



**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

**IN THE MATTER OF
ROBIN KATHLEEN BARRY**

State Bar of Texas Card No. 24031845

§
§
§

CAUSE NO. 61329

AMENDED JUDGMENT OF PARTIALLY PROBATED SUSPENSION

On January 25, 2019 and on April 12, 2019, the above-styled and numbered disciplinary action pursuant to Part IX of the Texas Rules of Disciplinary Procedure was called for hearing before the Board of Disciplinary Appeals. Petitioner Commission for Lawyer Discipline of the State Bar of Texas appeared by attorney and announced ready. Respondent appeared in person and pro se and announced ready. All questions of fact as well as all issues of law were submitted to the Board of Disciplinary Appeals for determination. On May 7, 2019, the parties were ordered to mediate the matter. On June 12, 2019, the mediation was held and no agreement was reached. Having considered the pleadings on file, having received evidence, and having heard the argument of counsel, the Board of Disciplinary Appeals finds as follows:

- (1) Respondent, Robin Kathleen Barry, State Bar of Texas Card Number 24031845, is currently licensed and authorized to practice law in the State of Texas by the Supreme Court of Texas.
- (2) On or about October 8, 2015, a Judgment of the Hearing Panel was filed in Disciplinary District O of the Board of Professional Responsibility of the Supreme Court of Tennessee in a matter styled, In Re: Robin Kathleen Barry, BPR #21843, Respondent, An Attorney Licensed and Admitted to the Practice of Law in Tennessee (Houston, Texas), Docket No. 2014-2332-O-WM.

The Judgment of the Hearing Panel found that (1) By distributing \$7,691.50 to Ms. Duke from the funds held in trust for Ms. Adams, Ms. Barry knowingly converted client property causing injury to Ms. Adams. In doing so, she violated TN RPC 1.15 (Safekeeping Property and Funds) and 8.4(c) (Misconduct); (2) By distributing \$7,150.00 to herself from the funds held in trust for Ms. Adams, Ms. Barry knowingly converted client property causing injury to Ms. Adams. In doing

so, she violated TN RPC 1.15(a) (Safekeeping Property and Funds) and 8.4(c) (Misconduct);

- (3) By depositing to her trust account the earned fees received from Lisa Chamberlain and Consensus Mediation Services, Ms. Barry commingled her own funds with those of her clients. In so doing, she violated TN RPC 1.15(a)(a) (Safekeeping Property and Funds); (4) By failing to promptly distribute the balance of the \$100,000.00 after payment of the settlement and failing to provide Ms. Adams with an accounting of the funds, Ms. Barry violated TN RPC 1.15(d) (Safekeeping Property and Funds); (5) Ms. Barry failed to adequately communicate with Ms. Adams after her move to Texas. In so doing, she violated TN RPC 1.4 (Communication); (6) A preponderance of the evidence demonstrates that the acts and omissions by the Respondent constitute ethical misconduct in violation of TN RPC 1.4, Communication; and 1.15(a) and (d), Safekeeping Property and Funds; and (7) The Board has carried its burden and proven the aforementioned violations of the Rules of Professional Conduct by a preponderance of the evidence.

The Judgment of the Hearing Panel suspended Respondent from the practice of law for eighteen months with sixty days active suspension and the remainder to be served on probation. Following entry of the Judgment of the Hearing Panel, the Board of Professional Responsibility appealed that decision to the Chancery Court for Davidson County, Tennessee.

- (4) On or about August 26, 2016, a Memorandum Opinion and Order was filed in the Chancery Court for Davidson County, Tennessee, in a matter styled, Board of Professional Responsibility of the Supreme Court of Tennessee, Petitioner, v. Robin K. Barry, Respondent, No. 15-120-1, BOPR Docket No. 2014-2332-0-WM, that states in pertinent part as follows:

The Court concludes that the panel acted arbitrarily and capriciously by failing to consider and apply the ABA Standards in light of the undisputed facts. Based on this record, the only appropriate sanction is disbarment. Based on all of the above, the Court hereby orders that respondent be disbarred from the practice of law in this state.

