable resources to such custodians.[31] The CDC maintains (and continues to grow) a list of volunteer attorneys throughout the state willing to serve as custodian attorneys when the primary attorney becomes unable to maintain their practice due to a variety of reasons including illness, incapacity, suspension, or even death.[32] Equally important, TLAP maintains (and continues to grow) its resource list of licensed therapists and other mental health/substance abuse treatment centers to provide assistance to affected attorneys.[33] As with any mental health or addiction issue, when crisis occurs, there is little time to plan ahead. Together, through their myriad resources, the CDC and TLAP can help affected attorneys by providing for the continuous supervision of caseloads and the ability to immediately access licensed professionals who are ready and willing to help when attorneys experience crisis.

Approximately 17 percent of practicing attorneys and judges are over the age of 65.[34] Statistically one in nine men and one in six women in this age group suffer some form of dementia, and cognitive decline has become a growing concern in the profession.[35] TLAP offers resources and education in recognizing such decline and how best to assist and address those whose competency has been impacted. TLAP's Volunteer Project can be utilized to enlist volunteer attorneys from its network to help support affected attorneys in a compassionate and dignified manner.

Given the potential for negative outcomes to clients of attorneys who do not prepare an appropriate succession plan and possibly in an attempt to alleviate the burden of assumptions on the CDC, the Committee on Disciplinary Rules and Referenda has recently proposed Texas Disciplinary Rule of Procedure 13.04.[36] This proposed rule is noteworthy because it explicitly grants an attorney permission (and possibly encouragement) to appoint their own designee to serve as a "custodian attorney" in the event that they become unable to continue practicing. That attorney "would be charged with assisting in the final resolution and closure of the attorney's

---

[31] https://www.texasbar.com/AM/Template.cfm?Section=Closing_aa_Law_Practice&Template=CM/HTMLDisplay.cfm&ContentID=31525

[32] *See* GOC 2018 Report, Assumption Section, Recommendation #3.

[33] TLAP Section, Resource Project, infra.

[34] http://texasbarsections.com/wp-content/uploads/2018/07/16-Research-Statistical-Profile-of-the-Bar.pdf

[35] https://www.alzheimers.net/8-12-15-why-is-alzheimers-more-likely-in-women/; https://www.alz.org/alzheimers-dementia/facts-figures

[36] Public hearings were held on this proposed rule on April 7, 2020 and June 18, 2020. A vote will be held on this and other rule changes in February 2021.

practice." Importantly, under the proposed rule, the volunteer attorney would not incur any liability by volunteering "except for intentional misconduct or gross negligence."

Recommendations:

1. The CDC/SBOT should continue to grow its network of volunteer attorneys willing to serve as temporary "custodian attorneys" in the event that an attorney can no longer practice.[37]

2. The Committee encourages continued coordination and resource sharing between the CDC/SBOT and TLAP, particularly concerning lists of volunteer attorneys.

3. The CDC/SBOT should increase the number of continuing education opportunities regarding setting up a succession and/or retirement plan (e.g., how and why) earlier in an attorney's career so that attorneys can be aware of the need and availability for such planning.

[37]The State Bar is actively seeking volunteers. Interested attorneys can visit the State Bar website for more information: https://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides1/ClosingaLawPractice/Volunteers_Needed.htm

E. THE GRIEVANCE PROCESS AS PART OF LAW SCHOOL CURRICULUM

Background

The GOC interviewed professors at several Texas law schools involved in legal ethics courses and teaching on the topic of the grievance process as it relates to students and their law school curriculum. Overwhelmingly, the professors were gracious with their time but advised that their schedules were limited regarding their instruction time, particularly in preparation for the bar exam. No professor interviewed reported devoting any extended discussion in the classroom to the Texas Disciplinary Rules or the grievance process. One professor did employ a detailed grievance overview and provided students with redacted petitions to review and deliberate the allegations and render sanctions, if warranted. However, the consensus was that, as ethics professors, their main responsibility was to focus their students on the ABA Model Rules of Professional Responsibility and the distinctions with the Texas rules. Courses are taught using a national textbook on the Model Rules. The textbook does not cover the grievance process of individual states. In sum, a Texas-specific curriculum is for the most part not taught at all.

Further, it was suggested that the State Bar recommend, to the independent law school academic committees, a 50-minute video presentation on state disciplinary rules be utilized if time allowed during the semester or when a substitute for a class session was needed. It was also generally noted that there was not sufficient time to cover the Multistate Professional Responsibility Examination ("MPRE") and the state rules in a single-semester course. But the suggested video could be used in order to allow students to view on their own or to receive credit for a makeup class. Such a video could be accompanied by a pass/fail test to be self-administered at the student's convenience.

Recommendations:

1. The GOC recognizes and appreciates that law schools may have limited time to devote to the Texas Disciplinary Rules and the disciplinary process. Nevertheless, instilling such knowledge at the beginning of a lawyer's education should make for better awareness of the ethical responsibilities that come with being a lawyer and the consequences for violations.

2. The GOC recommends that the SBOT consider developing a video relating to the Texas Disciplinary Rules in order to educate all law students on the significant ethical responsibilities each bar examinee is about to engage in, both personally and professionally. The video should have a short, but mandatory, pass/fail test component to be completed at the student's convenience, prior to completion of all course work.

3. The GOC further recommends that the SBOT consider establishing a committee of law school ethics professors to create a video regarding the grievance process, to ensure that the course data and information are relevant to the current student bodies at the various Texas law schools. In particular, students should know the areas of law most likely to have complaints, the nature of most complaints, how complaints are filed and processed within the grievance system and the sanctions that can be

imposed. In that way students will understand the impact of the disciplinary rules on the actual practice of law, and, in particular, the potentially serious consequences of any failure to comply, such as having to advise clients and courts of any discipline.

F. ROLE OF THE OMBUDSMAN

Background

The office of the Ombudsman for Attorney Discipline ("Ombudsman") was created as an additional layer of oversight "to help improve efficiency and responsiveness for attorneys and the public, and help the Office of the Chief Disciplinary Counsel better do its job to monitor and take action against unethical attorneys."[38]

The Ombudsman acts as a neutral representative, by responding to questions and concerns brought by the public on the grievance system's operations and by reporting trends and problems within the system. The Ombudsman reports directly to the Texas Supreme Court and is independent of the SBOT Board of Directors, the CLD, the GOC, the CDC, and BODA. The Ombudsman discloses information only to the Texas Supreme Court and the CDC. The Ombudsman cannot disclose any information, proceedings, hearing transcripts, or statements, including documents from various SBOT departments, to any person other than the CDC.

Under statutory mandates the Ombudsman is:

- A source of information for the public—answering questions from the public regarding the grievance systems operations, accessing the system, the filing of grievances, and the availability of other State Bar programs.

- A monitor of the attorney discipline system—responsible for receiving complaints about the system and investigating complaints to ensure proper procedures were followed. The Ombudsman also makes recommendations to the Texas Supreme Court as well as to the State Bar Board of Directors for improvements to the attorney disciplinary system.

- The Ombudsman is independent and reports directly to the Texas Supreme Court in a manner that is separate and apart from other disciplinary entities. This allows the Ombudsman to impartially evaluate any complaints from the public about the grievance system and impartially submit reports to the Supreme Court.

The Ombudsman is prohibited from:

- Drafting a complaint for a member of the public;

- Acting as an advocate for a member of the public;

- Reversing or modifying a finding or judgement in any disciplinary proceeding; or

- Intervening in any disciplinary matter.

[38]Ombudsman Annual Report (Oct. 1, 2019)-[hereinafter "Omb2019"].

In sum, the Ombudsman cannot and does not get involved in any actual disciplinary matter. Rather, the Ombudsman's mandate is solely on concerns and inquiries about the disciplinary process. In accordance with this mandate the Ombudsman's focus is "on public customer service."[39]

The Ombudsman maintains a website providing information on the role of the Ombudsman, including contact information, and links to the State Bar of Texas and other disciplinary entities. The website can be found under the Bar and Education section of the Texas judicial branch's webpage, as well as links to the webpage at both the State Bar of Texas and Supreme Court of Texas websites.

The Ombudsman's office is on the fifth floor of the Texas Law Center in Austin. The Ombudsman is available to meet in person, but most inquiries come via phone (55.6 percent) and email (29.8 percent). There were 464 inquiries received during the first reporting period, September 1, 2018-August 31, 2019. The overwhelming majority of inquirers were current or potential complainants (Omb2019).

Most of those who contacted the Ombudsman (45.8 percent) were seeking more information about the attorney discipline system, usually due to a disagreement with their attorney. Of note is the small percentage of people (9.9 percent) complaining about concluded disciplinary cases they felt should be further investigated or reviewed, most of which had been dismissed and time to appeal had expired. The Ombudsman is authorized to obtain a file from the CDC and conduct an inquiry only if a case is final. The Ombudsman reviews the file only to see if the State Bar followed proper procedures when processing and investigating the grievance. The Ombudsman is not allowed to review or comment on the merits of the grievance. After the inquiry, the Ombudsman informs the complainant whether proper procedures were followed. To date, of the 45 reviews the Ombudsman has completed, no procedural violations have been found. The process of requesting and reviewing the CDC files on each of those cases takes up much of the Ombudsman's time.[40]

Complaints about the lack of transparency of the attorney disciplinary process occurred with more frequency than any other category of criticism. Most were concerned with an unsatisfactory explanation, or no explanation at all, from the CDC's office about why a grievance was dismissed.[41]

The Texas Sunset Advisory Commission, the Texas Legislature, and those involved in the attorney discipline process created the Ombudsman to "foster further confidence in the attorney discipline system."[42] By responding to every inquiry, the Ombudsman ensures that the inquirer's

[39]Ombs 2019, *supra* note 38, p. 2.

[40]*Id*. at p. 4.

[41]*Id*. at p. 6.

[42]*Id.* at p. 2.

communication is received and reviewed. The average time to close inquiries is three days, which should promote confidence in the system.[43].

The GOC commends the Office of the Ombudsman for promoting and facilitating a more transparent, independent, efficient, and accessible attorney discipline system. The 464 inquiries in the first reporting period indicate a public need that is being served.

Recommendations:

1. During the GOC's meetings throughout the state with a broad base of persons, references to the CDC being overwhelmed were common and made the creation of the Ombudsman position an important endeavor; however, there was very little awareness of the Ombudsman's role by most of those with whom the GOC met. This is understandable given the newness of the position. The GOC recommends that the Ombudsman make an in-person introduction to the various disciplinary entities to increase awareness of this additional option for guidance in the grievance process.

2. The GOC and the Ombudsman were created to assist the Texas Supreme Court in overseeing the attorney-client grievance process but in different ways and with a different focus. The Ombudsman deals mainly with the public while the GOC primarily is directing its efforts to the Bar and the various organizations within the grievance process. The collaboration between the GOC and the Ombudsman should continue. The Ombudsman's open door to the public and the GOCs meetings throughout the State of Texas complement one another and findings should be shared and discussed. The GOC and the Ombudsman should meet in person at least once during every biennium.

3. The Ombudsman and the GOC should increase awareness of each other by posting links to each on the other's website.

4. The position of the Ombudsman has not been in existence for sufficient time to allow for a meaningful assessment of the value and necessity of the role or as to any recommended changes. The GOC will address more fully the role of the Ombudsman in future reports when longitudinal performance data is available.

[43] *Id*. at p. 6.

G. RAISING AWARENESS AND UTILIZATION OF TLAP

Background

The GOC congratulates TLAP on its recent thirtieth anniversary. Over the years, TLAP has grown into one of the country's most robust lawyer assistance programs—providing strictly confidential and free assistance to attorneys, law students, and judges struggling with mental health and addiction issues as well as cognitive decline. Over the years, TLAP's intervention has undoubtedly saved attorneys' lives.[44]

TLAP has recently launched many new services and campaigns, including new online resources.[45] There are too many to cite in this report, but the GOC will highlight a few particularly noteworthy ones:

- An anti-suicide campaign, including a free suicide-prevention CLE that has been viewed by thousands of attorneys statewide;[46]
- An anti-stigma campaign featuring "famous faces" in the legal profession (attorneys, judges, and law school professors), highlighting their struggles with mental health and substance abuse issues;
- Wellness programs for CLE launched in coordination with TYLA;
- Presentations as part of mandatory ethics training for newly-licensed attorneys;
- Outreach to law firms and other organizations (more than 150 presentations per year);[47]
- Outreach to law schools (in-person visits at least once per semester);
- The Sheeran-Crowley Memorial Trust that will pay for an attorney's mental health and/or substance abuse treatment (this fund has existed since 1995 and is awarded upon application);

---

[44]Increased numbers from TLAP's last reporting period (September 2019 – January 2020) show that TLAP's efforts are working:

- Phone – 420 helped (up from 285 the same time the previous year);
- TLAP website hits – 5,654 (up from 4,866 the same time the previous year);
- Facebook – 335 attorneys/day reached (up from 161 the same time the previous year).

[45]For example, TLAP has launched a website, "Well-Being Resources for Remote Living," that provides many helpful tips for attorneys struggling during the pandemic: https://www.texasbar.com/AM/Template.cfm?Section=articles&ContentID=49284&Template=/CM/HTMLDisplay.cfm.

[46] Studies show that suicide rates for attorneys are at least double the "average" suicide rate. *See http://www.lawpeopleblog.com/2008/09/the-depression-demon-coming-out-of-the-legal-closet/*

[47]During its last reporting period, TLAP presented to 7,227 attorneys during live presentations (up from 2,229 attorneys the same time the previous year).

- Text messaging access for attorneys and law students and telephonic professional counseling access;[48]

- TLAP's Resource Project (as part of an ongoing effort, TLAP continuously builds and confirms its resource list – comprised of therapists and other mental health/substance abuse treatment providers – to ensure that they are still willing to help attorneys in need); and

- TLAP's Volunteer Project (TLAP continuously builds and confirms its volunteer network, calling every volunteer on its list to confirm that the volunteer is still willing to help when needed and remains sober and healthy; this is time consuming and ongoing).

According to TLAP's director, during the COVID-19 pandemic, the number of attorneys seeking TLAP's help has not increased, but the magnitude of problems has become more intense. To provide increased assistance during this time, TLAP has been providing remote "Well-Being Wednesdays" every week at noon via Zoom, addressing issues such as managing anxiety and maintaining healthy boundaries.

