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Attorney Disciplinary Procedure in Texas: Competing Interests and Philosophies 1988-2004 The Fourth Annual Symposium on Legal Malpractice and Professional Responsibility: Essay.

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ESSAY

ATTORNEY DISCIPLINARY PROCEDURE IN TEXAS: COMPETING INTERESTS AND PHILOSOPHIES 1988-2004

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I. INTRODUCTION

The structure of the attorney disciplinary system in Texas in the latter part of the twentieth century reflected a compromise of com-

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peting interests and the pursuit of disparate goals by different constituencies.

The concept of self-regulation is at the very core of the integrated bar. Encompassed in the notion of self-regulation of the legal profession are upholding the public trust; affording participants the requisite due process; insuring the integrity of the process; upholding the dignity and sanctity of the legal profession; and, where misconduct is found, appropriately sanctioning lawyers and deterring future similar conduct.

Concomitant with these goals are differing viewpoints with regard to whom should be the decisionmakers and what forum should be utilized—whether the model should be administrative or judicial. Finally, there are the competing interests of permitting local custom and practice to view the same conduct differently and striving for uniformity in outcome regardless of locale.

II. THE STATE BAR RULES

Prior to 1992, the attorney discipline system was a two-tiered system, the first level of which was handled almost entirely by volunteers in a confidential setting—that is, the pendency, subject matter, identity of the accused lawyer (Respondent), and identity of the person filing the complaint (Complainant) were all confidential unless either a public sanction was agreed upon by the respondent or a disciplinary lawsuit was filed. In order to be processed, a grievance against a lawyer was required to be filed in writing. Where an initial review of a written grievance resulted in the conclusion that professional misconduct had been alleged, the matter was investigated, in rural areas of the state by the grievance committee members themselves and in the major metropolitan areas with the assistance of State Bar investigators housed within the Office of the General Counsel of the State Bar of Texas (General Counsel), the office then charged with administration of the attorney disciplinary system. If, after investigation, no misconduct could be established, the matter could be dismissed without the benefit of a grievance committee hearing upon the recommendation of the General Counsel and with the concurrence of the grievance committee. Matters not dismissed in that fashion proceeded to a grievance committee hearing.

In the late 1980s, grievance committees functioning in some parts of the state conducted hearings with little or no assistance or

input from the General Counsel staff. At the conclusion of the hearing, the grievance committee could attempt to negotiate an agreed sanction or simply direct the General Counsel's office to proceed without negotiation. Grievance committees could negotiate a private reprimand, public reprimand, suspension (which could be probated, partially probated, or active), or a resignation in lieu of discipline (which is the legal equivalent of disbarment) with the Respondent. There were no limitations on the usage or frequency of reprimands negotiated between a lawyer and a grievance committee for different complaints.

Where a grievance committee dismissed a matter as an inquiry (that is, as one where misconduct was not alleged); as a complaint (that is, where misconduct may have been alleged but could not be established); or sought to impose a sanction that was inappropriate under the circumstances, either the General Counsel or the Complainant, with the concurrence of the General Counsel, could appeal that decision to the Disciplinary Review Committee, a standing committee of the State Bar. The Complainant had no independent ability to appeal.

For those cases not resolved by the grievance committee, the second level of the pre-1992 process vested decisionmaking in district courts situated in the Respondent's county of residence with the option of a jury trial. The system was designed to permit local resolution of complaints, taking into consideration that the same conduct could be viewed differently in different legal communities. For cases not resolved at the grievance committee level, the judges hearing disciplinary matters were local, which meant that particularly in rural counties there was a good likelihood that the judge was, at the least, familiar with the accused lawyer's general reputation and, at the most, had a significant history of interaction with the lawyer in his or her court.

The General Counsel was hired by and reported to the State Bar Board of Directors (Board), which was comprised almost entirely of members elected from bar districts. The General Counsel performed, in addition to administering the attorney disciplinary system, the duties of an in-house corporate counsel for the State Bar of Texas, which included advising the Board on matters pertinent to the governance of the bar and any other issues that might arise in the course of performance of its duties as an elected board.

Because the functioning of the disciplinary system was invisible to the public eye unless either a public sanction was negotiated or a lawsuit was filed, many persons whose complaints were dismissed voiced the belief that those dismissals were the product of a “good old boy” system where lawyers protected lawyers. In truth, complaints were dismissed because, upon investigation, the grievance committee did not believe that professional misconduct for which the lawyer should be sanctioned could be established. Nonetheless, because many Complainants were not at the very least witness to a hearing where the lawyer was made to answer to the charges, some believed other reasons existed for their complaints not to be further pursued.

With these processes and perceptions in place, the supreme court-appointed Grievance Oversight Committee (GOC) in 1986 undertook a review of disciplinary procedures.¹ In so doing, the GOC reviewed the procedures utilized in other states with comparable lawyer populations and garnered information from members of the public, attorneys who had previously represented respondents, and members of the grievance committees.² Based upon this research, the GOC identified a number of problems believed to exist in the process then in place: “the lack of public information and access,”³ a perceived lack of accountability,⁴ the potential for political interference with the system,⁵ delays in the system,⁶ the lack of a system for addressing lawyers impaired by substance abuse or mental illness, the lack of uniformity of procedures with regard to sanctions, and the lack of appellate procedures.

1. See Official Minutes: State Bar of Texas Board of Directors Meeting 6 (Jan. 20-21, 1989) (on file with the State Bar of Texas) (stating that, according to the report from the Supreme Court Committee on Grievance Oversight, a research project began in 1986 to review the effectiveness of Texas disciplinary practices).

2. See *id.* (reporting that the research participants examined procedures in various states before concluding their report).

