HOW TO AVOID THE GRIEVANCE COMMITTEE

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I. WHAT CONSTITUTES GRIEVABLE CONDUCT?

A. Most Frequent Client Complaints

The State Bar, through the Client-Attorney Assistance Program (CAAP), has begun compiling information in a number of areas of interest in the Texas Disciplinary System. CAAP has fielded thousands of calls during its short existence from all over the state. The following lists, which are divided into five categories, are a sampling of the complaints received by CAAP. They shed some light on where we tend to drop the ball (at least in our clients' eyes):

PROFESSIONALISM & BEHAVIOR
- Rude or intimidating behavior
- Name calling and threats
- Use of profanity
- Hanging up on client
- Pressuring client
- Withdrawing or threatening to withdraw at critical time
- All communications through staff
- Not informing when attorney leaves firm
- Sexual advances
- Not licensed in Texas
- Attorney disappeared
- Lying to client
- Substance abuse
- Abusive litigation tactics
- Missing or canceling client meetings
- Errors in documents

NEGLECT & COMPETENCE
- Not completing case w/ final orders
- Failing to attend or late for court
- Not prepared at hearings
- Missing filing deadlines
- Failing to put on evidence at hearing
- Failing to supervise subordinates
- Failing to research legal issues
- Fail to include causes of action in petition
- Failing to file case within limitations
- Not providing copies continuously
- Not having file at client meeting
- Not returning phone calls
- Failing to inform client of hearings and case deadlines
- Failing to explain litigation strategies and legal issues
- Failing to schedule depos\hearings timely
- Failing to correct substantive errors in court papers

FEES, STATEMENTS & SETTLEMENTS
- Not providing itemized statements
- Statements hard to read
- Errors or overcharges in bills
- Billing at higher fee than quoted
- Not accounting for retainer
- Failing to deliver orders to third parties for distribution of funds
- Making settlement offers or settling case w/o client consult or consent

CONFIDENCES
- Disclosing client confidences to opponent
- Talking about clients' case with third parties

SAFEGUARDING CLIENT PROPERTY
- Mismanagement of trust funds
- Mismanagement of estate funds
- Not returning original documents or files to client
- Losing file or documents
- Not returning unused retainer
- Not paying expert witnesses or paying medical providers out of funds withheld from settlement
- Cashing settlement check and keeping clients' money

Before continuing, I should point out that each of us owns an excellent set of tools for weeding out potential problems early on. Those tools are the discretion and right to say "no" to a case or a client that has "trouble" tattooed all over them. The big question is whether we have the wisdom to figure out when to say "no" and the fortitude to actually do it.

Be aware that even the most careful screening will not always prevent some problems from developing in the course of representation. Clients become upset with lawyers for a myriad of reasons and there are those who will never be happy with what you do for them. Fortunately, not every client gripe necessarily rises to a level of grievable or actionable conduct. We can head off many of the most frequent client complaints with just a little organization, diligence, and some manners. Preparing for those few, perpetually grumpy clients will help you keep the rest of your clients relatively happy and will also keep the wolves away from your door.

B. Most Frequently Violated Rules

A review of complaints to the State Bar reveals which rules are alleged to have been violated by Texas attorneys most often. While not all of these rule violations are unique to the trial lawyer's practice, a significant number of them arise in the context of personal injury or other consumer-oriented claims. For the 1999 – 2000 time period, there were 608 complaints made to the State Bar regarding personal injury representation. Complaint-wise, we were the third highest area of practice trailing behind family law (714) and criminal law (1061) grievances.

1. Neglect [Rules 1.01, 1.03 and 2.01]
2. Declining or Terminating Representation [Rule 1.15]
3. Safeguarding the Clients' Property [Rule 1.14]
4. Fees [Rule 1.04]
5. Integrity [Rules 8.01 and 8.05]
6. Conflicts of Interest [Rules 1.06 – 1.13, 2.02 and 3.08]
7. Conduct Before a Tribunal [Rules 3.01 – 3.10]
8. Duties to Non-Clients [Rules 4.01- 4.04]
9. Lawyer Advertising [Rules 7.01 - 7.07]
10. Confidentiality [Rule 1.05]

The news is not all bad. While the total number of grievances filed over the last 5 years has remained fairly constant (between 9000 and 9500 annually), the number of grievances that actually rise to the level of a formal complaint has declined steadily from about 4000 per year to around 3000 per year. Furthermore, the number of complaints that arise in the area of personal injury law has dropped by about one-third since 1995. In the following section, we will focus our attention on those alleged rule violations, which most often involve lawyers in the plaintiff's practice and explore ways to sidestep them.

