

Texas Coalition on Lawyer Accountability Response
To the Sunset Advisory Commission Staff Report on the
State Bar of Texas - 2016

The Texas Coalition on Lawyer Accountability was established in 2010 to ensure that the interests of legal consumers and the public as a whole are well represented in matters related to the regulation and practices of the legal profession in Texas. TCLA is committed to holding Texas attorneys more accountable to their ethical and legal obligations and, in the process, to enhance protection of Texas clients and the public.

Sunset review of the SBPT provides an excellent opportunity for the Texas legislature to assess how well the State Bar is fulfilling its charge to protect the public and to legislate reforms so that the State Bar can better serve and protect the public. TCLA concurs with many of the findings in the Sunset Commission report and endorses many of the Commission's recommendations. However, the Sunset Commission has fallen far short of thoroughly assessing State Bar efforts to protect the public and failed to address major concerns of TCLA

SBOT Discipline Data Indicate a Decline in Efforts to Protect the Public from Unethical Attorneys

Perhaps the biggest disappointment of the Sunset Commission Report on the State Bar of Texas is its failure to address the alarming decline in attorney grievance and disciplinary actions over the last 20 years. The Texas Coalition on Lawyer Accountability raised concerns about this in its report to the Commission and other groups concerned with the public protection obligations of the State Bar have raised similar concerns over the years. The data is so alarming that it prompts legitimate concerns that the Bar's commitment to protecting the public from unethical attorneys has declined at an equally alarming rate.

In 2011, former chief disciplinary counsel Jim McCormack presented alarming statistics to the Grievance Oversight Committee of the Texas Supreme Court. According to the data presented, the number of licensed attorneys had steadily increased since the 1990's, yet the number of disciplinary actions against Texas attorneys and the number of grievances filed had steadily declined. According to McCormack, in the 1998-1999 State Bar fiscal year, for the almost 67,000 Texas attorneys, more than 9,000 grievances were filed and 552 disciplinary actions were taken. Fifteen years later in 2013-2014, the attorney population had increased by 40.4% to almost 95,000 attorneys. Yet the number of grievances filed against those attorneys had fallen 18% to 7,400 and the number of disciplinary actions fell 42% to 322.

McCormack referred to this disturbing statistical phenomenon as "the elephant in the living room." For years the State Bar observed the numbers without any attempt to discern why they were trending that way. Then in 2011, the Texas Supreme Court was specifically alerted to this trend by its own Grievance Oversight Committee, yet gave no indication of concern or curiosity. Although the Sunset staff acknowledged at the June 23, 2016 public hearing that they were aware of the disturbing data, its written report fails to mention what appears to be a decline in public protection efforts and productivity

and indicates no efforts on its part to hold State Bar accountable and demand concrete answers to explain the decline.

During the last 20 years, the State Bar Office of the Chief Disciplinary Counsel has experienced budget cuts, including a significant reduction early on of approximately \$1 million, or about 15% of the total budget. The number of regional CDC offices also was reduced significantly during that time. To what extent did these cuts contribute to the decline? And if they did contribute to the decline, should there not be discussion about reversing the reductions as a means of reversing the decline in grievance and disciplinary activity? It does not appear that these and other hard questions were ever asked. A thorough review should have explored these issues.

Thus far the Sunset review process has failed to effectively explore why the numbers imply a serious decline in the Bar's commitment to protecting clients from unethical attorneys. To extend the Bar for another 12 years without getting to the bottom of this would be a disservice to the public as well as to those members of the Bar who uphold the ethical standards of the profession. At the very least, the Texas legislature should mandate a study by an independent body to determine what caused the disturbing change in data so that during the next legislative session steps can be taken to address any problems that are identified by the study.

Referendum Requirement has Protected the Public and Should Not be Abolished

Another problem with the Sunset staff report and recommendations regarding the SBOT is its recommendation to eliminate the requirement that Texas attorneys approve by vote any proposed changes to attorney disciplinary rules. This recommendation was based on the staff's conclusion that the public interest has suffered due to the difficulty in securing passage of proposed disciplinary rules changes because of the referendum requirement. The report cites the failed referendum vote on proposed rule changes in 2011 as evidence. The staff made a remarkable leap to this conclusion given that the proposed rules failed in 2011, in large part, because of how harmful they would have been to consumers of attorney services and public in general.

The report praises the process that developed the 2011 proposed rules as well representing Texas attorney interests. It also claims that the referendum process lengthens the time it takes to make needed rule changes. Again, a closer look at the experience leading to the proposed rule failure in 2011 does not support these conclusions. In fact, State Bar representatives testifying at the June 23, 2016 public hearing admitted that the rule-making process and the resulting proposed rules of 2011 were deeply flawed and caused the failure.

