

THE ATTORNEY DISCIPLINE SYSTEM

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14TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS
JUNE 3 & 4, 2004
AUSTIN, TEXAS

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I. INTRODUCTION

The STATE BAR ACT, the TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, and the TEXAS RULES OF DISCIPLINARY PROCEDURE govern the attorney discipline system. During the 78th Session of the Texas Legislature, which convened in January 2003, the State Bar of Texas underwent the Sunset Review process. As a result of the recommendations made by the Sunset Commission, the Legislature amended the STATE BAR ACT and the Supreme Court, exercising its inherent power to regulate the practice of law, amended the TEXAS RULES OF DISCIPLINARY PROCEDURE (“TRDP”). These changes were effective January 1, 2004, and provide for some significant changes to the attorney discipline system. This paper is intended to provide a general overview of the new disciplinary process and to highlight the changes resulting from the recent amendments.

II. STRUCTURE OF THE DISCIPLINARY SYSTEM

A. DISTRICT GRIEVANCE COMMITTEES

The State of Texas is geographically divided into disciplinary districts with one or more grievance committees within each district. TRDP 2.01. The members of the District Grievance Committees are volunteers appointed by the State Bar President and each committee must be composed of two-thirds attorneys and one-third public members. TRDP 2.02. The District Grievance Committees act through panels assigned by the chair of the Committee and these panels must be composed of two attorney members for each public member. TRDP 2.06. Their responsibilities extend to making determinations in summary disposition matters and to conduct administrative evidentiary hearings. TRDP 2.07.

B. COMMISSION FOR LAWYER DISCIPLINE

The Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas and is not subject to dissolution by the State Bar of Texas Board of Directors. TRDP 4.01. The Commission is a twelve-member body comprised of six (6) attorneys appointed by the State Bar President and six (6) public members appointed by the Supreme Court. TRDP 4.01.

The Commission is the party/client in all lawyer disciplinary proceedings which are not dismissed by summary disposition. TRDP 4.05(A). While the Commission has other duties, the majority of its business is devoted to the consideration of discipline litigation matters. Generally, the Commission meets monthly and it is no longer subject to open meetings or open records provisions. TRDP 4.09.

C. THE CHIEF DISCIPLINARY COUNSEL

The Office of Chief Disciplinary Counsel is responsible for the administration of the discipline system. The Chief Disciplinary Counsel (“CDC”) reviews and screens all information coming to her attention or to the attention of the Commission relating to lawyer misconduct and

represents the Commission for Lawyer Discipline in disciplinary matters before all courts and administrative bodies. TRDP 5.02. In addition to the central office in Austin, the Chief Disciplinary Counsel maintains Regional Offices in San Antonio, Houston, and Dallas.

D. THE BOARD OF DISCIPLINARY APPEALS

The Board of Disciplinary Appeals (“BODA”) is an adjudicatory body of twelve lawyers appointed by the Supreme Court. BODA’s role in the disciplinary system is extensive and substantial.

For example, BODA has exclusive original jurisdiction to hear and determine compulsory discipline, reciprocal discipline, and disability suspension actions. TRDP 7.08G, 7.08H, and 7.08I. BODA also had the authority to affirm or reverse classification decisions and under certain circumstances to transfer disciplinary proceedings and other matters from one grievance committee to another and exercises initial appellate review from final decisions of evidentiary panels of a grievance committee. TRDP 7.08C, TRDP 7.08D, 7.08E, and 7.08F. Finally, BODA is granted exclusive jurisdiction to consider and determine motions to revoke arising from judgments entered by evidentiary panels of the district grievance committees. TRDP 2.23.

Current information regarding recent BODA decisions can be found on their website at www.txboda.org.

E. DISTRICT COURTS

Within the disciplinary framework, district courts are given the power to hear disciplinary trials de novo. TRDP, PART III. District courts also have the authority to determine reinstatements (from disbarments, resignations, and disability suspensions) assumptions of practice, interim suspensions, and revocations, which arise from district court judgments. TRDP, PARTS IV & XI; TRDP 12.06; TRDP 3.13.

III. GRIEVANCE PROCEDURE

A. CLASSIFICATION

The filing of a grievance against a lawyer triggers the disciplinary process and there is no standing requirement for a filing. TRDP 2.10. Consequently, not only are grievances received from clients and former clients, but they are also received from opposing counsel, judges, law partners, associates, appellate courts, etc.

