

# The Texas Attorney Discipline System

A look at the initial impact of Sunset Review recommendations.

BY SEANA WILLING

*Author's note: I am the chief disciplinary counsel for the State Bar of Texas. Prior to starting in that position on March 4, 2019, I served for two years as executive director of the Texas Ethics Commission and 14 years as executive director of the State Commission on Judicial Conduct. Before moving to Austin to join the staff of the State Commission on Judicial Conduct in 1999, I served as disciplinary counsel in the San Antonio Regional Office of the CDC following five years in private practice in Bexar County. I am a 1993 graduate of St. Mary's University School of Law in San Antonio, and a 1985 graduate of the College of Holy Cross in Worcester, Massachusetts, where I earned a B.A. in economics.*

*During my 18 years at the Commission on Judicial Conduct, I participated in the Sunset Review process for that agency twice—in 2000-2001 and again in 2012-2013—and fully appreciate and understand the importance of the work undertaken by the Sunset Advisory Commission, its staff, state legislators, and agency leadership and staff. This experience has provided me with a unique perspective in analyzing how recent Sunset Review recommendations will affect the work of the CDC during my tenure.*

Back in 2016-2017, the State Bar of Texas went through the Sunset Review<sup>1</sup> process, which resulted in significant legislative changes to the State Bar Act,<sup>2</sup> and more specifically to the chief disciplinary counsel's role in carrying out the bar's public protection mission. These revisions, which were adopted by the Texas Supreme Court through amendments to the Texas Rules of Disciplinary Procedure, went into effect on June 1, 2018. Some important changes include the following:

- Discretionary referral of grievances involving minor infractions to the Client-Attorney Assistance Program, the State Bar's voluntary mediation and dispute resolution division, for earlier resolution of disputes;
- Increased use of the Grievance Referral Program, a diversionary program within the discipline system designed to identify and assist lawyers who have impairment or performance issues;
- Disciplinary sanction guidelines for grievance committees and district courts;
- Investigatory hearings to resolve grievances short of formal proceedings;
- An ombudsman who reports directly to the Texas Supreme Court;
- Detailed reporting on sanctions and barratry investigations; and
- Mandatory reporting of certain criminal convictions and disciplinary judgments imposed in other jurisdictions.

In the wake of changes to the disciplinary system, there is always a period of transition where the CDC operates under both "old rules" and "new rules" in the classification, investigation, and litigation of disciplinary cases. This transition period makes an early assessment of the overall impact of new procedures difficult, but not impossible.

In its 2018-2019 annual report,<sup>3</sup> the Commission for Lawyer Discipline summarized the work of the CDC during the first year of implementation of the new procedures. In terms of meeting the objectives of the Sunset Review recommendations to improve the efficiency of the attorney disciplinary system and make the process more responsive to respondents and the public, here are a few key areas where the recent changes have already made a discernable impact.

## Discretionary Referrals

The bar's Client-Attorney Assistance Program, or CAAP,<sup>4</sup> is a voluntary, confidential dispute resolution service that has been in place since 2003. Its objective is to facilitate communication and foster a productive dialogue to

help Texas lawyers and their clients resolve minor concerns, disputes, or misunderstandings affecting the attorney-client relationship. Offering services in English, Spanish, Thai, and Laotian, CAAP's trained mediators help more than 25,000 clients annually understand the legal process and communicate respectfully and professionally with their attorneys. Clients who might be thinking about filing a grievance are encouraged to contact CAAP first if their concerns regarding their lawyer have to do with progress of their case, poor communication, or the need to retrieve documents from their former lawyer. For years, CAAP successfully reestablished communication between clients and their attorneys, often obtaining the return of documents or unearned fees, and eliminating the need for filing grievances. The result has been striking—in the 2018-2019 bar year, CAAP mediators resolved approximately 1,126 matters, the highest number of resolutions in the past five years. Without CAAP, those cases would have likely resulted in grievances, requiring additional time, effort, and resources to be expended by respondents, complainants, CDC staff, and grievance panel members.

