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THE LADY OR THE TIGER?
OPENING THE DOOR TO LAWYER DISCIPLINE STANDARDS

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In 1992, the Texas Supreme Court revamped the procedures under which lawyer discipline is meted out in Texas.¹ The laudable goal was twofold: (1) to establish uniformity, consistency, and, accordingly, a measure of predictability in the grievance system; and, as a result, (2) to increase public confidence that Texas lawyers can "police" their own.

We both defend lawyers and represent aggrieved clients before the State Bar of Texas. Our independent anecdotal experiences prompted this inquiry: Is either one or both of these goals realized in the current disciplinary system in Texas?

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¹ See Supreme Court Order For Implementation of the Texas Rules of Disciplinary Procedure (February 26, 1991), *reprinted* in TEX. R. DISCIPLINARY P. (1998); *see also* Supreme Court Amended Order for Implementation of the Texas Rules of Disciplinary Procedure (October 9, 1991, effective May 1, 1992), *reprinted* in TEX. R. DISCIPLINARY P. (1998).

Our conclusion is a resounding "No!" We are not alone in reaching this conclusion. For example, the out-going president of the Texas State Bar, like many others familiar with the system, has concluded that the Texas lawyer disciplinary system is broken.²

The lawyer disciplinary system in Texas resembles the fable in which a prisoner is given a choice of two doors, behind which lurks either happiness or death, sealing his fate.³ Behind one door beckons a beautiful lady.⁴ Behind the other growls a tiger.⁵ The prisoner is given no clue to inform his choice. He must simply decide and take his chances.⁶ We can think of no better analogy.

I. The Methodology (or Lack Thereof)

To answer our question, we took a snapshot of the discipline imposed on Texas lawyers during 1998, more than five years after the Texas Supreme Court adopted the majority of the procedural rules now in effect. We were in for a bit of a shock. First, the data is not maintained in a consistent manner, making it difficult to compile. Also, the statistical reporting periods for local grievance committees differ from those of the State Bar of Texas. Consequently, a comparison of sanctions imposed with the number of grievances filed for a specific time period is impossible. A more sophisticated analysis, such as by geographic, age, gender, or race demographics, is also impossible. Similarly, determining whether representation by counsel makes any difference in the sanction imposed for particular conduct is also impossible to determine. These are statistics that the State Bar either does not maintain or does not make available.

² See Janet Elliott, *Backlash*, 15 TEX. LAW. 13, 14 (1999).

³ See ASLAN, THE LADY AND THE TIGER (n.p.) (n.d.)

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

For what it is worth, during the period 1997-1998, the Texas State Bar announced in its annual report that the public initiated nearly 9,000 "inquiries."⁷ Out of the total number of inquiries, the Texas State Bar classified 3,320 as "complaints,"⁸ down from 3,640⁹ complaints in 1996-1997. "Inquiries" are classified as "complaints" if the inquiry alleges any conduct that violates one or more of the Texas Disciplinary Rules of Professional Conduct.¹⁰ Inquiries not classified as complaints are dismissed.¹¹ Inquiries that have been dismissed can be reinstated as complaints through an appeal to the Board of Disciplinary Appeals (hereinafter, "BODA").¹² Complaints can also be declassified to inquiries and dismissed through an appeal to the BODA.¹³ The State Bar of Texas does keep track of the frequency in which classification decisions are reversed. The initial classification determination was reversed on appeal about 3.7% of the time.¹⁴ However, this reversal rate does not disclose

⁷ See *Commission for Lawyer Discipline, 1997-98 Annual Report Synopsis*, 61 TEX. B.J. 1182, 1182 (1998) [hereinafter *Annual Report*].

⁸ See *id.*

⁹ See STATE BAR OF TEXAS, DISCIPLINARY SYSTEM, at 23 (1997-98).

¹⁰ See TEX. R. DISCIPLINARY P. 1.06(N) (1998), reprinted in TEX. GOVT CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1998).

¹¹ Texas has one of the most complicated and expensive lawyer disciplinary systems in the country. Texas lawyers through their bar dues paid about eight million last year to handle the nearly 9,000 inquiries. Inquiries in Texas are upgraded to complaints about twice as often as in Florida, which also handles about 9,000 inquiries a year. ELLIOTT, *supra* note 2, at 14.

¹² See TEX. R. DISCIPLINARY P. 2.21 (1998).

¹³ See TEX. R. DISCIPLINARY P. 2.09 (1998).

¹⁴ See STATE BAR OF TEXAS, DISCIPLINARY SYSTEM, *supra* note 9, at 26. "Of the 8,484 classification decisions, the Texas Board of Disciplinary Appeals reversed 316 classification decisions, or 3.7%. Complainants made up nearly two-thirds of the appellants." *Id.*

the number of inquiries that are reinstated after appeal as opposed to complaints that are declassified and dismissed.¹⁵ Accordingly, we do not know whether the 3.7% reversal rate actually increases or decreases the number of complaints or if reinstatements and declassifications are a wash.

The Texas State Bar in its annual report this year stated that 511 lawyers were disciplined during the 1997-1998 period.¹⁶ Lawyers who practice criminal law in Texas had the greatest number of complaints, totaling approximately 1,100 during 1998.¹⁷ Personal injury lawyers accumulated 778¹⁸ in the period, followed by family lawyers with 775.¹⁹ The Texas State Bar does not maintain records of the total number of licensed lawyers who practice in any particular area of practice. Because of the way these statistics are kept, it is impossible to determine, for example, if the number of grievances filed against criminal lawyers represents a higher frequency of grievances for criminal lawyers than for lawyers engaged in other areas of practice. This inability to correlate frequency with specific areas of practice holds true for all practice areas.

We have not attempted to catalogue and report all of the sanctions for the 1997-1998 period. Again, it is not possible to discern from the available data any correlation between the number of inquiries filed, the number of inquiries classified as complaints, and the number of lawyers disciplined. For the sake of brevity, we have not in this article reported all of the sanctions.