3. *Id.*

4. *Id.* The committee found that the system was controlled by attorneys “without adequate standards, without independent evaluation or sufficient supervision by the Supreme Court.” *Id.*

5. *Id.* The committee articulated the weakness in the “disbursement of the resources in addressing disciplinary problems with the bifurcation of the responsibilities of the general counsel.” *Id.*

6. Official Minutes: State Bar of Texas Board of Directors Meeting 6 (Jan. 20-21, 1989) (on file with the State Bar of Texas).

Taken separately, these concerns can be articulated as follows: *A lack of public information and access* – Although the State Bar Rules directed that information regarding public discipline be published in the Texas Bar Journal and in a newspaper of general circulation in the judicial district where the lawyer maintained an office, there was nonetheless a concern that insufficient information about the existence of and contact information regarding the attorney disciplinary system were disseminated.

A perceived lack of accountability – Because the grievance committees were the clients on whose behalf disciplinary litigation was brought, the General Counsel cultivated working relationships with individual grievance committees and individual grievance committee members. Although the General Counsel was accountable to the Board with regard to budgetary issues and was required to report to the Board generally on the status and functioning of the disciplinary system, there was no umbrella oversight by a state-wide body that had access to specific information about the conduct of disciplinary cases.⁷

The potential for political interference with the system – This was truly more a perception than a reality borne of the fact that the same person was both General Counsel and Chief Disciplinary Counsel. In matters related generally to the State Bar of Texas, the General Counsel represented the Board; in matters related to attorney discipline, the General Counsel represented grievance committees. In either capacity, funding for the operation of the Office of General Counsel had to be approved by the Board, which, in turn, incorporated that recommendation into the State Bar budget sought to be approved by the supreme court annually. The concern was that, because of the budgetary connection and the attorney-client relationship on other matters, pressure could be brought to bear by the Board on the General Counsel with regard to the handling of a particular case.

Delays in the system – This observation was the product of three distinct factors: (1) the absence of any deadlines in the procedural

7. See TEX. STATE BAR R., art. X, § 5 (1984, repealed 1992). The Disciplinary Review Committee of the State Bar of Texas was involved in individual cases where appeals were filed by the General Counsel or a Complainant with the concurrence of the General Counsel. It also had the duty of recommending proposed changes to the rules of procedure and to periodically review the operation of the disciplinary system, but it did not have general access to confidential information within the disciplinary system.

rules mandating the pace at which cases proceeded; (2) volunteer committees, many of whom were unassisted by professional General Counsel staff, frequently took a number of months to investigate and hold hearings on complaints; and (3) the reality that once cases were on file with a district court, they were given no real preference in being set for trial. In addition, many cases lingered because either local judges would be recused or recuse themselves and delays would ensue awaiting the appointment of a replacement judge.

The lack of a system for addressing lawyers impaired by substance abuse or mental illness – Very little discussion of how to handle lawyers with perceived disabilities was contained in the State Bar Rules. A lawyer could be placed on indefinite disability based upon a judicial declaration of mental incompetence or upon a finding within the context of the disciplinary proceeding that the lawyer is disabled to practice law because of “mental or emotional infirmity or illness caused by addiction to intoxicants or drugs” and is “unable to practice law without danger to the legal interests of his or her clients or to the public.”⁸

The lack of uniformity of procedures with regard to sanctions—The State Bar Rules provided no guideposts to grievance committees in the assessment of sanctions to be negotiated with an attorney after a grievance committee hearing. Not surprisingly, this created the possibility of widely different results for seemingly similar conduct in different parts of the state. Where cases were not resolved at the grievance committee level and suits were filed, the State Bar Rules in fact contained relevant factors for consideration in assessing sanctions that are not dissimilar from the factors set forth in the 1992 rules.

The lack of appellate procedures – Very little articulation of appellate procedures specific to disciplinary cases is contained in the State Bar Rules. Because no precedence was given to disciplinary appeals by the courts of appeals and no supersedeas was available to stay the effect of any suspension or disbarment judgment, some concern was expressed that there ought to be a mechanism in appropriate cases for staying the effect of the disciplinary judgment pending the outcome of the appeal.

8. *Id.*

The GOC presented its findings to the Board in January of 1989, which included the recommendations that the supreme court appoint a statewide commission of nine members to be charged with the responsibility of overseeing the disciplinary system (the genesis for the concept of the Commission for Lawyer Discipline) and that the roles of the position of General Counsel be bifurcated between the corporate counsel functions and the disciplinary system functions. The GOC proposed that the disciplinary functions be performed by a Chief Disciplinary Counsel employed by and answerable to the proposed Commission for Lawyer Discipline. The issues raised by the GOC's report were referred to the Board's General Counsel Advisory Committee (GCAC) and the Disciplinary Review Committee (DRC).

Between June of 1989 and February of 1990, a series of joint meetings between the GOC, chaired by William Hilgers of Austin, Texas, and the GCAC, chaired by Lonny Morrison of Wichita Falls, Texas, were held. One of the principal differences between the initial approaches of the two committees was the GOC's preference for administrative hearings and the GCAC's belief that the lawyers of Texas would prefer disciplinary litigation to remain in district courts.

