

HOW TO LAWYER FOR A LAWYER WITH A “DISABILITY” AGAINST THE STATE BAR OF TEXAS

BY: JOSÉ R. GUERRERO, JR.

PROCEDURAL FRAMEWORK OF GRIEVANCE PROCESS IN TEXAS

When a grievance is filed against a Texas attorney, it is carefully reviewed by the State Bar of Texas’ Office of Chief Disciplinary Counsel (CDC) and, within thirty days, a determination will be made as to whether it contains allegations of professional misconduct. If the grievance fails to allege misconduct, it will be classified as an “Inquiry” and will be dismissedⁱ. A grievance that successfully alleges professional misconduct will be classified as a “Complaint,” causing the respondent-attorney to be given written notice of the alleged acts and/or omissions giving rise to the grievance and any potential violations of the professional rulesⁱⁱ. Upon receipt of notice, the respondent-attorney must inform CDC whether he elects to have the Complaint heard in a district court of proper venue, with or without a jury, or by an Evidentiary Panel of the CDCⁱⁱⁱ. The election must be in writing and served upon the CDC no later than twenty days after receipt of notice. If the respondent-attorney fails to timely file an election, he will be deemed to have elected the Evidentiary Panel by default.

If the respondent-attorney elects to have the Complaint heard in a district court, the CDC must, within sixty days after receipt of this election, file a “Disciplinary Petition” with the Clerk of the Supreme Court of Texas in the name of the Commission for Lawyer Discipline (CFLD)^{iv}, a permanent committee of the State Bar of Texas. However, if the respondent-attorney is suffering from a “disability,” an election to proceed in district court will preclude any possibility of a “disability” referral, as the district court lacks authority to do so. Thus, a respondent-attorney must, at this stage of the proceeding, elect to have his Complaint heard by an Evidentiary Panel of the CDC if he intends to have the matter referred to a special “disability” committee. Accordingly, Evidentiary Panel procedure will be the focus of this discussion.

Within fifteen days of the earlier of either the date of CDC’s receipt of respondent-attorney’s election or the day following the expiration of respondent-attorney’s right to elect an Evidentiary Panel, the chair of a grievance committee having proper venue shall appoint an Evidentiary Panel to hear the Complaint^v. The CDC must then file with this Evidentiary Panel an “Evidentiary Petition” in the name of CFLD which is served upon the respondent-attorney. The respondent-attorney is given no later than 5:00 p.m. on the first Monday following the expiration of twenty days after service of the Evidentiary Petition to file a response^{vi}. In his response, it is crucial that the respondent-attorney make allegations concerning his “disability” in order to trigger the “disability” referral procedure.

The CDC or the Evidentiary Panel may make a determination as to whether it is evident from the Complaint, or response thereto, that the respondent-attorney is suffering a “disability” to such an extent that either his continued practice of law poses a substantial threat of irreparable harm to client or prospective clients; or he is so impaired as to be unable to meaningfully participate in the preparation of a defense^{vii}. If the CDC

reasonably believes that the respondent-attorney is suffering from a “disability,” it must seek authority from CFLD, to refer the Complaint to the Board of Disciplinary Appeals (BODA)^{viii}. After it has been vested with such authority, the CDC then forwards the Complaint and any other relevant documentation to BODA. An Evidentiary Panel may also refer the matter to BODA if it finds that the respondent-attorney is suffering from a “disability,” based on allegations made in his response to the grievance. In either case, a “disability” referral suspends the grievance process until BODA issues a final judgment in the matter but, in the latter case, no authority need be sought from CFLD before making a referral. Prior to January 1, 2004, only the Investigatory Panel (no longer in existence) could make a “disability” referral but now a referral may arise either during CDC’s initial investigation of a Complaint or during the evidentiary hearing stage where the matter is not being heard by a district court.

INTERPLAY BETWEEN THE BOARD OF DISCIPLINARY APPEALS (BODA) & THE DISTRICT DISABILITY COMMITTEE (DDC)

Appointed by the Supreme Court of Texas, BODA has served since 1992 as an independent statewide judicial body with appellate jurisdiction over certain types of attorney discipline cases and exclusive original jurisdiction in disability suspensions. BODA has the power to indefinitely suspend an attorney who is suffering from a “disability,” defined by Texas Rules of Disciplinary Procedure (TRDP) 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.” Generally, this definition encompasses a wide range of medical conditions including severe depression, alcoholism, drug abuse, and other more traditional physical and mental manifestations of disease.

Following receipt of a “disability” referral, BODA appoints a District Disability Committee (DDC), an ad hoc committee composed of one attorney; one doctor of medicine or mental health care provider holding a doctorate degree, trained in the area of disability; and one public member who does not have any interest in the practice of the law other than as a consumer^{ix}. The BODA notifies the respondent-attorney that a committee has been appointed and sends him a copy of any procedural rules that apply. At any time after notification, the respondent-attorney may waive the disability hearing and enter into an agreed disability suspension with BODA, so long as he is competent to do so. The respondent-attorney must submit a sworn affidavit that he understands the consequences of his actions, is competent to waive the hearing, and is competent to agree to the suspension.

