



THE TRIBUNAL

What you need to know about the Board of Disciplinary Appeals.

BY W. CLARK LEA

The Board of Disciplinary Appeals consists of 12 attorneys appointed by the Supreme Court of Texas. It is a statewide tribunal whose jurisdiction covers six types of disciplinary and disability matters, including original and appellate cases. BODA members, who are eligible to serve two consecutive three-year terms, represent a broad range of practice contexts, geographies, gender and racial diversity, and specialty areas. BODA was created in 1992 as part of the court's delegation of inherent power to regulate the practice of law.¹ BODA is funded by the court as part of the annual budget of the State Bar of Texas. While BODA is not part of the State Bar of Texas, the bar provides support services and office space for BODA's three-person staff in the Texas Law Center in Austin.

BODA's original jurisdiction includes:

- Compulsory cases (discipline arising from conviction for an intentional crime);²

- Reciprocal discipline (arising from discipline in another jurisdiction in which a Texas attorney is also licensed);³
- Petitions to revoke probated suspensions (based on a judgment imposed by a grievance committee evidentiary panel);⁴ and
- Indefinite disability suspensions (when an attorney is found to be suffering from any condition that causes him to be unable to perform professional responsibilities).⁵

The Office of the Chief Disciplinary Counsel initiates these actions by filing a petition with BODA on behalf of the Commission for Lawyer Discipline of the State Bar of Texas. BODA also has appellate jurisdiction to review:

- Grievances that the CDC dismissed for failing to allege a violation of the Texas Disciplinary Rules of Professional Conduct;⁶ and
- Disciplinary judgments imposed by an evidentiary panel of a district grievance committee (findings of misconduct and/or the sanction imposed).⁷

Additional information about BODA members, jurisdiction, operations, and decisions, as well as copies of all BODA opinions, annual reports, and some of the hearing videos, are available on its website (txboda.org). BODA staff is also available to answer questions about BODA case dockets and procedure.

In order to provide guidance on the workings of BODA, the remainder of this article focuses on frequently asked questions and common misunderstandings of BODA and the grievance system.

CAN I REALLY LOSE MY LICENSE IF I SPEND ONE DAY IN JAIL?

An attorney convicted of an intentional crime is subject to compulsory discipline, initiated by the CDC filing an action with BODA on behalf of the Commission for Lawyer Discipline. These matters do not proceed through a grievance panel, although the attorney can also be prosecuted for the underlying conduct through a regular disciplinary action.⁸ The record of conviction is conclusive evidence of the attorney's guilt.⁹

According to the Texas Rules of Disciplinary Procedure, an intentional crime is defined as:

- (1) Barratry;
- (2) Any felony involving moral turpitude;
- (3) 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 any of the fore-

going crimes so long as the crime requires proof of knowledge or intent; and

- (4) Any crime involving misapplication of money or other property held as a fiduciary.¹⁰

BODA holds a hearing to determine whether the attorney has been convicted of an intentional crime, confirm that the attorney is the same person as the criminal defendant, and determine whether the criminal conviction is final and whether the criminal sentence is fully probated. For purposes of compulsory discipline, an order of deferred adjudication is treated as a conviction. BODA can suspend an attorney convicted of an intentional crime while the conviction is being appealed.¹¹

An attorney convicted of an intentional crime who is sentenced to serve even one day “shall be disbarred.” Consequently, a conviction on a misdemeanor theft charge combined with a sentence of *any* time served or to be served—even one day—will result in disbarment.¹² A term of incarceration imposed solely as a condition of an otherwise fully probated sentence does not, however, require disbarment.

When an attorney receives deferred adjudication or a fully probated sentence, BODA can either suspend the attorney’s license for the term of probation or disbar the attorney.¹³ If the attorney’s criminal sentence is a fully probated sentence or he received deferred adjudication, BODA holds a hearing to receive evidence on whether the convicted attorney should be disbarred or suspended.¹⁴ In its hearings on these matters, BODA commonly receives evidence on the attorney’s prior professional conduct, acceptance of the conviction, post-conviction conduct, support in the community, whether the criminal conduct involved the practice of law, and other evidence relating to the decision to disbar or suspend.