C. Preventive Measures

At the risk of being accused of having a firm grip of the obvious, I am going to point out a few easy ways to avoid grievances. Some of these suggestions may seem childishly simple – they are. And I can assure you that every member of your local grievance panel will be of the

same opinion if you fail to observe them. That however, has not kept complaints alleging related violations from rolling across my desk every month.

1. Neglect

The neglect rules (1.01, 1.03 and 2.01) are by far the most frequently violated sections of the Texas Disciplinary Rules of Professional Conduct. For the one-year period beginning May 1, 1999 and ending April 30, 2000, neglect complaints exceeded all other Disciplinary Rules violations combined according to the Texas State Bar Board of Disciplinary Appeals. There is good reason for this – it is not difficult to run afoul of the neglect rules. Add in the fact that many neglect complaints are rooted in the client's perception of what you are (or are not) doing for them, or how you treat them, and it is not surprising that such complaints top the list. If your clients feel neglected because they think you have not worked on their case or returned their calls, you may well be driving them into the arms of the local grievance committee.

a. Case Screening

Rule 1.01(a) provides in part that, "A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyers' competence…"

Begin by using good judgment on whether to accept a case in the first place. Spend a little extra time investigating the clients, the facts, the applicable law, and estimating what resources it will take to prepare the case. Look at your caseload as this usually gives you a good idea if the case is one that you can take on. Some simple steps at the outset can head off many hours of agony down the road. Here are just a few that I have seen practiced by lawyers who rarely, if ever, make it onto a grievance committee docket:

- Ask the client how many other lawyers they have been to see before coming to you. (This one should be a BIG giveaway); - Call the other/previous lawyers they have had or visited to get their thoughts. -)They can give you the benefit of their investigation and analysis);
- Ask the client what they want you to do for them (Is it something within your field of practice or even something that you want to do?);
- Ask them what they want or expect out of the case. (Is their expectation realistic or even possible?);
- Are they pleasant, good natured, or sympathetic;
- Do they make you want to help them? (If not, what are the odds a jury will want to help them?)
- Do they seem like "needy" or "high maintenance" people? If so, their demeanor or personality is not likely to change once you take them on as clients and you should be prepared to deal with them accordingly.

Take the time to factor these things in (along with the usual business assessment you make) in coming to your decision to accept or decline representation. Doing so should help identify difficulties early on.

If the case is not within your area of practice and you do not think you can or will do the research to get up to speed on the issues, then DON'T TAKE IT! In the alternative, you should

consider referring the case out to an attorney with expertise in that area of the law or perhaps associating experienced co-counsel. Both options allow you to work on or at least maintain an interest in a case that may be lucrative but beyond the scope or means of your individual practice. Telling yourself that you will "learn as you go" is risky business unless you are sure that you will have the time and resources to bone up in an unfamiliar area. Do not, out of indecision, pride, or (heaven forbid) greed for an unshared fee, make the mistake of holding onto a file that you cannot or do not know how to prepare. A great trial lawyer who has forgotten much more law than I will ever learn used to say to me . . .

"Pigs get fat, but hogs get slaughtered"

. . . .My experience on the grievance panel has confirmed (for me at least) that he was correct.

b. Working the case

The very nature of the plaintiff's practice requires us to push, prod, and pull cases along. In spite of this, anyone who has had more than a few cases at a time can tell you that there are stretches when you will pay more attention to some cases than others. The DR's recognize that this is the practice of law and factors in that people will make inadvertent mistakes from time to time.

Rule 1.01, subparagraphs (b) and (c) provide that:

> (b) In representing a client a lawyer shall not:
> (1) neglect a legal matter entrusted to the lawyer; or
> (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.
>
> (c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(b)(c).