Within 20 days of BODA appointing the DDC, the CDC must file a proposed hearing order and serve it on the respondent-attorney who, in turn, has 20 days from receipt of CDC’s order to file his own proposed order with BODA. In addition, the CDC may also request an order directing the respondent-attorney to undergo a physical and/or psychiatric exam, or the DDC may so order the respondent-attorney without request from CDC. Failure of the respondent-attorney to comply with an order to submit to examination will cause the finding of the local grievance committee to be final. The

BODA deputy director serves as the clerk for the DDC proceedings; she manages all filing deadlines, sets hearings, and handles all motions and requests for appointment of counsel.

THE DISTRICT DISABILITY COMMITTEE (DDC) HEARING

The DDC holds a *de novo* evidentiary hearing governed by Part VIII of BODA Internal Procedural Rules where the committee takes evidence on the disability issue to determine whether a “disability” exists^x. Where the referral is made by an evidentiary panel, the party asserting “disability” carries this burden of proof. After the respondent-attorney has been given reasonable notice of the hearing, he must be afforded an opportunity to appear before and present evidence to the DDC, including evidence from his own medical expert regarding his particular disability. Upon timely request, BODA may appoint an attorney to represent the respondent-attorney’s interest during this closed disability hearing.

If the DDC finds that the respondent-attorney is not suffering from a “disability” at the present time, the entire record and findings will be returned to the CDC and the matter shall continue in the disciplinary process from the point where it was referred to BODA. Conversely, if there is a finding of “disability,” the DDC will certify such finding to BODA, who shall immediately enter an order suspending the attorney indefinitely. If, however, the attorney demonstrates that there is no likelihood of harm in his or her continued practice of law, the DDC may recommend a probated disability suspension conditioned on the attorney complying with certain terms and requirements. The DDC may also develop a monitoring plan for the attorney as a condition of the probation and require periodic reports to the CDC, who will be charged with supervising the probation. At any time during the probationary period, the CDC may request modification of the conditions or may move to revoke the probation altogether. After indefinite suspension has been ordered, the CFLD will notify each jurisdiction in which the respondent-attorney is admitted to practice law of the suspension and/or subsequent reinstatement.

According to the TRDP, a “disability” determination by BODA shall be reviewed under the “substantial evidence rule.” Under this rule, the findings and conclusions of an administrative body are presumed to be supported by substantial evidence, and the party challenging the findings and conclusions must bear the burden of proving otherwise^{xⁱ}. In determining whether there is substantial evidence to support the findings and conclusions of the administrative body, the reviewing court may not substitute its judgment for that of the administrative body but must consider only the record upon which the decision is based^{xⁱⁱ}. The administrative body's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the administrative body must have reached in order to justify its action^{xⁱⁱⁱ}. And although there must be more than a “mere scintilla” of evidence to support the administrative body's decision, it may be true that the evidence actually preponderates against the decision but still amounts to enough evidence to pass the substantial evidence test^{x^{iv}}.

REINSTATEMENT AFTER DISABILITY SUSPENSION

It must be noted that a disability suspension differs from disbarment, in that, disbarment requires that the disbarred attorney re-take the Texas bar exam, but only after five years have elapsed since the matter giving rise to disbarment has been resolved. A suspended attorney may file for reinstatement at any time after the imposition of an indefinite disability suspension simply by filing a verified petition with BODA or with a state district court of proper venue (BODA shares concurrent jurisdiction with the state district court). The petition must include a certified copy of any court order relating to the attorney's competence, an affidavit from a mental health care provider as to the attorney's current condition; and, if the suspension was related to alcohol or drug abuse, a report from a physician on the attorney's current condition. The suspended attorney must prove by a preponderance of the evidence that the reasons for the suspension no longer exist and that terminating the suspension will not endanger the public or the profession.

BODA holds an evidentiary hearing *en banc* to determine whether the attorney has met the requirements for terminating the suspension and may require that he undergo an examination by an appropriate health care provider. The adjudicatory body can grant or deny the reinstatement, or place the lawyer on a probated disability suspension for a fixed term. If the attorney is reinstated to the practice of law and he has been suspended for two or more consecutive years, he may be ordered to re-take and pass the professional responsibility portion of the bar exam, and/or take courses at a law school or through continuing legal education courses. Within 14 days after the attorney receives notice that his reinstatement petition has been denied, he may appeal the decision to the Texas Supreme Court. The record of all disability proceedings must be under seal and must remain confidential, except as to the respondent-attorney; only the final judgment and order of indefinite suspension is to be made public. Any statute of limitations applying to the disciplinary matter will be tolled during the period of any disability suspension.

ⁱ TEX. R. DISCIPLINARY P. 2.10.

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ⁱⁱⁱ TEX. R. DISCIPLINARY P. 2.15.

^{iv} TEX. R. DISCIPLINARY P. 3.01.

^v TEX. R. DISCIPLINARY P. 2.17.

^{vi} TEX. R. DISCIPLINARY P. 2.17 (B).

^{vii} TEX. R. DISCIPLINARY P. 2.14 (C).

^{viii} TEX. R. DISCIPLINARY P. 2.14 (B).

^{ix} TEX. R. DISCIPLINARY P. 12.02, 12.03.

^x TEX. R. DISCIPLINARY P. 12.03.

^{xi} *El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994).

^{xii} *R. R. Comm'n of Tex. v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995); *Tex. State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988).

^{xiii} *Tex. Health Facilities Comm'n v. Charter Med. - Dallas*, 665 S.W.2d 446, 452 (Tex. 1984).

^{xiv} *El Paso*, 883 S.W.2d at 185.