- (5) Respondent appealed the Chancery Court's decision to the Supreme Court of Tennessee. On or about February 16, 2018, an Opinion was issued by the Supreme Court of Tennessee at Nashville, June 1, 2017 Session, in a matter styled, Board of Professional Responsibility of the Supreme Court of Tennessee v. Robin K. Barry, Direct Appeal from the Chancery Court for Davidson County, No. 15-1270-1, Ben H. Cantrell, Senior Judge, No. M2016- 02003-SC-RJ-BP, that states in pertinent part as follows:

This case was heard upon the entire record on direct appeal from the Chancery Court for Davidson County and upon the briefs and argument of counsel. Upon consideration thereof, we agree with trial court's decision and conclude that the hearing panel acted arbitrarily and capriciously by failing to impose the presumptive

sanction in ABA Standard 4.11, namely, disbarment, in light of Appellant Robin K. Barry's knowing conversion of client funds, her other ethical violations, the finding of five aggravating circumstances, and the absence of any mitigating circumstances. We decline to make Ms. Barry's disbarment retroactive to the date of the temporary suspension of her law license. Accordingly, the judgment of the Chancery Court is affirmed.

In accordance with the opinion filed herein, it is **ORDERED** and **ADJUDGED** that the decision of the Chancery Court is affirmed, and Ms. Barry is disbarred from the practice of law in Tennessee....

- (6) This reciprocal discipline action is not barred by limitations.
- (7) The face of the record discloses that the Tennessee hearing committee imposed a partially probated suspension on Ms. Barry. The Tennessee appellate courts changed the sanction to disbarment after considering and relying heavily on sanction guidelines which did not exist in Texas at the time of the disbarment judgment.
- (8) Texas had no sanction guidelines equivalent to the Tennessee guidelines at the time Ms. Barry was disbarred. BODA finds that the imposition of a partially probated suspension is warranted in this case.

It is, accordingly, **ORDERED**, **ADJUDGED**, and **DECREED** that Respondent, Robin Kathleen Barry, State Bar Card No. 24031845, be and she is hereby **SUSPENDED** from the practice of law in the State of Texas for 36 months and her license to practice law in this state be and is hereby revoked effective June 13, 2019.

It is further **ORDERED** that Respondent, Robin Kathleen Barry, immediately surrender her Texas law license and permanent State Bar Card to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Capitol Station, Austin, Texas 78711, for transmittal to the Clerk of the Supreme Court of Texas.

Period of Active Suspension

It is further **ORDERED** that during the first twelve (12) months of the term beginning June 13, 2019, and ending June 12, 2020, Respondent shall be actively suspended from the practice of law in the State of Texas.

It is further **ORDERED, ADJUDGED** and **DECREED** that during the period of active suspension, Respondent, Robin Kathleen Barry, is prohibited from practicing law in Texas, holding herself out as an attorney at law, performing any legal services for others, accepting any fee directly or indirectly for legal services not completed before the date of this judgment, appearing as counsel in any proceeding in any Texas court or before any administrative body, or holding herself out to others or using her name, in any manner, in conjunction with the words “attorney at law,” “attorney,” “counselor at law,” or “lawyer.”

It is further **ORDERED** Respondent shall immediately notify each of her current clients in writing of the suspension. The notice must include a complete copy of this judgment. In addition to such notification, Respondent is **ORDERED** to return any files, papers, unearned monies and other property belonging to clients and former clients in the Respondent’s possession to the respective clients or former clients or to another attorney at the client’s or former client’s request. Respondent is further **ORDERED** to file with the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment by the Board, an affidavit stating that all current clients have been notified of Respondent’s suspension and that all files, papers, monies and other property belonging to all clients and former clients have been returned as **ORDERED** herein.