HOW CAN I APPEAL THE CHIEF DISCIPLINARY COUNSEL’S DECISION TO PROCEED ON A GRIEVANCE?

Part of BODA’s jurisdiction is hearing the appeals of the CDC decisions to classify a complaint as an “inquiry” (which asserts no violation of the TDRPC and differs from a grievance, which asserts a violation). If the CDC reviews a complaint and determines that it does not allege a violation of the TDRPC, it notifies the complaining party, which may then appeal the decision to BODA.¹⁵ Although the person making a complaint can appeal an inquiry classification, no corresponding authority currently exists for an attorney to appeal a grievance.¹⁶ A panel of three BODA members considers appeals from the classification of complaints (inquiry/grievance) in weekly telephone conferences. These classification ap-

peals are not “hearings” and are not open to the public. If BODA affirms the classification, the decision is final and no investigation or further action takes place. If BODA reverses the CDC’s classification, the matter proceeds as a grievance.

After classification as a grievance, the CDC conducts an investigation to determine if there is any basis for the claimed conduct and either sends the complaint to a grievance committee’s summary disposition panel to review and dismiss or recommends that the case continue to formal proceedings.

WHERE DOES BODA HOLD HEARINGS?

BODA holds hearings four times a year in the courtroom of the Supreme Court of Texas in Austin. These are open to the public unless a particular matter is made confidential by the TRDP or the BODA Internal Procedural Rules.¹⁷ The current hearings docket is available on the BODA website. BODA typically hears compulsory cases, reciprocal cases, revocations, and appeals from evidentiary judgments (oral argument) en banc, but can assign any matter to a panel of three members and set cases for preferential settings.¹⁸ BODA may also consider appellate matters without a hearing (typically on the request of the parties) and these deliberations, as with all deliberations, are not public. Finally, when BODA considers the appeal of a private reprimand, it does so in a closed hearing in order to preserve confidentiality.

IS THERE ANY WAY TO SEE A HEARING OTHER THAN GOING TO AUSTIN?

Many attorneys would like to see how a BODA hearing proceeds before actually participating in one (either as counsel representing a party or as the responding party).

In matters other than classification appeals, BODA usually conducts its hearings before all 12 members in the courtroom of the Supreme Court of Texas. In recent years, BODA has scheduled hearings on a quarterly basis. Although BODA can decide cases by assigning any matter to a panel of three members, this has not occurred in some time. When BODA receives evidence or hears appellate arguments, any of the 12 members may ask questions (of a witness or of the attorney) at any time during the proceedings. Although BODA often proceeds in a manner similar to other tribunals, the matters that come before it and its 12 members result in some differences. In order to provide information to the public and to attorneys, BODA posts video recordings of all proceedings that are not confidential. Interested parties can

view BODA's most recent public hearings on its website. Earlier hearings are available upon request, but BODA does not currently provide live video streaming of hearings. BODA encourages those who appear before it to view prior hearings and/or contact its staff prior to participation at a hearing.

DOES BODA FOLLOW THE CIVIL RULES?

Yes and no. BODA's first reference is to the Texas Rules of Disciplinary Procedure. When relevant and not in conflict with the TRDP, BODA also follows the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure. A few of the TRDP "quirks" are as follows:

- An appeal of a factual determination by a grievance panel to BODA is made under the substantial evidence burden;¹⁹
- An evidentiary panel's judgment of disbarment cannot be superseded or stayed;²⁰
- The notice of appeal from an evidentiary judgment is filed with BODA, but the appellant must request and pay for the record from the evidentiary court reporter;²¹
- BODA may remand an appeal from an evidentiary judgment, if reversed in whole or in part, to a statewide grievance committee panel;²²
- Compulsory cases do not have an "answer date," but the hearing must be at least 30 days from the petition's date of service;²³
- An appeal from a BODA decision to the Supreme Court of Texas must be filed with the clerk of the court within 14 days of the party's receipt of the judgment.²⁴

Any attorney with a matter before BODA should consult the disciplinary provisions of the State Bar Act,²⁵ the TRDP, and the board's Internal Procedural Rules. BODA also has published several opinions on substantive and procedural issues in compulsory cases, revocations of probation, and appeals from evidentiary judgments. The BODA Internal Procedural Rules and opinions are available on its website and on westlaw.com.