In an effort to improve the disciplinary system by building on CAAP's success, the new rules provided the CDC with additional tools at the classification stage. Now, in addition to classifying a grievance as an inquiry or a complaint, the CDC may refer complaints involving minor violations to CAAP for possible early resolution and is authorized to share confidential information with CAAP to help resolve these referrals.<sup>5</sup> In just the first year of this new program, the CDC made 322 discretionary referrals to CAAP. CAAP successfully resolved 180 of those cases and another 10 cases were deemed partially successful. In the end, the CDC dismissed 208 and upgraded 109 of the discretionary referrals handled by CAAP. As a direct result of the efforts of the CDC and CAAP this past year, hundreds of Texas attorneys were able to avoid the stress, time, cost, and uncertainty of having to participate in the grievance process. At the same time, the CDC was able to fulfill its mission to protect the public.

## Grievance Referral Program

Another tool that allows the CDC to resolve complaints earlier in the disciplinary process is the ability to refer cases to the Grievance Referral Program. GRP is a diversionary program within the discipline system designed to help identify and assist respondent lawyers who have impairment or performance issues and who enter the disciplinary system as a result of minor misconduct. GRP allows the lawyer to complete a remedial or rehabilitative program individually tailored to the lawyer's needs in exchange for a dismissal of the underlying complaint. The criteria, eligibility, procedure, and reporting for the program have existed in the

bar's Board of Directors Policy Manual<sup>6</sup> since 2009, and, prior to June 1, 2018, the program had been an available option for matters in litigation. With the recent changes to the disciplinary rules, GRP is now formally codified in the rules and the CDC has the ability to refer cases to GRP well before they enter the litigation stage.<sup>7</sup>

Due to the ability to identify appropriate GRP candidates earlier in the disciplinary process, GRP has experienced an influx of referrals to the program, with the average active docket for the GRP administrator doubling in the last year to nearly 50 cases. Since June 1, 2018, 75 attorneys have successfully completed the program. Instances of participants failing out of the program are rare and, thus far, the recidivism rate is low. With the increased caseload has come new focus areas, including reading assignments focusing on dealing with stress, improving time management, overcoming anxiety, processing the aftermath of domestic abuse, and finding resilience in attorneys' professional and personal lives; as well as new assignments focusing on time management and how best to make use of paralegals. Additionally, GRP staff has created a survey for respondents to complete at the end of their participation, which provides invaluable feedback on how well the program is performing:

- "I got so much out of the program and had a lot of feedback. I loved the articles and the timetable. I am using many of the things I learned in the program and feel my law office has benefited from the program!"
- "I revamped my whole filing system and have really perfected my time management practices. I am very pleased with the program and got a lot out of it."
- "I think I may get all the young attorneys I manage to come together and watch the video in our large conference room. It contains extremely helpful pointers and they can take some crucial information from that video."
- "I have learned so much from this process. ... I am going to seek out opportunities to teach ethics in my new role. I actually wish I had seen these videos 17 years ago. The content was so helpful even now as a Judge."
- "My experience with your office was rejuvenating, refreshing, and enjoyable. Thank you for this opportunity."

Like CAAP, the GRP program has been around for many years; however, until the recent implementation of the Sunset Review recommendations, GRP had not yet realized its full potential. The formal recognition of the program in the rules is a testament to its profound and lasting impact on the legal profession.

