REVISED 4-25-2022

Discipline Client Attorney Assistance Program Committee
Summary of Recommendations
April 25, 2022

Background:
On June 16, 2021, the Public Protection, Grievance Review and Client Security Fund Task Force (the "Task Force") presented a report to the State Bar Board of Directors containing recommendations regarding the attorney discipline system in Texas. At that meeting, the board referred the Task Force's report to the Discipline Client Attorney Assistance Program (DCAAP) Committee for review and potential recommendations.

The DCAAP Committee began its review on August 19, 2021 and created subcommittees to study the recommendations in the Task Force's report. The information provided below describes the comments and recommendations of the subcommittees and findings by the full DCAAP Committee. These comments and recommendations will be presented to the board at the April 29, 2022 meeting.

Task Force Recommendation	DCAAP Comments	DCAAP Recommendations
1) Grievance form should not be formally sworn to under penalty of perjury.	The subcommittee was provided a legal analysis by Director Andrew Tolchin about the viability of implementing a policy requiring complaints to be sworn to by the complainant under penalty of perjury. The analysis points out that the State Bar itself, cannot bring about effective sworn grievances without the Legislature changing the law. This change would require an amendment to the State Bar Act, and a carve out of unqualified immunity in order to enact such a policy [see State Bar Act, Section 81.072(g)]. Director Tolchin further indicated that it is not practicable to be achieved at the present time, and not really within the purview of the bar. The subcommittee agreed with this assessment. The subcommittee reviewed data provided by the Chief Disciplinary Counsel (CDC) concerning grievances filed. The disciplinary system, through its	**Based on the research and findings of the Subcommittee as set forth herein along with the research and information provided by Director Tolchin and the Task Force, the subcommittee agrees that the procedure for filing grievances should not be changed to require that they be sworn to by complainants under penalty of perjury.**

	investigators, attorneys, and grievance committees, screens out frivolous complaints. It was noted that 70% of all grievances filed are dismissed at the initial classification stage. Additionally, CDC investigators and attorneys further analyze whether a complaint is frivolous. Nearly 72% of all complaints result in summary dismissal when the respondent provides information to CDC investigators and attorneys. If a case makes it to an Investigatory Hearing panels, all participants are placed under oath, and approximately 22% of the remaining cases are dismissed. Only 11% of all grievances filed go before an Investigatory Hearing Panel or into litigation. This means that frivolous complaints are filtered out of the disciplinary process. The subcommittee conducted interviews with stakeholders within the disciplinary system, including Regional Counsels from the CDC and Chairs of local grievance committees throughout the state. They unanimously agreed there was no reason to implement sworn grievances because they did not see many frivolous complaints coming through the system. Also, the current grievance form requires a complainant to swear that "the information provided in this Grievance is true and correct to the best of my knowledge." Additionally, they believed it would have a chilling effect on the public, as they could be intimidated by such a requirement. (Note: The Grievance Oversight Committee of the Texas Supreme Court also recommended that the sworn grievances under penalty of perjury not be implemented, determining that "There is insufficient evidence to suggest that the addition of such a sworn attestation would deter any false or frivolous claims in such a way that would not also hinder the	

	necessary public access to the grievance process". The subcommittee did not believe it necessary to make any determination on whether this statement is actually supported by empirical evidence as the issue relating to sworn grievances is resolved through the above process.)	
2) Notice to complainant and respondent should be provided with alleged specific disciplinary rule infraction from the CDC in advance of Investigatory Hearing.	The CDC indicated that they have already made changes to provide more information prior to an Investigatory Hearing panel to respondents. This issue was raised by the Grievance Oversight Committee, and the CDC responded as follows: "As recommended, in the IVH notice letter sent to respondents, we can include the specific allegations and rule violations that we have identified as having been raised by our investigation. In addition, we already include in the notice letter a statement notifying the respondent that the IVH panel is not bound by the issues raised by the CDC and may expand the scope of the investigation during the course of the hearing."	**The subcommittee agrees with the recommendation to provide alleged specific disciplinary rule infraction information to respondents. We recognize that the CDC has already taken efforts to address this issue.**
3) No private session between the Investigative Hearing panel and the CDC Counsel.	As mentioned in the task force report, the Investigative Hearing panel meets with CDC counsel privately, after hearing presentations from the complainant and respondent. The task force recommends that the respondent or respondent's attorney be allowed to be present during this meeting. As indicated by the CDC, these private sessions are lawful and permitted by the procedural rules. The CDC serves as counsel to the IVH panels, and provides information about process, technical and legal facts, and answers any questions that the panel may have. It was pointed out that neither the	**The subcommittee does not recommend doing away with the CDC's working session with its client (Investigatory Hearing Panels). Although some individuals characterize this meeting to be an ex-parte hearing, it is an allowable practice and a tool to be used in the disciplinary system to help resolve complaints quickly.**