The resulting compromise was approved by the Board on March 3, 1990 and became part of what was provided to the Sunset Commission's staff as it determined whether to recommend continuation to the Texas Bar in 1991. The most salient features of the proposed rules included: (1) the establishment of the Commission for Lawyer Discipline as both the client body in disciplinary litigation and the oversight body for the entire disciplinary system; (2) creation of the position of Chief Disciplinary Counsel as the Texas Bar's lawyer to investigate and litigate disciplinary matters, administer the grievance committee system, report on the status of the system, and answer to the Commission;⁹ and (3) the establishment

9. State Bar of Texas, Draft of Texas Rules of Disciplinary Procedure 4.01-4.03, at 16-17 (Mar. 3, 1990) (on file with the *St. Mary's Law Journal*) (draft for review and comment by the legal community prior to final adoption). The General Counsel initially also served as Chief Disciplinary Counsel, a compromise between those who wished to retain a line of authority between the person in charge of discipline and the Board and those who believed the positions should be separate. In fact, the proposed rule provided that the question of whether the General Counsel should continue to also function as the Chief Disciplinary Counsel could be reviewed by the Commission for Lawyer Discipline in each odd-num-

of a two-tiered system that permitted an attorney's election between an administrative hearing process and district court for all matters not resolved before the local grievance committee.¹⁰

The State Bar Act passed in 1991 enlarged the Commission to a membership of twelve, six of whom would be lawyers appointed by the bar and six of whom would be public members appointed by the supreme court.

III. THE 1992 TEXAS RULES OF DISCIPLINARY PROCEDURE

The Texas Rules of Disciplinary Procedure (TRDP), originally effective May 1, 1992, made significant strides in ensuring the usage of professional staff to evaluate and process attorney grievances.¹¹ The initial processing of grievances mandated their review by the Chief Disciplinary Counsel, who was charged with determining, based strictly upon a review of what was filed, whether an

bered year during the months of January or February. *Id.* Compare TEX. R. DISCIPLINARY P. 5.01, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 2005) (providing the same).

10. State Bar of Texas, Draft of Texas Rules of Disciplinary Procedure 2.20, at 12 (Mar. 3, 1990) (on file with the *St. Mary's Law Journal*) (draft for review and comment by the legal community prior to final adoption).

11. See State Bar of Texas, Draft of Texas Rules of Disciplinary Procedure pmb., at 12 (Mar. 3, 1990) (on file with the *St. Mary's Law Journal*) (draft for review and comment by the legal community prior to final adoption). The preamble to the draft-approved Texas Rules of Disciplinary Procedure set out the responsibilities and mandated:

The Supreme Court of Texas has exclusive constitutional and statutory responsibility within the State for the structure and administration of the lawyer discipline and disability system, and has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability in a manner that does not discriminate by race, creed, color, sex or national origin. In order to carry out this responsibility, the Supreme Court hereby promulgates the following rules for lawyer discipline and disability proceedings. Subject to the inherent power of the Supreme Court of Texas, the responsibility for the administration and supervision of the attorney professional disciplinary and disability system is hereby delegated to the Board of Directors of the State Bar of Texas. Authority to adopt rules of procedure and administration, not inconsistent with these rules shall be vested in such Board. The delegation under these rules of the Supreme Court's authority to the State Bar of Texas is specifically limited to the rights, powers and authority herein expressly delegated.

Id. Compare TEX. R. DISCIPLINARY P. pmb., reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005) (showing the preamble as adopted in 1991, which varied only slightly from the preamble proposed by the draft).

allegation of professional misconduct by the Respondent was made or not.¹²

The TRDP also expanded Complainant involvement in the grievance process. Where the initial review of a grievance resulted in the Chief Disciplinary Counsel's conclusion that the matter should be dismissed as an Inquiry, the Complainant had the ability to appeal that classification to the Board of Disciplinary Appeals (BODA). More significantly, the system inaugurated in May of 1992 provided that virtually every received writing that facially *alleged* professional misconduct by a lawyer—termed a “Complaint”¹³—would receive a grievance committee hearing to which the Complainant and Respondent would be invited.

With the advent of a statewide client body for disciplinary litigation, which was charged with maintaining oversight of the attorney disciplinary and disability system, in the form of the Commission, ground was being laid for a movement toward statewide consistency in sanctions as a counterbalance to local input at the nonpublic stage of the proceeding.

A potential for significant change was the Commission's ability every odd-numbered year to determine whether the General Counsel would continue to serve as the Chief Disciplinary Counsel.

12. TEX. R. DISCIPLINARY P. 5.02 (requiring the Chief Disciplinary Counsel to “[r]eview and screen all information coming to his or her attention . . . relating to lawyer misconduct,” and to “[r]eject all matters and Inquiries not constituting a Complaint”); see generally John Cornyn, *Conflicts of Interest—Recent Developments in the Texas Supreme Court*, 16 REV. LITIG. 515, 516 (1997) (stating that “[t]he Texas Rules of Disciplinary Procedure (Texas Rules) take a different approach to discerning and enforcing rules of professional conduct by making the sanctions of what should be every lawyer's conscience into explicit rules”). Cornyn states:

The general goal of the Rules is to “define proper conduct for purposes of professional discipline. . . . Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.” Enforcement of this code of conduct thus is achieved not simply by punishment, but by encouraging and enabling lawyers to assimilate ethical standards into their behavior by clearly setting out those standards.

Id. (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT pmb1.) (omission in original).

13. TEX. R. DISCIPLINARY P. 1.06(F), 833-34 S.W.2d (Tex. Cases) XLII (1991). “‘Complaint’ means those written matters received by the Office of the Chief Disciplinary Counsel that, either on the face thereof or upon screening or preliminary investigation, allege Professional Misconduct or attorney Disability, or both, cognizable under these rules or the Texas Disciplinary Rules of Professional Conduct.” *Id.* This same definition is currently in effect as TEX. R. DISCIPLINARY P. 1.06(G).