An important case to remember at this point is *Brown v. The State Bar of Texas*, 970 S.W.2d 671 (Tex. App.—El Paso 1997, no writ). In *Brown*, the Court held that in order to violate § 1.01 of the Code of Professional Responsibility, an attorney's neglect must be "willful" or "intentional" and not the result of mere neglect or bad judgment (this sounds like great protection for lawyers, especially if it is interpreted anywhere near the Moriel standard). *Brown* may help you out on appeal of a finding of just cause, but I would not rely on it to keep you out of the grievance process altogether. Even if you can "beat the rap," you will not enjoy the ride.

Sitting on a grievance committee reading through piles of complaints, I have learned that there are many reasons for neglect complaints, which normally are rooted in one of the following areas:

poor or non-existent screening of cases;
clients' lawyer is not well organized;
lawyer is overworked or understaffed;
cases beyond the lawyers' expertise or resources;

cases outside the lawyer's area of practice;
poor communication with clients;
inefficient use of time by attorney;
cases with multiple parties with conflicting interests or objectives (potential conflicts);
cases that are not promising in terms of recovery (these are usually the ones with the most demanding clients); or
too many cases.

Most of these are things over which the lawyer has some degree of control. Most of them have to do with time or resource management. Look for a good calendar system. There are several excellent programs that are relatively inexpensive and easy to install on your office computer. Most have features that allow automatic calculation of deadlines and provide tickler systems to help avoid blowing meetings, deadlines, hearings, and statutes. You can also implement a trial preparation outline that sets out a loose but structured time frame for reviewing and filing a case, getting the case set for trial, sending written discovery, taking depositions, and preparing for trial (document and exhibit preparation and the like) along the way so that these phases of the case are actually scheduled in an organized, but flexible fashion.

c. Communicating with Clients

A large percentage of client gripes begin with the lawyer not keeping them informed about the status of their case. Even good lawyers who actually perform competent and valuable services for their clients seem to run afoul of Texas Disciplinary Rule of Professional Conduct § 1.03 (a) and (b) from time to time. It provides as follows:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Not hearing from the lawyer for extended periods makes clients nervous. Not hearing from the lawyer, after repeated client attempts to contact her, makes clients feel jilted, powerless, and just plain mad. Call them back or at least have someone in your office do so. Some really well-organized lawyers write their clients a short letter each month, even if it is just to say that there is no change in the status of a case. This practice has the simultaneous effect of reminding you to push the case along, even if it's just so you have something to report every now and then.

Countless are the grievance complainants who have told me that a periodic call from their attorney would have prevented the entire procedure. There is a cycle among busy practitioners, which often ends in a trip to the grievance committee. It goes something like this:

Client comes in and lawyer tells client his case is a viable one;

Lawyer begins diligent work but case turns out to be not so good;

Not wanting to disappoint client and hoping to turn case around, lawyer does not tell client of less than favorable status of litigation;

Case gets no better (or gets worse) and lawyer begins to avoid client;

Lawyer cannot avoid client forever and finally discloses bad news;

Client upset at unpromising state of case;

Client assumes lawyer never called because lawyer was neglecting case and assumes neglect is the reason the case is in bad shape;

Client files grievance against lawyer.

Do not hide bad news about a case from the client. Obviously, there may be some strategic or diplomatic reason for planning such disclosures, but don't ignore them and hope that they will get better. They will not. Even if the client is not happy about what turn a case has taken (assuming you have done your job), they will appreciate your being direct. Doing this also helps to comply with section (b) of the Rule in that getting bad news fast gives the client more time to decide how to proceed.

2. Declining or Terminating Representation

Rule 1.15 deals with declining or terminating representation. Declining representation is fairly straightforward. The Rule says that you shall not take on or continue representation of the client if it requires you to be a witness in the case (with some exceptions that can be found in Rule 3.08); your physical, mental, or psychological condition impairs your fitness to represent the client; or, you are fired by the client, with or without good cause. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(a) (1-3).