	respondents nor the complainants are allowed to attend this meeting. The subcommittee spoke to the Regional Counsels and several local grievance committee chairs. They indicated that such a meeting is valuable for the panels because they can discuss process issues with the CDC and get any questions answered about the case. They do not believe it is prejudicial to any party. It was also noted that if the respondent and their attorney were allowed into the meeting, it would give the appearance of favoritism to the respondent. (Note: The Grievance Oversight Committee of the Texas Supreme Court also recommended that meetings with the CDC and Investigatory Panels should not include respondents or their attorneys.)	
4) Steps should be taken to ensure that Investigative Hearings are less adversarial. (Example, no required oaths for witnesses.)	The subcommittee discussed the efforts being made by the CDC to educate respondents about the disciplinary system. Although there is an inherent adversarial nature between a complainant and respondent, the CDC does its best to assist both parties in the disciplinary process. The subcommittee does not believe it is prudent to do away with a required oath for witnesses in the Investigatory Hearing (IVH). This recommendation would be inconsistent with the requirement that complainants swear to the accuracy of the information contained in the grievance (even though there is currently no penalty for perjury). The subcommittee agreed with the suggestions of the CDC to make additional efforts to reduce the natural tension and adversarial nature of the IVH. Prior to the start of the IVH, the panel chair reads a statement asking for proper decorum, but the subcommittee recommends there be more focus and attention	**The subcommittee recommends that the panel chair ask all participants to agree that they will uphold the spirit of the Texas Lawyers Creed during the hearing.**

	made to stress the importance of appropriate behavior during the hearing. Referring to the Texas Lawyers Creed at the outset of the hearing reiterates the importance of professionalism by all individuals involved in the disciplinary process. The subcommittee discussed a requirement that lawyers sign a written code of conduct, but determined that a verbal reference to the creed would convey the right message and tone.	
5) Educate Lawyers and investigate disproportionate findings of wrongdoing in grievances filed against minority attorneys (require grievance committee members to take bias training; educate minorities how to avoid a grievance)	The CDC stated that information regarding gender, race and ethnicity of attorneys who are sanctioned is included in the Commission for Lawyer Discipline's annual report. The data collected is a snapshot in time and is insufficient to draw any conclusions. The CDC is considering conducting further studies, and has conveyed that it will share results with the DCAAP committee as appropriate.	**The subcommittee recommends that the CDC continue to incorporate implicit bias, equity, and inclusion training for grievance committee members as part of the existing training for incoming and existing grievance committee members.**
6) Stakeholders should study whether to raise burden of proof to clear and convincing evidence from preponderance of the evidence.	The current standard of preponderance of the evidence has always been the standard in Texas. The subcommittee believes it is important to maintain public confidence in the grievance system in order to protect the public. Even though the subcommittee doesn't believe the standard of evidence should be changed, it suggests additional study should be undertaken as to whether the standard of evidence should be raised for those attorneys who are facing disbarment.	**The subcommittee members recommended further study on whether burden of proof for disbarments only to clear and convincing evidence. The majority of the subcommittee members recommended the burden of proof for other levels of discipline remain at a preponderance of evidence.**
7) Adopting uniform standards for case selection and procedures across the regions. (Case selection for Investigatory Hearings; procedures for conducting hearings)	The CDC indicated that grievance committees receive annual training on procedures for uniformity and consistency in the disciplinary process. Grievance panels are independent and are allowed discretion in the decision-making process.	**The subcommittee recommends that the CDC ask the CDRR to initiate a study of amendments to the rules of disciplinary procedure to give the CDC discretion to remove a case from the IVH Panel when additional information comes to light that eliminates the need to conduct an IVH.**