Staffing

TLAP was originally organized as a committee with no office or employees. From 1984 to 1989, this committee was comprised of attorneys throughout Texas functioning as TLAP representatives for their city/area. With the significant stigma attached to mental health and addiction issues at that time, the committee received very few calls. In 1989, TLAP began with a single employee providing a confidential forum for attorneys seeking help.

Today, TLAP has a staff of four full-time employees. These employees have professional, and in some cases, personal experience with addiction and/or mental health issues. These staff members have made it their mission to help and protect attorneys seeking help. TLAP also maintains an extensive list of volunteer attorneys throughout Texas. These volunteer attorneys serve as needed to support TLAP services.[49]

Observations

Since its last report, the GOC has had many discussions with various stakeholders in the attorney grievance process. Those discussions have many times led to concerns over attorneys' mental health issues, substance abuse issues, and even cognitive decline due to age or illness. There is often a link between one, or sometimes several, of those issues and grievances filed against attorneys.

In addition to, or even in place of imposing a sanction against an attorney following an evidentiary or investigatory hearing, a grievance panel has the ability to make a recommendation that the respondent attorney contact TLAP. Discussions with TLAP representatives reveal that if

[48]In November 2019, TLAP started using text messaging to communicate with attorneys (48 people helped via text messaging as of January 2020 reporting).

[49]For example, see Section I(D) of this report on Assumption/Cessation of Practice.

a troubled attorney receives even six therapy sessions for depression, that attorney is more than 80 percent likely to experience some recovery. Unfortunately, many of those interviewed by the GOC, particularly grievance panel members, had little TLAP awareness.

The GOC commends all of TLAP's efforts to help suffering attorneys and heighten awareness of TLAP and its many programs. TLAP's efforts should be continued and supported.[50]

Recommendations

1. The GOC recommends that TLAP be included in grievance panel orientations and training sessions to explain the program's function, purpose, and ways in which it can help affected attorneys in the grievance process. This could be accomplished by presentation of a video or by live participation by a TLAP representative. Panels should know that they can recommend or require substance abuse testing and/or a mental health evaluation and/or that a respondent attorney contact TLAP as part of their "punishment." (Because of confidentiality concerns, it is important to note that the panel will be unable to follow up with TLAP or find out whether the respondent attorney actually complied with the order or recommendation.) TLAP should also provide the panel with helpful tips to identify whether a respondent attorney might be suffering from mental health or substance abuse issues so that the panel can reach a fair and compassionate outcome for the attorney.

   Consistent with increased communication/awareness among entities, the GOC will meet with TLAP at least once a year so that the GOC can more effectively promote TLAP's valuable services among stakeholders in the attorney-client grievance process. The GOC will also attend a TLAP meeting every year in order to become further educated about TLAP's many services.

2. The GOC recognizes that mental health and substance abuse issues are often prevalent for attorneys in solo practice. The GOC recommends that the SBOT, with TLAP's assistance, create a system by which young solo practitioners can be "matched" with older, experienced (perhaps even retired or semi-retired) attorneys. Such a relationship could be very beneficial to both mentor and mentee. Retired or older attorneys would be able to share their wisdom and support the younger mentee, while the younger mentee would benefit from having a "peer" presence in an otherwise solo environment and a credible source to approach with questions without feeling isolated or the need to "go it alone." Volunteers from TLAP's Volunteer Project could be used to serve as mentors in this capacity.

3. Much of TLAP's advertising is done through SBOT-sanctioned events and online, but for solo attorneys, particularly those working in more rural parts of Texas, it might be more challenging to access TLAP's breadth of resources. The GOC recommends that TLAP broaden its text messaging access not only to correspond

[50]TLAP recently received a sizeable grant in the amount of $54,000 from the Texas Bar Foundation. The GOC commends the Bar Foundation for its recognition of the service that TLAP provides and is confident that TLAP will use that grant to help save even more attorneys' lives.

with those affected attorneys actively seeking help but also to advertise TLAP's outreach programs/events to a broader audience. This could be offered as an "opt-in" service for those who are interested in receiving such information through text messaging. In that way, even if an attorney is not as connected to the SBOT publications or a local bar association, they would still be able to easily receive information about TLAP.

4. The GOC recommends consideration of implementing a form of "judicial liaison" who can help promote TLAP among the judicial community. The GOC additionally recommends that TLAP consider presenting on topics that would be more specific to judges, including behaviors to look for among fellow judges as well as among practitioners that they may consistently see in court. Judges are in a unique posture to spot mental health or substance abuse behaviors in attorneys that fellow attorneys might not be able to do. The GOC also recognizes that law professors are in a similarly unique posture that could potentially impact and help shape the minds of future attorneys. The GOC recommends that TLAP consider developing content specific to judges and law professors as both positions share the potential to observe and influence numerous attorneys and future attorneys (e.g. "How Judges Can Best Use TLAP" and "How Law Professors Can Best Use TLAP"). Additionally, because both judges and law professors find themselves operating in somewhat isolated universes, the GOC recommends that TLAP consider providing a national hotline addressing the mental health of judges and law professors. Consider the old adage "you can't help others if you can't help yourself." Judges and law professors need a safe place to turn to for their own mental health needs before they can adequately help and spot the same issues in others. Finally, the GOC recommends that TLAP present at judicial conferences, including conferences for municipal court judges.

5. According to TLAP's experience, there is a well-established and widely accepted culture of alcohol use both in law schools and the legal profession. The GOC recommends that TLAP collaborate with law schools and law firms to help change the thinking habits, actions, and language around alcohol consumption. Offering non-alcoholic beverages during happy hours and social events and planning coffee/tea conversations and otherwise encouraging healthy ways to burn off stress could help initiate this change. Collaborative efforts to hold the legal community accountable for the health and stability of our future attorneys will positively impact the grievance system.

H. BOARD OF DISCIPLINARY APPEALS

Background

BODA consists of 12 attorneys appointed by the Supreme Court of Texas. BODA members on average possess 25 or more years of legal experience and represent legal as well as geographic diversity. Collectively, the members contribute over 2,000 hours annually in performing their duties. BODA maintains a website, www.txboda.org, at which detailed information can be obtained regarding BODA members and its operations.

BODA has been part of the Texas grievance system since 1992. BODA's original, and up to recently, only executive director retired in January of 2020. A new director was appointed in April 2020. The GOC will maintain contact with the director to provide recommendations and any needed assistance in the transition to new leadership.

BODA has both appellate and original jurisdiction. BODA's appellate jurisdiction extends to classification appeals and evidentiary appeals from decisions of grievance panels. Classification appeals are decided in three-member telephone conferences. All other BODA matters are decided at quarterly en banc hearings at the Supreme Court of Texas courtroom. BODA rules do allow for hearings by three-member panels on an expedited basis if good cause is shown. Classification appeals by far account for the largest number of matters and the largest time commitment of members by subject matter.

Original jurisdiction of BODA consists of compulsory discipline (attorney convicted of an intentional crime), reciprocal discipline (attorney disciplined in a jurisdiction other than Texas where the attorney is licensed), revocation of probation (violation of probation imposed by an evidentiary or agreed to as a result of an investigatory panel), and disability cases and reinstatements (matters in which an attorney suffers from a disability which, in general, results in the attorney being unable to practice law).[51] Compulsory discipline and reciprocal discipline account for most of the matters coming under BODA's original jurisdiction. Probation revocation and disability matters each average one or less per year.

Very few probation revocations are filed with BODA.[52] A revocation proceeding requires 30 days' notice to the respondent and is heard at one of BODA's quarterly en banc hearings. If probation is revoked, the respondent forfeits any time already served as part of the probation and then must serve the complete suspension as an active suspension.

Disability matters are usually referred to BODA by the CDC, generally as a result of one or more complaints (often from a lawyer or judge). These cases mainly involve mental health issues in which the respondent has exhibited extreme behavior. Often, these lawyers are unwilling or unable to acknowledge a disability and have not or will not seek help from TLAP. BODA appoints a district disability committee (including a mental health professional) to determine if the

[51]BODA has concurrent jurisdiction with Texas state district courts to hear reinstatement petitions.

[52]See discussion in Section I(C) on Enforcement of Sanctions/Probation Revocation regarding the CDC's handling of probations and, in particular, a respondent's failure to make restitution payments as a condition of probation.

lawyer is disabled. A lawyer will be appointed if requested to represent the respondent if he cannot afford a lawyer. The committee members and any lawyer appointed to represent the respondent serve pro bono.

Recommendations:

1. BODA currently handles a large volume of matters—primarily classification appeals and evidentiary appeals. The GOC intends to track the number of evidentiary appeals filed with BODA in light of the fact that many grievances are now being resolved at the investigatory stage. Fewer evidentiary hearings will likely result in fewer appeals.

2. BODA and/or CDC should track probation revocations to make sure the disciplinary system is meeting its obligations to the bar and the general public, particularly as it applies to restitution being made to the aggrieved party. In addition, BODA and the CDC should evaluate if the criteria for revocation should remain limited only—to failure to pay restitution or practicing while suspended.

3. The SBOT and the CDC should make the bar and judges aware of BODA's disability jurisdiction and process as an option for protecting the public from lawyers with significant disabilities who should not be practicing law.

4. BODA is a significant and necessary part of the grievance process. The experience and expertise of its members need to be utilized to the fullest extent possible. Consideration may need to be given to expanding BODA's jurisdiction if there is a downward trend in the number of cases, such as evidentiary appeals or areas such as probation revocations, in which BODA's jurisdiction has not been fully utilized.

II. ANALYSIS OF IMPLEMENTATION OF 2017 LEGISLATIVE CHANGES

A. REINSTITUTION OF THE INVESTIGATORY HEARING

Background

The reinstitution of the investigatory hearing, as a frequently conducted part of the grievance process, has been one of the most—if not *the* most—discussed and controversial developments in the process since the Committee's last report in 2018.

An investigatory hearing is convened by the CDC and conducted as a confidential proceeding before a grievance panel.[53] The CDC invites both the complainant (and any counsel) and the respondent (and any counsel) to attend.[54] As discussed below, the CDC describes the investigatory hearing in the letter invitations as being a "non-adversarial" opportunity to involve a panel in an early evaluation of a grievance matter before the matter proceeds to what the CDC describes as "adversarial" proceedings—either an evidentiary hearing before a panel or trial in district court.

This investigatory hearing (also commonly referred to by the CDC and others and sometimes in this report as an "IVH") is conducted as part of the CDC's evaluation of whether "just cause" exists for placing a grievance matter that has been classified by the CDC as a "complaint" on a track for either an evidentiary hearing or trial in state district court.[55] In short, once the CDC has classified a filed grievance as a "complaint,"[56] the CDC, at its discretion, can set such a "complaint" for an investigatory hearing or IVH.

The investigatory hearing may (but, as discussed below, does not always) involve:

- Presentations by CDC attorneys;
- Presentations by complainants and respondents or their respective counsel;
- Questioning of witnesses by the panel members or CDC attorneys (questioning not just of the complainant and respondent, but also of other witnesses voluntarily appearing or subpoenaed by the CDC);
- Conferences between CDC counsel and the panel about the matter; and

[53]An investigatory panel cannot hear the same matter if it goes to evidentiary hearing.

[54]Copies of the form letters sent to the complainant and respondent are attached at **Tab 2**.

[55]The State Bar Act provides that if the CDC reviews and investigates a grievance classified as a complaint, and finds there is no "just cause" for the complaint, then the CDC "shall place the complaint on a dismissal docket." Tex. Gov't Code § 81.075(a), (b).

[56]For a thorough examination of the "classification" first step of the grievance process, see the GOC's Classification Report, *supra* note 7.

- Efforts to reach resolution of the matter based on recommendations by the panel and follow-up discussions between CDC counsel and the complainant and/or respondent and their counsel, if any.

Prior to 2003, investigatory hearings were convened routinely, for most filed grievances. Following a Texas Sunset Commission review of the State Bar in 2003, the Sunset Commission recommended eliminating the use of investigatory hearings. Subsequent legislation resulted in the elimination of investigatory hearings and the CDC's related investigatory subpoena power.

The Committee's 2018 report was written when the CDC had not yet fully reinstituted investigatory hearings. Currently, the CDC is convening investigatory hearings in approximately 15 percent of matters classified as "complaints." Although this pace has been affected by the pandemic, the CDC began convening IVHs via Zoom.

Since its 2018 report was issued, the Committee has examined the manner and means by which the CDC has sought to, and has in fact used, the investigatory hearing process. The Committee did so by conducting numerous interviews of stakeholders in the attorney-client grievance process—including face-to-face (and during the ongoing COVID-19 pandemic, "virtual") interviews of grievance panel members, CDC personnel, and private practice attorneys who regularly represent respondents and complainants in grievance proceedings. The Committee included the topic of investigatory hearings as a subject for discussion at its regional meetings discussed in the introduction to this report and conducted additional one-on-one interviews with CDC staff and with attorneys who have appeared at investigatory hearings on behalf of clients (either respondents or claimants). The Committee reviewed the written guidance available for CDC staff and investigatory panels on the purpose and conduct of IVHs. As part of its evaluation, the Committee has also taken into account data and information compiled by CDC personnel concerning the use of investigatory hearings and case resolutions.

The observations and recommendations in this section are based on that review.

First, to put these observations and recommendations in their proper context, the following additional background may be helpful:

In its 2018 report, the Committee discussed various changes enacted by the Texas Legislature in 2017 to the provisions of state law governing the attorney disciplinary system. These statutory changes followed the January 2017 Report to the 85th Legislature from the Texas Sunset Advisory Commission (the "Sunset Commission").[57] A 2017 Sunset Commission staff report addressed the attorney-client grievance and disciplinary process in several respects, most notably under a section entitled "Texas' Attorney Discipline System Lacks Best Practices Needed to Ensure Fair, Effective Regulation to Protect the Public."

Among the Sunset Commission's findings under this section of the staff report were recommendations that the CDC should be re-vested with authority that the CDC once had to issue

[57]A copy of the relevant sections of the Sunset Commission report is attached at Tab 1 to the Committee's 2018 Biennial Report of June 1, 2018 [hereinafter "2018 Biennial Report"] [copy available at http://www.txgoc.com/services.html].

and enforce subpoenas in connection with grievance investigations and that the CDC should implement an "investigatory hearing" process "to help with early resolution of cases." As discussed in the Committee's last biennial report, the CDC had been vested with the power to issue investigatory subpoenas prior to 2003 legislation that eliminated that authority. In addition, the CDC had conducted investigatory hearings in every grievance matter classified as a complaint until the 2003 legislative changes that stripped that authority from the CDC.