WHAT HAPPENS AFTER A BODA DETERMINATION?

With the exception of classification appeals (which are not appealable), the following matters may be appealed directly to the Supreme Court of Texas, which must hear the appeal:

- Decision on evidentiary appeal;
- Interlocutory suspension in compulsory discipline case;
- Final suspension or disbarment in compulsory discipline case;
- Final order on reciprocal discipline;

- Final order on disability suspension;
- Final order on revocation of probation.

The court can decide the appeal with or without written opinion.

WHAT ARE BODA'S STATISTICS FOR 2012-2013?

(1) All cases filed and decided

Total cases filed	1,839
Total dispositions	1,832

	Filed	Decided
Classification appeals	1,809	1,791
Compulsory cases	9	15
Reciprocal cases	7	8
Appeals from evidentiary judgment	11	14
Revocation of probation	-	-
Disability	3	3
Reinstatements	-	1

(2) Grievances generally

Total grievances filed with the	
CDC	7,882 (9 percent increase from the previous year)
Total grievances classified by the CDC	7,123
Upgraded	1,628 (23 percent)
Dismissed	5,495 (77 percent)

(3) Classification appeals to BODA

Total grievances dismissed by the CDC	5,495
Appeals filed with BODA	1,809
33 percent of dismissed grievances appealed to BODA (3 percent increase from the previous year)	
Appeals to BODA disposed	1,791
Appeals denied by BODA (dismissal affirmed)	1,641
Appeals granted by BODA (grievance upgraded)	150 (8.4 percent)

Classification appeals – average decision time

SBOT process time	23 days
BODA decision time	19 days
Total decision time from the date appeal was filed	42 days

(4) Disposition of classification appeals granted by BODA

Appeals granted by BODA 2011-2012	114 total
Sanction entered	2
Just cause found (proceeding to hearing)	14
Appeals granted resulting in sanction or formal proceedings	16 (14 percent)
No just cause (pending summary disposition)	12
Dismissed at summary disposition	86
Appeals granted ultimately dismissed	98 (86 percent)

(5) Appeals from BODA decisions to the Supreme Court of Texas

Filed 13
 Decided 13
 (All appeals either affirmed or dismissed)

The author would like to thank Christine E. McKeeman, who was appointed to the Board of Disciplinary Appeals in October 1992, for her assistance with this article.

NOTES

1. Tex. Gov't Code § 81.071 and 81.072; Part VII, Texas Rules of Disciplinary Procedure, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 ("TRDP"); *In re State Bar of Texas*, 113 S.W.3d 730 (Tex. 2003).
2. TRDP Part VIII.
3. TRDP Part IX.
4. TRDP 2.23.
5. TRDP Part XII.
6. TRDP 2.10.
7. TRDP 2.21, 2.24.
8. TRDP 8.01.
9. TRDP 8.02.
10. TRDP 1.06T and 1.06Z.