The Chief Disciplinary Counsel is required to examine each grievance and to determine within thirty days whether it constitutes an Inquiry or a Complaint. TRDP 2.10. An Inquiry means any written matter concerning attorney conduct that, even if true, does not allege professional misconduct or disability. TRDP 1.06(S). In contrast, a Complaint means those written matters that, either on the face thereof or upon screening and investigation, allege professional misconduct or a disability, or both. TRDP 1.06(G).

If the CDC determines that the grievance constitutes an Inquiry, it is dismissed and both the Respondent and Complainant are notified of the dismissal. If the CDC determines that the grievance constitutes a Complaint, the Respondent is provided a copy of the Complaint with notice to respond, within 30 days of receipt of the notice to the allegations. TRDP 2.10

The Complainant has the right to appeal a decision by the CDC to dismiss the grievance as an Inquiry to BODA. If BODA affirms the decision, the Complainant has the ability to re-file the grievance one-time with additional or new evidence. However, unlike the former system, the Respondent no longer has the right to appeal a decision by the CDC to classify the grievance as a Complaint. TRDP 2.10.

B. JUST CAUSE DETERMINATION

Once a response is received from the Respondent or if no response is received, a determination of Just Cause is made. Just Cause is defined as “such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either a suspension as an attorney licensed to practice law in the State of Texas or probation.” TRDP 1.06(U).

Under the former system, an investigatory panel of the grievance committee made this determination after a hearing at which both the Complainant and Respondent were invited to appear. This hearing was mandated for every matter classified as a Complaint regardless of whether the response received from the Respondent and/or further investigation by the CDC clearly established no professional misconduct.

In an effort to address this issue and to streamline the process, the new disciplinary rules eliminate this hearing and provide for the summary disposition of Complaints. The CDC now makes the determination of Just Cause within 60 days of the Respondent’s response date. If after investigation, the CDC determines that Just Cause does not exist to proceed upon the Complaint, the CDC places the Complaint on a *Summary Disposition Panel* docket. TRDP 2.13. At this docket, the CDC will present the Complaint to the *Summary Disposition Panel*, which is composed of local grievance committee members, and the panel will determine whether the Complaint should be dismissed or should proceed. In addition, neither the Complainant nor the Respondent is allowed to be present at the docket hearing and there is no appeal from the panel’s decision. TRDP 2.13. The elimination of the investigatory hearing and the provision for summary dismissals of Complaints are clearly the most significant changes in the new system.

C. EVIDENTIARY PANEL HEARING OR DISTRICT COURT TRIAL

For all Complaints not dismissed, either because the CDC determined Just Cause or the Summary Disposition Panel determined that a Complaint should proceed, the Respondent is notified in writing of the allegations of misconduct and disciplinary rule violations. TRDP 2.14 (D). The Respondent has 20 days from receipt of this notice to elect whether the case will be heard by a district court or by an Evidentiary Panel of the grievance committee. TRDP 2.15.

If the Respondent elects district court, a Disciplinary Petition in the name of the Commission is filed with the Supreme Court. TRDP 3.01. The Supreme Court appoints an active district judge who does not reside in the Administrative Judicial District in which the Respondent resides. TRDP 3.02. Once the judge is appointed, the petition and order of appointment are forwarded to the district clerk of the county of proper venue. TRDP 3.03. The disciplinary matter then proceeds as with other civil cases including the right to a trial by jury. The Commission bears the burden of proof by a preponderance of the evidence and the rules of civil procedure and evidence apply. TRDP 3.08.

If the Respondent elects an Evidentiary Panel or makes no election, an Evidentiary Petition is filed in the name of the Commission with the panel. TRDP 2.17(A). No panel may include any person who served on a Summary Disposition Panel that heard the Complaint and the panel must have a ratio of two attorney members for every public member. TRDP 2.17.

In connection with Evidentiary Panel proceedings, the new rules were amended to provide for procedures that mirror district court to the extent feasible. For example, under the former system, at least three separate notices to the Respondent were required before a default judgment could be obtained. The new system provides for a procedure much more akin to district court for the obtaining of default judgment. TRDP 2.17 (B)(C). In addition, both limited discovery and post-trial motions are incorporated into the process. TRDP 2.17(E); TRDP 2.22. The Commission must prove its allegations by a preponderance of the evidence and the rules of civil procedure and evidence apply generally. TRDP 2.17(L)(M).