It is further **ORDERED** Respondent shall, on or before thirty (30) days from the signing of this judgment by the Board, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice of each and every court or tribunal in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing. The notice must include a complete copy of this judgment. Respondent is further **ORDERED** to file with the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment by the Board, an affidavit stating that each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice has received written notice of the terms of this judgment, including a complete copy of this judgment.

Conditions of Active Suspension

If Respondent complies with all of the following terms and conditions timely, the two (2) year period of probated suspension shall begin on June 13, 2020 and shall end on June 12, 2022:

- (1) Respondent shall immediately update her State Bar of Texas online profile to report her disbarment in Tennessee. Respondent shall verify compliance to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Suite 200, Austin, TX 78701).
- (2) No later than ten days after the receipt of this judgment, Respondent shall report this disciplinary judgment to the Supreme Court of the State of Tennessee and to any other jurisdiction in which she is, or recently has been, licensed to practice law, by providing a copy of this judgment. Respondent shall verify compliance to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Suite 200, Austin, TX 78701).
- (3) Respondent shall make contact with the Office of the Chief Disciplinary Counsel's Compliance Monitor at 877-953-5535, ext. 1334 and the Special Programs Administrator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

- (4) In addition to complying with the Minimum Continuing Legal Education (MCLE) requirements of the State Bar of Texas, Respondent shall complete 5 additional hours of continuing legal education in the area of Law Practice Management, 5 additional hours of continuing legal education in the area of Trust Account Management, and 5 additional hours of continuing legal education in the area of Client Communications. These fifteen (15) additional hours of CLE are to be completed by June 12, 2020. Within ten (10) days of the completion of each of these additional CLE hours, Respondent shall verify completion of the course to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Suite 200, Austin, TX 78701).
- (5) Respondent shall make contact with the Texas Lawyers' Assistance Program (TLAP) at its hotline number, 800-343-8527, not later than ten (10) days after receipt of a copy of this judgment to inquire as to services and referrals offered by that program. Respondent shall send verification of contact with TLAP to the Chief Disciplinary Counsel's office within fifteen (15) days of such contact.
- (6) Within thirty (30) days of Respondent's receipt of a copy of this judgment, Respondent shall schedule a full psychological assessment to be conducted by a mental health professional licensed in Texas as a psychiatrist, a psychologist, a master's level social worker (LCSW), or a licensed professional counselor (LPC). Respondent shall complete the assessment at the earliest practicable date, but in no event later than sixty (60) days after receipt of a copy of this judgment. Although the details of information disclosed during the assessment shall remain confidential, the conclusions, diagnosis and treatment plan recommendations of the mental health professional shall be reported to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Suite 200, Austin, TX 78701) within ten (10) days of the completion of the assessment. Respondent shall take all necessary action, including the execution of a valid release of information, to allow and direct the mental health professional to report such results and recommendations.
- (7) If recommended as part of the above assessment, Respondent shall remain under the care of one or more mental health professionals at the frequency recommended by the treatment plan for the duration of the active and probated suspension period, or until released in writing by the treatment provider. Each treating mental health professional shall provide written reports to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX, 78711-2487 (1414 Colorado St., Ste. 200, Austin, TX, 78701) verifying Respondent's attendance at the sessions and good faith participation in the treatment plan. The initial report(s) shall be due ten (10) days after completion of the assessment, with subsequent reports due within ten (10) days of subsequent visits with the provider. Respondent shall take all necessary action, including the execution of a valid release of information to permit any treating mental health professional to provide written reports for the duration of the suspension period.