¹⁵ *See id.*

¹⁶ ELLIOTT, *supra* note 2, at 14. The sanctions imposed for the last 10 years by the Commission for Lawyer Discipline are set out in Table 1 and depicted graphically in Tables 2 and 3, *see infra*, at 260-62. The authors gratefully acknowledge the assistance of Nancy Campbell, M.S., Statistics, Southern Methodist University, without whose assistance the tables and graphs in this paper would not have been available.

¹⁷ *See Annual Report, supra* note 7, at 1182.

¹⁸ *See id.*

¹⁹ *See id.*

Instead, we have only taken a sampling of about 13%. We have included as the largest number of examples those sanctions meted out for the most common misconduct, but not necessarily in the same proportion to the total sanctions assessed or rules violated. We have also included sanctioned conduct that is numerically small, but which we perceive anecdotally represents emerging trends.

Our snapshot is by no means scientific, statistically significant, or reliable for any purpose other than for the conclusion we reach: There appears to be no consistency in the discipline imposed in Texas for particular misconduct, even when the procedural rules themselves impose a particular discipline for a particular transgression. The resulting image is out of focus and presents only a partial photograph. It is the best we can do with the available information. From this fuzzy picture, we conclude that neither one of the two goals set in 1992 has been accomplished.²⁰ Based on the comments made by lawyers who are familiar with the system, our conclusion is shared by many Texas lawyers.²¹ The 1992 procedural rule changes have not promoted uniformity, consistency, or predictability. Instead, with the imposition of the new rules, the sanctions meted out climbed dramatically for the first few years and then began to decline during the 1994-1995 period.²² We doubt that public confidence in the system has improved.

With these disclaimers out of the way, we first outline the criteria theoretically applied by grievance committees and district courts in sanctioning lawyers, both as reflected in national jurisprudence and in the Texas Rules of Disciplinary Procedure, as well as the available sanctions. We then report our selected samples from the Texas Bar Journal, which examples underscore the inconsistency suggested by our own anecdotal experiences. Finally, we present a necessarily truncated report of the private (that is, anonymous) sanctions

²⁰ See *supra* p. 1.

²¹ ELLIOTT, *supra* note 2, at 14-15.

²² Tables 1 and 2, which are based on data provided by the Commission for Lawyer Discipline, reflect this dramatic increase followed by an almost as dramatic decrease. See Tables 1 and 2, *infra*, at 260-61.

reported by the State Bar of Texas in the Texas Bar Journal. For obvious reasons, we include only published results in both categories and not our own clients' experiences.

II. The Standards

The ABA Standards for Imposing Lawyer Sanctions, which were adopted by the ABA House of Delegates in February 1986, and amended in 1992 and 1996,²³ provide that a court should consider the following factors in determining the sanction to impose for lawyer misconduct: a) the duty violated to the client, the public, the administration of justice, or the profession; b) the lawyer's mental state; c) the extent of actual or potential injury; and d) any aggravating or mitigating circumstances.²⁴ These standards were formulated to promote a complete and balanced consideration of all factors that are relevant in imposing a sanction against an individual.²⁵ The standards attempt to ensure that the outlined factors are given appropriate weight in light of the goals of lawyer discipline while considering relevant aggravating and mitigating circumstances at the appropriate time.²⁶ Finally, these standards should help attain the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.²⁷

²³ See STANDARDS FOR IMPOSING LAWYER SANCTIONS (1996).

²⁴ See *id.* Standard No. 3.0.

²⁵ See *id.* at Preface.

²⁶ See *id.*

²⁷ See *id.*

The above factors have been expanded and codified in the Texas Rules of Disciplinary Procedure.²⁸ In addition to these factors, the lawyer's disciplinary record, including any private reprimands, is admissible for determining the appropriate sanction to be imposed.²⁹ However, the responding lawyer's disability resulting from the use of drugs or alcohol may not be considered in mitigation, unless the lawyer demonstrates successful participation in a recovery program.³⁰

Aggravating and mitigating factors may be considered in deciding an appropriate sanction for lawyer misconduct.³¹ Aggravating factors justify an

²⁸ TEX. R. DISCIPLINARY P. 3.10 (1998) states, in part:

- In imposing the Sanction or Sanctions, the court shall consider:
- A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned.
 - B. The seriousness of and circumstances surrounding the Professional Misconduct.
 - C. The loss or damage to clients.
 - D. The damage to the profession.
 - E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found.
 - F. The profit to the attorney.
 - G. The avoidance of repetition.
 - H. The deterrent effect on others.
 - I. The maintenance of respect for the legal profession.
 - J. The conduct of the Respondent during the course of the Committee action.
 - K. The trial of the case.
 - L. Other relevant evidence concerning the Respondent's personal and professional background.

²⁹ *See id.*

³⁰ *See* TEX. R. DISCIPLINARY P. 2.17 (1998); *see also* TEX. R. DISCIPLINARY P. 3.11 (1998).

³¹ *See* STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard No. 3.0.

increase in degree of discipline to be imposed³² and include: a) prior discipline; b) dishonest or selfish motive; c) a pattern of misconduct; d) multiple offenses; e) obstruction of the disciplinary process; f) submission of false evidence during disciplinary process; g) failure to acknowledge wrongfulness of conduct; h) vulnerability of victim; i) substantial experience in the practice of law; j) indifference to making restitution; and k) illegal conduct.³³

Mitigating factors are any factors that may justify a reduction in the degree of discipline to be imposed³⁴ and include: a) absence of prior discipline; b) absence of dishonest or selfish motive; c) personal or emotional problems; d) timely effort to make restitution; e) cooperation with disciplinary proceedings; f) inexperience in the practice of law; g) good reputation; h) physical or mental disability; i) delay in disciplinary proceedings; j) imposition of other penalties; k) remorse; and l) remoteness of prior offenses.³⁵

Absence of harm or loss to clients in selected situations may also be considered in mitigation.³⁶ Whether or not a particular factor will be deemed aggravating or mitigating in a specific case will depend on the jurisdiction, the nature of the ethics rule violated, and the facts of the case.³⁷

Further, these factors should be considered in light of the purpose of lawyer disciplinary proceedings, which is not to punish the attorney "but rather

³² See *id.* Standard No. 9.21.