During the mid- to late-1990s, a debate ensued between the Board's General Counsel Oversight Committee and the Commission as to whether one person should serve in both capacities. The Commission's concern was that there not be even a perception that the General Counsel could be influenced by the Board in the handling of a particular disciplinary case. In addition, the Commission believed that oversight of the attorney disciplinary system was indeed a full time endeavor that left little room for other unrelated duties. The Board believed that keeping the positions together was an essential component as the bar approached the next Sunset review process.

A second entity new to the attorney discipline system established in the TRDP was the Board of Disciplinary Appeals, initially a nine-lawyer member body appointed by the supreme court to three-year staggered terms,¹⁴ which performs a number of discreet functions:

- Proposing rules for its own operation;
- Deciding all classification appeals;¹⁵
- Hearing appeals from evidentiary proceedings;
- Transferring disciplinary proceedings when a committee fails or refuses to hear it or when fairness to the Complainant or Respondent requires it;
- Serving as the court of original jurisdiction for compulsory discipline and reciprocal discipline proceedings;
- Hearing motions to revoke probation filed pertaining to grievance committee-entered judgments; and
- Hearing disability proceedings.

Other salient features of the 1992 disciplinary system included:

- The requirement that grievances be made in writing;
- The absence of a standing requirement as to the identity of the person complaining;

14. TEX. R. DISCIPLINARY P. 7.01, 833-34 S.W.2d (Tex. Cases) XLII (1991). In 1994, the supreme court amended Rule 7.01, increasing the membership of the BODA to twelve. Misc. Docket No. 94-9076, 881 S.W.2d (Tex. Cases) L-LI (1994).

15. The TRDP as originally enacted provided for a further appeal of classifications to the supreme court. See TEX. R. DISCIPLINARY P. 7.08 (enumerating the powers and duties of the Board). Effective October 1, 1994, the court amended Rule 7.11 of the TRDP to say, "Determinations by the Board of Disciplinary Appeals that a statement constitutes either an inquiry or a complaint or transferring cases are conclusive, and may not be appealed to the Supreme Court." Misc. Docket No. 94-9076, 881 S.W.2d (Tex. Cases) LI-LII (1994).

- The usage of professional staff in the classification, investigation, and presentation of disciplinary matters and in the representation of the disciplinary authority in litigation;
- Lack of staff “prosecutorial discretion” for any matter where professional misconduct is alleged;
- Usage of volunteers, including members of the public unaffiliated with law, as adjudicators except where a timely election for district court is made;
- The confidentiality of the disciplinary proceedings to a certain point in the process;
- A system that functions independent of political influence of the Bar’s governing body;
- Immunity from suit for system participants and professional staff and volunteers in the course and scope of their duties; and
- The option of district court, with the possibility of a jury trial, as the venue for disciplinary cases based upon complaints filed against a lawyer where timely election by Respondent was exercised.

Disability issues—issues relating to lawyers who were incapable of timely, competently, and ethically discharging their obligations to clients, courts, and the profession due to substance abuse or mental health problems—were the subject of an entire section of the rules. Investigatory panels, believing that as a result of the Respondent’s conduct the Respondent was suffering from a Disability,¹⁶ could certify that finding. The BODA would then appoint a District Disability Committee—an ad hoc committee comprised of a lawyer, a mental health care provider, and a public member—to determine whether a Disability, in fact, existed. Where a Disability was found, the BODA placed the attorney on an indefinite disability suspension.¹⁷ Provisions describing reinstatement from disabil-

16. “‘Disability’ means any physical, mental, or emotional condition that, with or without a substantive rule violation, results in the attorney’s inability to practice law, provide client services, complete contracts of employment, or otherwise carry out his or her professional responsibilities to clients, courts, the profession, or the public.” TEX. R. DISCIPLINARY P. 1.06(H), 833-34 S.W.2d (Tex. Cases) XLII (1991).

17. TEX. R. DISCIPLINARY P. 12.04.

Upon receiving a finding of Disability from the District Disability Committee, the Board of Disciplinary Appeals shall immediately enter its order suspending the attorney indefinitely. The record of all proceedings on disability must be sealed and must

ity suspension permit the attorney to seek reinstatement before the BODA or a district court, with the possible outcomes being denial of the reinstatement, placing the attorney on probated disability suspension,¹⁸ or terminating the disability suspension.

The TRDP also contain sections describing procedures seeking to discipline lawyers convicted of certain types of crimes, lawyers who have been disciplined by other jurisdictions in which they hold a license, and lawyers who have engaged in conduct violative of terms of probation contained in a disciplinary judgment. Where a lawyer has disappeared, abandoned his or her law practice, become disabled, been suspended or disbarred, or died, leaving client matters unattended, the TRDP provide a mechanism for seeking court intervention in winding down the lawyer's practice.

remain confidential, except as to the Respondent; only the order of indefinite suspension is to be made public.

Id.

18. TEX. R. DISCIPLINARY P. 12.10, 833-34 S.W.2d (Tex. Cases) LXXVI-LXXVII (1991). Rule 12.11 mandated:

The order placing an attorney on Disability probation must state the conditions of probation. The conditions must take into consideration the nature and circumstances of the Professional Misconduct and the history, character, and condition of the attorney. Any or all of the following conditions, and such others as the Board of Disciplinary Appeals or the district court deems appropriate, may be imposed:

- A. Periodic reports to the Chief Disciplinary Counsel.
- B. Supervision over client trust accounts as the Board of Disciplinary Appeals or the district court may direct.
- C. Satisfactory completion of a course of study.
- D. Successful completion of the multistate Professional Responsibility Examination.
- E. Restitution.
- F. Compliance with income tax laws and verification of such to Chief Disciplinary Counsel.
- G. Limitations on practice.
- H. Psychological evaluation, counseling, and treatment.
- I. The abstinence from alcohol and drugs.
- J. Payment of costs (including Reasonable Attorneys' Fees and all direct expenses) associated with the proceedings.
- K. Substance abuse evaluation, counseling, and treatment.
- L. Participation in an Impaired Attorney Recovery and Supervision Program if such a program has been adopted by the Board of Directors of the State Bar of Texas.

