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**THE GRIEVANCE PROCESS****Presented By:**

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## TABLE OF CONTENTS

<b>I.</b>	<b>TO GRIEVE OR NOT TO GRIEVE, THAT IS THE QUESTION.....</b>	<b>1</b>
	A. No Standing or Privity Requirement.....	1
	B. Lawyer's Mandatory Duty to Report Misconduct or Fitness of Another Lawyer or Judge.....	1
<b>II.</b>	<b>ONE SIDE OF THE STORY – THE CLASSIFICATION PROCESS.....</b>	<b>2</b>
	A. Classification .....	2
	B. Dismissal as an Inquiry.....	2
	1. Complainant Has a Right to Appeal.....	2
	2. Confidentiality.....	3
	C. Upgrade to a Complaint.....	3
	1. Upgrades Occur in One of Two Ways.....	3
	a. Classification.....	3
	b. Reversal of a Dismissal Appealed to the Board of Disciplinary Appeals (BODA).....	3
	2. Upgrade is an Opportunity to Tell the Lawyer's Side of the Story.....	3
	3. Importance of a Timely Response.....	3
	4. Complainant Becomes Fact Witness.....	4
<b>III.</b>	<b>DEVELOPING THE STORY – THE INVESTIGATION PROCESS.....</b>	<b>4</b>
	A. Confidentiality.....	4
	B. Investigation.....	4
	C. Summary Disposition Panel (SDP) – A Second Chance for Dismissal.....	4
	1. Venue.....	4
	2. SDP Meets Without Complainant, Respondent or Fact Witnesses.....	5
	3. Dismissal by SDP is Final and Cannot be Appealed by Complainant.....	5
	4. SDP May Disregard the Office of Chief Disciplinary Counsel's Recommendation for Dismissal and Vote to Proceed.....	5
	D. Just Cause.....	5
	1. Standard.....	5
	2. Notification of Rule Violation(s).....	5
	3. Election.....	5
	a. Evidentiary Hearing.....	5
	b. District Court.....	6
<b>IV.</b>	<b>TELLING THE STORY – ADJUDICATION.....</b>	<b>6</b>
	A. Procedural Rules.....	6
	1. Texas Rules of Disciplinary Procedure (TRDP).....	6
	2. Texas Rules of Civil Procedure.....	6
	B. Evidentiary Panel and a Proper Quorum.....	6
	C. Timeframes and Venue.....	7
	D. Published Case Law.....	8
	1. Southwest Reporter.....	8

2. Board of Disciplinary Appeals Web Site .....	8
E. Appeal of an Evidentiary Judgment.....	8
<b>V. ENDINGS ARE THE HARDEST PART – SANCTIONS.....</b>	<b>9</b>
A. Sanctions.....	9
B. Grievance Referral Program.....	11
C. Reinstatement.....	11
<b>VI. ANOTHER GENRE – COMPULSORY DISCIPLINE.....</b>	<b>12</b>
A. Intentional Crime.....	12
1. Incorporates Two Definitions From Rule 1.06 of the TRDP.....	12
2. Any Crime Involving Misapplication of Money or Other Property Held as a Fiduciary.....	12
B. Pleas That Trigger Compulsory Discipline.....	12
1. Guilty.....	12
2. Deferred Adjudication.....	13
<b>VII. APPENDICES</b>	
Appendix A – Resources.....	13
Appendix B - Flowchart for Processing a Grievance .....	15
Appendix C - Regional Offices for the Office of Chief Disciplinary Counsel.....	16

## I. TO GRIEVE OR NOT TO GRIEVE, THAT IS THE QUESTION

### A. No Standing or Privity Requirement

A grievance is defined as “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.”<sup>1</sup> Consequently, any person or entity may file a grievance against a lawyer, who is licensed in Texas, *regardless of standing or privity*. The State Bar of Texas’ Office of Chief Disciplinary Counsel (CDC) receives approximately 7,000 grievances each year.<sup>2</sup> Because *anyone* can file a grievance *and allege anything*, whether or not the allegation involves a violation of the Texas Disciplinary Rules of Professional Conduct (TDRPC), roughly two-thirds of the grievances are dismissed; although, these figures vary annually.<sup>3</sup> A grievance which is dismissed is referred to as an inquiry.<sup>4</sup> A grievance that is upgraded for investigation is called a complaint.<sup>5</sup>

### B. Lawyer’s Mandatory Duty to Report Misconduct or Fitness of Another Lawyer or Judge

Rule 8.03 of the TDRPC addresses a lawyer’s duty to report misconduct or fitness of another lawyer or judge. As Comment 1 to the rule notes: “Self-regulation of the legal profession requires that *members of the profession* take effective measures to protect the public when they have knowledge not protected as a confidence<sup>6</sup> that a violation of these rules has occurred. Lawyers have a similar obligation with respect to judicial misconduct.”<sup>7</sup>

However, not every violation by another lawyer or judge falls under the reporting requirements of 8.03(a) & (b). Comment 4 emphasizes that the rule “...limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. Similar considerations apply to the reporting of judicial misconduct. A measure of *judgment is, therefore required* in complying with the provisions of this Rule.”<sup>8</sup>

Consequently, under the mandatory duty to report another lawyer or judge, the reporting lawyer needs to have: (1) *actual knowledge* of the prohibited behavior, which (2) raises a *substantial question* of either (a) the lawyer’s honesty, trustworthiness or fitness as a lawyer; or (2) the judge’s fitness for office.<sup>9</sup>

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<sup>1</sup> Tex. R. Disciplinary P. 1.06 (R).