³³ See *id.* Standard No. 9.22.

³⁴ See *id.* Standard No. 9.31.

³⁵ See *id.* Standard No. 9.32.

³⁶ See, e.g., *Office of Disciplinary Counsel v. Kagawa*, 63 Haw. 150, 158, 622 P.2d 115, 121 (1981) (not "serious, unethical conduct"); *In re Fling*, 316 N.W.2d 556, 558 (Minn. 1982) (stating that there is no loss in commingling).

³⁷ Law. Man. On Prof. Conduct. (ABA/BNA) § 101:2101 (June 15, 1994).

to protect the courts, the public and the legal profession, as well as to guard the administration of justice."³⁸

Finally, the ABA specifies six factors that should not be considered in either aggravation or in mitigation:³⁹ a) forced or compelled restitution; b) agreeing to the client's demand for certain improper behavior or result; c) withdrawal of the complaint against the lawyer; d) resignation prior to completion of disciplinary proceedings; e) complainant's recommendation as to sanction; and f) failure of injured client to complain.⁴⁰

III. The Available Sanctions

The available sanctions in Texas are:⁴¹ a) disbarment; b) resignation in lieu of disbarment; c) indefinite disability suspension; d) suspension for a term certain; e) probation of suspension, which probation may be concurrent with the period of suspension, upon such reasonable terms as are appropriate under the circumstances; f) interim suspension; g) public reprimand; h) private reprimand; i) restitution; and j) attorneys' fees and direct expenses.⁴²

³⁸ See *In re Madsen*, 426 N.W.2d 434, 435 (Minn. 1988); see also, *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987); *In re Gallo*, 568 A.2d 522, 526 (N.J. 1989).

³⁹ See STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard No. 9.4.

⁴⁰ See *id.*

⁴¹ See TEX. R. DISCIPLINARY P. 1.06(T) (1998).

⁴² See *id.* In addition, the term "Sanction" may include the following additional ancillary requirements:

- a) Restitution (which may include repayment to the Client Security Fund of the State Bar of any payments made by reason of Respondent's Professional Misconduct); and
- b) Payment of Reasonable Attorneys' Fees and all direct expenses associated with the proceedings.

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.⁴³ As an example of the way in which these standards are applied to particular misconduct, the ABA Model Standards for Imposing Lawyer Sanctions classify misappropriation offenses according to level of intent and injury:⁴⁴

- a) Disbarment -- knowing conversion with injury or potential injury to the client;⁴⁵
- b) Suspension -- the lawyer knows or should know he is "dealing improperly with client property," unless there is little or no actual or potential injury to the client;⁴⁶
- c) Reprimand -- the lawyer is merely negligent in dealing with client property;⁴⁷ and
- d) Admonition (private reprimand) -- the lawyer is merely negligent and causes little or no actual or potential injury to the client.⁴⁸

⁴³ See Law. Man. On Prof. Conduct § 1:601 (April 28, 1999).

⁴⁴ See STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard No. 4.1.

⁴⁵ See *id.* Standard No. 4.11.

⁴⁶ See *id.* Standard No. 4.12.

⁴⁷ See *id.* Standard No. 4.13.

⁴⁸ See *id.* Standard No. 4.14.

IV. Application of the Standards in Texas

A. Overall Observations of Sanction Application

In analyzing the sanctions meted out in 1998, we observed that the application of discipline was at best uneven. In the worst situations the same or essentially the same conduct yielded widely disparate treatment for the sanctioned lawyers. Four types of conduct highlight the disparate treatment problem: (1) missed deadlines; (2) failure to safeguard property; (3) neglect of a client matter; and (4) termination of the attorney client relationship.⁴⁹

1. Missed Deadlines

During 1998, to our surprise, we found a number of lawyers who were disciplined for missing a deadline such as a statute of limitations. As is reflected in the discussion below, the discipline that was meted out to these lawyers ran the gamut from public reprimand all the way up to disbarment or resignation. Slightly more of these lawyers were suspended with partial probation of their suspensions. Qualitatively, we were unable to discern any guiding principal that would explain such disparate treatment. We were both surprised to see these cases of professional discipline. The standards for imposing discipline on a lawyer require intentional conduct, not negligence, involving conscious disregard for the responsibilities owed to clients.⁵⁰

2. Failure to Safeguard Property

Similarly, lawyers who failed to safeguard the property of third parties also received widely disparate sanctions. A large number of these lawyers were disbarred or resigned. Others received partially or fully probated suspensions. A few received only a public reprimand. Predicting a likely sanction based on the facts reported in the Texas Bar Journal is impossible.

⁴⁹ See Tables 4 and 5, *infra*. at 263-64.

⁵⁰ See TEX. DISCIPLINARY R. PROF. CONDUCT Rule 1.01(c) (1998).

3. Neglect of a Client's Matter

Neglect of a client's matter also yielded disparate levels of discipline. Several of the lawyers who neglected their client's matter were disbarred. Some were suspended. The largest number received a public reprimand. Frequently, neglect of the client's matter also carried with it other disciplinary rule violations.

4. Termination of the Attorney-Client Relationship

Finally, misconduct arising during the termination of the attorney-client relationship highlighted a different kind of uneven application problem. More particularly, five of the lawyers described below failed to return their client's file as requested by the client. In one instance, the lawyer apparently was just slow in returning the file. In another instance, the lawyer's delay in returning the client's file caused the client to miss the statute of limitations. In a third instance, the client made a timely request for the file but never received it because the lawyer shredded it. Although these fact patterns suggest different levels of knowledge by the lawyers involved, the sanction meted out was the same — public reprimand.