The 2017 legislation restored the CDC's investigatory subpoena power and its ability to convene investigatory hearings.[58]

At the same time, in its recent reports, the Committee has also encouraged the CDC to evaluate opportunities to engage disciplinary panels in the merits of more cases. The Committee has consistently made this recommendation in light of statistics showing that only a small percentage of overall grievance filings result in merits-based hearings, rather than:

1. Classification of grievances as "inquiries" subject to dismissal without any action by a panel;[59] or

2. Summary disposition of complaints for lack of "just cause," most often through a telephone conference calls with a "summary disposition" panel.

In light of the 2017 changes to the State Bar Act, the Committee made the following observation and recommendation in its 2018 report to the Court:

> As indicated in the below section of the report discussing the summary disposition process, there is a need (that is fully recognized by CDC and other stakeholders) to augment grievance panel participation in the process. The "pendulum has swung too far," in the Committee's view, toward the direction of summary or other disposition of grievances by CDC staff, and away from contested hearings before grievance panels to determine the outcome of complaints presenting factual disputes. CDC should (and has indicated that it will) use the newly re-instituted investigatory hearing process as a means of increasing grievance panel involvement in the substantive review, administration, and resolution of grievances. Even in matters in which the existence of a Professional Conduct Rules violation may be not apparent from existing facts, the GOC believes that there are certain situations in which it would be beneficial for the complainant and respondent to appear in person before a grievance panel in an investigatory hearing. The use of an investigatory hearing would provide feedback to the complainant and respondent before a decision is made on whether a complaint presents "just cause." Using this process in cases that present a disputed fact issue on the existence of a Professional Conduct Rule violation would increase the sense of transparency and access to the

[58]Tex. Gov't Code §§ 81.080, 81.082.

[59]The Court previously requested that the Committee take an in-depth evaluation of the classification process, and the report was presented to the Court in October 2015.

> grievance process, as well as serve to get panels more involved, and at an earlier time in the process.[60]

The Committee also made the following recommendation in its 2018 report:

> As a means of evaluating the use of investigatory hearings to gain increased involvement by grievance panels in the process, the efficacy of the investigatory subpoena process, and the impact of investigatory hearings on the overall administration of grievances, the CDC should consider tracking on an annual or more frequent basis (a) the number of investigatory hearings conducted following the passage of Senate Bill 302; (b) the number of investigatory subpoenas issued in connection with that process; (c) compliance rate with investigatory subpoenas; and (d) the number of grievances that are resolved following the initiation or conduct of an investigatory hearing.[61]

Second, there was a very significant divergence of opinions among grievance process stakeholders on the following topics, among others:

- Whether the IVH process should have been reinstituted at all.
- What the proper purpose is for the IVH process.
- Whether the appropriate protocols and procedures have been put in place to achieve the purpose of an investigatory hearing.
- Whether the CDC has provided enough guidance to panels in conducting investigatory hearings.
- Whether the IVH, as often conducted, respects the rights and interests of all participants, and most particularly complainants and respondents.

The divergence of opinions on these subjects and others has been readily evident among the many dedicated professionals who work within the grievance process. As a prime example of the wide variety of opinions on these subjects, private practice attorneys who frequently represent respondents in investigatory hearings expressed to the GOC often conflicting views on whether the reinstitution of IVHs has been an overall positive or negative development for the system. The topics of the reinstitution of the investigatory hearing, its purpose and how it is conducted, have similarly generated ongoing discussions among the Committee members.

Third, the reinstitution of the investigatory hearing is clearly and understandably an evolving process. The Committee fully recognizes that the reintroduction of the IVH necessarily takes time; that improvements will be inevitable over time, just as they are with any system or process; that the CDC continues to evaluate and make changes to the IVH hearing format and process; that a considerable amount of discretion is afforded to individual IVH panels in

[60] 2018 Biennial Report, *supra* note 57, at 8-9.

[61] *Id*. at 9.

conducting the hearings; and that this level of discretion has led to variations in the conduct of IVHs that in turn may influence the diverging views of stakeholders.

Observations on Use of Investigatory Hearings Since 2017 Legislative Changes

As it has done in prior report cycles, the GOC analyzed the available data on the trends in the overall processing of grievance matters. With the re-introduction of the investigatory hearing as a tool in the CDC kit during the 2018/2019 State Bar year, the data in the following chart shows the volume and disposition of grievance matters. The Committee's analysis of this data underlies many of the observations and recommendations set forth below.

BAR YEAR	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Total Grievances Filed	7,394	7,512	7,760	7,559	7,640	8,015	7,505
Total Grievances Classified by CDC as Complaints	1,567	1,495	2,383	2,125	2,357	2,315	2,202
Investigatory Hearings Convened/Conducted	N/A	N/A	N/A	N/A	N/A	88	338
Cases Settled at IVH Stage (includes GRP)	N/A	N/A	N/A	N/A	N/A	63	192
Cases Dismissed at IVH Stage	N/A	N/A	N/A	N/A	N/A	41	132
Complaints Presented by CDC for Dismissal on Summary Disposition Dockets	1,175	1,217	1,554	1,932	1,728	1,799	1,722
Complaints Dismissed Through Summary Disposition Process	1,147	1,189	1,520	1,897	1,697	1,779	1,705
Elections/Defaults to Evidentiary Hearings Following Absence of Summary Disposition	415	452	471	532	538	341	208
Elections to Evidentiary Hearings Following Absence of IVH Settlement	N/A	N/A	N/A	N/A	N/A	N/A	5
Evidentiary Hearings Convened/Conducted	73	82	80	70	74	90	79
Evidentiary Settlements	149	214	219	208	162	201	111

As reflected by the numbers in the above chart, the CDC has been aggressive in implementing the use of investigatory hearings throughout the state. Through leadership by former CDC Assistant General Counsel and San Antonio Regional Counsel James Ehler,[62] the roll-out of investigatory hearings began in San Antonio, Houston, and Dallas in November 2018, and in

[62]The GOC generally operates on a "non-attribution" basis in its reports and endeavors to avoid attributing particular actions or comments to individuals who work within the disciplinary system or provide input to the Committee. The Committee believes that Mr. Ehler's enthusiastic and well-intentioned commitment to the investigatory hearing process (and to the effective operation of the disciplinary process as a whole) merits departure from that tradition and individual mention. This is especially true in light of Mr. Ehler's retirement from the CDC, which was effective February 2020. Mr. Ehler's presence in the disciplinary system will be missed, and the Committee very much appreciates his contributions on this and many other issues, and thus commends his contributions.

Austin in March 2019. The CDC has now conducted investigatory hearings with panels in all areas of the state. This roll-out includes investigatory hearings in each of the CDC's four regions (headquartered in Austin, Dallas, Houston, and San Antonio), as well as in each of the 17 districts established for the purposes of creating and staffing grievance panels. In 2019-2020 there were 338 IVHs, of which 157 were conducted in the four regional headquarters cities and 181 in other counties within those districts.[63] The CDC has thus conducted investigatory hearings not only in major Texas cities but also in more rural counties, including such counties as Wichita to the north, Willacy to the south, Marion to the east, and Brewster to the west.

Observation One: Investigatory Hearings Have Increased Panel Involvement in More Cases

The reported data and the GOC's past analysis of the use of the classification system[64] and the summary disposition process,[65] and the analysis of the recent reimplementation of the investigatory hearing, continues to lead the Committee to conclude that in the years since the "no just cause" summary dismissal procedure was implemented, the pendulum had swung too far away from the use of evidentiary hearings to fully evaluate complaints on the merits. In its meetings with grievance panel members and leadership across the state in the most recent cycle, the GOC continued to inquire about the number of evidentiary hearings being conducted before panels. Some grievance panel members, even those who had served for many months on a panel, continued to report having not been involved in even one evidentiary hearing. Other more experienced panel members continued to report being involved in only a handful of evidentiary hearings, if that, in a given year.

The above-reported data supports the GOC's concerns over the low number of evidentiary hearings. The data shows that grievance panels participate in a limited number of evidentiary hearings each year, but that data also shows that a relatively small percentage of grievances classified as complaints ultimately result in evidentiary hearings before grievance panels. When comparing the number of classified complaints in a given year against the number of evidentiary hearings before panels has ranged from a high of 2.85 percent in the 2014-2015 State Bar year to a low of 1.48 percent during the 2019-2020 State Bar year.[66]

To their great credit, leadership of both the CLD and the CDC have continued to express a full recognition that since 2003, the pendulum swung too far away from active involvement of grievance panels through contested hearings in the investigation and resolution of complaints. The GOC applauds this continued recognition. CLD and CDC leadership have repeatedly indicated their interest in increasing the involvement of grievance panels in the complaint resolution process, and have used investigatory hearings as a means of accomplishing that goal.

---

[63]See chart attached at **Tab 3** which shows investigatory hearings that had been conducted in various Texas counties as of July 2020.

[64]Classification Report, *supra* note 7.

[65]The GOC reported its prior analysis of and observations on the summary disposition process in its 2018 report. 2018 Biennial Report, *supra* note 57, at 10-18.

[66]The data is tracked according to the State Bar of Texas fiscal year, which runs June 1 through May 31.

As documented by the data, it remains unclear to the GOC that the reintroduction of investigatory hearings will result in an increase in the number of evidentiary hearings. If anything, it would appear that if IVHs serve one of the functions intended by the CDC and expressed in the Sunset Commission report—"to help with early resolution of cases"—their continued and expanded use might actually contribute to a *decrease* in the number of evidentiary hearings. Determining whether such a longer-term trend actually exists and, if so, whether it is a positive or negative outcome for the grievance process, will require more years of experience with IVHs.

On the other hand, it is readily apparent to the GOC that investigatory hearings have reinvigorated panel involvement in the substance of more grievance matters. The process of convening grievance panel members to actively consider the substance of grievance cases, even in the context of investigatory hearings, achieves in a significant way the goal of moving the pendulum back towards increased panel involvement.

The advantages of keeping panels actively involved in the substance of more cases are myriad. To list just some of those advantages:

- Grievance panel members serve as "jurors" in the grievance process, and limiting their substantive involvement in cases does not serve that role.

- To maintain objectivity, balance, and transparency in the system, it makes sense to avoid placing too much authority over case dispositions strictly in the hands of CDC counsel reporting to the CLD.

- Public trust in the grievance process is better supported by a system that, by intention, involves both the attorney and public members of grievance panels in the substantive resolution of grievances that have potential merit and fact issues.

- There is good reason to believe that the summary disposition process often does not allow panelists to deal seriously with the issues in a particular matter, as opposed to simply receiving and affirming a "no just cause" recommendation by CDC counsel and investigators.

- Grievance panel members are more likely to be kept engaged in their roles and interest through substantive discussions and meetings as opposed to cases that only involve infrequent telephonic hearings as part of summary disposition panels. This engagement necessarily includes, for example, increased reference to and familiarity with the Texas Disciplinary Rules of Professional Conduct, as well as to the overall procedures for grievance matters set out in the Rules of Disciplinary Procedure.

- More substantive involvement by panels in more cases necessarily means that panel members interact with each other on a more frequent and meaningful basis, allowing them to more effectively collaborate and allowing public members to feel more comfortable asking questions and expressing their views.

- This increased involvement by panel members in "hands on" review of the factual background of complaints presented at IVHs will likely be perceived as more meaningful

participation by panel members than such activities as participating in short summary disposition conference calls. On the summary disposition conference calls, as discussed by the Committee previously,[67] the panel members are provided with records related to the grievance and are then asked to confirm the recommendation by CDC attorneys and investigators to dismiss the matter for lack of "just cause." "Hands on" involvement should serve to increase retention of experienced panel members who appreciate the opportunity to be more actively engaged in the review of grievance matters.

- More substantive involvement by panels necessarily means, as has been shown by the experience with IVHs, increased opportunities for complainants to be heard in person and see the process in action and for respondents to get more information on the nature and basis of grievances made against them.

In line with these goals, the GOC can express with confidence that grievance panel members—who, after all, are volunteering their time as an extremely important component of public service—generally support the effort to increase their substantive involvement in more cases through the reinstitution of the investigatory hearing process. Many panel members expressed appreciation for the opportunity to get more directly involved in the substance of grievances through IVHs. The GOC developed a strong sense from interviews that IVHs had in fact served the purpose of allowing members of grievance panels to work together and collaborate in ways that they had not previously.[68] In this manner the investigatory hearing process has served an important role in re-invigorating the involvement of regional grievance panels.

The GOC also believes that the re-introduction of the investigatory hearing has achieved the GOC's previous recommendation that at least two meetings of each grievance panel per year be conducted in person.[69] As previously recommended, such routine interactions will and have allowed panel members to become familiar with each other and become more comfortable interacting with and reaching consensus following meaningful review and discussion among their peers.

As with any general assessment, however, there are caveats. One caveat (as discussed further below) is that the GOC recognizes that the frequent use of IVHs has led some panel members to question whether expanding the pool of grievance panels and members might be advisable. Another caveat is that on frequent occasions various stakeholders (including grievance panel members and attorneys who represent complainants and respondents) reported some concern that grievance matters with little or no apparent merit were being scheduled for IVHs.

With respect to this latter concern, the GOC believes that the interest of getting panels involved in the substance of more cases (and the corresponding benefits listed above) far

[67]2018 Biennial Report, *supra* note 57, at 10-18.

[68]It should be noted, for example, that there were far fewer instances in the current GOC interview and reporting cycle of the somewhat awkward situations in the past in which some panel members indicated that they did not know or recognize their colleagues on panels.

[69]2018 Biennial Report, *supra* note 57, at 16. Of course, as indicated in the introduction to this report, the ongoing COVID-19 pandemic (and inevitable future public health challenges) must necessarily affect the conduct of "in-person," as opposed to "virtual," hearings.

outweighs concerns that on occasion a grievance matter with little or no apparent merit gets set for an IVH. Conducting a substantive review of a matter that an IVH panel may ultimately view as having little or no merit has value to that panel and to the system as a whole. It is only by substantively reviewing a variety of grievances on differing fact patterns that panels can develop the experience that allows them to play a meaningful role in the processing and resolution of grievance matters. The associated reinvigoration of panel members and associated effects on retention of experienced panel members would be a corollary benefit. And, if a grievance matter has progressed even to the stage of an IVH despite having little or no merit, the investigatory hearing provides another mechanism of resolving it and allows the CDC to focus on matters involving genuine merit.