- (8) Respondent shall arrange for an attorney monitor approved by the Office of the Chief Disciplinary Counsel, State Bar of Texas who will meet in person at a minimum of once per month with the Respondent to review Respondent's law practice beginning when, and if, the Respondent resumes the practice of law. Respondent shall meet with the attorney monitor at least three (3) times during the active suspension period, in order to coordinate Respondent's return to the practice of law and to discuss the best practices to prevent future grievances. Respondent shall have the attorney monitor approved and in place to being meeting within nine (9) months of the signing of this judgment by the Board. Respondent shall make contact with the Office of the Chief Disciplinary Counsel's Compliance Monitor at 877-953-5535, ext. 1334 and Grievance Referral Program Administrator at 877-953-5535, ext. 1323, to coordinate Respondent's compliance.
- (9) Respondent shall be responsible for all costs and expenses incurred, directly or indirectly, by compliance with these terms and shall pay all such costs and expenses as required by the provider, but in no event later than the final day of the supervision period.

If Respondent fails to meet the requirements of active suspension timely, she shall remain actively suspended until the date of compliance with all of the conditions of active suspension or until June 12, 2022, whichever is later.

Probation

If Respondent timely completes the requirements of her active suspension, the active suspension shall end on June 12, 2020, and Respondent will thereafter be on probation until June 12, 2022, subject to the terms and conditions of probation as set forth below.

- (1) Respondent shall not violate any term of this judgment.
- (2) Respondent shall not engage in professional misconduct as defined by Rule 1.06W of the Texas Rules of Disciplinary Procedure.
- (3) Respondent shall not violate any state or federal criminal statutes.
- (4) Respondent shall keep the State Bar of Texas membership department notified of current mailing, residence, and business addresses, telephone numbers and email addresses.
- (5) Respondent shall comply with Interest on Lawyers Trust Account (IOLTA) requirements.

- (6) Respondent shall promptly respond to any request for information from the Chief Disciplinary Counsel in connection with any investigation of any allegations of professional misconduct.
- (7) If recommended as part of the above assessment, Respondent shall remain under the care of one or more mental health professionals at the frequency recommended by the treatment plan for the duration of the active and probated suspension period, or until released in writing by the treatment provider. Each treating mental health professional shall provide written reports to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX, 78711-2487 (1414 Colorado St., Ste. 200, Austin, TX, 78701) verifying Respondent's attendance at the sessions and good faith participation in the treatment plan. The initial report(s) shall be due ten (10) days after completion of the assessment, with subsequent reports due within ten (10) days of subsequent visits with the provider. Respondent shall take all necessary action, including the execution of a valid release of information to permit any treating mental health professional to provide written reports for the duration of the suspension period.
- (8) Respondent shall arrange for an attorney monitor approved by the Office of the Chief Disciplinary Counsel, State Bar of Texas who will meet in person at a minimum of once per month with the Respondent to review Respondent's law practice beginning when, and if, the Respondent resumes the practice of law. The monitor shall report Respondent's compliance to the Office of the Chief Disciplinary Counsel on a monthly basis. The written monthly reports shall be due on the 5th of the following month.
- (9) In addition to complying with the Minimum Continuing Legal Education (MCLE) requirements of the State Bar of Texas, Respondent shall complete 15 additional hours of continuing legal education each year. Respondent shall complete 5 hours in each of the following areas: Law Practice Management, Trust Account Management, and Client Communications. The first 15 hours of additional CLE must be completed by June 12, 2021 and the second 15 hours of additional CLE must be completed by June 12, 2022. The Respondent shall verify completion of the courses to the Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Suite 200, Austin, TX 78701).
- (10) By June 13, 2020, Respondent shall engage the services of an independent Certified Public Accountant (the CPA), approved by the Special Programs Administrator in the Office of the Chief Disciplinary Counsel of the State Bar of Texas, to assist Respondent in implementing an accounting method to balance the Trust Accounts and to maintain account records, as explained in detail below.
- (11) Respondent will timely satisfy all administrative practice requirements including payment of dues and occupation tax and completion of MCLE without delinquency.

- (12) Respondent shall be responsible for all costs and expenses incurred, directly or indirectly, by compliance with these terms and shall pay all such costs and expenses as required by the provider, but in no event later than the final day of the supervision period.