B. Sanctions Grouped by Severity

We have included below a discussion of the sanctions we selected for analysis. They are grouped on the basis of the sanction imposed. In addition to the four areas of conduct discussed above, we have also included other areas of conduct that suggest there is much room for improvement in making the application of discipline more uniform.

I. Disbarment/Resignation

Lawyer failed to prepare and record deed conveying real property to his client's children. The lawyer also failed to notify client of his suspension and continued to practice law. Result: Disbarred.⁵¹

Lawyer, after agreeing to represent complainant and son in a personal injury matter, assigned the matter to an associate. When the associate left the firm, the lawyer took over the matter, but failed to: (1) prosecute the matter, (2) settle the claims, (3) communicate with the complainant, (4) respond to the complainant's request for information, (5) return the complainant's file, or (6) respond to the grievance committee subpoena. Result: Disbarred.⁵²

Lawyer failed to timely file and serve answers or objections to admissions. Result: Disbarred.⁵³

Lawyer represented complainant in a deceptive trade practices lawsuit and settled the case, but failed to retain the funds in a trust account or pay the funds to his client. Result: Resignation.⁵⁴

Personal injury lawyer failed to respond to his client's inquiries, disburse settlement proceeds to a medical provider, or respond to notice of the complaint and a subpoena from the grievance committee. Result: Disbarred.⁵⁵

⁵¹ See *Grievance Disciplinary Actions*, 61 TEX. B.J. 171, 171 (1998) [hereinafter *Grievance*].

⁵² See *Grievance*, 60 TEX. B.J. 1175, 1175 (1997).

⁵³ See *Grievance*, 61 TEX. B.J. 591, 593 (1998).

⁵⁴ See *Grievance*, *supra* note 52, at at 1175.

⁵⁵ See *Grievance*, *supra* note 53, at 593.

Lawyer issued letters of protection to two medical providers, but failed to pay the providers on receiving settlement funds for his clients. The lawyer converted \$200,000 of settlement funds for his personal use. Result: Resignation.⁵⁶

Lawyer repeatedly failed to attend court hearings and, after being admonished that no future failures to appear would be tolerated, failed to appear at his next scheduled court hearing. Result: Disbarred.⁵⁷

Lawyer filed a motion to appear *pro hac vice* in a California court stating he was an attorney licensed in Texas and was in good standing. The lawyer had previously been suspended from the active rolls of the State Bar of Texas for non-payment of dues. Result: Disbarred.⁵⁸

Lawyer pleaded guilty to attempted forgery, a Class A misdemeanor. Result: Resignation.⁵⁹

Lawyer pleaded guilty to three counts of making a false statement in an income tax return. Result: Disbarred.⁶⁰

Lawyer pleaded *nolo contendere* to one count of insurance fraud, money laundering, and conspiracy to commit insurance fraud. Result: Disbarred.⁶¹

⁵⁶ See *id.* at 591.

⁵⁷ See *Grievance*, 61 TEX. B.J. 787, 788 (1998).

⁵⁸ See *Grievance*, 61 TEX. B.J. 963, 963 (1998).

⁵⁹ See *Grievance*, *supra* note 52, at 1175.

⁶⁰ See *Grievance*, *supra* note 57, at 787.

⁶¹ See *id.*

Lawyer convicted for making false oaths and claims. Result: Disbarred.⁶²

Lawyer convicted of bank fraud, conspiracy, and false statement. Although the conviction has been appealed, he will be disbarred if the conviction becomes final.⁶³

Lawyer pleaded *nolo contendere* to indecency with a child. If the lawyer's ten-year probation is revoked, he will be disbarred.⁶⁴

Lawyer pleaded *nolo contendere* to theft by check. After he violated his probation, he was disbarred.⁶⁵

2. Active Suspension

Patent lawyer failed to respond to client's numerous requests for information regarding patent application, attend several scheduled meetings with her client, or timely respond to notice of the complaint from the grievance committee. Result: Six-month suspension.⁶⁶

Lawyer retained to represent complainant and son in a divorce and custody action. The lawyer neglected matter and failed to refund the complainant's money after termination. Result: Twenty-nine-month suspension.⁶⁷

⁶² See *id.*

⁶³ See *Grievance*, 61 TEX. B.J. 499, 499 (1998)

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *Grievance*, *supra* note 58, at 963.

⁶⁷ See *Grievance*, *supra* note 51, at 173.

Lawyer received settlement funds on behalf of his client and withheld a portion to pay medical providers. The lawyer failed to disburse the funds to the medical providers or return the funds to his client. The lawyer also failed to obtain a written contingency fee agreement for the representation. Result: Fourteen-month suspension.⁶⁸

Lawyer failed to hold funds of clients or third persons in a trust or escrow account. Result: Six-month suspension.⁶⁹

3. Partial Probation/Active Suspension

Lawyer neglected legal matters entrusted to him, failed to keep his clients reasonably informed of the status of pending matters, and failed to take steps reasonably practicable to protect his clients' interests on termination of employment. Result: Two-year fully probated suspension.⁷⁰

Lawyer retained to represent complainant in a paternity action failed to secure DNA testing as requested by the complainant and failed to respond to subpoenas from the grievance committee. Result: Eighteen-month suspension, six months actively served, twelve months probated.⁷¹

Personal injury lawyer allowed statute of limitations to expire on his client's claim. Result: Three-month suspension, one month active, two months probated.⁷²

⁶⁸ See *Grievance*, 61 TEX. B.J. 281, 282 (1998).

⁶⁹ See *id.*

⁷⁰ See *Grievance*, *supra* note 52, at 1176.