Observation Two: The CDC Has Tracked the Implementation and Results of Hearings to Help Determine Their Effectiveness

In light of the above observations on the importance of promoting involvement in more cases by panels through the use of IVHs, the GOC also evaluated the manner in which the CDC tracks the number and effectiveness of investigatory hearings.

In its 2018 report the GOC recommended that the CDC track the number of investigatory hearings and the number of grievances that are resolved following the initiation or conclusion of an investigatory hearing. The tracked data is summarized in the following table:

Bar Year	**2018-19**	**2019-20**
Subpoenas Issued	68	93
Resolutions from Investigatory Hearings	104	324
Dismissed	41	132
Private	15	69
Public	1	16
Fully Probated	7	36
Partially Probated	2	4
Active Suspension	1	1
Resignation	0	2
Disbarment	0	0
GRP	37	64
Restitution Ordered	$8,866	$136,972.96
Default Investigatory Hearings	0	1

The CDC is to be commended for tracking this data in ways that help to reinforce transparency within the grievance process as a whole. The tracking of this data will help the Court, the GOC, and others evaluate the effects of IVHs on the overall processing of grievance cases and caseloads. It will also allow for data on a central tenet of importance to the system: the involvement of attorneys and public members in shaping how the system of attorney self-

regulation actually works. This is a critical part not only of operating an effective system of self-governance but also of promoting respect for and confidence in that system among attorneys and the public.

Observation Three: Procedures for Instituting and Conducting Investigatory Hearings Are Not Fully Defined

The GOC fully appreciates that the reinstitution of investigatory hearings is an evolving process that only began in 2018, and that gradual development for how cases would be selected for IVHs and how those hearings would be conducted was inevitable. With those caveats in mind, the GOC reports on its observations on some of the essential questions related to the IVH process.

How Does the CDC Choose Which Grievances Go to an IVH?

Unlike in the pre-2003 past, when investigatory hearings were required for all grievance matters, the CDC now has discretion to decide which matters will go to an IVH. No formal criteria for IVH hearing selection exists at the CDC. Instead, the selection process appears to be (and may necessarily have to be) based on subjective judgments of CDC attorneys. The CDC's stated intention is that most complaints will go to an IVH unless the matters involved are too complex or have too many witnesses to handle in an "informal" setting, or if there is a very small likelihood that the complaint can be resolved by agreement after a hearing.

There is no internal process that requires CDC management to approve or sign off on the decision to refer a case for IVH. Those decisions are in the sound discretion of the trial attorney (sometimes in consultation with the CDC's regional counsel for the region in which the trial attorney works). The CDC believes that individual trial attorneys are in the best position to determine if a case would be appropriate for an IVH. According to the CDC, the trial attorneys know that certain cases are generally not appropriate for an investigatory hearing, such as cases that are too complex to present reasonably in the context of an IVH; cases that involve allegations of serious misconduct or misappropriation of large sums of money; or cases involving a missing or uncooperative respondent. The regional counsel also reviews reports on IVH proceedings on a regular basis in an effort to monitor consistency in selection of cases for investigatory hearings. CDC management in Austin is also available for consultation to discuss unusual, complex, high profile, or borderline cases.

Some of the factors taken into consideration in reaching a decision on whether to take a matter to an investigatory hearing, as reported by the CDC, are:

- The facts discovered during investigation.
- Uncertainty surrounding the credibility of statements made by the complainant and/or respondent.
- Uncertainty surrounding the factual allegations of the complainant and/or respondent.
- The possibility that a panel would dismiss or order GRP after hearing the testimony of the parties.

- The possibility of a settlement.
- Whether the alleged conduct appears intentional.
- Whether the respondent is cooperating and participating in the grievance process.
- Whether the injury to the complainant appears to have been rectified and/or could be potentially rectified by settlement.
- Prior panel rulings in similar cases and/or the perceived likelihood that a respondent would accept a similar settlement.
- The disciplinary history of respondent, if any.
- The respondent's conduct in prior disciplinary proceedings, if any.

The CDC believes that once a matter is set for an IVH, it cannot be cancelled, even if the CDC receives information after the setting that indicates such a hearing is not appropriate. This situation can arise, for example, if the CDC receives information after an IVH setting from a complainant or respondent that indicates a grievance is not supported by the facts.

How Are Panel Members Chosen for Investigatory Hearings?

Typically, each regional office within the CDC will schedule investigatory hearings for one day per month. Generally, the CDC seeks to conduct one to four IVHs in each panel session. Accordingly, the CDC regional counsel will coordinate through the chair of a particular grievance panel by giving a planned hearing date for that panel, and the chair then sends out an inquiry to the members on that panel as to availability.[70] If the entire panel is not available, the determination as to which members or how many members will attend the hearing is based on the need to maintain the appropriate attorney to public member ratio. Before the COVID-19 pandemic halted in-person IVHs, in certain districts in which members might have to travel some distance to attend a hearing, the location of the panel members could also determine which of the members would hear the cases.

Are Complainants and Respondents Required to Attend?

Complainants and respondents involved in the grievance matter submitted to an IVH are provided notice through form letters issued by the CDC,[71] typically 45 days in advance of the hearing.[72]

---

[70]Grievance panels are chosen for State Bar districts. Grievance panel members are assigned to a particular panel and serve beginning on July 1 of each year. If there are multiple panels within the district, they usually meet on the same day each month and IVH hearings are assigned on a rotating basis.

[71]Copies of the form letters are attached at **Tab 2**.

[72]The CDC has stated that its policy is to follow the notice requirements laid out in the Texas Rules of Civil Procedure. TEX. R. CIV. P. 503.3(a).

Although the CDC has investigatory subpoena power, it generally does not issue subpoenas to either the complainant or the respondent to attend an IVH. This is in line with the CDC's view that the hearing is intended to be "non-adversarial." Thus, a complainant and a respondent can choose whether to attend the hearing. For example, an attorney representing a respondent may choose to attend the IVH but advise a client not to attend. The potential reasons for such a decision are discussed below in another of the GOC's observations.

According to the CDC, in general, subpoenas are not issued or needed for attendance. The CDC will often issue subpoenas duces tecum for the production of documents at (or preferably before) the hearing. There have been rare instances in which the CDC has issued a subpoena to compel the appearance of a complainant or a respondent who became uncooperative after the decision had been made to proceed with an IVH. From the CDC's standpoint, there is little benefit in attempting to compel an uncooperative or unresponsive respondent to attend an IVH, which the CDC views as a voluntary investigatory proceeding. The CDC believes that in most instances, cases involving unresponsive respondents are better addressed and resolved in litigation. In the CDC's experience, occasionally a non-responsive respondent will "wake up" and provide a response once the matter is set for an investigatory hearing, but most non-responsive or uncooperative respondents do not wish to participate in the IVH process and prefer to engage, if at all, once served with a petition for an evidentiary hearing or district court proceeding.

Attendance by complainants is not always in person. The GOC was told that on numerous occasions, complainants who could not attend in person were allowed to attend by phone.

What Materials Are Provided in Advance to the IVH Panel?

Generally, IVH panels receive electronic access to a packet containing the filings (the grievance and response submissions, if any) and records obtained by the CDC as part of the investigation (for example, phone or medical records) at least 20 days before the IVH is scheduled. Included in this material is a CDC investigator's report containing a summary of the allegations against the respondent, a summary of the respondent's defenses, an analysis of the facts, and any CDC recommendation as to potential rule violations and/or range of sanctions. These packets can be voluminous, depending on how many records (including how much of the client file) have been collected as part of the CDC's investigation.

Where Are Investigatory Hearings Conducted?

Investigatory hearings are often conducted at a "neutral" site, such as a court reporter's office. But many IVHs are conducted at a State Bar/CDC office. The CDC believes that its regional offices are well-equipped for conducting IVHs and (in pre-COVID-19 pandemic times) were proven to be the most convenient locations for the panel members who reside, work, and serve in those cities. For the districts outside of Austin, Dallas, Houston, and San Antonio, the CDC has used a local court reporter's office for reason of space as well as neutrality and confidentiality. Use of such space comes at a per-hearing cost, however, which raises a budget issue. In some instances, the CDC has been able to avoid the cost of renting space when a panel member or a local attorney is able to provide a conference room located in their offices. Although not routine, the CDC has also used conference rooms at the offices of the Texas Highway Department, county law libraries, other county office buildings, a municipal court annex, or grand

jury or attorney conference rooms at local courthouses. Use of such public facilities should be limited as much as possible so as to maintain the confidentiality of the grievance process.

At the time of publication of this report, the CDC had initiated investigatory hearings using the Zoom online meeting platform due to COVID-19 restrictions.

The GOC notes that the issue of conducting what the CDC describes as "non-adversarial" hearings on "neutral ground"—in other words, someplace other than CDC offices—is a matter of importance to a number of attorneys who routinely represent respondents in grievance matters.

Are Investigatory Hearings Recorded?

When the reinstitution of the investigatory hearing process first began, some of the IVHs were transcribed by a court reporter. As the process has evolved, however, court reporters are no longer used to transcribe the hearings. Instead the proceedings are recorded (but not always, by all IVH panels) by a video camera operated most often by a CDC investigator assigned to the matter. Online meetings via Zoom are easily recorded through the online platform.

Are Investigatory Hearings Open to the Public?

Consistent with the confidentiality requirements imposed on grievance proceedings,[73] the hearings are not open to the public. Panels have a peace officer or security officer in attendance at the hearings, which can sometimes become heated with exchanges between complainants and/or respondents.

Is There a Common Procedure for the Hearing?

There are no uniform procedures with respect to investigatory hearings, which has led to a variety of hearing methods being used throughout the state. The CDC generally defers to a panel chair for how a particular hearing will be conducted. The CDC has provided discretion to regional CDC counsel to formulate procedures for IVHs. Generally, there are no time limits imposed on a particular investigatory hearing, but they usually last an hour, with more complicated matters lasting longer. The CDC reported that it attempts to conduct from two to four IVHs in a half-day session.

From reports provided to the GOC, there are some common elements to most hearings.The panel chair is provided a standard opening introduction by the CDC, which the panel chair reads. This opening provides in part as follows:

> We are here to investigate the allegations of professional misconduct. This is an informal and non-adversarial proceeding but testimony will be taken under oath and this proceeding is being recorded. Other than the recording device of the Chief Disciplinary Counsel's Office, cameras or tape recorders are not allowed into this room.

[73]Tex. Rules Disciplinary P. R. 2.12(F), 2.16(B).

> All participants are asked to conduct themselves with respect as if you are in a court of law. If you become adversarial or disruptive, you will be excused from the hearing.
>
> Pursuant to Rule 2.12(F) of the Texas Rules of Disciplinary Procedure, this hearing is strictly confidential and the record of this hearing can only be released for use in further disciplinary matters.

For some of the hearings, the CDC provides a summary of the grievance matter, and it was reported to the GOC that the panel chair reads this summary as well.

Questioning of witnesses—of the complainant and/or respondent if either or both are available, and of other witnesses appearing voluntarily or by subpoena—then takes place. As indicated in the standard opening provided to the panel chair, witnesses are typically placed under oath, although the rules do not necessarily require that witnesses be placed under oath. The applicable rule[74] provides that a "[p]anel may administer oaths and may set forth procedures for eliciting evidence, including witness testimony." The Committee has received information during its statewide meetings that IVH panels occasionally receive testimony or statements that are not made under oath.

Practices vary widely on who asks questions and whether all stakeholders in a hearing get to do so. In some parts of the state, it was reported that the panel members did all questioning, to the exclusion of CDC counsel and the complainant and respondent and any counsel attending with or for them. In other parts of the state, it was reported that the CDC counsel would conduct all of the questioning and then ask the panel members if they had any follow-ups. In some parts of the state, it was reported that complainants and respondents and/or their counsel could ask questions of witnesses.

In terms of presentations by the complainant and/or respondent and their respective counsel if any, procedures appear to vary widely on whether they are allowed time to make statements or presentations. From the reports to the GOC, complainants and respondents are rarely afforded the opportunity to call witnesses. Practices on allowing complainants or respondents or their counsel to make opening or closing remarks or presentations vary widely as well, at the discretion of the panel chair. Panel practices appear to vary on whether a complainant or respondent can address the panel without the other party to the grievance being present.[75] A number of attorneys who routinely represent respondents reported dissatisfaction with the lack of opportunity and/or lack of time to present their clients' positions. Others reported that they were afforded adequate opportunity to meaningfully participate. With regard to online IVHs, the participation of complainants and respondents can be even more varied, and technically challenging. For example, for hearings conducted via Zoom, complainants and respondents may not be able to take advantage of the "share screen" and "breakout room" functions to communicate with and display materials and parts of the record to the IVH panel.

---

[74]Texas Rules Disciplinary P. R. 2.12(F).

[75]For example, a respondent may wish to advise the panel about disability or substance abuse issues, and not have the complainant be present for that discussion.

In line with the general thought expressed by the CDC (and as provided in the Texas Rules of Disciplinary Conduct) that IVHs are "non-adversarial," the questioning is not conducted as strictly as it would be at a trial, within the guidelines of the Texas Rules of Evidence. Practices appeared to vary somewhat, however, on the ability of a complainant or respondent to lodge objections to questioning.

Following the questioning and any presentations by the complainant and respondent, the participants leave, and the panel generally goes into private session with the CDC counsel assigned to the grievance matter. In that private session, the CDC attorney seeks feedback from the panel as to their perceptions of (1) whether a disciplinary rules violation occurred and (2) if so, what an appropriate sanction would be in the panel's view.

Armed with the panel's input, and recommendations on possible rule violations and sanctions, the CDC attorney then engages in discussion, if warranted in the view of the CDC attorney, with the respondent and/or respondent's counsel. For example, if the IVH panel concludes that a disciplinary rules violation did not occur, the panel can recommend that the CDC should dismiss the matter.[76] As another example, if the IVH panel concludes that a disciplinary rules violation occurred, and that the violation merits a particular sanction, the CDC counsel can attempt to resolve the matter with the respondent or respondent's counsel in a manner consistent with the panel's view. Such a negotiation is explicitly authorized by the Texas Rules of Disciplinary Procedure, which provide that "[a]n investigatory hearing may result in a Sanction negotiated with the Respondent."[77] This follow-up discussion on a negotiated resolution to include a sanction may occur immediately following the CDC attorney's private session with the panel, but more commonly occurs through follow-up phone calls and conferences about potential resolution of the matter.