You may be entitled to reimbursement of expenses, compensation for work performed, or be able to retain an interest in the case if you are fired without cause. You should expect to provide documentation of and prove up these claims if you are going to make them after you are discharged by the client. Keep in mind that any contractual agreements regarding fees that are entered into during the attorney-client relationship will be strictly scrutinized by the courts. This is a result of the fiduciary relationship that arises between an attorney and her client. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). If you breach this duty, you may wind up forfeiting all or part of your fees regardless of whether your breach actually caused any damages to your former client. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

One more word on declining representation for those of you who may be asked to take court-appointed cases. In *Hawkins v. Commission for Lawyer Discipline*, 988 S.W.2d 927 (Tex.App.—El Paso 1999, pet. denied), the attorney was appointed to represent a criminal defendant but refused to continue the representation in defiance of a court order on the grounds that he was not competent to handle the case. The subject lawyer refused to advise or defend the client in any way and failed to attend court hearings and a trial setting. Big mistake. The portion of Rule 1.01 (a), which prevents you from accepting employment beyond your competence does mean that you can unilaterally decide that you are incompetent to handle a

case to which you have been appointed by a Court. Under Rule 6.01, you may not seek to avoid court-appointed representation, except for good cause, and Rule 1.15(c) requires you to continue representation when ordered by a court. If you want to avoid disciplinary action, you best get the Judge's permission to "decline" the representation – even if you feel it was never accepted.

Terminating representation is a bit more hazardous. Rule 1.15 sets out the circumstances under which withdrawal is allowed. That is to say, generally you are not allowed to withdraw from representation unless one of the following occurs:

> withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;
>
> the client has used the lawyer's services to perpetrate a crime or fraud;
>
> a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement;
>
> the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including a obligation to pay the lawyer's fee as agreed and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or other good cause for withdrawal exists.

TEX. DISCINPLINARY R. PROF'L CONDUCT 1.15(b) (1-7)

The comments to this rule are clear. Before you withdraw, you must make sure that you have done all that you can reasonably do to mitigate the consequences to the client. Failing to do so can be disastrous. Do not make the mistake of holding onto a case until just before limitations and then punting to the client. You can bet that you will see them again. Calendar the arrival of the case into your office, any applicable limitations dates, and give yourself a reasonably prompt deadline for evaluating the case. If you do not even have time to perform a cursory analysis in that period, it may be a good indicator of how much time you will have to actually work on the case if you take it.

If the case is pre-suit, be sure to make your termination of representation in writing. Do not assume that a phone call will suffice. The letter should clearly state that you will perform no further services on the client's behalf and explain any applicable limitations periods with the deadlines set forth in the termination letter itself. Have the letter hand delivered or sent by certified mail to ensure receipt by the client or referring counsel. It is also a good idea to advise them of when they may pick up their file or offer to forward it to another attorney of their choosing.

If the case has already been filed, remember that you must file a motion to withdraw and obtain the court's permission before that withdrawal is effective. Until such an order is signed, you are still counsel of record and therefore responsible for protecting the clients' interests. *Ditto v. State*, 898 S.W.2d 383 (Tex. App.-San Antonio 1995, no writ).

3. Fees

As much of our work is done under contingency fee contracts, there are a few things you should note about Rule 1.04, which authorizes the use of such agreements if they meet the criteria set forth therein.

First of all, and I hope this is a surprise to no one, your contract has to be in writing. An oral contingent fee contract is not only a violation of Rule 1.04 and grounds for a disciplinary complaint, it is also voidable by the client. *Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App. – Austin 1994). Your contract must set forth the method of calculating your fee and if there is a differentiation in percentage accrued to you (varied fees for settlement pre-suit, pre-trial, or on appeal), those percentages and the triggering event(s) must be set forth. You must also list the litigation and other expenses to be deducted from any proceeds and state whether the expenses will be deducted before or after the contingency fee is calculated. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d).

Creating an exhaustive list of every conceivable expense would add several pages to your contract. However, it would be wise to list, at least in general terms, all categories of expenses in your contract that you believe might be incurred. At the end of the case, we provide a statement of fees, expenses, subrogation payments, and net recovery to the client followed by an itemized list of the expenses. There are a number of tracking systems available for copiers, phone, and postage, which can be installed to keep running accounts of exactly how much is spent on any case in your office. Clients not only appreciate this type of disclosure, they expect and deserve it. Often such information can prevent a simple question about where money was spent from becoming a complaint with a life of its own.