TEX. R. DISCIPLINARY P. 12.11, 833-34 S.W.2d (Tex. Cases) LXXVI-LXXVII (1991). These two rules have since been renumbered to subsections of TEX. R. DISCIPLINARY P. 12.06.

In May of 1999, the Commission voted that the General Counsel should no longer serve as Chief Disciplinary Counsel (CDC), marking the beginning of a process that culminated in the hiring of a separate CDC answerable directly to the Commission for the administration of the attorney disciplinary and disability system.

More than a decade's experience with the TRDP raised different concerns as the State Bar began the Sunset review process. Many believed having a full-blown grievance committee hearing on virtually every alleged professional misconduct grievance to be overkill, because in many instances, by virtue of the investigation that ensued between classification of the matter as a Complaint and convening an investigatory hearing, evidence was on hand that refuted the allegations of professional misconduct. This, according to some, rendered the actual holding of the hearing unnecessary, except as a platform for a Complainant to air dissatisfaction with the lawyer for reasons that did not rise to the level of Professional Misconduct.¹⁹

19. "Professional Misconduct," as defined in Rule 1.06(Q) of the Texas Rules of Disciplinary Procedure, in effect from May 1, 1992, through December 31, 2003, included:

1. Acts or omissions by an attorney, individually or in concert with another person or persons, that violate one or more of the Texas Disciplinary Rules of Professional Conduct.
2. Attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.
3. Violation of any disciplinary or disability order or judgment.
4. Failure of a Respondent to furnish information subpoenaed by a Committee, unless he or she, in good faith, asserts a privilege or other legal grounds for the failure to do so.
5. Engaging in conduct that constitutes barratry as defined by the law of this state.
6. Failure to comply with Section 13.01 of these rules relating to notification of an attorney's cessation of practice.
7. Engaging in the practice of law either during a period of suspension or when on inactive status.
8. Conviction of a Serious Crime, or being placed on probation for a Serious Crime with or without an adjudication of guilt.
9. Conviction of an Intentional Crime, or being placed on probation for an Intentional Crime with or without an adjudication of guilt.

TEX. R. DISCIPLINARY P. 1.06(Q), 833-34 S.W.2d (Tex. Cases) XLIII (1991). This definition has since been renumbered to TEX. R. DISCIPLINARY P. 1.06(V).

IV. THE 2003 SUNSET REVIEW PROCESS

The perfect forum for examining concerns expressed about efficiencies in the disciplinary process came in the form of the Sunset review process, which the State Bar of Texas undergoes every twelve years. The State Bar began the two-year Sunset process in 2001, culminating in the passage of a new State Bar Act in May of 2003.

The Sunset review process begins with the agency's self-evaluation, followed by the Sunset staff conducting extensive interviews with agency personnel, persons serviced by the agency in various capacities, and others.²⁰ The Sunset Commission then issues an initial report that articulates issues and makes recommendations. The agency has the opportunity to file a response, after which a public hearing is held. The Sunset Commission then renders a decision document. Once the Sunset bill for the agency is filed, a second public hearing is held.

Initially, the Sunset Commission observed that the grievance system then in place was unnecessarily complex, lacked consistency, and took a long time from initiation to resolution of a grievance. This was based upon its analysis of Texas's two-tiered hearing process, where every grievance classified as a Complaint received a hearing before an investigatory panel of the grievance committee at which both the Complainant and Respondent were invited to attend. Any Complaint where Just Cause²¹ is found that was not resolved by a negotiated sanction with the Respondent proceeded to a *de novo* proceeding before either a different grievance committee panel called an Evidentiary Panel or a district court, at the Respondent's option. Default cases proceeded through the Evidentiary Panel route. A second opportunity to get to district court existed based upon the Respondent's assertion that hearing orders

20. See Texas Sunset Act, TEX. GOV'T CODE ANN. §§ 325.001-325.024 (Vernon 2005) (outlining the comprehensive procedures for Sunset review).

21. TEX. R. DISCIPLINARY P. 1.06(Q), 833-34 S.W.2d (Tex. Cases) XLIII (1991) (defining "Just Cause"). "Just Cause" means:

[S]uch cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.

Id.

proposed by the Evidentiary Panel and the Respondent for the evidentiary process differed. Any case that went through the entire process—particularly those that ended up in district court—could easily take more than a year from beginning to end.

The most significant changes proposed by the Sunset Commission were the elimination of the investigatory hearing and the elimination of the option of district court, with the ability to seek a jury trial, in the disciplinary process.

The Sunset Commission also believed that the Client-Attorney Assistance Program (CAAP)²² was not being fully utilized and made a recommendation that would greatly expand the scope of what the program could address. The Sunset Commission believed that referring dismissed matters to the CAAP could provide additional help to legal consumers trying to work out problems with their lawyers, even when those problems did not rise to the level of professional misconduct. The resulting statutory provision makes mandatory the referral to the CAAP of dismissed grievances—either as an Inquiry or a Complaint. Participation by the lawyer in that process is voluntary, however.