CPA Review of Trust Accounts

By June 13, 2020, Respondent shall engage the services of an independent Certified Public Accountant (the CPA), approved by the Special Programs Administrator in the Office of the Chief Disciplinary Counsel of the State Bar of Texas, to assist Respondent in implementing an accounting method to balance the Trust Accounts and to maintain account records. By July 1, 2020, Respondent shall insure that the CPA has provided written confirmation of the implementation of such accounting method directly to the Special Programs Administrator. Respondent shall take all necessary action, including the execution of a valid release of information, to allow and direct the CPA to provide such confirmation and to provide the reports described below.

By October 1, 2020, Respondent shall insure that the CPA has completed a review of the Trust Accounts and provided a report summarizing the results of the review directly to the Special Programs Administrator. This initial review and report shall cover the period from June 1, 2020 through August 31, 2020; the report should note any irregularities in Respondent's handling of funds deposited in the Trust Accounts. Additional reviews shall cover the periods from September 1, 2020 through November 30, 2020; December 1, 2020 through February 28, 2021; March 1, 2021 through May 31, 2021; June 1, 2021 through August 31, 2021; September 1, 2021 through November 30, 2021; December 1, 2021 through February 28, 2022, March 1, 2022 through May 31, 2022; and June 1, 2022 through June 30, 2022. The CPA shall provide reports summarizing the results of the reviews directly to

the Special Programs Administrator before the expiration of 30 days following each review period. The last report will be due on July 31, 2022.

Respondent shall be responsible for all costs and expenses incurred in completing these terms and shall pay all costs and expenses directly to the CPA in the manner determined by the CPA.

Probation Revocation

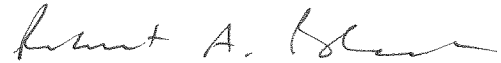
Upon information that Respondent has violated a term of this judgment, the Chief Disciplinary Counsel may, in addition to all other remedies available, file a motion to revoke probation pursuant to Texas Rules of Disciplinary Procedure Rule 2.23 with the Board of Disciplinary Appeals (“BODA”) and serve a copy of the motion on Respondent pursuant to the TRDP. BODA shall conduct an evidentiary hearing and determine by a preponderance of the evidence whether Respondent has materially violated any term of this Judgment. If BODA finds grounds for revocation, BODA shall enter an order revoking probation and placing Respondent on active suspension for two years from the date of such revocation order. Respondent shall not be given credit for any term of probation served prior to revocation.

It is further **ORDERED** that the Chief Disciplinary Counsel may, in lieu of seeking revocation of probation under this judgment, initiate a separate disciplinary complaint based on any conduct on the part of Respondent that serves as the basis for a motion to revoke probation herein.

It is further **ORDERED** that a certified copy of the Petition for Reciprocal Discipline on file herein, along with a copy of this Judgment, be sent to the Chief Disciplinary Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

This suspension shall be made a matter of record and appropriately published in accordance with the Texas Rules of Disciplinary Procedure.

Signed this 15th day of July, 2019.



CHAIR PRESIDING

Board members Mike Mills and Deborah Pullum did not participate in this decision.

BODA member Kelli Hinson dissents for the reasons articulated by Mr. McKetta and Mr. González. BODA member Cezy Collins joins in the dissents by Mr. McKetta and Mr. González.

BODA member John J. “Mike” McKetta III dissents.

I respectfully dissent. I agree with the majority’s decision to deny the Respondent’s defense that this reciprocal disciplinary proceeding is barred by limitations; but I cannot agree with the majority’s decision as to suspension. The Respondent was disbarred in Tennessee. If Tennessee had instead imposed the discipline that the majority has ordered, I would readily have joined. But the law governing reciprocal discipline requires this Board to impose the sanction imposed by Tennessee unless the Respondent has proved one of five specified defenses by clear and convincing evidence. In my view, she has not done so.