The ABA Model Rules were adopted by the ABA in 2002. Texas began its consideration of the Model Rules and how to modify them appropriately for Texas the following year. Multiple competing drafting committees spent more than six years before any proposed rule changes were published and they were not voted on for another two years. The resulting proposed rules did not represent consensus and compromise among all lawyer communities but rather the interests and egos of the individuals heavily involved in the drafting. It was clear in the months before the 2011 referendum vote that no segment of the Bar heartily endorsed the proposed rules. In fact, the rules failed because 80% of the voting members voted "No."

It was very clear during the public comment period that the leadership and supreme court were eager to get the proposed rules to a vote. Rather than seriously consider and acknowledge feedback about problems with the draft, they argued how urgently a vote was needed and the members should trust the lengthy process that went into drafting and support the resulting draft.

The 2011 proposed rules varied considerably, and often illogically, from the ABA Model Rules, both in terms of issues of interest to attorneys and those of interest to the public. Additionally, the draft made substantive changes to attorney ethics provisions which had been modified to better protect the public by the Supreme Court Professional Ethics Committee. At no point did the proponents of the proposed rules respond substantively to concerns raised by TCLA and other representatives of the public and explain why they recommended that these public protections be diminished.

The 2011 referendum is a clear example of how, had there not been a referendum requirement, which in this case resulted in overwhelming defeat, serious changes to the rules harmful to individual consumers and the public as a whole would have been adopted. Additionally, staff's references to past referendum failures as evidence of the problem are misleading as most of those failures were due to the now abolished requirement that at least 51% of the members vote. Until the State Bar demonstrates that actual harm has come to the public because of the referendum requirement and that it has a rule-drafting process that properly addresses and protects needs and concerns of the public, then the referendum requirement should not be eliminated.

Despite TCLA's opposition to eliminating the referendum requirement, we endorse the other recommendations of the Sunset staff regarding State Bar rule-making process and included in Parts 1.2 and 1.3 of the report. In fact, had these provisions been in place when the 2011 proposed rules were developed, the disastrous 2011 referendum experience could have been avoided.

The State Bar Attorney Grievance Process Must be Made More User Friendly and Protective

The Sunset staff recognizes in its report that improvements are needed in the attorney grievance process to make it more user friendly. TCLA, of course, agrees but urges the legislature to go much further than the staff recommendations.

TCLA has heard from many complainants who are quite dissatisfied with the process. It is no wonder that the public at large believes that attorneys take care of their own. When a grievance is denied, as most are, the CDC does a poor job of informing the complainant in an understandable way why it was denied. Attorneys affiliated with TCLA have been involved in drafting and submitting grievances that were denied. The standard communications from the CDC explaining the denial rarely make sense to these attorney complainants, so it is not surprising that non-attorney complainants are totally frustrated.

CDC must provide a meaningful, understandable explanation for their negative decision, as already required by Texas Government Code Sec. 81.072(b)(1). The complainant should also have a right to see what CDC presented to the Summary Disposition Panel to secure approval of CDC's recommendation to dismiss.

Independent Ombudsman. TCLA recommends creation of an independent ombudsman's office to improve the experience of those who file or want to file attorney grievances. The ombudsman would be available to assist the complainant in understanding the CDC's rationale for dismissing their complaint.

The disappointed complainant could request that the Ombudsman conduct an investigation into what the CDC did with their grievance. The Ombudsman also could help the grievant understand the appeal process, any right they have to resubmit, and how they can restructure their complaint if resubmission is appropriate.

It is imperative that the Ombudsman be independent of the CDC, the Commission for Lawyer Discipline, and the Board of Disciplinary Appeals. TCLA recommends that the Ombudsman report directly to the Texas Supreme Court.

Allow Complainant Participation in the Grievance Process. When CDC does prosecute a complaint, the complainant only has the right to attend hearing and have counsel present at the hearings. Neither is allowed to speak. This is another factor leading to public distrust of the system. Sunset legislation should expand complainants' rights to allow at least the following:

- Filing of pleadings.
- Participating in discovery.
- Participating in hearings.
- Reviewing CDC recommendations to dismiss a complaint in advance of the hearing.
- Filing a response to a dismissal recommendation and participating in that hearing.

Remove Prosecution and Tribunal Functions from the State Bar. As noted in the Sunset staff report, the State Bar serves as the attorney trade association while also serving as the regulatory arm of the Texas supreme court. This inherent conflict also contributes to the public's perception that the State Bar is more concerned with protecting its members than protecting the public. That the Summary Disposition Panels, appointed by the Bar, rarely go against what the CC staff recommends increases distrust. Although recognizing this issue, the staff makes no related recommendations. To address this serious issue, TCLA recommends moving the CDC prosecutorial functions to the control of the Supreme Court and moving tribunal functions to a professional tribunal, such as the State Office of Administrative Hearings or a specialized Bar court as in California.

These are the issues and recommendations identified by TCLA as most important to the public it represents. TCLA representatives are available to work with the Sunset Advisory Commission, its staff, and the rest of the legislature to ensure that the public is well protected by the State Bar sunset legislation.

Respectfully Submitted by:

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