The State Bar worked vigorously during the legislative process to ensure the retention of the jury trial option for accused lawyers. Ultimately, the bill retained the district court option. The State Bar Act passed following the Sunset review took effect September 1, 2003. It mandated that the supreme court enact rules necessary to effectuate the legislative changes to the disciplinary system by

22. The CAAP began as a pilot program in 1999, modeled after a similar program in Georgia. As originally conceived, it was a joint project of the State Bar Board of Directors and the Commission. Its original intent was to answer the toll-free grievance helpline maintained by the Commission as the initial point of contact with callers to the attorney disciplinary and disability system. In visiting with callers, CAAP personnel first assure that the caller is even at the right place (sometimes, for example, the caller might in fact be searching for a lawyer referral rather than seeking to file a grievance) and then, by means of listening and asking questions, assess whether the caller's questions or complaints indicate a likelihood of attorney misconduct. If not, the CAAP refers the caller to the appropriate resource. If so, the caller is informed and provided written materials about the attorney disciplinary process. Any caller seeking information about the grievance process will receive those materials regardless of the CAAP's assessment of the merits of the complaints being lodged. In some instances involving minor communication problems, CAAP employees will contact the lawyer and attempt to facilitate improved communication between client and lawyer. *See generally* State Bar of Texas, Client Assistance & Grievance, Client-Attorney Assistance Program, at http://www.texasbar.com/Template.cfm?Section=Client_Attorney_Assistance (last visited Mar. 10, 2005).

January 1, 2004. The supreme court entered an order December 30, 2003 imposing amendments to the TRDP. Those amendments effectuated all of the legislative changes plus additional changes necessary to ensure a functioning disciplinary system. All grievances filed on or after January 1, 2004 are governed by these amended rules.

V. THE 2004 TEXAS RULES OF DISCIPLINARY PROCEDURE

Several major changes and a number of other significant changes came out of the Sunset review process and the resulting State Bar Act.

As was the case under the 1992 version of the Texas Rules of Disciplinary Procedure (1992 TRDP), upon receipt of a Grievance,²³ the CDC reviews what has been submitted and, for the purposes of this analysis, assumes everything stated in the Grievance is true. If any of the acts or omissions described constitute the named lawyer's violation of one of the Texas Disciplinary Rules of Professional Conduct (the substantive ethical rules by which Texas lawyers must abide), the Grievance is classified as a Complaint and the lawyer against whom the Grievance has been filed, called the Respondent, is provided a copy of the Complaint and asked to file a written response. Under the 1992 TRDP, a respondent could at that point appeal the classification of the Grievance as a Complaint to the BODA. This right to appeal is eliminated in the 2004 rules because of the existence of the summary disposition process, described below.

Where a Grievance does not allege Professional Misconduct by the Respondent, it is dismissed as an Inquiry and the Complainant is so notified. The Complainant can appeal that classification decision to the BODA. The BODA reviews the very same material, undertakes the very same analysis, and either affirms the dismissal as an Inquiry or reverses it. If the dismissal is reversed, the matter proceeds on for a determination of Just Cause after investigation by the CDC. Where the BODA affirms the dismissal, the Com-

23. See TEX. R. DISCIPLINARY P. 1.06(R), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 2005) (effective Jan. 1, 2004) (defining "Grievance"). "'Grievance' means 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." *Id.*

plainant has a one-time ability to file an amended Grievance containing any additional information not previously submitted, which will then be reviewed and analyzed to ascertain whether a Complaint has been stated. The Complainant has the ability to appeal a dismissal of the amended Grievance as an Inquiry to the BODA, but has no additional right to amend or appeal.

Any time a Grievance is classified as a Complaint, whether initially by the CDC or as a result of a Complainant's appeal of the classification decision, the Respondent is sent a copy of the Complaint and asked to respond in full to the allegations within thirty days.

At this juncture, under the 1992 TRDP, the Complaint would be scheduled for hearing before an investigatory panel of the grievance committee. Both the Complainant and Respondent would be invited to attend and the investigatory panel would hear testimony and receive evidence in order to determine whether there was Just Cause to believe Professional Misconduct had been committed by the Respondent.

The elimination of the investigatory panel hearing process—the hearing which heretofore took place in every grievance classified as a Complaint—is the single most significant change in the disciplinary system wrought by the Sunset review process. In its place, the CDC (which means both the person serving as Chief Disciplinary Counsel and any of his or her assistants) is charged with undertaking an investigation of each Complaint and determining within sixty days of the date of the Respondent's response deadline whether Just Cause exists.²⁴

Where Just Cause is not found, the CDC takes the Grievance before a Summary Disposition Panel (SDP) *outside the presence of either the Complainant or Respondent*. In fact, neither the Complainant nor Respondent is entitled to know that the Complaint is being taken before a SDP—seeking authority to dismiss the Com-

24. See TEX. R. DISCIPLINARY P. 1.06(U), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 2005) (defining "Just Cause"). "Just Cause" means:

[S]uch cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.

Id.

plaint.²⁵ This is not a forum where testimony is given; it is simply a presentation by the CDC of the results of the investigation of the Complaint coupled with an explanation of why the CDC believes Just Cause cannot be established. The Complainant has no ability to appeal a SDP's dismissal of a Complaint, and the Respondent has no ability to inject into any subsequent disciplinary proceeding the fact that the Complaint was taken to a SDP and not dismissed.

In each Complaint where Just Cause is found, or which a SDP declines to dismiss, the Respondent is provided a description of the factual allegations and rule violations believed to be implicated as a predicate to a Respondent's decision whether to elect that the matter go forward before an Evidentiary Panel of the grievance committee or to a district court.²⁶ If district court is timely elected and a disciplinary petition filed, a jury may be sought by either the Respondent or the CDC.²⁷ If a Respondent declines to timely elect either forum, the matter proceeds before an Evidentiary Panel. There is no longer a second opportunity to opt out for district court based upon differing hearing orders.