BODA member David M. González dissents.

Hard cases improve jurisprudence.

I agree with the majority opinion in the sense that I do not want to see Ms. Barry disbarred. She appears to be a lawyer who works for the public interest. She seems to genuinely care about the profession and her clients. Her conduct during the proceedings and her credibility under oath were beyond reproach. The evidentiary panel in Tennessee did not issue a judgment of disbarment, and I would prefer to defer to the trier of fact.

But two Tennessee appellate courts overturned the evidentiary panel's decision and issued a sanction of disbarment. While I disagree that such a sanction was warranted based upon the evidence presented at the original hearing, it is improper to substitute my personal or professional opinion. The remedy afforded to Ms. Barry under Texas law is to present evidence that the Tennessee sanction was unwarranted. I dissent because Ms. Barry failed to present sufficient evidence to meet her burden by clear and convincing evidence.

I write separately to improve our body of authority on an area where there can be more guidance.

▪ ▪ ▪

There is no dispute about the facts. Ms. Barry was disbarred in the State of Tennessee for failing to hold client funds in trust, failing to promptly deliver funds to the person entitled to receive them, failing to provide an accounting, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and failing to adequately communicate with her client. However, this was not the sanction imposed by the Tennessee Hearing Panel. While the Board of Professional Responsibility of the Supreme Court of Tennessee advocated for disbarment, the Hearing Panel assessed a sanction of suspension for a period of 18 months, with 60 days of that suspension active.

Likely concerned that Ms. Barry was not disbarred, the Tennessee Board then appealed this sanction to the Chancery Court for Davidson County, Tennessee who reversed the Hearing Panel decision for acting arbitrarily and capriciously. The Chancery Court ordered Ms. Barry's disbarment. Ms. Barry then appealed to the Supreme Court of Tennessee and the judgment of disbarment was affirmed. Because Ms. Barry had moved her practice to Texas after the commencement of the Tennessee grievance process, the State Bar of Texas Office of Chief Disciplinary Counsel brought a reciprocal disciplinary action against Respondent pursuant to Part IX of the Texas Rules of Disciplinary Procedure ("TRDP").

Ms. Barry appeared before this Board and argued that the Texas reciprocal action was barred by the statute of limitations under TRDP 17.06A and that imposition of identical discipline would be either a grave injustice under TRDP 9.04C or warrants substantially different discipline in Texas under TRDP 9.04D. The burden was on Ms. Barry to prove her defenses.

Defenses to Reciprocal Discipline in Texas

While the imposition of identical discipline is the default result under reciprocal discipline, it is not automatic. Texas defers to the originating jurisdiction in that the judgment creates a rebuttable presumption of identical discipline. TRDP 9.04 presents a high burden for a lawyer who seeks to avoid reciprocal discipline. The lawyer must prove, by clear and convincing evidence, one of the following five defenses:

- 1) lack of due process in the originating proceeding;
- 2) an infirmity of proof sufficient to give rise to a "clear conviction" that BODA should not accept the judgment;
- 3) imposition of identical discipline would result in a grave injustice;
- 4) the misconduct in the jurisdiction warrants substantially different discipline in this state; or

5) the conduct does not does not constitute misconduct in Texas.

Texas Rules of Disciplinary Procedure 9.04A through E.

While each of these defenses require an analysis of the underlying proceedings, these defenses are not an invitation to relitigate misconduct allegations that have been heard and decided in another jurisdiction. In reviewing the transcript of the original Tennessee proceeding, Ms. Barry did not dispute the conduct that resulted in her disbarment. She similarly did not dispute the conduct in her appearance before this Board. Thus, the only issue for this Board was whether she proved one of her defenses by clear and convincing evidence that would warrant relief.