If the negotiations over an agreed sanction are successful, a judgment with findings of fact and conclusions of law is prepared and submitted to the chair of the investigatory hearing panel for entry into the record of the matter.[78]

Observation Four: More Complainants Have Had an Opportunity to Be Heard and There Have Been Amicable Resolution of More Cases

The GOC has consistently focused on the issue of transparency of the grievance system to complainants—be they clients, former clients, members of the public, or other persons. The issue of the system's transparency to those who invoke the grievance process has come up in many contexts of CDC review: for example, in the transparency involved in classification decisions and dismissals of grievances through the initial filter that classification process provides.[79] One key component of transparency—as with any administrative, judicial, or other process challenge—is the opportunity to actually be heard.

---

[76]Tex. Rules Disciplinary P. R. 2.12(G).

[77]*Id*. R. 2.12(F).

[78]*Id.*

[79]*See* Classification Report, *supra* note 7, at 18-23.

One documented advantage of investigatory hearings is that more complainants have been heard, in a renewed and substantive way. But an IVH panel through its members and working with CDC counsel needs to have the flexibility to impose reasonable time and subject matter limits to that opportunity. The IVH is not intended to be and cannot reasonably be a forum for the unlimited airing by a complainant of their views, especially on topics unrelated to the grievance at hand. However, the IVH process does open a door for complainants initiating a grievance to be heard on the grievance and to have added confidence that the grievance system incorporates substantive review of their concerns. The GOC received consistent feedback as part of its interviews indicating that many complainants who participated in IVHs came away from the process expressing appreciation for simply the opportunity to be heard.

The physical presence of complainants and respondents before investigatory hearing panels also appears, from the data reported above and from reports provided to the GOC, to have been an important component of another effect of the reinstitution of IVHs: earlier resolution of more grievance matters. This effect is apparent from the face of the data reported in the above tables, on pages 36 and 40. For example, in the 2019-2020 State Bar year, investigatory hearings resulted in 192 matters classified as complaints being dismissed, and another 132 matters classified as complaints being resolved through settlement.

The GOC gathered anecdotal data to go along with these numbers. For example, participants are dismissed from an IVH when the panel goes into private session with the CDC attorney. However, there were numerous reports to the GOC about positive interactions, and even in some cases reconciliations, occurring between complainant and respondent after the hearings. The GOC received numerous reports of IVHs resulting in situations in which the complainant and respondent reconnect and "mend fences" over matters leading to the grievance. These types of direct and early resolutions can, and are certainly on occasion, aided by the complainant and respondent being in the same room. Many grievances result from a breakdown in communication between attorney and client, and the investigatory hearing format as currently used by the CDC provides a platform on which communication can sometimes be restored.

On the other hand, some stakeholders have questioned whether an investigatory hearing should be used at all to promote or encourage settlement. On this issue, the GOC observes that the CDC's use of investigatory hearings in part as early resolution conferences appears to be entirely in accord with legislative intent in enacting the 2017 changes to the State Bar Act. For example, as a part of the Sunset Commission staff report issued in connection with the legislative process, the staff indicated:

> Providing a standard opportunity for an informal hearing before reaching litigation would allow the parties to agree to a settlement sooner, and could also increase the overall percentage of cases settled before trial.[80]

The Sunset Commission staff report appears to refer to the investigatory hearings as akin to "informal settlement conferences to resolve enforcement cases at the conclusion of an

[80] Sunset Commission Staff Report With Final Results, 2016-2017, 85th Legislature at 28 (June 2017) (relevant excerpts attached to 2018 Biennial Report, *supra* note 57, at Tab 1).

investigation when evidence suggests a licensee has committed a violation."[81] Thus, the CDC appears to be meeting the purpose of the State Bar Act as amended in using IVHs to encourage resolution of cases. Such a resolution could involve a respondent agreeing to some form of relief, such as return of client files or deposits, or a sanction such as a public or private reprimand. On the other hand, such a resolution could cause the complainant to understand that their concerns over attorney misconduct were based on incorrect information or otherwise not justified, or even if justified, may not represent an actual violation of the Texas Rules of Professional Conduct.

Observation Five: Respondents and Their Counsel Have Legitimate Concerns Over Current Use and Conduct of Investigatory Hearings

The CDC states in its internal policies and to participants in the grievance process that the investigatory hearing process is "non-adversarial." At the same time, the process of IVHs can involve, among other things:

- Invitations to attend IVHs without specification of the potential rules violations that, in the view of the CDC attorney, merit a hearing;
- Subpoenas issued by the CDC for records or witness testimony;
- Questioning of the respondent on the underlying facts of a grievance filed against them; and
- Evaluation by a panel of the underlying facts and potential sanction.

Given these aspects of investigatory hearings as conducted, it is hardly surprising that many respondents—and counsel who routinely represent them—view the investigatory hearing as an adversarial process.

As one stark example supporting a healthy suspicion over the "non-adversarial" label placed on investigatory hearings, respondents are usually placed under oath and their answers to questions are recorded on video by a CDC representative. The video recording of answers can and might be used at a subsequent evidentiary hearing, and nothing in the CDC's procedures or rules would prevent such a use of videotaped statements.

Largely because of the exposure to questioning under oath—and to free-flowing questioning, given the lessened formality to the hearing and the absence of traditional application of rules of evidence—several attorneys who represent respondents recommend to their clients not to attend IVHs at all. These attorneys find little or no advantage to participation and have commented that without having power to subpoena documents or witnesses for their clients, there is little to be achieved and a lot to be risked through participation. More than one attorney has also questioned whether it is appropriate for CDC attorneys to use investigatory panels as "sounding boards" for the existence of "just cause," much less sanctions recommendations, as they view those issues to be in the purview of the CDC itself, under applicable laws and rules. As discussed below in the recommendations, this is a trend worth monitoring. The GOC has some concern that if

[81] *Id.*

respondents choose not to participate, the effect will be to defeat the purpose of getting panels involved more directly in the merits of more grievance matters and of bringing the participants together in a manner that might allow for early resolution.

In its many discussions with attorneys representing respondents in the attorney-discipline process, the GOC has learned that a common concern exists over the adequacy of the notice letter sent to respondents or respondents' counsel inviting them to participate in an IVH. There are two sets of letters that are sent to respondents and complainants. The first set of correspondence is a broader IVH notice informing the complainant and respondent that their case will be heard in an IVH format, and the second is a notice setting forth a date, time, and more specifics about what to expect at the actual IVH hearing. Noticeably absent from any of the correspondence is the mention of an alleged or potential disciplinary rule violation. In many instances, counsel for respondents has expressed concern that the notice is not sufficient and makes it challenging to prepare their clients for the IVH, not knowing which rule(s) their client has allegedly violated. The GOC has learned from the CDC, however, that CDC attorneys and investigators are always willing to talk with respondents or their counsel and answer questions that they may have in advance of an IVH, including questions regarding alleged rule violations. In fact, the CDC has encouraged respondents or their counsel to simply call to obtain any additional information that they need.

Because of the broad discretion provided to panel chairs to oversee IVHs, it is no surprise that procedures vary among regions and even among panels within a given region.[82] In some instances, respondents' counsel voiced concern that even though a case goes to IVH after classification on a particular rule violation, other issues may arise during questioning, leading to an allegation of additional rule violations. Panel chairs "may set forth procedures for eliciting evidence, including witness testimony."[83] Depending on the panel chair's approach during the IVH, the CDC, respondent or respondent's counsel, and/or the panel may be able to ask questions of various witnesses.[84] The GOC has learned that disparity exists regarding whether respondents or their counsel can ask questions during the proceeding, object to questions, provide opening or closing statements, and/or interact with the panel in order to narrow the scope of potential rule violations. Accordingly, there is sometimes a reluctance for respondents' counsel to encourage their clients to attend an IVH. They want to avoid any potential "fishing expedition" that might serve the purpose of unveiling more potential rule violations that they were not prepared to discuss or defend in advance of the IVH.

On the other hand, other attorneys who represent respondents in grievance proceedings appreciate the opportunities afforded by investigatory hearings. These attorneys have stated to the Committee that there is a great deal of information to be gained for the respondent's benefit through IVHs, which far outweighs any risk associated with presenting the respondent for questioning. These attorneys have also highlighted the opportunities presented to resolve grievance matters at an early stage, including providing a chance for face-to-face interaction with the CDC and grievance panel members.

---

[82]Tex. Rules Disciplinary P. R. 2.12(F).

[83]*Id.*

[84]*Id.*

Recommendations:

1. The CDC Should Consider Placing More Formality on the Case Selection and Hearing Processes

The GOC recognizes that there inevitably had to be a "feeling out" period involved with the reinstitution of the investigatory hearing. Some trial and error and variance in approaches is healthy, as it has allowed the relevant stakeholders—the CDC, the grievance panels, and attorneys who represent complainants or respondents—to react to differing methods. However, the absence of definition for case selection methods and procedures for conducting hearings has undoubtedly resulted in the following:

- Reports of confusion from grievance panel members and participants over the proper purpose of investigatory hearings.

- Reports of confusion from grievance panel members and participants over the best method of conducting investigatory hearings.

- Concerns from attorneys who represent complainants or respondents over what they perceive as uncertainties over purpose and procedures that cause them to sometimes choose not to participate.

Accordingly, the GOC recommends that the CDC consider increased standardization of approaches for (1) case selection for IVHs and (2) procedures for conducting investigatory hearings.

The GOC believes that formalization of criteria for case selection would be helpful to ensure uniformity of assignment of matters to investigatory hearings. The formalization of these criteria, such as those that the CDC has articulated to the GOC (see above at pages 41-42) would also help to mitigate any concern—well-founded or not—that sometimes a CDC attorney will use an investigatory hearing to "kick the can down the road" on making a "just cause" determination, even on matters of little or no merit.[85]

On written or more formal procedures for the conduct of investigatory hearings, the GOC recommends that in addition to the general matters set out in the Texas Rules of Disciplinary Procedure for IVHs, the CDC should establish a more uniform template for hearings. This is not to suggest the creation of rules of procedure and evidence as detailed as the Texas Rules of Civil Procedure or Texas Rules of Evidence, but rather the creation of a straightforward listing of the pieces of the hearing structure. This could be accomplished in a simple outline listing such steps as "Panel Chair Opening," "Questioning of Witnesses," and "Panel Evaluation of Matter." These written guidelines would add clarity to procedural issues, such as whether a complainant or respondent can address the IVH panel separately from one another, as requested. The written structure outline could be provided to the complainant and respondent as part of the notices sent

[85]Generally, the CDC must make a just cause determination within 60 days of the date that respondent's response to the complaint is due. Tex. Rules Disciplinary P. R. 2.12(A). There are several exceptions, including an extension to 60 days ***after*** the date that an IVH is completed. *Id.*

by the CDC to attend the IVH and to the panel chair for use in conducting the hearing. The GOC makes this recommendation with the understanding that CDC attorneys are developing expertise with respect to the conduct of investigatory hearings but that most if not all complainants, respondents, and counsel for respondents or complainants (and to a lesser degree over time panelists) may be attending their first investigatory hearing. Providing additional structural information to participants, in advance of an IVH, would remove some of the "mystery" behind such hearings in a way that would only increase their efficiency and transparency to all involved.

The Texas Rules of Disciplinary Procedure do not prohibit the creation of more structured rules, and in fact appear to encourage the development of such rules. The rules applicable to investigatory hearings provide, for example, that "[t]he chair of the Investigatory Panel may administer oaths and may set forth procedures for eliciting evidence, including witness testimony."[86] The CDC undoubtedly has the authority to develop standard procedures for how evidence should be elicited during IVHs. The GOC's interviews indicated that such additional guidance in the conduct of investigatory hearings would be welcomed by all stakeholders.

In connection with case selection, the CDC should also consider whether to vest unrestricted discretion to set a matter for an IVH in individual CDC attorneys or whether some internal review process involving CDC management would be appropriate. Such an approach might lead to a more consistent setting of grievance matters for investigatory hearings and also help avoid the perception that IVHs are used solely for the purpose of extending a grievance investigation.

On the issue of how investigatory hearings are conducted, the CDC should consider:

- Whether the panel chair always controls the conduct of the hearing, as opposed to allowing a CDC attorney to do so.

- Whether the panel controls all questioning or whether CDC counsel and the participants are also allowed to question under the control and guidance of the panel.

- Whether the complainant and respondent are afforded the opportunity to address the panel with their respective views on the matter, either directly or through counsel if counsel is present.

- In online IVHs, whether complainants and respondents will be allowed to "share screen" and use the "breakout room" feature as part of presentations to panels.

- Whether complainants and respondents are placed under oath during their "testimony" to the panel.

- Whether complainants and respondents have the ability to call witnesses, or present documentary "evidence" to the panel without calling witnesses.

[86]Tex. Rules Disciplinary P. R. 2.12(F).

The current investigatory hearings have been underway for almost two years. The GOC believes that through the CDC's efforts, a sufficient critical mass of investigatory hearing experience has been developed to allow for more formality regarding these topics of case selection and the conduct of hearings.

2. The CDC Should Continue to Train Panel Members About the Purposes of and Procedures to Be Used at Investigatory Hearings

To its great credit, the CDC recognized early on in the IVH reimplementation process the need to train panels on investigatory hearings and how they can be conducted. The CDC conducted "mock" hearings with panel members and included the subject of IVHs as part of its regional and statewide training presentations to grievance panel members.

The uncertainty among panel members about the purpose and proper conduct of investigatory hearings has shown that emphasis on training needs to be continued, if not amplified. Some confusion among participants is inevitable in rolling out a program like the reinstitution of investigatory hearings. The CDC has begun to do and can continue to do an effective job of educating grievance panel members on the purpose and process behind investigatory hearings.

As was the experience in prior biennia,[87] in traveling the state, the GOC heard from several panel members (many being public members) that additional training would be helpful after becoming a grievance panel member. Incoming panel members receive an initial orientation training, but an increased emphasis should be placed on continuing education of panel members.

Training is critical to all areas of the function of grievance panels. The GOC applauds the efforts by the CDC to increase training for grievance panel members in the substance and process involved in their work, including in the area of how investigatory hearings are conducted. For example, the CDC has developed a series of online training videos for grievance panel members. In addition, the CDC has incorporated training into its annual meetings with panels.