The Evidentiary Panel process functions essentially the same as under the 1992 TRDP, with a few notable exceptions. The process is commenced, as in district court, with the filing of a notice pleading containing information comparable to what is required for a disciplinary petition filed in district court.²⁸ Venue is in the county of principal place of practice and, in the absence of a principal place of practice, in the county of residence. Where neither a principal place of practice nor county of residence exist, venue is in the county where all or part of the alleged misconduct occurred and, in all other instances, in Travis County, Texas.

In Evidentiary Panel proceedings brought under the 1992 TRDP, discovery was only available upon leave of the Evidentiary Panel chair. The revised rules provide for limited discovery, in-

25. TEX. R. DISCIPLINARY P. 2.13.

26. TEX. R. DISCIPLINARY P. 2.14.

27. TEX. R. DISCIPLINARY P. 3.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005). As in the 1992 TRDP, however, even where a jury is sought the jury decides only the factual matters in dispute. The judge decides the appropriate sanction based upon the jury's verdict as to the facts of the case.

28. *See* TEX. R. DISCIPLINARY P. 2.15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 2005) (delineating the procedures and requirements followed in an evidentiary hearing).

cluding the filing of a request for disclosure, six hours of depositions, twenty-five written interrogatories, requests for production and inspection of documents and tangible things, and requests for admissions, with the ability to seek modification of those limitations upon a showing of reasonable need.

In a significant departure from the 1992 TRDP, matters pending before an Evidentiary Panel are confidential unless a public sanction is entered by the Evidentiary Panel.²⁹ If a public sanction is entered, the entire process becomes open to the public. The private reprimand is an available sanction before an Evidentiary Panel, subject to the limitations imposed on the usage of a private reprimand in a particular case by reason of recidivism or the type of misconduct found to have occurred.³⁰

29. Three principal reasons drove the decision to render the Evidentiary Panel process confidential: (1) the notion that lawyers unjustly accused of Professional Misconduct should be afforded a process which did not subject their conduct to public scrutiny unless there was some merit to the allegations, a principal honored in the pre-2004 rules by the fact that the disciplinary process was confidential through the Investigatory Panel process; (2) the recognition that, if the proceeding itself were public, the availability of a private reprimand as a sanction would be rendered meaningless if the proceeding in which the private reprimand was imposed were public; and (3) ensuring that, where a Disability issue arises during the course of investigation such that a referral to a District Disability Committee is deemed appropriate, the confidentiality of a pending Disability proceeding is maintained, as existed under the pre-2004 rules.

30. *See Amendments to the Commission for Lawyer Discipline Internal Operating Rules and Procedures*, 67 TEX. B.J. 789, 791 (2004) (describing the limitations on the use of private reprimands signed and entered by the Texas Supreme Court on August 17, 2004). The Commission established the following limitations on the use of private reprimands. Private reprimands shall not be utilized by district grievance committees if:

- A. A private reprimand has been imposed upon the Respondent within the preceding five (5) year period for a violation of the same disciplinary rule; or
- B. The Respondent has previously received two (2) or more private reprimands, whether or not for violations of the same disciplinary rule, within the preceding ten (10) years; or
- C. The misconduct includes theft, misapplication of fiduciary property, or the failure to return, after demand, a clearly unearned fee; or
- D. The misconduct has resulted in substantial injury to the client, the public, the legal system or the profession; or
- E. There is likelihood of future misconduct by Respondent; or
- F. The Respondent's misconduct was an intentional violation of the Texas Disciplinary Rules of Professional Conduct or, if applicable, the Texas Code of Professional Conduct; or
- G. A Disciplinary Action has been filed as a result of such misconduct.

Id.

The Evidentiary Panel chair rules on any discovery disputes that may arise and has the ability, upon motion made or upon his or her own motion, to order the Commission and the Respondent to participate in mandatory alternative dispute resolution as provided by Chapter 154 of the Civil Practice and Remedies Code.³¹

Evidentiary Panel proceedings are to be set for hearing within 180 days of the date the Respondent files his or her answer.³² The Evidentiary Panel may, in its discretion, conduct a separate hearing and receive evidence as to the appropriate Sanction to be imposed. The Commission and the Respondent have the right to appeal the Evidentiary Panel's decision to the BODA. The Complainant's independent right to appeal the outcome of the evidentiary proceeding has been eliminated in the 2004 rules, bringing the Evidentiary Panel proceeding in line with district court proceedings, in which a Complainant has never had an independent right to appeal.³³

District court proceedings under the 2004 rules are not significantly different from pre-2004 filings. Petitions are still initially filed with the supreme court in order that the court may assign a sitting district judge from outside the administrative region where the case will ultimately be filed. Venue parallels provisions governing Evidentiary Panel proceedings. Generally, discovery is the same as in civil cases. Cases are to be set for trial within 180 days after the Respondent's answer is filed. Appeals are as in civil matters generally.

New to the system is a mandatory referral of Grievances dismissed at any juncture—whether as an Inquiry, as a result of the vote of a SDP, because the Commission at some point directs that the matter not be pursued, or because the matter is dismissed on its merits by either an Evidentiary Panel or a district court—to the CAAP, in order that there be some possibility of further assisting the Complainant in resolving his or her disputes with the Respon-

31. TEX. R. DISCIPLINARY P. 2.17(K), *reprinted in* TEX. GOVT. CODE. ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 2005); Dawn Miller, *Attorney Disciplinary Procedure in Texas: An Update*, 68 TEX. B.J. 78, 79 (2005) (“The evidentiary panel chair, upon motion of either party or sua sponte, can order the parties to participate in mandatory alternative dispute resolution when deemed appropriate.”).