In a departure from the former system, the Evidentiary Panel hearing is confidential. TRDP 2.16. The purpose for this confidentiality is to allow for the imposition of a private reprimand or the consideration of a Respondent's disability. However, if misconduct is found and the sanction imposed is more than a private reprimand, then the proceedings shall be, upon request, made public. TRDP 2.16(E). If the Evidentiary Panel finds misconduct, it is required to issue a judgment within 30 days that includes findings of fact, conclusions of law, and the Sanctions imposed. TRDP 2.17(P).

E. SANCTIONS

If a finding of professional misconduct is made, a sanction is to be imposed. Sanction can include disbarment, suspension for a term certain, probation of a suspension (which probation may be concurrent with the period of suspension, upon such reasonable terms as are appropriate under the circumstances), public reprimand, or a private reprimand (available only in the Evidentiary Panel setting). TRDP 1.06(Y). In addition, the tribunal may impose restitution and payment of reasonable attorneys' fees and all direct expenses associated with the proceedings, as an ancillary sanction. 1.06(Y)(a)(b).

F. APPEALS

A judgment of disbarment entered by either a district court or an Evidentiary Panel cannot be superseded or stayed. A judgment of suspension may be stayed if the Respondent can establish that his or her continued practice of law does not pose a continuing threat to the welfare

of the Respondent's clients or the public. Any stay may be conditioned upon reasonable terms and there is no interlocutory appeal from a stay of a suspension, with or without condition. TRDP 2.25; 3.14

District Court judgments are appealed to the appropriate court of appeals and ultimately to the Supreme Court upon petition for review.

An Evidentiary Panel judgment is appealed to BODA, which reviews the appeal under the standard of substantial evidence. TRDP 2.24. A Complainant no longer has the right of an independent appeal to BODA of an Evidentiary Panel judgment. BODA's decisions are appealed directly to the Supreme Court. TRDP 7.11. The rules provide for the filing of the record from the underlying proceeding and briefs by the parties. The cases are reviewed under the standard of substantial evidence and the Court may affirm a BODA decision by order without a written opinion. TRDP 7.11

E. VOLUNTARY MEDIATION AND DISPUTE RESOLUTION

A new aspect of the disciplinary system is that dismissed matters, including Inquiries, summary dismissals, and those dismissed by the Evidentiary Panel, will be referred to a voluntary mediation and dispute resolution procedure. TRDP 2.10, 2.13, 2.16(P). Currently, the State Bar maintains the Client Attorney Assistance Program ("CAAP") as a statewide dispute resolution program, which assists clients and attorneys in resolving disputes that do not involve misconduct.

IV. OTHER DISCIPLINARY ACTIONS

A. COMPULSORY DISCIPLINE

Attorneys who have been convicted or placed on probation with or without an adjudication of guilt for certain crimes are subject to compulsory discipline. TRDP 8.01. These crimes include barratry, any felony involving moral turpitude, any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property, or any attempt, conspiracy, or solicitation of another to commit these crimes. TRDP 1.06(Z). In addition, any crime involving misapplication of money or other property held as a fiduciary can result in compulsory discipline. TRDP 1.06(T).

These proceedings are initiated with BODA, which determines all questions of law and fact. If BODA determines that the attorney is subject to compulsory discipline, it has the discretion to either suspend or disbar the attorney depending upon the attorney's criminal sentence. If the attorney's conviction has become final and the attorney was not given probation, BODA must impose disbarment. TRDP 8.05. If however, the attorney's sentence is fully probated, BODA can either impose disbarment or a suspension during the term of criminal probation. If, however, the attorney's criminal probation is revoked, the attorney shall be disbarred. TRDP 8.06. In addition, an early termination of a criminal probation has no effect on any judgment entered pursuant to the compulsory discipline scheme. TRDP 8.07. Finally, if the

attorney has appealed the criminal conviction, BODA is mandated to enter an interlocutory order of suspension pending the outcome of the criminal appeal. TRDP 8.04.