	The subcommittee considered a suggestion from the CDC to streamline the Investigatory Hearing process (note: this suggestion was not included in the task force report). The subcommittee agreed with the CDC that rules of disciplinary procedure should be amended to allow some cases to be pulled out of the IVH process when appropriate. There are situations in which additional information comes to light that eliminates the need to conduct an IVH (such as additional information provided by the respondent). In order to amend these rules, the State Bar Act requires that the Committee on Disciplinary Rules and Referenda (CDRR) study the issues and develop a proposal to amend the rules as needed. The CDC indicated that they are exploring whether to ask the CDRR to initiate study of such a rule. If the CDRR develops a rule, it will be submitted to the Board, Supreme Court of Texas and ultimately through the referendum process.	
8) Filing grievances against opposing counsel should be discouraged (particularly when being used as litigation strategy.)	The subcommittee reviewed data provided by the CDC concerning lawyer versus lawyer grievances. Overall, there is not a significant number of lawyer-to- lawyer complaints. The CDC database does not track whether a grievance is being filed during the course of litigation between opposing counsels. However, the CDC Classification attorneys monitor cases within the system to identify frivolous or harassing grievances to weed them out during the classification stage. The subcommittee encourages the CDC to continue its efforts in this regard. While the subcommittee agrees that using the grievance system as a litigation strategy should be discouraged, there is no evidence that this is done on a frequent basis. Therefore, the subcommittee does not believe that any rule changes are necessary at this time.	**The subcommittee requests that statistics regarding the number of complaints filed by attorneys against opposing counsel during litigation be collected to the extent possible and that this information be reported to the State Bar Board of directors on an ongoing basis**.

9) Client Security Fund- a. explore methods to ensure protection of public, maintain the maximum amount of grant money per applicant, and preserve the corpus of funds, i.e. reduce percentage of grants. b. allocate funds for lawyers who serve as custodians c. increase funding by assessing a surcharge against those lawyers who have received a probated sanction.	The subcommittee examined data about the Client Security Fund presented by the CDC's office. Additionally, the subcommittee met with the Chair of the Client Security Fund Board Committee and staff administrator. One of the main issues noted was the amount of processing time required to review the high volume of applications received. There is limited staffing capacity to process the approximately 180-200 applications that are submitted every year. There are two CDC employees who work on these applications, but both of them have full time positions handling other work responsibilities. As a result, it can take one to two years for the staff and committee to process an application. The subcommittee was notified that theft of client funds continues to be a significant issue in the disciplinary and client security fund system. It was noted that from the period 2018 through 2021, the client security fund paid approximately $748,000 to clients whose settlement funds were stolen by their attorney. A potential systematic solution is to consider payee notification, where insurance companies provide written notification to the claimant at the same time payment is made to the client's attorney. This could reduce the number of problems with clients not getting notified about their share of their settlement or award. More internal discussion on payee notification is needed and State Bar of Texas staff should continue to look at potential solutions to bring to the Board. Funding of the client security fund will always be a challenge, as more applications will lead to a greater demand for bar funds to cover the awards. If funding demands continue to increase, the Bar might be forced to consider awarding a percentage of what each applicant is seeking in order to reduce the amount of money being paid out.	**Staffing resources should be examined, such as short-term temporary staff or part time employees, to help reduce the backlog of pending client security fund cases.**

10. Create a system to check on attorneys who have received a grievance, to ensure that they respond to the complaint. Development of office similar to the Ombudsman to help lawyers understand the grievance process.	The subcommittee reviewed data from the CDC related to default judgments against attorneys who did not respond to grievance complaints. Over the past three years, there have been only a handful of instances where attorneys failed to respond to grievance complaints. Per the CDC, a respondent is more likely to not respond in the later stages of the process, typically during litigation, and when the respondent is facing multiple allegations of misconduct. There does not appear to be a significant problem with respondents failing to respond to grievance complaints. This is largely due to the CDC's efforts at communicating with respondents. There are multiple written notices, certified mail, emails, and telephone calls throughout the grievance process. The subcommittee believes that the CDC goes above and beyond its duties to communicate with attorneys, and that sufficient notice is given to respondents. The CDC works with respondents and their attorneys by answering questions and extending deadlines when needed. They also offer Zoom hearings in order to reduce travel time for respondents. As a result, more than 72%of cases are dismissed when attorneys simply respond to the grievance complaint. The subcommittee doesn't recommend any changes in policies or procedures.	**The subcommittee recommends that the CDC incorporate statistics on default judgments in its reports in order to keep track of these occurrences and with consideration of the statistics, evaluate whether changes should be made in the future.**