Be smart about the circumstances in which you collect fees and expenses. No client will ever like it if your fees exceed their recovery, even if they have signed off and agreed to your contract and the settlement amount. If the case is a small one with a marginal recovery, don't expect them to pay for high dollar meals or grandiose travel arrangements and be happy about it. Use a little common sense when these situations come up, unless, of course, you want to explain to your local grievance panel how those nights at the MGM Grand or the Lexus rental were beneficial to your client.

Section (f) of the rule is important for those of you who take on referral cases from other lawyers. The rule prohibits the division of or agreements for the division of fees between lawyers not in the same firm. Note that while the rule requires the client to be advised of and consent to a division of fees, section (f) does not require disclosure to the client of the share each lawyer is to receive. Exceptions to the general rule are permissible if the client is advised of the division and does not object to the participation of all the lawyers and the division of fees is in proportion to the professional services performed by each lawyer; made with a forwarding lawyer; or made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation.

Do not rely on a simple fee split letter with referring counsel to entitle you to compensation for working on a case. Develop “consent to refer” and “referral contract” forms for the client to sign. This should be in addition to whatever fee split agreement you may have with your referring lawyer. In the recent case of *Sanes v. Clark*, 25 S.W.3d 800 (Tex.App.-Waco 2000), Attorney Stringer signed two clients in a serious injury case and immediately thereafter “secured the assistance” of lawyer Sanes. The client later retained other counsel and when the case was settled, there was a dispute about whether the client’s discharge of Stringer and Sanes was effective. Sanes made a claim to the Defendants’ insurers for his 40% contingency fee. The Waco Court of Appeals held that Sanes was not entitled to any fee because he had no written contingency fee contract with the clients. *Sanes*, 25 S.W.3d at 805.

Perhaps more importantly, in addressing Stringer’s claim for fees under his contingency fee contract, the Court reiterated that such contracts must not contain provisions that abrogate the Disciplinary Rules. Stringer’s contract contained a provision that authorized him to settle the Plaintiff’s claims without the prior consent of the clients. It may be that this provision was intended to allow Stringer to pull the trigger on a settlement offer that was time sensitive or in the event that the clients could not be found. Regardless of the intent, the Court held that this provision under the circumstances then before it, was violative of Rule 1.02 and therefore voidable by the clients. *Sanes*, 25 S.W.3d at 805. Check your contracts against the Rules, especially 1.02 (Scope and Objectives) and 1.04 (Fees).

4. Conflicts of Interest

We will assume for the moment that you rarely, if ever, find yourself being asked to represent opposing parties in the same litigation. But just for the record … you cannot do it. Remember that Rule 1.06(a) prohibits your representing opposing parties in the same litigation in situations with such clear conflicts of interest.

It is also rare for a plaintiff’s lawyer to find themselves in a situation where they are asked to sue a former client, but it does happen from time to time. Absent your former clients’ consent, Rule 1.09 limits such representation if it is adverse to your former clients’ interests and:

the new client is questioning the validity of your work for the former client;

the representation will likely lead to a violation of the former clients’ confidences under Rule 1.05; or it is the same or a substantially related matter.

Note that this limitation extends to partners and associates in your office and former partners and associates who were with your office under section (b) of Rule 1.09. This means that if you leave your firm, you must comply with the provisions of part (a) of Rule 1.09 before taking on a case against a client of your former firm and that all lawyers coming into your firm must likewise comply with part (a) before taking on a case against their former clients or clients of their former firms. Comments 5 and 7 of Rule 1.09 are helpful in this regard. You can try to head off this problem by keeping a running computer list of clients which can be cross-checked when new clients (and lawyers) come in. For questions on successive representation of private clients against a government entity which a lawyer previously represented, was employed by or was a public officer of, consult Rule 1.10.

The more common (and problematic) situation arises with some regularity as plaintiff's lawyers are often put in the position of representing, or being asked to represent, multiple plaintiffs in the same litigation. Such representation can be hazardous because of the potential for conflicts that can arise with respect to any divergent interests between the clients. This includes relative position for purposes of testimony, trial strategy and, of course, settlement posture.