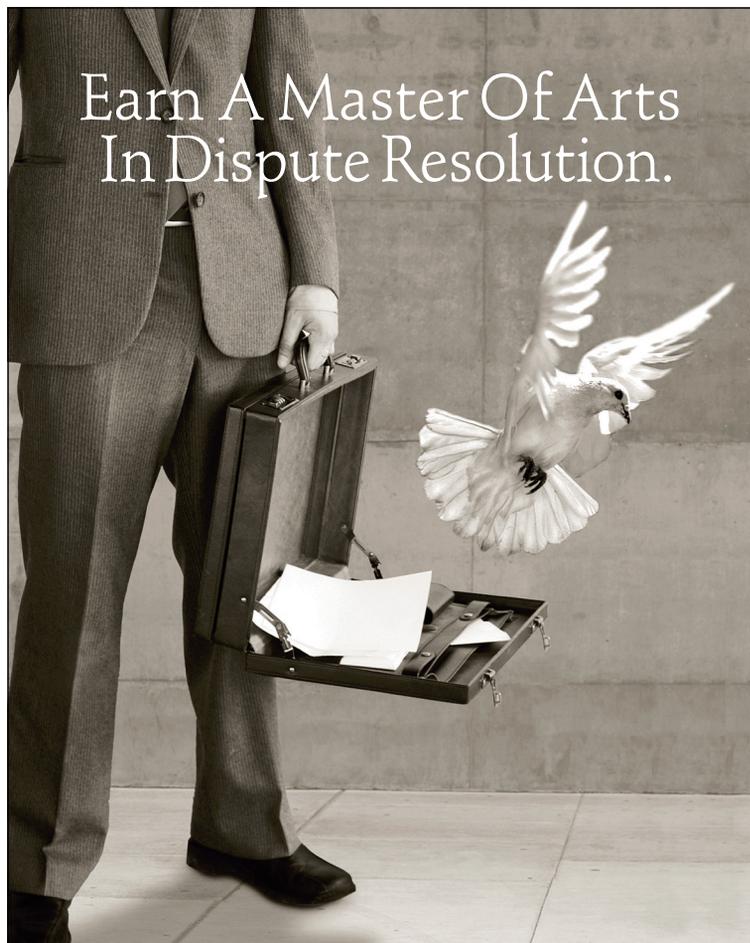
11. TRDP 8.04.
12. TRDP 8.05.
13. TRDP 8.05, 8.06. *In re Caballero*, 272 S.W.3d 595 (Tex. 2008).
14. TRDP 8.04.
15. As you might expect, attorneys rarely appeal these decisions.
16. Prior to revisions to the TRDP in 2004, attorneys could appeal the CDC's decision to "upgrade" a grievance to a complaint to the board.
17. TRDP 2.16, 6.08, 12.04; BODA IPR 2.02.
18. TRDP 7.05; BODA IPR 1.04.
19. TRDP 2.24.
20. TRDP 2.25.
21. TRDP 2.21; BODA IPR 4.03.
22. TRDP 2.27.
23. BODA IPR 1.11(a).
24. TRDP 7.11.
25. Particularly, Tex. Gov't Code § 81.072.



W. CLARK LEA

is a Shareholder in Cotton, Bledsoe, Tighe & Dawson in Midland. Lea graduated from Baylor Law School in 1990 and received his B.A. from Austin College in 1979 and his M.B.A. from Southern Methodist University in 1980. The Supreme Court of Texas appointed Lea to the Board of Disciplinary Appeals in 2007, with his final term expiring in 2013. Lea served as chair of BODA for the last four years of his appointment. Lea has also served as vice chair of the State Bar of Texas Law Office Management Committee and is a life fellow of the Texas Bar Foundation.

Bar of Texas Law Office Management Committee and is a life fellow of the Texas Bar Foundation.



Earn A Master Of Arts
 In Dispute Resolution.

The Center for Dispute Resolution and Conflict Management at SMU's Plano campus.

SMU's Center for Dispute Resolution helps professionals learn to broker effective solutions agreeable to both parties. You can pursue a Master's or a Graduate Certificate in Dispute Resolution. Because conflict is a natural and recurring part of work and life, professional training and experience in conflict management enhances both your career and personal interactions. Small, interactive courses teach practical skills in negotiation, mediation and collaboration. Evening and weekend classes available.

Learn more at resolution.smu.edu



SMU is an Affirmative Action/Equal Opportunity Institution.