⁷¹ See *Grievance*, 61 TEX. B.J. 79, 82 (1998).

⁷² See *Grievance*, *supra* note 68, at 281-82.

Personal injury lawyer allowed statute of limitations to expire. Result: Three-year suspension with third year probated.⁷³

Lawyer sold an oil and gas interest to the complainant for more than \$11,000. When a dispute arose over whether a payment was for attorney's fees for another matter or the oil and gas interest, the complainant requested a refund, and the lawyer sued the complainant. Result: One-year suspension, six months of which was to be actively served.⁷⁴

Lawyer, in a meeting with a client regarding revocation of the complainant's probation, requested and the client performed a "sexual massage" for which the client would be compensated. Lawyer paid the client for a portion of the massage and told her the rest would be applied to attorney's fees. Result: Five-year partially probated suspension, the first thirty months actively served.⁷⁵

Lawyer and client entered a business transaction that was not fair or reasonable to the client. The client did not consent in writing to the transaction and was not given a reasonable opportunity to seek the advice of independent counsel regarding the transaction. Result: Two-year suspension, one month active suspension, twenty-three months probated.⁷⁶

Lawyer received a settlement check on behalf of a client and endorsed the check on behalf of an interested third party without the party's knowledge or consent. The lawyer deposited the proceeds into his IOLTA account but did not keep segregated disputed proceeds until there was an accounting and determination of all parties' interest and further failed to promptly remit to the

⁷³ See *id.* at 283.

⁷⁴ See *Grievance*, 61 TEX. B.J. 367, 368 (1998).

⁷⁵ See *id.*

⁷⁶ See *Grievance*, *supra* note 57, at 788.

third party his agreed-upon interest in the proceeds. Result: Twenty-seven-month suspension with three months actively served.⁷⁷

Lawyer violated rules regarding candor toward the tribunal and failed to report another lawyer's misconduct. Result: Thirty-nine-month suspension with three months actively served and thirty-six months probated.⁷⁸

Lawyer had failed to pay his bar dues and meet his MCLE requirements and was suspended. While suspended, the lawyer faxed a letter to four individuals indicating he was a licensed attorney. Result: Two-year suspension, six months actively served.⁷⁹

Lawyer was hired to represent a client on two misdemeanor criminal cases. The lawyer charged an illegal and unconscionable fee. Result: Two-year suspension, one month active suspension, twenty-three months probated.⁸⁰

Lawyer who had been suspended failed to remove or properly cover the words "attorney at law" following his name on a building sign. Result: Eighteen-month partially probated suspension, with the first six months actively served.⁸¹

4. Fully Probated Suspension

⁷⁷ See *Grievance*, 61 TEX. B.J. 1071, 1072 (1998).

⁷⁸ See *Grievance*, *supra* note 68, at 283.

⁷⁹ See *Grievance*, *supra* note 77, at 1072.

⁸⁰ See *Grievance*, *supra* note 57, at 788.

⁸¹ See *Grievance*, 61 TEX. B.J. 713, 714 (1998).

Court-appointed criminal defense lawyer failed to respond to letters from complainant regarding the status of the case and failed to file an appeal brief. Result: Two-year fully probated suspension.⁸²

Lawyer retained to represent complainant in a probate matter that lawyer should have known was beyond her competence, yet she failed to withdraw from the representation. Result: Three-month suspension fully probated.⁸³

A company hired a person who was a lawyer as a regional manager. The lawyer violated the company's policy when he opened a checking account without the company's knowledge or consent under the name of the lawyer, doing business under the company's name. The lawyer deposited more than \$10,000 belonging to the company into the checking account and used those funds for himself. When the company became aware of the account, the lawyer resigned his job as regional manager of the company and replaced the funds he had used. Result: One-year suspension fully probated.⁸⁴

Lawyer pledged complainant's funds as security for a loan to the lawyer. The lawyer defaulted, and the bank offset against the pledged property. Five years later, the complainant discovered the offset, at which time the lawyer gave the complainant a check for \$50,000 that bounced. The lawyer eventually paid the \$50,000 and gave a promissory note for \$30,000 for the remaining balance. The lawyer filed bankruptcy and cannot pay the promissory note. Result: Seven-year fully probated suspension.⁸⁵

Lawyer failed to timely answer requests for admission and interrogatories in a child support case, and complainant had to dismiss the case

⁸² See *Grievance*, *supra* note 51, at 171-72.

⁸³ See *id.* at 172.

⁸⁴ See *Grievance*, *supra* note 81, at 714.

⁸⁵ See *Grievance*, *supra* note 58, at 963-64.

to avoid possible liability and court sanctions. Result: Twenty-month suspension fully probated.⁸⁶

Tax lawyer failed to adequately consult with the complainant to determine the complainant's wishes concerning the representation. The complainant therefore did not consent to the limited scope, objectives, and general methods of representation provided by the lawyer. Result: Six-month suspension fully probated.⁸⁷

Lawyer settled the complainant's case without the complainant's knowledge or approval, failed to keep the complainant informed of the status of the case, and received settlement funds but failed to notify or deliver the funds to the complainant. Result: Five-year suspension fully probated.⁸⁸

Lawyer represented complainant on claim for lost money. The lawyer recovered funds for the complainant but failed to notify the complainant of the existence of two checks representing interest on the claim. The lawyer then cashed the two checks and kept the funds for herself without fully obtaining the complainant's authorization. Result: Two-year suspension fully probated.⁸⁹

Lawyer obtained a \$70,000 no-answer default judgment for his client but failed to submit it to the court for execution. The case was dismissed for want of prosecution. The lawyer failed to respond to requests for information from the complainant, to explain the dismissal, or to respond to a notice of the complaint and subpoena from the grievance committee. Result: Six-month suspension fully probated.⁹⁰

⁸⁶ See *id.* at 963.

⁸⁷ See *Grievance*, *supra* note 57, at 790.