The Texas Supreme Court has defined the clear-and-convincing burden of proof as “that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002). Uncorroborated testimony or other evidence that is not sufficiently specific or detailed and leaves room for surmise or speculation may be insufficient even if undisputed. *See, Boyd v. Boyd*, 131 S.W.3d 605, 614-617 (Tex. App.—Fort Worth 2004, no pet.) citing *McKinley v. McKinley*, 496 S.W.2d 540, 544 (Tex. 1973).

In agreeing with the majority opinion that this reciprocal disciplinary proceeding is not barred by the statute of limitations defense, I write to address the lack of proof of grave injustice or substantially different discipline.

Providing Proof Before the Board

Podiums can be deceiving.

BODA has appellate jurisdiction over judgments issued by evidentiary panels of State Bar grievance committees. As with appellate review throughout Texas, the parties may request

oral argument. These arguments before BODA are held in the Supreme Court of Texas and this forum works well for oral argument given the seriousness of these matters.

But BODA also has original jurisdiction to hear compulsory and reciprocal discipline cases, and to revoke fully- or partially-probated suspensions imposed by a grievance committee. All of these matters require the presentation of evidence to the Board. In addition, BODA has exclusive jurisdiction to indefinitely suspend an attorney who suffers from a disability from the practice of law and this requires the presentation of evidence to a committee of the Board.

There is no witness stand in the Supreme Court courtroom. Litigants are expected to present evidence at the podium or at a witness table set up in the courtroom just for BODA. As with any evidentiary hearing, witnesses must be sworn under oath and subject to cross-examination. This is even the case when a party appears before the Board *pro se*.

Too frequently lawyers appearing before BODA at an evidentiary hearing present argument but not evidence. Perhaps the presence of a podium can be misleading, so I write to provide guidance: oral argument is not evidence in an evidentiary hearing. In Ms. Barry's case, the Commission for Lawyer Discipline helpfully suggested that Ms. Barry be placed under oath so that her arguments could become testimony. But *pro se* lawyers frequently combine argument and personal testimony without being sworn under oath. It puts the Board in a position of having to discern the difference, and that should be the responsibility of the parties.

Analyzing the Proof in This Case

I join Mr. McKetta's dissent because I agree that even after Ms. Barry testified under oath she did not provide ample proof that rose to the level of clear and convincing evidence of either grave injustice or substantially different discipline.

Ms. Barry has never offered any evidence explaining her failure to hold client funds in trust, her failure to promptly deliver funds to the person entitled to receive them, her failure to provide an accounting, her conduct involving dishonesty, fraud, deceit, or misrepresentation, and her failure to adequately communicate with her client. At most, Ms. Barry eluded that she had personal problems and that her conduct was related to substance abuse. However, she provided no evidence of a substance abuse problem. And when asked about how she has addressed the problems that she asserts caused the conduct that resulted in the grievance, Ms. Barry conceded that she did not attend treatment or therapy nor did she offer any evidence of rehabilitation. The overall lack of explanation makes it difficult to determine how the imposition of identical discipline would result in a grave injustice or warrants substantially different discipline in this state. Ms. Barry focused her efforts almost exclusively on her statute of limitations defense to her detriment.

As a practitioner of family law, Ms. Barry is undoubtedly familiar with the clear and convincing evidentiary standard when she advocates for her clients. But when she advocated for herself, Ms. Barry called no witnesses. Ms. Barry did not present any documentary evidence in support of her defenses. While Ms. Barry mentioned her current practice representing people in termination proceedings, she did not provide sufficiently specific or detailed information that would allow a determination of whether the sanction results in a “grave injustice.” Ms. Barry did not provide statistics or data about what discipline Texas grievance panels have imposed conduct similar to hers to prove that she would have received substantially different discipline in Texas. Ms. Barry did not provide a method of determining what constitutes a “grave injustice,” or offer evidence in support of her position.

The parties have broad latitude in presenting evidence and argument to the Board. Unfortunately, Ms. Barry simply did not meet her evidentiary burden. Based upon her presentation to the Board, I wish she had.