B. RECIPROCAL DISCIPLINE

Attorneys disciplined in other jurisdictions also face disciplinary action in Texas based upon the discipline imposed in the other jurisdiction. These proceedings are filed with BODA and a certified copy of the judgment or order from the other jurisdiction is considered prima facie evidence of the matters contained therein. In addition, a final adjudication of professional misconduct is conclusive subject to enumerated defenses which may be raised by the Respondent in defense of the reciprocal discipline lawsuit. TRDP 9.01. If the Respondent fails to file an answer, BODA is mandated to enter a judgment imposing identical discipline, to the extent practicable, with that imposed in the other jurisdiction. TRDP 9.03

To avoid the imposition of identical discipline, the Respondent must prove by clear and convincing evidence any of the following defenses: 1) A procedural due process violation in the other jurisdiction; 2) An infirmity of proof establishing misconduct in the other jurisdiction due to such a degree that BODA should not accept the decision as final; 3) The imposition of identical discipline would result in a grave injustice; 4) The misconduct established in the other jurisdiction warrants substantially different discipline in Texas; or 5) The misconduct for which the attorney was disciplined in the other jurisdiction does not constitute professional misconduct in Texas. TRDP 9.04

C. DISABILITY SUSPENSION

An attorney may be subject to an indefinite suspension if it is found that the attorney is suffering from a Disability. Disability is defined as “any physical, mental, or emotional condition that, with or without a substantive rule violation, results in the attorney’s inability to practice law, provide client services, complete contracts of employment, or otherwise carry out his or her professional responsibilities to clients, courts, the profession, or the public.” TRDP 1.06(I).

If during the investigation of a Complaint, the Chief Disciplinary Counsel reasonably concludes that the attorney is suffering from a Disability and is directed or authorized by the Commission, the CDC sends the Complaint and any other documents or statement that support a finding of Disability to BODA. BODA forwards all of the information to a District Disability Committee, composed of one attorney; one doctor of medicine or mental health care provider holding a doctorate degree; and one disinterested public member. TRDP 12.02.

The District Disability Committee holds a de novo proceeding to receive evidence and determine whether the attorney is suffering from a Disability. If there is no finding of Disability, the entire record is returned to the CDC and the matter continues in the disciplinary process from the point where it was referred. If the committee determines that the attorney is suffering from a Disability, it certifies the finding to BODA. Upon receiving the finding of Disability, BODA immediately enters an order of indefinite suspension. TRDP 12.04

The record of the proceedings on disability is sealed and remains confidential. However, the order of indefinite suspension is made public. TRDP 12.04. Any statute of limitation applying to a disciplinary matter is tolled during the period of any Disability suspension. TRDP 12.05. An attorney may petition BODA or a district court for reinstatement and must show by a preponderance of the evidence that the reasons for suspension no longer exist and that termination of the suspension would be without danger to the public and the profession. TRDP 12.06(A)(C).

D. INTERIM SUSPENSION

The immediate interim suspension of an attorney may be sought if the Chief Disciplinary Counsel reasonably believes based upon investigation of a Complaint that an attorney poses a substantial threat of irreparable harm to clients or prospective clients and is authorized or directed by the Commission to seek the interim relief. TRDP 14.01. The basis for an interim suspension is: 1) conduct by an attorney that includes all the elements of the types of crimes which subject a lawyer to compulsory discipline; 2) three or more acts of professional misconduct as defined in TDRPC 8.04(a)(2)(3)(4)(6)(7)(8)(10), whether or not actual harm or threatened harm is demonstrated; or 3) any other conduct by an attorney that, if continued, will probably cause harm to clients or prospective client. TRDP 14.02.

In an interim suspension proceeding, the Commission files a petition with a district court and a hearing is held within ten days. If the Commission proves by a preponderance of the evidence the required evidentiary standard, the district court is mandated to enter an order immediately suspending the attorney pending the final disposition of any disciplinary proceeding based on the conduct causing the harm. TRDP 14.01.

E. REVOCATION

The Commission may seek the revocation of an attorney's probated suspension by filing a motion to revoke with either a district court (for a district court judgment) or with BODA (for an Evidentiary Panel judgment). TRDP 2.23, 3.13. A hearing must be set within thirty days of service upon the Respondent and if the Commission proves a violation of probation, the probation is revoked and the attorney suspended from the practice of law for the full term of suspension without credit for any probationary time served. TRDP 2.23, 3.13.

F. RESIGNATION IN LIEU OF DISCIPLINE

An attorney may resign from the practice of law in lieu of discipline. This is accomplished by the filing of a motion for resignation in lieu of discipline in the Supreme Court. The Chief Disciplinary Counsel files a response stating whether the acceptance of the resignation is in the best interest of the public and the profession and setting forth a detailed statement of the professional misconduct with which the attorney is charged. TRDP 10.01, 10.02. The motion to resign is not effective until and unless accepted by the written order of the Supreme Court. TRDP 10.04. And a resignation in lieu of discipline is treated as a disbarment for all purposes, including client notification, discontinuation of practice, and reinstatement. TRDP 10.05.