⁸⁸ See *Grievance*, *supra* note 68, at 282.

⁸⁹ See *Grievance*, *supra* note 51, at 171.

⁹⁰ See *Grievance*, *supra* note 53, at 593.

Lawyer revealed and used confidential information previously received from the complainant to the complainant's disadvantage. The lawyer also accepted employment by a former client without obtaining consent of all parties to the dispute. Result: One-year suspension fully probated.⁹¹

Lawyer who settled two personal injury cases failed to safeguard or timely disburse the settlement funds to medical providers. The lawyer also failed to respond to client's inquiries about payment of medical bills. Result: Two-year suspension fully probated.⁹²

Real estate lawyer handled closing and withheld funds from the closing to satisfy outstanding taxes and a lien. The lawyer failed to timely pay the taxes or lien and converted funds held in trust for his own use.⁹³ Result: One-year suspension fully probated.⁹⁴

Lawyer improperly prepared a bankruptcy matter, violated local tradition when he filed Chapter 7 petitions for clients whose Chapter 13 cases had been dismissed, accepted fees for services without disclosing them in bankruptcy petitions and erroneously requested attorney's fees in case. Result: Sixty-six-month suspension, partially probated.⁹⁵

Lawyer failed to keep funds belonging to third persons separate from his and knowingly disobeyed a ruling by a tribunal. Result: Two-year fully probated suspension and the lawyer to pay \$5,000 in restitution and \$4,160 in attorneys' fees.⁹⁶

⁹¹ See *Grievance*, *supra* note 71, at 80.

⁹² See *Grievance*, *supra* note 53, at 593.

⁹³ See *Grievance*, *supra* note 57, at 789.

⁹⁴ See *Grievance*, *supra* note 52, at 1176.

⁹⁵ See *Grievance*, *supra* note 81, at 715.

Personal injury lawyer handling a large number of cases operated without a trust account and had several non-lawyer employees over whom the lawyer had direct supervisory control who were involved in and later convicted of insurance fraud. The lawyer failed to ensure that the employees' conduct was compatible with his professional obligations and ordered, encouraged, or permitted their conduct. Result: One-year suspension fully probated.⁹⁶

Lawyer ordered two non-lawyer employees to contact the families of deceased children by phone and in person for the purpose of soliciting employment in a medical negligence suit. The non-lawyer employees told the families their children died as a result of negligence by doctors and a hospital when, in fact, there were no facts to support the statements. The families were also told the reason for contacting them was to identify witnesses when the sole purpose was to solicit employment for the lawyer. Result: Two-year fully probated suspension.⁹⁷

Lawyer filed medical malpractice suits on behalf of the families of several deceased children without the consent of some of his clients. The lawyer filed eight suits after little or no investigation and without substantiation of the alleged facts. He continued employment in these cases even after learning many of the cases were obtained through improper solicitation. Result: Two-year fully probated suspension, plus \$20,000 in attorney fees and \$4,000 in litigation costs.⁹⁸

Lawyer approached an employee of a grocery store, handed her his business card, suggested the employee could receive financial benefits by having an on-the-job injury, and offered to represent her in that claim. Result: One-year fully probated suspension.⁹⁹

⁹⁶ See *Grievance*, *supra* note 53, at 595.

⁹⁷ See *Grievance*, *supra* note 52, at 1176.

⁹⁸ See *id.*

⁹⁹ See *Grievance*, *supra* note 74, at 368.

5. Public Reprimand

Lawyer failed to perform any meaningful legal services on a family law matter for nearly a year. The lawyer then failed: (1) to notify the complainant of the date of a hearing, (2) to appear at the hearing, (3) to return the complainant's telephone calls, (4) to accept certified mail from the complainant, and (5) to timely respond to notice of the complaint from the grievance committee. Result: Public reprimand.¹⁰⁰

Lawyer handling a deceptive trade practices lawsuit that went to trial failed to: (1) prepare trial testimony, (2) properly designate witnesses, (3) develop his client's case, or (4) inform his client about the importance of hiring an expert witness. Result: Public reprimand.¹⁰¹

Lawyer was hired to oversee the management of complainant's father's estate and replace the executor because of suspected mismanagement. Lawyer failed: (1) to investigate the status of the estate property; (2) to hire an accountant to review the estate's financial condition; or (3) attempt to remove the executor. Result: Public reprimand.¹⁰²

Lawyer during a one-year period failed to respond to his client's telephone calls concerning the status of the case and failed to keep several office appointments with his client. Result: Public reprimand.¹⁰³

Lawyer was hired to represent complainant in three employment discrimination cases. The lawyer failed to: (1) return phone calls, (2) respond to correspondence from the complainant, (3) attend planned meetings, (4)

¹⁰⁰ See *Grievance*, *supra* note 68, at 283.

¹⁰¹ See *Grievance*, *supra* note 53, at 596.

¹⁰² See *Grievance*, *supra* note 58, at 965.

¹⁰³ See *Grievance*, *supra* note 52, at 1176.

reasonably explain the representation, or (5) keep the complainant informed of the status of his cases. Result: Public reprimand.¹⁰⁴

Lawyer improperly revealed a confidential communication of his client. Result: Public reprimand.¹⁰⁵

Lawyer represented a client with interests adverse to those of a former client and in a matter substantially related to the former client's case. Result: Public reprimand.¹⁰⁶

Lawyer accepted personal loans from a client on seven occasions during 1993 without advising the client to seek independent counsel regarding the propriety of the transactions. Result: Public reprimand and must reimburse client \$11,800.¹⁰⁷

Lawyer failed on two occasions to promptly deliver settlement funds to medical providers. Result: Public reprimand.¹⁰⁸

Lawyer contacted a client and told him he was closing his office and would no longer provide representation. The lawyer gave client a phone number to call to request the return of the client's file, but stated the client's file would be shredded if it was not retrieved by a certain date. The lawyer failed to return file despite client's attempts by phone and in writing to get the file. Result: Public reprimand and ordered to pay \$100 in attorney's fees and litigation expenses.¹⁰⁹

¹⁰⁴ See *Grievance, supra* note 58, at 965.