This training should be expanded or amplified to make the investigatory hearing process more understandable and "user-friendly" to panel members. Regular organized panel training would be beneficial. The CDC should consider, for example, increasing the frequency of training opportunities in which CDC attorneys and investigators meet with panel members in their communities, and conducting a special training day or days on these hearings, possibly to include mock hearings. The Committee believes that additional training will lead to better panel member understanding and assessment of the purposes and conduct of investigatory hearings, as well as of the rules that apply to the matters being heard. As examples specific to IVHs, additional training could reinforce and emphasize the following points:

- The investigatory hearing process benefits from panel members taking active participation in and control over the proceeding, as opposed to deferring entirely to CDC attorneys or investigators.

[87]Many of these training recommendations are similar to those made by the GOC with respect to other aspects of the process in the past—for example, with respect to the summary disposition process. *E.g.*, 2018 Biennial Report, *supra* note 57, at 10-18.

- Panel chairs should actively solicit input from their fellow panel members, even to the point of "calling on" members to ask questions or provide their views.

- Although the CDC attorney and staff may have made preliminary conclusions on the merits of a matter, the investigatory hearing provides an opportunity for the panel to evaluate a matter without deferring to the CDC's views.

- If a matter is presented for an investigatory hearing, that does not mean that "just cause" to proceed to an evidentiary hearing/district court election has been made, much less that a rule violation will ultimately be found. Instead, it means that a case presents enough contested facts over potential rule violations to merit at least an evaluation by an IVH panel.

- If a resolution recommended by the IVH panel is not reached, that does not mean that "just cause" to proceed to an evidentiary hearing/district court election will be made, much less that a rule violation will ultimately be found. Rather, the panel is merely assisting the process by providing an external assessment of a matter in the context of other grievance matters the panelists have considered. In other words, the role of "early case resolution" through investigatory hearings should be open and obvious to panelists.

- The CDC should also consider developing more specific discussion and hypotheticals for presentation to grievance panels as part of general training. To ensure adequate training to the panel members on their role as an independent assessor of a matter presented at an IVH, the GOC recommends that during training, the CDC create and discuss hypothetical "mock training" situations in which a panel (or at least several panel members) might ultimately disagree with a view expressed by a CDC attorney.

- Complainants (who are most often not lawyers) are not required to allege a particular rule that applies to their grievance. Although the grievance presented at IVH may have been classified as a complaint based on a determination that the grievance states a claim under a particular rule, that does not prevent an IVH panel from considering other professional conduct rules that may have been violated.

- Training on the "elements" of each professional conduct rule at issue, to facilitate a discussion on how the investigation has uncovered (or not uncovered) facts to support (or not support) each. This specific training can also be incorporated into the more general training made available across all panels.

- Training on sanctions guidelines,[88] which are important in terms of the IVH panel attempting to make recommendations on potential resolution of grievance matters.

- Additional guidance to IVH panel members on application of sanctions guidelines to particular cases, to give panel members a range of potential sanctions that has been applied in matters involving similar allegations of attorney misconduct.

[88]For a discussion of the sanctions guidelines also put in place as a result of the 2017 legislation that led to the reinstitution of the investigatory hearing, please see 2018 Biennial Report, *supra* note 57, at 7-10, 18.

- Additional guidance to panel members that in the appropriate case—such as those of attorney neglect allegations in which the attorney admits to or exhibits mental health or substance abuse issues—the panel can recommend a referral to TLAP.

To ensure uniformity and effectiveness of training, the GOC recommends that the CDC consider designating a statewide "point person" within the CDC staff to design and implement panel training efforts. To ensure that the training is balanced and emphasizes process concerns of all who participate in investigatory hearings, the CDC should also consider soliciting input if not participation in the training by attorneys who regularly represent complainants or respondents in grievance matters.

3. The Existing IVH and Any More Formalized Hearing Procedures Should Ensure Due Process

Although the Texas Rules of Disciplinary Procedure provide that the investigatory hearing is to be "non-adversarial," and the CDC views the IVH as "voluntary," all stakeholders must be mindful of the fact that to a complainant and respondent, all matters associated with a filed grievance are adversarial. The adversarial nature of an IVH is only accentuated by placing persons under oath, where they are subjected to questioning by a CDC trial attorney who may ultimately (should the case not resolve at IVH) be the opposing counsel if that matter proceeds to an evidentiary or district court proceeding. In other words, the spirit of conducting an early "non-adversarial" proceeding, in an effort to engage in further fact-finding and potential resolution, is laudable, but the manner in which the IVH is conducted may have adversarial consequences for the respondent or complainant.

The CDC should consider the following steps that would lessen the concern that IVHs are adversarial or may at least have adversarial consequences:

- Exercising discretion that appears to be provided under the Texas Rules of Disciplinary Procedure *not* to swear in witnesses to provide testimony under oath. Such an approach would be consistent with, for example, how mediations are conducted in civil litigation. In a mediation context, even though "adversaries" are in the process together (and sometimes even in the same room), participants are not placed under oath.

- Ensuring that all participants understand that statements made in the course of an investigatory hearing will not be used to prove or disprove the merits of a disciplinary matter at a contested evidentiary or district court proceeding. Again, such an approach would be consistent with rules governing mediation, which explicitly prevent participants from using matters raised in mediation for purposes of proving or disproving a case in litigation.[89]

- Providing notice to the complainant and respondent in advance of the investigatory hearing of the potential rule violations the CDC believes will be addressed at the IVH. This notice should also advise the complainant and respondent that the IVH panel will maintain discretion to evaluate the case under all applicable disciplinary rules. It was reported to

[89]Tex. Civ. Prac. & Rem. Code § 154.073.

the Committee that attorneys representing a respondent sometimes call the CDC trial attorney who will specify in those conversations the rule violations under consideration. Providing that information proactively to all participants in advance will address the concern that any participant (particularly a respondent) is subject to "ambush" at the hearing if the respondent participates. In the alternative, information about the rules implicated by the complaint could simply be stated in the notice of hearing.

- Expanding the current opening script to be read by the investigatory panel chair to incorporate any of the above matters, as well as language similar to that used by mediators in joint sessions among litigants.

- For IVHs conducted online via Zoom, ensuring that both sides have equal access to the technology to make their presentations.

These suggestions are by no means an exhaustive list of potential improvements to make the investigatory hearing "non-adversarial." Making a meeting "non-adversarial" involves such human factors as attitudes expressed among participants, that cannot be fully regulated. There will inevitably be tensions in any proceeding that involves a former client or another person making an accusation of professional misconduct against a lawyer. Steps should be considered, however, to further reduce these tensions if the IVH is to serve its intended purposes. In short, if the intended purpose of the IVH is to engage panel members as neutral arbitrers of grievances, there are concrete steps that the CDC could take to make investigatory hearings less adversarial, in both approach and appearance. In making hearings less adversarial, the CDC could readily borrow from the concepts applicable to mediations in civil litigation.

4. The CDC Should Evaluate Grievance Panel Workloads and Be Open to Seeking the Expansion of the Number of Grievance Panels and Participants

The GOC has learned that many panel members, while enjoying the additional in-person meeting opportunities and increased participation in hearings vis-à-vis IVH, believe that they have inadvertently "bitten off more than they can chew." In particular, certain panels, especially in the Dallas and San Antonio regions, are often sitting for a full day of hearings once a month. As a preliminary matter, at its annual training (or even before), the GOC recommends that the CDC stress the "new" time commitment involved in serving on a grievance panel and ensuring that all members, particularly new ones, are fully committed to meeting such time commitments.[90] The GOC also recommends that the CDC consider working with the State Bar to add additional panels or members as needed to relieve the workload of existing panels. Finally, the GOC recommends that the CDC consider appointing substitute members, particularly substitute public members, to some or all of the panels so that the same panel members are not being required to do all of the work if there is a panel member who seems to regularly miss.

Finally, with the onset of the pandemic, the CDC has conducted investigatory hearings online. This use of online investigatory hearings should continue where appropriate, even when the current pandemic winds down. In various parts of the state, panel members and other hearing participants are required to travel significant distances to attend in-person meetings. The CDC

[90]See the report's recommendation for a commitment memorandum from panel members in Section I(B).

might evaluate whether the Zoom or another online meeting platform—once the procedural kinks for IVHs outlined above are worked through—is an effective tool to use for some investigatory hearings out into the future.

5. The CDC Should Continue to Evaluate Methods of Increasing the Number of Cases Heard on the Merits at Full Hearing

The Committee has previously advocated on many occasions for consideration of changes that will both increase the substantive involvement by panels in the merits of more cases and provide opportunities for disputes over the application of the Texas Rules of Professional Conduct to be tested in adversarial proceedings. The reintroduction of the investigatory hearing certainly has provided an opportunity to meet the first goal, and despite the labeling of IVHs as "non-adversarial," perhaps the second goal as well. For example, just looking at the one full year of data for the 2019/2020 State Bar year, there was a combined total of 418 evidentiary and investigatory hearings convened or conducted. This compares to the total of 178 such hearings conducted the prior year, and the 70-80 evidentiary hearings in years prior to that. By any measure, the reinstitution of investigatory hearings has multiplied exponentially the opportunities for panel members to get actively engaged in the factual inquiry and examination of grievance matters. The CDC is to be commended for these efforts.

At the same time, the CDC should monitor the use of investigatory hearings to ensure that they do not replace evidentiary hearings in their entirety. Evidentiary hearings and district court proceedings serve as an important component and check on the enforcement of the rules, and the experience gained from evidentiary hearings and district court proceedings is invaluable to the system and to the CDC. It does not appear, at least from the first full year of reinstitution of investigatory hearings, that investigatory hearings are causing the number of evidentiary or district court disciplinary proceedings to decrease. But the relationship between the number of investigatory hearings and resolutions and the number of evidentiary and district court disciplinary proceedings bears monitoring as the IVH program continues.

6. The CDC Should Take Steps to Ensure That Investigatory Hearings Are Not Used Solely for Purposes of Extending the Investigation Period

Some attorneys who represent respondents believe that matters are sometimes set for investigatory hearings as a means of extending the normal 60-day investigation period after a grievance is classified as a "complaint." The Rules of Disciplinary Procedure provide for a period of 60 days from the time a response is due to a complaint for the CDC to make a "just cause" determination.[91] The Rules further provide that this 60-day period can be extended to the time that an investigatory hearing on the complaint is completed.[92] Thus, according to some, the rules provide an incentive for CDC lawyers to use an IVH as a means to extend the period for the "just cause" determination beyond 60 days.

The CDC strongly disagrees with this assertion. According to the CDC, the decision to set a matter for an investigatory hearing is never used as a delay tactic, but rather only as a mechanism

[91] Tex. Rules Disciplinary P. R. 2.12(A)(1).

[92] *Id*. 2.12(A)(2).

to gather additional information, including obtaining documents and assessing the credibility of witnesses and the positions of complainants and respondents. The CDC points out that its investigation of matters classified as complaints can and does extend beyond 60 days, including further investigation conducted during evidentiary or district court proceedings. From the CDC's perspective, respondents who cooperate and participate in IVHs have much to gain, given that investigatory hearings can result in a complete dismissal or an early agreed-to resolution (such as a private reprimand) before any evidentiary or district court proceedings are initiated.

The CDC also validly states, that it would be impractical, if not impossible, to have all investigatory hearings conducted within 60 days of a date for a response to a complaint. There are undeniable factors such as the scheduling and re-scheduling of grievance panels, the loss of quorums, obtaining documents from third parties (such as banks and court reporters), and accommodating the schedules of respondents and complainants. The CDC is mindful of the burden that existing proceedings (such as summary disposition hearings and evidentiary hearings) place on volunteer grievance panel members—which can require multiple days of participation each month in some circumstances—and thus is concerned about the additional burden on panels imposed by investigatory hearings.

Finally, the CDC emphasizes that in its experience a respondent often fails to provide any (or sufficient) information to allow the CDC to determine the absence of "just cause" and thus to potentially place the matter on a summary disposition docket. Providing respondents with notice that their case is being set for an IVH, may prompt respondents to take the matter "more seriously," and send the CDC more information. Once the CDC sets an IVH, the CDC has no ability to take the case out of the investigatory hearing process and move it into a summary disposition process. In other words, the CDC believes it is required to conduct the hearing. Similarly, the CDC has no authority on its own to settle or resolve a case once the IVH has been scheduled, which leads to the situation in which the respondent either goes forward with an IVH or elects litigation.

Based on its review, the Committee does not believe that the CDC is "playing games" with IVH notices to slow down the ultimate resolution of cases. In fact, it is clear that the CDC is endeavoring to use the investigatory hearing as a means of *increasing* efficiency in the system. The Committee believes that any contrary perception can be addressed by conducting investigatory hearings within the 60-day period, and if not possible, keeping lines of communication open with complainants and respondents and their counsel as to the reasons for any extension past 30 days.

The CDC's ability to effectively and efficiently investigate grievances classified as complaints was undoubtedly aided by its restored CDC's investigatory subpoena power. This has allowed the CDC another means to independently investigate a grievance classified as a complaint. Complainants do not have the power to subpoena records and documents that would shed additional light on their allegations, but the CDC does, and it can do so outside of the investigatory hearing process. Although 60 days may not be enough time for an evaluation of every case, the CDC's ability to use the investigatory subpoena process to obtain records as needed should not only assist the CDC's evaluation of the existence of "just cause" but also the summary disposition panel's decision to accept the CDC's recommendation on the absence of "just cause."

7. Allowing for Post-Setting Withdrawal of Cases

The CDC believes that under the current rules, once a matter is set for an IVH, the CDC has no discretion to withdraw that setting. If the CDC receives information after a matter is set for an investigatory hearing that indicates that the hearing is not warranted—for example, because additional information shows the matter is meritless or that a hearing would not be productive—the CDC should be allowed to take the matter off of a panel's docket. This would prevent a needless expenditure of panel resources.

8. Obtaining IVH Panel Input on GRP Referrals

Another method of involving IVH panels in the resolution of grievances would be the referral of cases to the GRP as a potential resolution through the IVH. As discussed in Section II.C of this report, that program has now been fully implemented following prior GOC reports and a Sunset Commission recommendation. Giving IVH panels the option of recommending a matter be referred to the GRP program would increase panel involvement in the resolution of matters that may not rise to a level requiring a full evidentiary hearing. The Committee consistently received feedback from panel members across the state that they would welcome additional tools to address situations that may not merit a full evidentiary hearing.

9. Continuing to Ensure Communication With Complainants and Respondents About IVHs and Their Outcomes

Concerns have been raised about the amount of information afforded to respondents (and to a lesser extent complainants) about what is involved in an investigatory hearing.