One thing is for sure … You should get the written consent of all the clients before heading down such a path. Consult Rule 1.06 (b) for guidance on these matters and study the case of *Conoco v. Baskin*, 803 S.W.2d 416 (Tex. App.-El Paso 1991, no writ). The *Baskin* case reviews several conflict situations that may develop in the simultaneous representation of multiple plaintiffs in the same litigation.

II. RESOURCES AND ALTERNATIVES TO THE GRIEVANCE PROCESS

The State Bar of Texas has initiated several programs to assist both clients and attorneys. Some of these are geared towards assisting attorneys in improving their practice, dealing with disability issues and alternatives to the grievance process. Listed below are a few of the programs which attorneys may take advantage of as alternatives to or aids in the grievance process.

A. Professional Enhancement Program (PEP)

The Professional Enhancement Program (PEP) was initiated by the State Bar of Texas in 1995. Originally, PEP was created to enhance professionalism in lawyer-client relations, lawyer-to-lawyer relations and relations between lawyers and the bench. As you can see from the table of most frequent complaints listed in Section I above, there is a great deal of conduct that may be unprofessional, but not necessarily violative of any ethical rules. This then, is the focus of PEP, to help lawyers maintain professional and ethical standards that are truly representative of the bar and resolving the legitimate complaints of clients.

PEP offers assistance in the form of office management consultations, specialized training and education, as well as fostering assistance between lawyers. These resources are directed specifically at problem areas in the lawyer-client relationship that result from poor office management skills, communication problems, minor neglect (which does not rise to the level of disciplinary rule violations) and other such difficulties. The PEP program is run by a director and staff members who are employees of the State Bar of Texas. There are a number of ways to seeks and/or obtain assistance from the PEP program including the following:

1. A lawyer requests assistance from PEP;
2. Clients and/or attorneys request assistance in resolving a problem between them;
3. A lawyer requests assistance in resolving a lawyer-to-lawyer dispute;
4. A complaint against a lawyer that is dismissed but rises to the level of an inquiry regarding the lawyer's professionalism;

5. A grievance committee investigatory panel delays its just cause hearing while the respondent lawyer participates in the PEP program; and

6. A respondent lawyer may be referred to PEP by the grievance committee as part of a sanction or condition to the probated sanction.

There are two distinct routes to PEP. One is voluntary and the other is integrated as a part of the grievance system. Voluntary entry into a PEP program outside of the grievance process is not reported to the grievance committee. An attorney who is having trouble in her practice can ask for assistance and, together with PEP staff, come up with an individual plan to assist the requesting attorney. Such a plan might include a number of phases, including specialized ethics courses, referrals to management or business consultants, doctors, mental health professionals, financial planners or other attorneys.

Your local grievance committee can also refer you to PEP if they feel that you are an appropriate candidate. Keep in mind that being referred to PEP by the grievance committee does not save you from the consequences of rule violations. A grievance committee can refer you to PEP absent any sanction or send you there as part of a sanction for a rule violation. If you find yourself in a position where you are referred or it is suggested by the grievance committee that you participate in PEP, you would be well advised that you take advantage. As noted, participating in the PEP program will not excuse sanctionable conduct, but it might affect what sanction you ultimately receive if you are found to have violated any disciplinary rules.

B. Client-Attorney Assistance Program (CAAP)

The State Bar of Texas Client-Attorney Assistance Program (CAAP) was implemented in 1999 by the State Bar of Texas Board of Directors and the Commission for Lawyer Discipline. The Board and the Commission were primarily concerned with the enhancement of the efficiency of the disciplinary process, raising public awareness, and fostering and maintaining the integrity, competence, and standards of conduct among almost 70,000 Texas lawyers.

Initially started as a pilot program, CAAP had a number of objectives, which included the following:

to develop statistical information for use by the State Bar in the improvement of the ethical practice of law and professionalism among lawyers;

to evaluate the potential impact of CAAP on the caseload of the various grievance committees and the Office of Chief Disciplinary Counsel;

to determine what types of attorney-clients' disputes could be successfully resolved through CAAP as an alternative to the grievance process.