¹⁰⁵ See *Grievance, supra* note 52, at 1176.

¹⁰⁶ See *Grievance, supra* note 77, at 1073.

¹⁰⁷ See *Grievance, supra* note 58, at 965.

¹⁰⁸ See *Grievance, supra* note 68, at 283.

¹⁰⁹ See *Grievance, supra* note 58, at 964.

Lawyer failed to return a client's file within a reasonable amount of time. Result: Public reprimand.¹¹⁰

Lawyer neglected family law and bankruptcy matters and failed to adequately communicate with the complainant. The lawyer also failed to timely return the complainant's file on termination of the representation. Result: Public reprimand.¹¹¹

Lawyer handling a matter on a contingent fee basis refused to release the file to complainant's new lawyer. The file could not be found and limitations expired. Result: Public reprimand.¹¹²

Lawyer filed suit on behalf of numerous plaintiffs who were exposed to fumes of a chemical spill. When one of the complainants terminated the representation and requested his file, the lawyer failed to return the file. Result: Public reprimand and \$200 in attorneys' fees and court costs, plus the lawyer was required to attend six additional hours of legal ethics training.¹¹³

Lawyer filed a frivolous lawsuit against a hospital and a physician. Result: Public reprimand and \$300 in attorneys' fees.¹¹⁴

Bankruptcy lawyer, while representing his clients in a Chapter 11 proceeding, filed a statement with the court indicating the clients had not paid him legal fees, nor did they owe him legal fees. After filing this statement the lawyer accepted compensation from the clients, but failed to disclose this to the court. The lawyer also improperly signed his client's name to a bankruptcy

¹¹⁰ See *Grievance*, *supra* note 53, at 596.

¹¹¹ See *id.*

¹¹² See *Grievance*, *supra* note 77, at 1073.

¹¹³ See *Grievance*, *supra* note 53, at 596.

¹¹⁴ See *Grievance*, *supra* note 58, at 964.

petition and made a false statement to the bankruptcy judge regarding his experience in handling bankruptcy cases. Result: Public reprimand.¹¹⁵

Lawyer employed a private investigator on a fee-sharing basis. Result: Public reprimand.¹¹⁶

Lawyer failed to pay student loans and attorney occupation tax. The lawyer filed a lawsuit on behalf of a client in district court during his resulting administrative suspension. The lawyer later failed to timely respond to notice of the complaint from the grievance committee or respond to the subpoena. Result: Public reprimand.¹¹⁷

Lawyer had a business agreement with a non-lawyer assistant. The non-lawyer undertook a social security case in the lawyer's name, working on it without the lawyer's knowledge and charging attorneys' fees to the client, none of which went to the lawyer. The non-lawyer also cashed checks in the lawyer's name. Result: Public reprimand.¹¹⁸

Lawyer failed to obtain approval of a public advertisement or include pertinent information required by advertising rules. Result: Public reprimand.¹¹⁹

Lawyer failed to respond to lawful demands for information from a disciplinary authority. Result: Public reprimand and \$1,000 attorneys' fees and court costs.¹²⁰

¹¹⁵ See *Grievance*, *supra* note 68, at 284.

¹¹⁶ See *Grievance*, *supra* note 81, at 715.

¹¹⁷ See *Grievance*, *supra* note 77, at 1073.

¹¹⁸ See *Grievance*, *supra* note 57, at 790.

¹¹⁹ See *Grievance*, *supra* note 51, at 174.

¹²⁰ See *Grievance*, *supra* note 68, at 284.

Lawyer repeatedly failed to attend professional enhancement sessions ordered by grievance committee and failed to prepare a written report required by the committee. Result: Public reprimand.¹²¹

Lawyer failed to timely respond to notice of a complaint from the grievance committee. Result: Public reprimand.¹²²

Lawyer was hired to incorporate and apply for tax exempt status for an organization. The lawyer incorporated the organization, but failed to apply for the tax-exempt status. The lawyer failed to return complainant's phone calls. The lawyer was administratively suspended for failure to pay his attorney occupation tax. He continued to represent the complainant while suspended. Result: Public reprimand.¹²³

6. Private Reprimands

Texas law prohibits the imposition of private reprimands for particular conduct, specifically any conduct involving a trust account violation or misapplication of clients funds, repeated violations, and conduct involving deceit, fraud, dishonesty, or misrepresentation.¹²⁴ Private reprimands, as the term implies, and referrals for rehabilitation are not reported by name of attorney.¹²⁵ However, the Texas Bar Journal does report private reprimands and referrals by specific rule violation.¹²⁶

¹²¹ See *Grievance*, *supra* note 74, at 369-70.

¹²² See *Grievance*, *supra* note 81, at 715.

¹²³ See *Grievance*, *supra* note 58, at 964.

¹²⁴ See TEX. GOVT CODE ANN. § 81.072(b)(11) (Vernon 1998); *Commission for Lawyer Discipline*, INTERNAL OPERATING RULE 5.1.

¹²⁵ See TEX. R. DISCIPLINARY P. 6.07 (1998).

¹²⁶ See *id.*

During 1998 there were 137 private reprimands.¹²⁷ Over 30% or thirty-seven of the private reprimands were for neglect of a client file.¹²⁸ There were sixteen lawyers who received a private reprimand for failing to protect property, and twelve lawyers who were admonished for mishandling the termination of the attorney-client relationship.¹²⁹

Similarly, there were thirty-four lawyers who received referrals for rehabilitation during the period.¹³⁰ Neglect of a client matter generated twelve referrals while failure to protect property generated two referrals.¹³¹ There were five lawyers who received referrals for rehabilitation relating to the termination of the attorney-client relationship.¹³²

Through April of 1999, sixteen lawyers received private reprimands and referrals for rehabilitation for violations of rules for which no private reprimand is theoretically available.¹³³

¹²⁷ The authors obtained this information by completely reviewing all Texas Bar Journals published in 1998 and tabulating the relevant data.