Through its interviews, the Committee was not always able to confirm that as a matter of practice, CDC attorneys and investigators reach out affirmatively to each and every complainant concerning the outcomes of IVH resolutions. At the same time, the Committee received reports that the CDC makes an effort to contact complainants if an IVH results in a recommendation on which the CDC attorney and respondent ultimately resolve the matter.

According to the CDC, the complainant is always informed in writing of the result of an IVH, including a settlement and conclusion of the complaint if an agreement is reached; the fact that the CDC will proceed to litigation on the complaint if no agreement is reached; or that the CDC dismissed the complaint based on the panel's recommendation. In advance of the IVH, the complainant is informed at the hearing (in the panel chair statement) and by letter of the possibility of a negotiated settlement. While there is a concerted effort to notify the complainant once a case has been resolved or if it goes into litigation, the complainant is not provided with details or the status of a negotiation while in progress. Contacting the complainant by phone in addition to the written notification is not always possible but does occur in some cases.

The CDC's representations are assuring, given the importance of transparency and communication with all stakeholders. The Committee encourages the CDC to continue to ensure the uniformity of these communication practices.

The Committee understands that the IVH process would be unduly complicated, if not impractical, to conduct post-hearing negotiations with the complainant's active involvement.

Once the grievance is filed and classified as a "complaint," the CDC has the sole responsibility and ability to resolve the matter with the respondent. However, as the CDC recognizes, a standardized effort to contact the complainant following the conclusion of the IVH process serves multiple interests. Such a uniform approach increases the transparency of the process, as well as public confidence in the thoroughness of the evaluation of the matter by the IVH.

This approach is also consistent with GOC suggestions in prior reports, which recommended that the CDC continue and reinforce its stated goal of contacting every complainant of a grievance that is classified as a complaint.[93] Such contacts are essential to a full and fair evaluation of the complaint and to the exercise of responsibility to preserve access to the grievance process, as well as the transparency and integrity of the system. These contacts also permit investigators, for example, to follow up with complainants on issues relating to the written grievance, and to inquire whether the complainant is aware of any instances or evidence of misconduct other than that cited by the complainant in their grievance.

The CDC recognizes that open communication between CDC attorneys and respondents and their counsel often occurs in the time leading up to and after an investigatory hearing. The GOC understands that CDC attorneys are supportive of having respondents or their counsel schedule telephone conferences, if not in-person meetings, on the rationale behind setting a grievance matter for an investigatory hearing before the hearing occurs. The CDC does stress to its attorneys handling grievance investigations that the receipt and sharing of information is very much a positive, especially in light of the CDC's view that this re-introduction of the IVH represents an effort to emphasize to all stakeholders a "non-adversarial" aspect of the overall grievance process.

[93] 2018 Biennial Report, *supra* note 57, at 18.

B. UNIFORM SANCTIONS GUIDELINES

Background

As an additional part of the Sunset Advisory Commission review in 2017 and resulting implementation, the CDC adopted a new standardized range of sanctions for grievances, patterned after the American Bar Association Standards for Imposing Sanctions.[94] In its last report, the GOC opined that these new sanctions should prove helpful to panels and district courts when issuing a sanction following the finding of attorney misconduct. The GOC also believed that such uniform guidelines on sanctions would bring more uniformity to the imposition of sanctions across regions for similar types of misconduct.

Training

Panels receive training on the uniform sanctions guidelines at their annual grievance committee training with the CDC. They receive written materials and an explanation on the guidelines and the purpose that they serve. Some regions provide an example on how a panel might use the guidelines after hearing the facts of a "mock" case.

The CDC instructs panels that they have broad sanction discretion depending on the unique facts of each case. The CDC also reminds panels that it will ask the CLD for a range of sanctions and that it is the CDC's practice to seek the upper end of the range, thereby allowing more room for compromise. During an investigatory or evidentiary hearing, the CDC attorney will review with the panels the factors that are listed in the guidelines as to what they might consider as a resolution.

Implementation

The CDC does not provide reports to evidentiary/investigatory panels on whether a sanctioned respondent is complying with sanctions. According to the CDC, panels do not request that information, and providing that information could impact a panel's impartiality. The CDC does not provide panels with information that a respondent is non-compliant, unless non-compliance is an aggravating factor when using the respondent's disciplinary history to determine the appropriate sanction.

At this point, it is difficult to determine how often the sanctions guidelines are being utilized. There is no tracking mechanism in place at the CDC to determine whether panels are utilizing the guidelines and to the extent they are, what uniformity their use is bringing to the process. Any information on the use of the guidelines by panels is anecdotal in nature.

Overwhelmingly, the belief is that panels do what they think is right whether or not there are sanctions guidelines in place. The CDC and panels alike, however, do seem to appreciate the existence of the guidelines as a tool to use if there are mitigating or aggravating factors.

---

[94] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.pdf.

Investigatory panels now have the ability to offer GRP to a respondent, which was not an option when the sanctions guidelines were implemented (only a CDC attorney could then offer GRP and then only after a finding of just cause). More private reprimands and GRPs are now being utilized by panels following an investigatory hearing.

Recommendations:

1. The GOC recommends that the CDC track different sanctions assessed at both the investigatory and evidentiary hearings against the sanctions guidelines. This will help show whether or not the guidelines are bringing uniformity to sanctions. It would also show if any disparity exists among the regions when it comes to issuing sanctions and compliance with the guidelines.

2. The GOC recommends providing a voluntary survey to panel members following an investigatory or evidentiary hearing to determine whether the uniform sanctions guidelines were presented by the CDC and whether they considered the uniform sanctions guidelines before voting on an appropriate sanction.

C. GRIEVANCE REFERRAL PROGRAM

Background

The Grievance Referral Program ("GRP") is a diversion program within the attorney disciplinary system designed to help identify and assist respondent lawyers who enter the disciplinary system as a result of minor misconduct.[95] GRP allows the lawyer to complete the rehabilitative program, which is individually tailored to the lawyer's needs in exchange for a dismissal of the underlying complaint. The GRP has existed since 2009, but through 2018 was an option only for matters already in litigation. As a result of the 2017 Sunset Advisory Commission recommendations, the Texas Legislature mandated changes to the Texas Rules of Disciplinary Procedure giving the CLD the ability to refer grievances that have reached the "just cause" stage to GRP before the litigation stage. The recommendation for a GRP referral is made by an investigatory hearing panel which means that a "just cause" finding has been made; otherwise, the complaint would be dismissed. In making a GRP referral the panel believes there has been minor misconduct.[96]

The CDC informs the respondent that they are a candidate for the GRP. The respondent attorney must then agree to enter the GRP and must meet with the program administrator for an assessment of the issues that contributed to the misconduct. In some cases, respondents, especially those represented by counsel, may suggest a referral to the GRP by raising the matter with the CDC. The following chart lists the subject matter of referred cases since the June 2018 effective date of the new rules:[97]

Problem Areas	**FY18/19**	**FY19/20**	**Total**
Communication	56	71	127
Neglect	50	64	114
Termination	26	30	56
Integrity	23	26	49
Safeguard property	23	18	41
Other	8	18	26
Conflicts	9	7	16
Tribunal	5	10	15
Fees	6	3	9
Confidentiality	4	2	6
Advertising	0	3	3
Non-client relation	1	2	3
Law firms	0	2	2

[95]Tex. Rules Disciplinary P. R. 16.01.

[96]*Id*. R. 16.03(A).

[97]Interview with GRP program administrator July 15, 2020.

Because appropriate GRP candidates can be identified earlier in the disciplinary process, GRP cases have doubled in four years from the forty-nine cases in State Bar Year 15/16 to ninety-eight cases in State Bar Year 19/20.[98]

GRP Case Count		
Region	**FY18/19**	**FY19/20**
Austin	5	12
Dallas	32	46
Houston	9	17
San Antonio	35	23
TOTAL	81	98

Participants falling out of the program are rare: only three in State Bar Year 18/19 and two in State Bar Year 19/20.[99]

The GRP focus areas have included dealing with stress, improving time management, overcoming anxiety, and developing resiliency in attorneys' professional and personal lives. The average time in the program is approximately 6 months: 163 days on average in State Bar Year 18/19 and 147 days on average in State Bar Year 19/20.[100]

The demographics reported by the GRP indicate that more attorneys in the 40-60 age group utilized the program than any other age group.[101]

GRP Age Group	**FY18/19**	**FY19/20**
Under 40	21	30
40-60	45	56
Over 60	15	12
TOTAL	81	98

The GRP staff has created an informal survey for respondents to complete at the end of their participation. According to GRP staff, the feedback on the program has been very positive.

The GRP has been an effective process that the CDC can use—especially in light of expanded access to referrals following the 2017 Sunset Review and associated legislative changes—to address minor infractions. The program helps attorneys identify and address specific problem areas. Attorneys who participate in the GRP and successfully complete the program have the grievance complaint dismissed. It is a win-win situation for both the attorney and the public, since specific problem areas are sought to be addressed to avoid these infractions from recurring.

[98]Statistics regarding the GRP program are reported in CLD's annual reports.

[99]Interview and review of statistics with GRP administrator July 15, 2020.

[100]*Id.*

[101]*Id.*

Recommendations:

1. The GRP has successfully reduced the number of sanctions issued to Texas attorneys while also addressing problem areas and educating attorneys on correctional measures to avoid future issues. The GOC commends the CDC for its use of this program and recommends continued referrals to the GRP when appropriate. The GOC also encourages the CDC to evaluate, on a continuous basis, if the criteria for GRP referrals can be expanded further to promote even greater efficiency in the system.

2. The GRP should consider a one-time follow up with attorneys who have completed the program with a questionnaire to validate the program's success and to point out potential improvements that might enhance the effectiveness of the program.

D. CLIENT-ATTORNEY ASSISTANCE PROGRAM

Background

The Client-Attorney Assistance Program ("CAAP") is a voluntary confidential dispute resolution service of the SBOT. It is one of the few dispute resolution programs for grievance matters in the nation. CAAP is unique in structure because it is available prior to the filing of a grievance against a lawyer. CAAP's files are not shared with the CDC.

Established in 1999, CAAP's objective is to "facilitate communication and foster productive dialogue to help Texas lawyers and their clients resolve minor concerns, disputes, or misunderstandings impacting the attorney-client relationship."[102] The State Bar of Texas CAAP brochure details the dispute resolution process option available through CAAP.[103] The CAAP process is available to the public and Texas lawyers. CAAP supports the attorney discipline process by providing information about the grievance process and grievance forms upon request or through its website.[104] In addition, CAAP makes referrals to appropriate SBOT departments, local bar associations and other community and State of Texas programs and agencies that can assist those persons who contact CAAP for assistance.[105]

The 2017 Texas Legislative's Sunset Advisory Commission recommendations prompted legislative and rule changes to allow the CDC at the classification stage to refer minor complaints to CAAP for resolution of these discretionary referrals.[106]

Staffing

CAAP has eight employees—the program director, two administrators, and five certified mediators. The CAAP director is an attorney. The CAAP mediators answer the Grievance Information Helpline and provide information to the public about the attorney disciplinary process; educate the public about various self-help options for navigating the legal arena; and intervene in the attorney-client relationship on the client's behalf when necessary.[107] Services are offered in English, Spanish, Thai, and Laotian.[108]

---

[102] State Bar of Texas Commission for Lawyer Discipline, Annual Report June 1, 2018-May 31, 2019 [hereinafter "CLD 2019"].

[103] SBOT brochure *"CAAP Client-Attorney Assistance Program 'What It Is and How It Works'"* (43808 9/19).

[104] https://www.texasbar.com/AM/Template.cfm?Section=CAAP1&Template=/CM/HTMLdisplay.cfm&ContentID=43322

[105] CLD 2019, *supra* note 102.

[106] *Id.*

[107] *Id.*

[108] March 5, 2020 interview with CAAP Director.

2018-2019 CAAP Activity

During the 2018-2019 bar year, CAAP handled 17,928 live calls from the public and responded to 4,848 mail and email requests for forms, information, and resources. CAAP assisted 2,789 inmates in Texas county jails and state penitentiaries. CAAP conducted 1,126 dispute resolutions and successfully re-established productive communication in 87 percent of its cases.[109]

The main complaints about Texas attorneys fielded through CAAP involve lack of communication and a belief that the attorney is withholding documents or information from the client.[110] The majority of disputes involve criminal law matters. Family law, personal injury, and civil matters were the next most common areas of complaints.[111] The average length of time to resolve an issue in the 2018-2019 State Bar year was thirty-one days.[112]

Utilizing the rule change, in the 2018-2019 State Bar year, the CDC made 322 discretionary referrals to CAAP, resulting in 190, or 59 percent, of the matters being totally or partially resolved.[113]

2019-2020 and COVID-19 Impact

During the 2019-2020 bar year, CAAP handled 17,814 initial calls from the public and responded to 4,850 mail and email requests for forms, information and resources. CAAP conducted 1,016 dispute resolutions and successfully re-established productive communication in 87 percent of its cases.[114] CAAP assisted 2,645 inmates in Texas county jails and state penitentiaries.[115] The main complaints fielded through CAAP continued to involve lack of communication, and the withholding of information from the client.[116] Other areas of concern included criminal and family law followed by civil law matters.

The CDC made 251 discretionary referrals to CAAP, of which 203, or 81 percent, were totally or partially resolved.

The COVID-19 Quarantine

On March 13, 2020 Governor Abbott's Executive Order declared a state of disaster, and the Supreme Court of Texas and the Court of Criminal Appeals of Texas issued First Emergency Orders[117] requiring all non-essential personnel to work remotely. The emergency orders

---

[109] *Id.*

[110] CLD 2019, *supra* note 102.

[111] *Id.*

[112] June 25, 2020 conference with CAAP Director.

[113] 180 totally resolved and 10 partially resolved, as of a March 5, 2020 meeting with CAAP Director.

[114] *Id.*

[115] CLD 2020 4th Quarter statistics.

[116] CLD 2019, *supra* note 102.

[117] Misc. Docket No. 20-007 (Tex. S. Ct. Mar. 13, 2020).

mandating working remotely were in effect during most of the fourth quarter of the 2019-2020 bar year. A comparison of the fourth quarter numbers between FY 2019 and FY 2020 show an approximate 30 percent decline in the number of calls to the Grievance Information Helpline and a decrease of 38 percent in requests to CAAP for forms, information, and resources. Only 224 dispute resolution files were opened in the fourth quarter of 2020 compared to 298 during the same period, or a 25 percent decrease. The average length of time to resolve matters was 29 days.

The raw numbers are close for FY 2019 and FY 2020, but the COVID-19 quarantine obviously impacted the fourth quarter numbers, which were on average 25 percent lower than the prior year.