The CAAP program fields calls from clients or consumers who have complaints about attorney conduct. These calls are screened by staff members who determine whether the complaints rise to a level of misconduct or unethical behavior that is clearly violative of the

rules. If the complaint is one that involves non-grievable conduct, the client is offered assistance from CAAP. If this assistance is accepted, CAAP will contact the attorney involved to discuss and identify options for resolving the complaint. This is time consuming but it has also proven to be effective in most of the situations where CAAP intervenes. In those cases, the attorney and client were able to resolve their dispute without the involvement of the grievance committee.

Although in its infancy and still being evaluated as a long-term program, CAAP staff members took almost 14,000 public inquiries and participated in over 400 interventions as of the last quarter of 2000. CAAP analyses all of the complaint information that they receive and provide this information to the State Bar to identify grievance issues, as well as social, cultural, and economic trends that may affect your practice. The hope is that the growth of the CAAP program will result in a decrease in the number of grievance forms sent to clients and a corresponding decrease in the actual number of grievances filed as the public and the lawyers are given an alternative to the grievance process.

C. Texas Lawyers Assistance Program (TLAP)

The Texas Lawyers Assistance Program (TLAP) was created to identify, intervene, and rehabilitate licensed attorneys whose work is impaired due to physical or mental illness, including alcoholism and substance abuse. Impairment is a wide-spread problem. It is estimated that as many as 15,000 Texas lawyers may suffer from physical or mental illness. TLAP's purpose is to assist the attorney in regaining her health and to protect the public from ethical violations of impaired lawyers.

An important thing to note about TLAP is that the confidentiality of all communications between the program and the attorney seeking assistance is protected. TLAP was created under Chapter 467 of the Texas Health & Safety Code, which prohibits disclosure of any information without the consent of the attorney involved. This includes disclosure to any disciplinary authorities.

TLAP maintains a confidential 1-800 hotline, which is in operation 24 hours a day, 7 days a week. Currently, TLAP receives about 300 hotline calls per month from impaired attorneys, their families, friends, partners, staff, and judges. The great majority of those who seek assistance, or for whom assistance is sought, suffer from alcohol or other drug abuse. About 1/5 suffer from depression, mental illness, stress, or physical impairments. The program assists attorneys from all geographical areas of the state in every field of practice and age group; however, the majority of participants in the program are members of small firms or solo practitioners who fall between the ages of 30 and 50. TLAP counsels those seeking help and assigns volunteer attorneys to work with the impaired lawyer on a personal basis to assist them in their recovery or rehabilitation. TLAP may also offer the impaired attorney appropriate professional assistance.

My experience on the grievance panel leads me to believe that every grievance committee in the state will see some percentage of respondent lawyers, who are impaired to some degree by either substance abuse, depression, mental illness, or stress. Let's face it, the plaintiff's practice can be very stressful. We owe it to ourselves, to say nothing of our clients, to recognize and address these situations wherever possible.

Texas Lawyers Assistance Program
(1-800-343-8527)
24 Hour Confidential Hotline

III. PROCEDURE AS OF JANUARY 2004

As of January 2004, new procedures became effective concerning how a grievance may be filed against someone.

First, a written grievance must be filed with the Chief Disciplinary Counsel (CDC).

The CDC classifies the grievance as an "inquiry" when there is no allegation of misconduct or as a "complaint" when there is an allegation of misconduct. If the grievance is dismissed as an inquiry, then the Complainant and Respondent are notified, and the Respondent receives a courtesy copy of the inquiry. The Complainant is notified of their right to appeal the classification to the Board of Disciplinary Appeals (BODA) within 30 days. If an appeal is filed, BODA either affirms the dismissal or so notifies Complainant of their right to amend within 20 days with additional information or a reverse classification and the case proceeds as if it had been classified as a complaint. All cases that are dismissed as inquiries (other than those pertaining to deceased attorneys or persons not licensed as attorneys) are referred to the Client Attorney Assistance Program (CAAP) for voluntary dispute resolution.