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.*

¹³³ The authors obtained this information by completely reviewing all 1999 Texas Bar Journals published through April, and tabulating the relevant data.

V. Recommendations

The authors propose a five-part plan to address these inconsistencies:

1. Initiation of uniform statistical reporting periods;
2. Assimilation of relevant demographic data for all licensed lawyers;
3. Assimilation of relevant statistical data for all inquiries filed, inquiries classified as complaints, and sanctions imposed;
4. Generation of reports of the statistics accumulated; and
5. Centralized oversight of any trends indicated by significant features of the statistical information.

The authors believe that only by adopting these recommendations will the State Bar of Texas be in a position to rationally and systematically resolve actual problems in the disciplinary system, as opposed to tinkering with anecdotal symptoms.

VI. Conclusion

Grievances are a part of practicing law. We will all receive a grievance sooner or later. Which will it be when it happens to you?

The Lady or the Tiger?

Table I

Table I: Ten Years of Lawyer Sanctions in Texas

	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97	97-98	98-99
Disbarments	18	24	12	14	30	35	42	32	38	38
Resignations	14	20	10	15	21	28	23	15	15	20
Suspensions	84	108	87	89	101	101	205	188	148	154
Public Reprimands	69	47	51	61	149	149	107	65	72	89
Private Reprimands	78	60	88	174	288	235	189	175	168	191
Order for rehabilitation									64	58
Other	4	4	2	1	6	6	9	10	6	2
Total	265	293	228	354	655	612	575	515	511	552

Source: *The Commission for Lawyer Discipline*

Table 2

Table 2: Disciplinary Sanctions Over the Last 10 Years

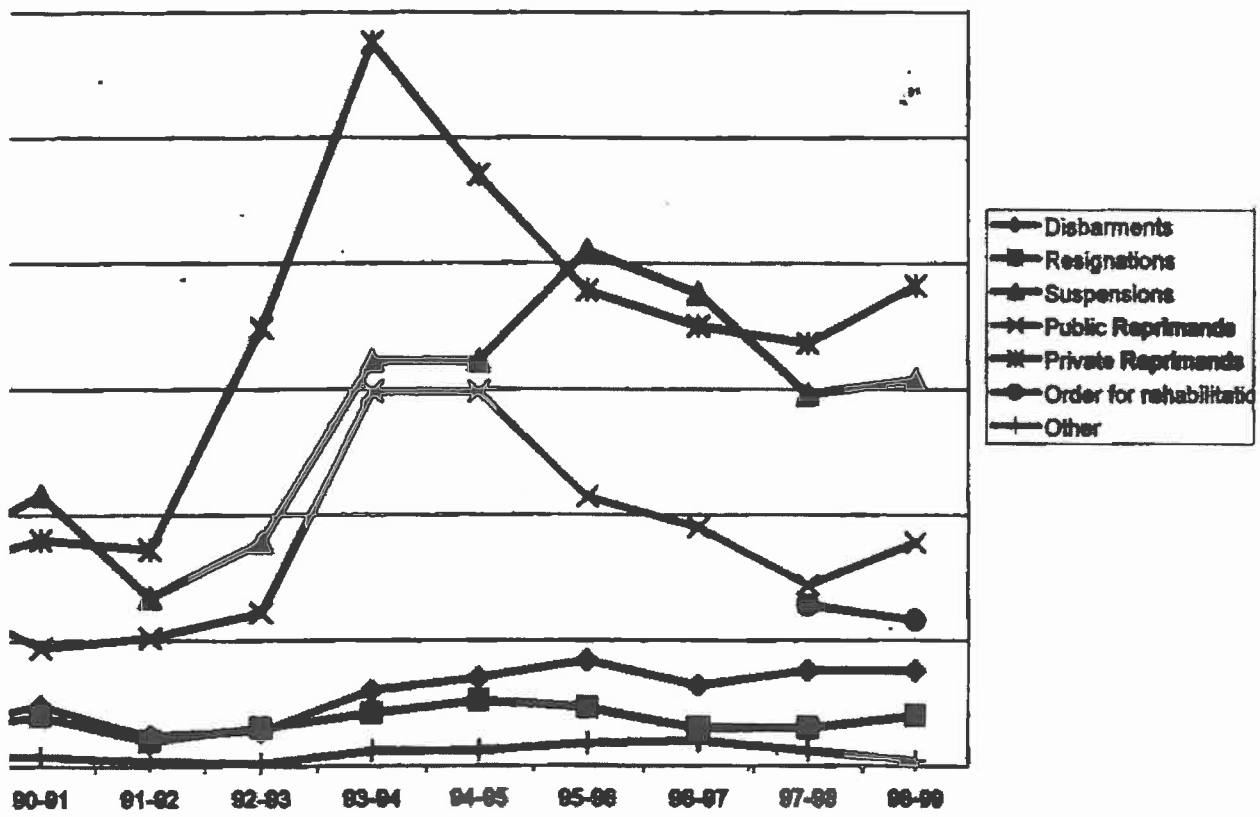


Table 4

Table 4
Selected sample of lawyer sanctions in 1997-1998 period

	Reprimand	Probation	Suspension	Disbarment/Resignation	Total
Private Reprimand					7
Public Reprimand	6	2	2	5	6
Fully Probated Suspension	2	2	5		4
Partial Probation/Active Suspension	2	4	4		1
Active Suspension			2		1
Disbarment/Resignation	2	2	6		6
Total	12	10	19	5	25

Table 5

Table 6: Selected 1998 Sanctions

