

Is the Fox guarding the Chicken Coop?

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STATE BAR OF TEXAS:

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An attorney disciplinary proceeding is, perhaps, one of the most traumatic, exhausting and financially draining experiences a lawyer can face. As members of a self-policing profession, we accept the burdens placed on us by disciplinary proceedings as an evil necessary to protect both the integrity of our profession and individuals who deal with attorneys. Protection of the integrity of our profession, however, should not come at the expense of attorneys facing disciplinary proceedings.

This is effectively what has resulted from the implementation of the Special Assistant Disciplinary Counsel Program by the State Bar of Texas' Commission for Lawyer Discipline. The program potentially robs attorneys charged with disciplinary violations of due process and calls into question the integrity, validity and legality of the entire disciplinary process.

The program provides volunteer trial attorneys, or special assistant disciplinary counsel, to prosecute attorney misconduct suits under both prior disciplinary rules and procedures and the new Texas Rules of Disciplinary Procedure.

THE STATE BAR'S SPECIAL ASSISTANT DISCIPLINARY PROGRAM FUNNELS ATTORNEY'S FEES TO THE BAR, GIVING IT A FINANCIAL INCENTIVE TO PROSECUTE QUESTIONABLE DISCIPLINARY MATTERS

A special assistant disciplinary counsel is an attorney in private practice who, having met certain qualifications set by the Bar, has agreed to prosecute a disciplinary matter on a pro bono basis. Attorneys chosen to participate in this program must have been licensed for at least six years, tried at least six cases to verdict and devoted at least 75 percent of their practice to litigation during the three previous years.

At first blush, the program might appear to be an effective, cost-cutting plan for which the Bar should be congratulated. Upon closer examination, however, it is evident that the utilization of this program presents numerous ethical issues and calls into question the validity and legality of every disciplinary matter that has been prosecuted by a special assistant disciplinary counsel. **The Attorneys' Fees Loop**

Under the program, each special assistant disciplinary counsel agrees to charge only for expenses; their time, and the time of their associates and legal assistants, is provided at no cost to the Bar. Each special assistant also agrees to maintain time records, and if an order is entered that is adverse to the respondent, to testify as to the value of his or her services and seek an award of attorneys' fees. Any attorneys' fees awarded by the trial court are required to be remitted to the Bar.

This arrangement creates a contingency interest for the Bar in every case prosecuted through a special assistant. The Bar, although having incurred no attorneys' fees, receives a windfall whenever attorneys' fees are awarded. This expectation of a windfall gives the Bar added incentive to prosecute disciplinary proceedings vigorously even in situations where the facts do not warrant such prosecution, or even prosecution at all.

In addition, Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct specifically prohibits splitting fees with a non-lawyer. There can be little argument that the Bar is not a lawyer, and therefore, by paying the awarded attorneys' fees to the general fund of the Bar instead of to a fund specifically established for the purpose of prosecuting attorney disciplinary cases, there is a prohibited fee split. As a participant in this fee-splitting arrangement, the Bar violates the very rules it was established to promote and enforce.

'Major Givers'

The Bar also receives two other benefits from the program, both of which have serious due process implications. First, attorneys who are asked to represent the Bar are experienced litigators who charge high fees. Whether these fees are commensurate with their experiences or are much higher than reasonable or necessary, any attorney, including one who is entirely innocent, would find it difficult and financially risky to appeal a disciplinary matter where losing could result in being forced to pay prohibitively high attorneys' fees. Instead of being afforded due process protections, the attorney faced with such financial risk, will all too often 'choose' to accept a decision at the disciplinary committee level, essentially (and ironically) having been robbed of his or her day in court.

Second, if an attorney does decide to take the risk, goes to court and loses, the prohibitively high attorneys' fees act as a sanction on the attorney above and beyond any that might have been imposed by the court. The consequence is a more severe penalty than would have resulted had a "regular" State Bar assistant disciplinary counsel prosecuted the case.

This disparity certainly raises the specter of discriminatory practices. Further, because the fee arrangement is a money-making opportunity for the Bar, the program has conflict-of-interest implications and raises other issues of impropriety. The high fees charged by the experienced litigators go directly into the treasury of the State Bar. These Bar prosecutors and their firms are analogous to "major givers" to a charity or political campaign. Such givers usually receive something in return. What do these attorneys or firms actually receive in return for generating revenues for the State Bar? While the answer may not be readily apparent, the question remains, as does the appearance of impropriety - impropriety that, in itself, is impermissible under the program.

The rules set out by the Commission for Lawyer Discipline for the special assistant disciplinary counsel include:

Immediately notifying the Chief Disciplinary Counsel in the event that an actual or potential conflict of interest arises in connection with either the continued participation of

the special assistant disciplinary counsel in the program or in the handling of an assigned case (Emphasis in original.)

These rules also specify that the professional conduct of a special assistant:

Must not be subject to even the appearance of impropriety or disregard for either the disciplinary rules or the spirit of ethical behavior. (Emphasis added.)

As it currently operates, the program itself violates the State Bar's own mandates and guidelines and the special standard of conduct appropriate to prosecutors.

The Real Purpose of Discipline

A prosecutor in a criminal proceeding has the responsibility under Rule 3.09 of the TDRPC to see that justice is done, not simply to act as an advocate. While a special assistant in a disciplinary matter may be prosecuting a civil rather than a criminal case, he or she is still a representative of the sovereign for the purpose of the disciplinary rules and legal ethics in general, and the respondent in such a matter is entitled to fairness and justice, as a matter of due process. As the California Supreme court has held in *People Ex Rel. Clancey v. Superior Court (Ebel)*; 705 P.2d 347 (Cal. 1985):

Just as certainly there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement

While a prosecutor or a government attorney in a civil enforcement proceeding may "prosecute vigorously.... both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case." *People v. Connor*, 666 P.2d 5 (Cal. 1983), quoting *People v. Superior Court (Greer)*, 561 P.2d 116.4 (Cal. 1977). The Bar's financial interest in these cases serves to abrogate that impartiality and casts a shadow over the Bar's disciplinary procedures

Applying these principles, it is apparent that the purposes of the attorney regulatory system do not require that the commission collect attorneys' fees that represent amounts that it has not paid to its special assistant disciplinary counsel, and that the harms so clearly perceived if a prosecutor in a criminal proceeding has a financial interest in the outcome are equally present in a disbarment or other disciplinary proceeding. The risk that the commission's discretion will be affected by the Bar's financial interest in the outcome is simply too great, and the commission has no legitimate interest in using its disciplinary enforcement system to augment the Bar's overall revenues.

At a time when the legal profession is under attack as being parochial, self-interested, political and worse, the lawyers and citizens of Texas deserve better from their leaders. The Bars disciplinary enforcement program must be reformed so that legitimate grievances can be prosecuted quickly, fairly, effectively, impartially and with both the appearance and fact of due process and justice.

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Reference Materials

[Article: The "Grief-ance" System and What You Should Know, by Robert S. 'Bob' Bennett](#)

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