If the grievance is classified as a complaint, Complainant and Respondent are notified. The Respondent receives a copy and is asked for a response within 30 days of receipt of the notice. The CDC then investigates to determine within 60 days of the date the Respondent's response is due whether or not just cause can be established. If the CDC believes that just cause cannot be established, it sets the case before the Summary Disposition Panel, which determines whether the case should be dismissed. Neither Complainant nor Respondent is present. All cases that are dismissed as inquiries (other than those pertaining to deceased attorneys or persons not licensed as attorneys) are referred to the CAAP for voluntary dispute resolution. If the Summary Disposition Panel disagrees that the case should be dismissed, the case proceeds as if it had not been taken to the Summary Disposition Panel.

If the CDC determines just cause can be established, it notifies the Respondent of the allegations, including the factual contentions and rule violations believed to be implicated, and of their right to elect either Evidentiary or District Court. The Respondent has 20 days to elect. Failing timely election, the matter proceeds to the Evidentiary Panel. The Commission for Lawyer Discipline (CFLD) is the client on all cases not dismissed as inquiries or by a Summary Disposition Panel.

If the CDC believes, based on their investigation, that the respondent suffers from a disability, the CDC must seek authority from CFLD to refer the matter to BODA for assignment of a District Disability Committee. If the CDC believes, based on their investigation, that an interim suspension should be sought, the CDC must seek authority from the CFLD to do so.

In Evidentiary Panel Proceedings, the CDC files an Evidentiary Petition in the name of the Commission. Venue is in the county of the Respondent's principal place of practice; if there is none, in the county of residence; if none, in the county where the alleged misconduct

occurred, in whole or in part. In all other instances, venue is in Travis County, Texas. The respondent is provided with a list of the names of all the Committee members who might serve on the panel at the time the Respondent is served with the evidentiary petition. The answer date is 20 days after service. The case must be set for hearing with a minimum of 45 days' notice of setting to the parties and shall be set within 180 days after the date the answer is filed, except for good cause shown. Private reprimand and referral to the BODA for disability is available. These proceedings are confidential unless public sanction entered. Appeals of evidentiary decisions can be made by the CFLD and the Respondent to BODA, with appeals from the BODA decision going to the Supreme Court.

In District Court proceedings, the CDC files a disciplinary petition in the name of the Commission with the Supreme Court, which assigns a judge and forwards a petition and order to the district court. The case must be set for trial within 180 days after the date the answer is filed. A jury trial is available to either side. Appeals by the CFLD and the Respondent are, generally, as in civil cases.

I cannot stress how important it is to respond in writing to the complaint within the thirty (30) days. Failure to do so is a separate violation of the Texas Disciplinary Rules of Professional Conduct under Rule 804. It is not uncommon for the grievance panel to receive a complaint (which might otherwise be dismissed for no just cause) and hold onto an otherwise marginal complaint because the respondent lawyer fails to respond to the grievance committee. Do not, I repeat, DO NOT, fail to respond to a complaint. If you need more time to respond, write the grievance committee immediately and request an extension. If you find yourself up against the deadline without enough time to answer each of the complaints in as much detail as you would like, remember that the rules obligate you to respond to the complaint but do not set forth how detailed your response needs to be. In a pinch, you can file a response denying each of the allegations of the complaint, which allege a rule violation and supplement this response with documentary materials or other evidence prior to, or even at the time of the investigatory hearing.

REFERENCES

Texas Disciplinary Rules of Professional Conduct:

Rule 1.01	Competent and Diligent Representation
Rule 1.03	Communication
Rule 1.04	Fees
Rule 1.06	Conflict of Interest: General Rule
Rule 1.09	Conflict of Interest: Former Client
Rule 1.10	Successive Government and Private Employment
Rule 1.15	Declining or Terminating Representation

Cases

Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964)

Brown v. The State Bar of Texas, 970 S.W.2d 671 (Tex. App.-El Paso 1997, no writ)

Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999)

Conoco v. Baskin, 803 S.W.2d 416 (Tex. App.-El Paso 1991, no writ)

Ditto v. State, 898 S.W.2d 383 (Tex. App.-San Antonio 1995, no writ)

Enochs v. Brown, 827 S.W.2d 312, 318 (Tex. App.-Austin 1994)

Hawkins v. Commission for Lawyer Discipline, 988 S.W.2d 927 (Tex. App.-El Paso 1999, pet. denied)

Sanes v. Clark, 25 S.W.3d 800 (Tex.App.-Waco 2000)