32. TEX. R. DISCIPLINARY P. 2.17(O).

33. *See* Dawn Miller, *Attorney Disciplinary Procedure in Texas: An Update*, 68 TEX. B.J. 78, 78-79 (2005) (explaining the appeals process available under the Texas Rules of Disciplinary Procedure).

dent. The only exception to this referral is if the Grievance is dismissed because the named Respondent is deceased, disbarred, resigned, or is not a person who is licensed to practice law in Texas.³⁴

VI. SOME OBSERVATIONS ABOUT THE CHANGES

In creating the SDP proceeding and eliminating the investigatory panel hearing, the Sunset staff intended to streamline the grievance process by eliminating what it deemed unnecessary hearings, while retaining in the hands of volunteers the decision not to go forward with an investigated Complaint where Just Cause was not evident.³⁵ All Complaints in which Just Cause is found by the CDC and those not dismissed by a SDP become matters for which the Commission is the client as to any subsequent action.

Under the 1992 TRDP, the local grievance committees, where acting as an investigatory panel, had the ability to negotiate a sanction with a Respondent for a certain time period following the investigatory panel hearing. Grievance committee members no longer have any ability to negotiate sanctions with a Respondent. They are either serving on a SDP making a decision whether the Complaint should be dismissed or they are performing an adjudicatory function as a member of an Evidentiary Panel.

As a result, the volume of disciplinary cases in which the Commission is the client is tenfold what it was prior to January 1, 2004. What this means for those who voice concern over consistency is that a single, statewide client body is involved in any negotiated outcome of a disciplinary matter. Local grievance committees weigh in on what is appropriate to dismiss at an early stage and serve as adjudicators in the evidentiary setting, but have no input on negotiated results.

A second significant change is the possibility that, for every Grievance that ends up either by choice or by default in the Evidentiary Panel process, the matter remains at a confidential stage

34. *Id.*

35. Gib Walton, *Sunset Review: The New State Bar Act*, 66 TEX. B.J. 724, 725-26 (2003) (discussing the revisions to the State Bar's grievance system that are intended to streamline and simplify the system).

for a much longer period of time than under the 1992 TRDP.³⁶ Under the 1992 TRDP, once an attorney elected an (or defaulted into) Evidentiary Panel or district court, the pendency and content of the grievance proceeding became public. This distinction creates the possibility for the *perception* that the disciplinary process is less open and less subject to scrutiny. In reality, other than the fact that a trial occurring before an Evidentiary Panel is not open to the public, the manner in which the cases proceed—that is, investigation followed by filing a petition, conducting discovery, reaching a negotiated sanction or not, and proceeding to a trial where the Complainant may participate as a witness—is not unlike how cases proceeded previously. And the same types of oversight remain in place. The Commission's duties and responsibilities include, among other things, in addition to serving as the client body for all Complaints not dismissed by a SDP: monitoring, evaluating, and reporting to the State Bar Board the performance of the CDC; recommending to the State Bar Board an annual budget for the operation of the attorney discipline system; drafting and recommending for adoption to the Board the Commission's internal operating rules; and reporting to the Board at each regular meeting and to the Grievance Oversight Committee annually on the state of the attorney disciplinary and disability system. The CDC is charged with administering the attorney disciplinary and disability system and answers solely to the Commission in that endeavor.

It remains to be seen how the public will view these changes—most especially the prospect of an investigation of their Complaint without the utilization of a hearing as a tool of investigation. Although the modifications were truly intended to facilitate a faster resolution of unmeritorious matters in order to concentrate resources on the cases in which misconduct could be established, some persons familiar with the pre-2004 system might believe that consumers were better served by having a hearing in all instances where misconduct was facially alleged, even in those instances where a dismissal was anticipated.

After only a few months of experience with the usage of SDPs, grievance committee members who have served under both sys-

36. See Dawn Miller, *Attorney Disciplinary Procedure in Texas: An Update*, 68 TEX. B.J. 78, 79 (2005) (stating that the entire process of the evidentiary panel proceeding is confidential “unless and until a public sanction is entered”).

tems have been generally impressed with the efficiencies gained by that process.³⁷ Understandably, some members have expressed a disappointment in losing the ability to negotiate with the Respondent, but local input is still maintained with their role as adjudicators in the Evidentiary Panel process.

Attorneys who have themselves been or have represented Respondents and who are familiar with the differences between the two systems view positively the elimination of an investigatory panel hearing in all Complaints; the advent of the SDP process as a means of dismissing unfounded complaints; the provisions of factual allegations and rules violations to a Respondent as a predicate to making an election between an Evidentiary Panel proceeding and district court; and the changes to the Evidentiary Panel process which make it more closely resemble a proceeding in district court (with the major differences of the availability of a private reprimand and the confidential nature of the proceeding pending entry of a public sanction, both of which are also viewed positively by lawyers).

The challenge for the Office of Chief Disciplinary Counsel posed by the new system is continuing to ensure that those cases that can be negotiated to a mutually acceptable result are resolved at the earliest possible juncture, in order to concentrate on the investigation and preparation of those cases for trial that must be tried, and doing so without the benefit of the investigatory panel hearing as either a baseline example of the Complainant's and Respondent's testimony and demeanor or the investigatory panel's impact upon the Respondent in seeking to negotiate and, at times, informally mediate an outcome at an early stage of the process.

Without a doubt, suggestions for additional refinements to the system will emerge as experience with the 2004 rules increases. For the foreseeable future, the Office of Chief Disciplinary Counsel continues to work on implementation of the changes by examining and refining the in-house processing of Grievances, training staff, educating grievance committee members, and educating lawyers and the public about the changes.

37. *Id.*