### Investigatory Hearings

When a grievance is classified as a complaint, the CDC conducts an investigation to determine if there is "just cause" to believe a violation of the disciplinary rules of professional conduct has occurred. In the past, if just cause were found, the matter proceeded into litigation. Under the new procedures, the CDC can issue subpoenas during the investigation phase, set a matter for an investigatory hearing, and enter into a negotiated sanction with the respondent lawyer before the matter reaches litigation.<sup>8</sup> Investigatory hearings allow the respondent and the complainant to appear before a grievance panel, answer questions from panel members, and provide evidence to support their position in the case. These hearings are intended to be somewhat informal and non-adversarial in nature. No disciplinary action will be taken against a respondent at this stage without his or her agreement.<sup>9</sup>

Having subpoena power in the investigative stage allows the CDC to complete a thorough investigation prior to the just cause determination. This in turn could lead to an early dismissal of a complaint or prevent the

pursuit of complaints that ultimately proved baseless once in litigation.<sup>10</sup> The ability to obtain records during the investigation stage and hold investigatory hearings has resulted in the earlier resolution of thousands of disciplinary matters, including a large percentage of results in favor of the respondent lawyer.

For example, in the 2018-2019 bar year, more than 90% of the 8,015 grievances filed were dismissed prior to an investigatory hearing. Nearly 70% of cases classified as complaints were dismissed after the CDC's investigation. These statistics remain consistent with the dismissal rate of cases over the past 10 years; however, with the re-introduction of investigatory hearings in the 2018-2019 bar year, the impact on early resolution of disciplinary cases becomes more apparent with more than 40% of the 160 cases heard by investigatory panels resulting in dismissal. Moreover, nearly 22% of the 414 sanctions issued in 2018-2019 were through the efforts of investigatory hearing panels.

The full impact of the investigatory hearing process remains to be seen as we close in on the second half of the 2019-2020 bar year. Though there are fewer cases being litigated in district court, the growing number of cases being heard by grievance committee panels may reveal a need for the creation of more investigatory panels and, therefore, the necessity to recruit more attorney and public member volunteers to serve on those panels. And while the costs of litigation are expected to decline, these costs will be offset, if not surpassed, by increases in the cost of travel and security for investigatory hearings.

Though it will take more time to assess the impact of some of the other Sunset Review recommendations, including the ombudsman<sup>11</sup> and the disciplinary sanction guidelines used by grievance committee panels,<sup>12</sup> there is abundant evidence that many of the changes contemplated by that process have been successful. The implementation of investigatory subpoenas and investigatory hearings before litigation, along with more effective use of the CAAP dispute-resolution services and the services offered by the GRP program are just a few, important examples of the progress the CDC has made, and will continue to make, to improve the efficiency of the grievance system and make the process more responsive to respondents and the public.

If you have any questions concerning these changes, please contact the Office of Chief Disciplinary Counsel.

If you are interested in learning more about the Texas grievance system, stay tuned for more information about the CDC's upcoming Grievance Symposium taking place on **Wednesday, May 20, 2020**. The symposium will begin at 10 a.m. in Room 101 of the Texas Law Center, 1414 Colorado St., in Austin. Topics will include presentations from various stakeholders in the disciplinary process relating to all aspects of the grievance system. Attendees will qualify for CLE credits in ethics. **TBJ**

### Notes

1. Texas Sunset Advisory Commission, <https://www.sunset.texas.gov>.
2. Tex. Gov't Code Ch. 81.
3. The Commission for Lawyer Discipline's 2018-2019 Annual Report can be found on the State Bar's website at: <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=41986>.
4. More information about CAAP can be found on the State Bar's website at: <https://www.texasbar.com/AM/Template.cfm?Section=CAAP1&Template=/CM/HTMLDisplay.cfm&ContentID=43322>.
5. Tex. Rules Disciplinary P. 2.10(C).
6. State Bar of Texas Board of Directors Policy Manual § 6.09.
7. Tex. Rules Disciplinary P. 16.01-16.04.
8. Tex. Rules Disciplinary P. 2.12.
9. Tex. Rules Disciplinary P. 2.12(G).
10. Staff Report with Final Results, Tex. Sunset Advisory Comm'n, 27-28 (Jun. 2017).
11. Tex. Gov't Code § 81.0881-.0885 (effective Sept. 1, 2017).
12. Tex. Rules Disciplinary P. 15.01-15.09.



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