<sup>2</sup> Source: State Bar of Texas Attorney Grievance System Statistics (2010). An average of 7,031 grievances were received over the past seven years, beginning with the State Bar of Texas fiscal year, June 1, 2003-May 31, 2004 to June 1, 2009- May 31, 2010.

<sup>3</sup> *Id.* An average of 4,927 grievances were dismissed in the time period described in FN2, based on a total average of 7,031 less an average of 2,104 grievances classified as complaints. (7,031-2,104 = 4,927 inquiries.)

<sup>4</sup> Tex. R. Disciplinary P. 1.06(S).

<sup>5</sup> Tex. R. Disciplinary P. 1.06(G).

<sup>6</sup> See Tex. Disciplinary R. Prof’l Conduct 8.03(d); 1.05(c)(2) [client may consent to reveal confidences].

<sup>7</sup> *Id.* 8.03 cmt. 1 (emphasis added).

<sup>8</sup> *Id.* 8.03 cmt. 4 (emphasis added).

<sup>9</sup> *Id.* 8.03(a)-(b).

The term “substantial” refers to the *seriousness* of the alleged misconduct and “not the quantum of evidence of which the lawyer is aware”.<sup>10</sup> For example, a lawyer who misuses his or her client’s trust account funds would meet the definition of substantial, because of the resulting financial harm to the client and/or a third person, and the profession.<sup>11</sup>

The term “fitness” is defined in the terminology preceding the TDRPC. “Fitness” denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer’s responsibilities to clients in conformity with the [TDRPC]. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.’<sup>12</sup>

Rule 8.03(c) allows a lawyer to satisfy the mandatory duty to report a fitness issue, resulting from substance abuse or mental illness, by *anonymously* reporting the lawyer or judge to a peer assistance program, such as the Texas Lawyers Assistance Program (TLAP).<sup>13</sup> The name of the person who reports another lawyer or judge is kept confidential.<sup>14</sup> (See Appendix A for a list of organizations which handle reporting requirements.)

## II. ONE SIDE OF THE STORY – THE CLASSIFICATION PROCESS

### A. Classification

The story begins with a written grievance. The grievance is only one side of the story about an individual lawyer, but it is the crux of how long the story continues. The screening of a grievance to determine whether or not it alleges a violation of the disciplinary rules is called, classification. Lawyers at the CDC in Austin classify all of the grievances for the state within 30 days of receipt.<sup>15</sup>

### B. Dismissal as an Inquiry

A grievance classified as an inquiry may be appealed by the complainant to the Board of Disciplinary Appeals (BODA) within 30 days from receipt of notice of the CDC’s

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<sup>10</sup> *Id.* 8.03 cmt. 4 (emphasis added).

<sup>11</sup> See generally *Neely v. Comm’n for Lawyer Discipline*, 302 S.W.3d 331 (Tex.App.-Houston [14<sup>th</sup> Dist.] 2009, pet. denied); *Onwuteaka v. Comm’n for Lawyer Discipline*, 2009 WL 620253 (Tex.App.-Houston [14<sup>th</sup> Dist.], pet. denied); *McIntyre v. Comm’n for Lawyer Discipline*, 247 S.W.3d 434 (Tex.App.-Dallas 2008, pet. denied); *Brown v. Comm’n for Lawyer Discipline*, 980 S.W.2d 675 (Tex.App.-San Antonio 1998, no pet.); and *Fry v. Comm’n for Lawyer Discipline*, 979 S.W.2d 331 (Tex.App.-Houston [14<sup>th</sup> Dist.] 1998, pet. denied).

<sup>12</sup> Tex. Disciplinary R. Prof’l Conduct Terminology.

<sup>13</sup> *Id.* 8.03(c) & Cmt. 5.

<sup>14</sup> Tex. Health & Safety Code §467.005 (Vernon 1989 & Supp. 1997), §467.007(a) (Vernon 1989 & Supp. 1991). See generally [http://www.texasbar.com/AM/Template.cfm?Section=Texas\\_Lawyers\\_Assistance\\_Program](http://www.texasbar.com/AM/Template.cfm?Section=Texas_Lawyers_Assistance_Program).

<sup>15</sup> Tex. R. Disciplinary P. 2.10.

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