G. REINSTATEMENT AFTER DISBARMENT OR RESIGNATION

A disbarred lawyer or one who has resigned in lieu of discipline may apply for reinstatement after five (5) years from the date of the judgment of disbarment or of the supreme court order accepting the resignation. However, a person who was disbarred or resigned in lieu of discipline by reason of a conviction or having been placed on probation without an adjudication of guilt for a compulsory discipline type crime cannot apply for reinstatement until five (5) years following the date of completion of sentence, including any period of probation and/or parole. TRDP 11.01.

The petition for reinstatement is filed with the district court in the county of the person's residence and is required to be verified and set forth specific information. TRDP 11.01. The petitioner must establish by a preponderance of the evidence that the best interests of the public and the profession, as well as the ends of justice would be served by the reinstatement. TRDP 11.02. If this burden is met, the district court renders judgment authorizing the petitioner to be reinstated upon compliance within eighteen (18) months from the date of judgment with the rules governing admission to the Bar (Board of Law Examiners). The Board of Law Examiners is also directed to admit the petitioner to a regularly scheduled bar examination given to those individuals who have never before been licensed. TRDP 11.06. If a petition for reinstatement is denied on the merits, the petitioner must wait three (3) years before re-filing. TRDP 11.08.

H. ASSUMPTION OF PRACTICE

Occasionally, it becomes necessary to assume an attorney's practice because of the attorney's disbarment, resignation, suspension, inactive status, mental or emotional disability, or death. In such instances, a client of the attorney, Chief Disciplinary Counsel, or any other interested person may petition a district court in the county of the attorney's residence to assume jurisdiction over the attorney's law practice. TRDP 13.02.

If the court finds that its supervision is required, the court assumes jurisdiction and can appoint one or more attorneys to do one or more of the following: 1) examine the client matters, including files and records of the attorney's practice; 2) notify persons and entities that appear to be clients of the attorney of the assumption of the law practice, and suggest that they obtain other legal counsel; 3) apply for extension of time before any court or any administrative body pending the client's employment of other legal counsel; 4) with the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client's rights; 5) give appropriate notice to persons or entities that may be affected other than the client; 6) arrange for surrender or delivery to the client of the client's papers, files, or other property. TRDP 13.03 (A)-(F).

I. ENFORCEMENT OF JUDGMENTS

Evidentiary Panel judgments and judgments entered by BODA have the force of a final judgment of a district court. TRDP 15.01. To enforce these judgments, the Commission may apply to a district court in the county of the residence of the Respondent and the district court has

available to it all writs and processes, as well as the power of contempt, to enforce the judgment as if the judgment had been the court's own.

V. TASK FORCE ON THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

The Texas Disciplinary Rules of Professional Conduct ("TDRPC"), the substantive rules, last underwent significant amendment in January of 1990. Since then, only the rules governing lawyer advertising, (TDRPC 7.01 – 7.07) have been amended (October of 1994).

On February 5, 2002, the American Bar Association adopted changes to the Model Rules of Professional Conduct. Historically, these Model Rules have generally formed the basis for each state's own ethics rules. On August 29, 2003, the Supreme Court appointed a Task Force to study the changes to the Model Rules with the current Texas ethics rules as well as the rules of attorney conduct adopted by other states. The Task Force is to advise the Court of any changes it deems appropriate to improve the Texas Disciplinary Rules of Professional Conduct.

VI. RESOURCES

- THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

TEX. GOV'T CODE ANN. tit. 2, subtit. G. app. A (Vernon Supp. 2002)(Tex. State Bar R. art. 10 §9),

- THE TEXAS RULES OF DISCIPLINARY PROCEDURE

TEX. GOV'T CODE ANN. tit. 2, subtit. G. app. A-1 (Vernon Supp. 2002)(Tex. State Bar R. art. X, §9)

- THE STATE BAR ACT

TEX. GOV'T CODE ANN, §81.001, ET SEQ.

- ETHICS HELPLINE

1-800-532-3947

- STATE BAR OF TEXAS WEBSITE

www.texasbar.com

- GRIEVANCE INFORMATION HOTLINE

1-800-932-1900