Observations

Contacts to CAAP are made through telephone calls, mail, or email. CAAP maintains a user-friendly web page[118] that provides the public with information about CAAP and the ability to download the CAAP Brochure and the CAAP Checklist and Request for Assistance. Forms are available in English and Spanish.

As a result of remote operation, electronic communications were used almost exclusively for the resolution of conflicts, though the postal service continued to be available for clients without access to technology. The use of electronic communications has increased the efficiency of CAAP and will continue to be utilized post-pandemic.

The dedication of the CAAP staff is a significant factor in the prompt and positive resolution of disputes.[119] During the COVID-19 quarantine period CAAP continues to work remotely and offer services electronically. Staff are cross-utilized to ensure that incoming and outgoing communications were promptly addressed. CAAP remains flexible with deadlines since some attorneys were not able to immediately return to their offices to obtain client files or information from the files. CAAP staff expanded the resources for clients because the pandemic presented new and COVID-19 specific issues.

Recommendations:

1. CAAP should continue to expand its use of electronic communications, which have proved to be effective during the COVID-19 pandemic.

2. The SBOT should consider increased funding for additional CAAP staff to address the increase in the numbers of calls and other contacts to CAAP and the increase in CDC discretionary referrals.

[118] See https://www.texasbar.com/caap/

[119] *Id.*

CONCLUDING COMMENTS

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

Tab 1

OFFICE OF THE CHIEF DISCIPLINARY COUNSEL
STATE BAR OF TEXAS
GRIEVANCE FORM

ONLINE FILING AVAILABLE AT http://cdc.texasbar.com.

I. GENERAL INFORMATION

Before you fill out this paperwork, there may be a faster way to resolve the issue you are currently having with an attorney.

If you are considering filing a grievance against a Texas attorney for any of the following reasons:

~ You are concerned about the progress of your case.
~ Communication with your attorney is difficult.
~ Your case is over or you have fired your attorney and you need documents from your file or your former attorney.

You may want to consider contacting the Client-Attorney Assistance Program (CAAP) at 1-800-932-1900.

CAAP was established by the State Bar of Texas to help people resolve these kinds of issues with attorneys quickly, without the filing of a formal grievance.

CAAP can resolve many problems without a grievance being filed by providing information, by suggesting various self-help options for dealing with the situation, or by contacting the attorney either by telephone or letter.

I have _____ I have not _____ contacted the Client-Attorney Assistance Program.

If you prefer, you have the option to file your grievance online at http://cdc.texasbar.com.

In order for us to comply with our deadlines, additional information/documentation that you would like to include as part of your grievance submission must be received in this office by mail or fax within (10) days after submission of your grievance. This information will be added to your pending grievance. Information received after that timeframe will be returned and not considered. Thank you for your cooperation in this matter.

NOTE: Please be sure to fill out each section completely. Do not leave any section blank. If you do not know the answer to any question, write "I don't know."

II. INFORMATION ABOUT YOU -- PLEASE KEEP CURRENT

1. TDCJ/SID # _____ ☐ Mr. ☐ Ms. Name: _____
   Immigration # _____

   Address: _____

   _____

   City: _____ State: _____ Zip Code: _____

2. Employer:_____

   Employer's Address:_____

   _____

3. Telephone numbers: Residence: _____ Work: _____
   Cell: _____

4. Email:_____

5. Drivers License # _____ Date of Birth _____

6. Name, address, and telephone number of person who can always reach you.

   Name _____ Address _____

   _____ Telephone _____

7. Do you understand and write in the English language? _____
   If no, what is your primary language? _____
   Who helped you prepare this form? _____
   Will they be available to translate future correspondence during this process? _____

8. Are you a Judge? _____
   If yes, please provide Court, County, City, State: _____

III. INFORMATION ABOUT ATTORNEY

Note: Grievances are not accepted against law firms. You must specifically name the attorney against whom you are complaining. A separate grievance form must be completed for each attorney against whom you are complaining.

1. Attorney name: _____ Address: _____

City: _____ State:_____ Zip Code:_____

2. Telephone number: Work _____ Home _____ Other _____
3. Have you or a member of your family filed a grievance about this attorney previously? Yes ___ No ___ If "yes", please state its approximate date and outcome. _____

_____

Have you or a member of your family ever filed an appeal with the Board of Disciplinary Appeals about this attorney?

Yes ____ No ___ If "yes," please state its approximate date and outcome.

_____

4. Please check one of the following:
   _____ This attorney was **hired** to represent me.
   _____ This attorney was **appointed** to represent me.
   _____ This attorney was hired to represent **someone else**.

   If you hired the attorney, tell us how you met the attorney. Specifically, please provide details about how you came to know and hire this attorney._____

   _____

   _____

   Please give the date the attorney was hired or appointed. _____

   Please state what the attorney was hired or appointed to do._____

   _____

   _____

5. What was your fee arrangement with the attorney? _____

   _____

   How much did you pay the attorney? _____

   _____

If you signed a contract and have a <u>copy</u>, please attach.
If you have <u>copies</u> of checks and/or receipts, please attach.

Do not send originals.

6. If you did not hire the attorney, what is your connection with the attorney? Explain briefly

_____

_____

7. Are you currently represented by an attorney? _____
If yes, please provide information about your current attorney: _____

_____

8. Do you claim the attorney has an impairment, such as depression or a substance use disorder? If yes, please provide specifics (your **personal** observations of the attorney such as slurred speech, odor of alcohol, ingestion of alcohol or drugs in your presence etc., including the date you observed this, the time of day, and location).

_____

_____

9. Did the attorney ever make any statements or admissions to you or in your presence that would indicate that the attorney may be experiencing an impairment, such as depression or a substance use disorder? If so, please provide details.

_____

_____

IV. INFORMATION ABOUT YOUR GRIEVANCE

1. Where did the activity you are complaining about occur?

   County: _____ City: _____

2. If your grievance is about a lawsuit, answer the following, if known:

   a. Name of court _____

   b. Title of the suit _____

   c. Case number and date suit was filed _____

   d. If you are not a party to this suit, what is your connection with it? Explain briefly.

_____

If you have <u>copies</u> of court documents, please attach.

3. Explain in detail why you think this attorney has done something improper or has failed to do something which should have been done. Attach additional sheets of paper if necessary.

Supporting documents, such as copies of a retainer agreement, proof of payment, correspondence between you and your attorney, the case name and number if a specific case is involved, and copies of papers filed in connection with the case, may be useful to our investigation. <u>Do not send originals, as they will not be returned</u>. Additionally, please do not use staples, post-it notes, or binding.

Include the names, addresses, and telephone number of all persons who know something about your grievance.

Also, please be advised that a copy of your grievance will be forwarded to the attorney named in your grievance.

V. HOW DID YOU LEARN ABOUT THE STATE BAR OF TEXAS' ATTORNEY GRIEVANCE PROCESS?

__	**Yellow Pages**	__	**CAAP**
__	**Internet**	__	**Attorney**
__	**Other**	__	**Website**

VI. ATTORNEY-CLIENT PRIVILEGE WAIVER

I hereby expressly waive any attorney-client privilege as to the attorney, the subject of this Grievance, and authorize such attorney to reveal any information in the professional relationship to the Office of Chief Disciplinary Counsel of the State Bar of Texas. I understand that it may be necessary to act promptly to preserve any legal rights I may have, and that commencement of a civil action may be required to preserve those rights.

Additionally, I understand that the Office of Chief Disciplinary Counsel may exercise its discretion and refer this Grievance to the Client-Attorney Assistance Program (CAAP) of the State Bar of Texas for assistance in resolving a subject matter of this Grievance. In that regard, I hereby acknowledge my understanding that such discretionary referral does not constitute the commencement of a civil action and that the State Bar of Texas will not commence any civil action on my part. I acknowledge that it is my responsibility to seek and obtain any necessary legal advice with respect to this matter. I also understand that any information I provide to the State Bar of Texas may be used to assist me and will remain confidential for purposes of resolving the issue(s) described above.

I understand that the Office of Chief Disciplinary Counsel maintains as confidential the processing of Grievances.

I hereby swear and affirm that I am the person named in Section II, Question 1 of this form (the Complainant) and that the information provided in this Grievance is true and correct to the best of my knowledge.

Signature: _____ Date: _____

TO ENSURE PROMPT ATTENTION, THE GRIEVANCE SHOULD BE MAILED TO:

THE OFFICE OF CHIEF DISCIPLINARY COUNSEL
P.O. Box 13287
Austin, TX 78711
Fax: (512) 427-4169

Tab 2

STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

August 13, 2018

EXHIBIT

IVH Hearing Notice to C

Mr. New Test Test
1234 Home St
Austin, TX 78701

Re: 00D0070835294 - New Test Test; Test Case, Jr. - Primer Record Tester, I

Dear Mr./Ms. Test:

Please be advised that an Investigatory Hearing for your grievance has been scheduled for **September 12, 2019 at 3:30 P.M.** The Hearing will be held at **State Bar of Texas, Travis Park Plaza, 711 Navarro Street, Suite 750, San Antonio, TX 78205**. **Your attendance is requested to give testimony and assist the Investigatory Panel with its investigation.**

The Investigatory Panel will take testimony under oath from the Complainant, Respondent and other witnesses, if necessary, in an attempt to resolve your grievance. You are allowed to bring witnesses that you think will be helpful to the Panel in the investigation. If you are represented by an attorney, your attorney may attend the hearing and participate but he/she will not be allowed to question witnesses directly. Witnesses, parties and Panel members may participate by teleconference if they are unable to attend in person.

The Panel chair will decide which witnesses will testify, administer oaths and determine how the hearing will be conducted. The questioning of witnesses will be conducted by the Chief Disciplinary Counsel, the Respondent, and/or the Panel members. This Investigatory Hearing is strictly confidential and any record may be released only for use in a disciplinary matter.

The Investigatory Hearing may result in an agreed Sanction negotiated with the Respondent or in the Chief Disciplinary Counsel dismissing the grievance. If an agreement is reached, a judgment will be presented to the Panel chair for his/her signature.

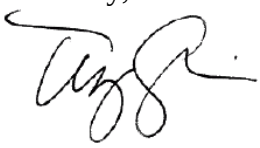
Please do not hesitate to contact this office should you have any questions.

Sincerely,

Marie A. Haspil
Assistant Disciplinary Counsel

MH/dls

Sincerely,



Troy Garcia
Administrative Attorney

TG/eyl

STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

August 13, 2018

EXHIBIT

IVH Hearing Notice to R

Sent Via Personal Service

Record D Test Jr.
123 Main Street
Austin, Texas 78701

Re: 00D0070835294 - New Test Test; Test Case, Jr. - Primer Record Tester, I

Dear Mr./Ms. Test:

Please be advised that an Investigatory Hearing in the above-referenced matter has been scheduled for **August 6, 2019 at 5:30 P.M.** The Hearing will be held at **Texas Pictorial, 2611 E. Elm Street, Laredo, TX 78043**. **Your client's attendance is requested to give testimony and assist the Investigatory Panel with its investigation.**

Pursuant to Rule 2.12(F)&(G) of the Texas Rules of Disciplinary Procedure, the Investigatory Panel will take testimony under oath from the Complainant, Respondent and other witnesses, if necessary, in an attempt to resolve this disciplinary matter by agreement. You are allowed to bring witnesses that you think will be helpful to the Panel in the investigation of this matter. Witnesses, parties and Panel members may participate by teleconference if they are unable to attend in person.

The Panel chair will determine which witnesses will testify, administer oaths and will set forth procedures for eliciting evidence. Witness examination may be conducted by the Chief Disciplinary Counsel, the Respondent, and/or the Panel members. This Investigatory Hearing is strictly confidential and any record may be released only for use in a disciplinary matter.

The Investigatory Hearing may result in an agreed Sanction negotiated with the Respondent or in the Chief Disciplinary Counsel dismissing the grievance or finding Just Cause. If an agreement is reached, the terms of the negotiated Sanction must be in a written judgment signed by the Panel chair, Respondent and Chief Disciplinary Counsel and must contain findings of fact and conclusions of law.

Please do not hesitate to contact this office if you have questions.

Sincerely,

Troy Garcia
Administrative Attorney

TG/eyl

Enclosure: Panel Members

Tab 3

Investigatory Hearings By County			
	Austin Region		
District	**County**	**18-19**	**19-20**
8	Bastrop		1
	Bell	1	4
	Bosque		2
	Coryell		1
	McLennan		3
	Williamson		2
9	Travis	6	22
	Region Total	**7**	**35**
	Dallas Region		
District	**County**	**18-19**	**19-20**
1	Bowie	1	3
	Cass		1
	Collin	2	8
	Grayson	2	2
	Hopkins		2
	Kaufman		1
	Marion		1
	Morris	1	
	Rockwall		1
	Titus		2
	Upshur		1
	Van Zandt	2	3
2	Madison		2
	Nacogdoches	1	
	Smith	1	4
6	Dallas	13	44
	Kent		1
7	Ellis		1
	Hill		1
	Johnson		1
	Tarrant	3	22
13	Potter	1	2
	Randall	2	
14	Brown		1
	Comanche	1	
	Denton	1	5
	Hood		1

	Taylor	2	2
	Wichita		1
	Region Total	**33**	**113**
	Houston Region		
District	**County**	**18-19**	**19-20**
3	Hardin		1
	Jefferson		1
	Liberty		1
	Montgomery	1	3
	Newton		1
	Walker		2
4	Harris	6	37
5	Brazoria	1	1
	Fort Bend		2
	Waller		1
	Region Total	**8**	**50**
	San Antonio Region		
District	**County**	**18-19**	**19-20**
10	Bexar	17	54
	Dimmit		1
	Lampasas		1
	Wilson		1
11	Aransas		1
	Bee		2
	Kleberg	1	2
	Nueces	2	7
	San Patricio		2
	Victoria		1
12	Atascosa		1
	Cameron	3	9
	DeWitt	1	
	Duval		1
	Hidalgo	6	11
	Starr		1
	Webb	2	5
	Willacy		2
15	Bandera		1
	Burnet		2
	Comal		2
	Ector		6
	Hays	1	1

	Kerr	2	1
	Kinney		1
	Tom Green		1
	Val Verde		1
16	Dawson		1
	Garza		1
	Lubbock	2	4
17	Brewster		1
	El Paso	3	14
	Hudspeth		1
	Region Total	**40**	**140**
	Grand Total	**88**	**338**