



# THE DEFENSE PERSPECTIVE

*What you need to know about the grievance process—and how to respond to a complaint.*

**BY ROBERT E. VALDEZ**

The grievance process is one that lawyers must take very seriously. A grievance places your license and your professional reputation at stake. An adverse result from a grievance action affects not only your ability to practice in state court, but it may affect your ability to practice in federal court as well. It may also cause additional hearings by other administrative boards, such as the Texas Board of Legal Specialization. While not exhaustive, the following article provides assistance in understanding the basics of the grievance process and some matters you should consider when responding to a complaint.

## A GRIEVANCE

A written statement from a client or another member of the public complaining against a lawyer to the State Bar of Texas starts the grievance process.<sup>1</sup> The Office of

the Chief Disciplinary Counsel then reviews the writing to determine<sup>2</sup> whether it constitutes a “Complaint” (i.e., that it states on its face a violation of the Disciplinary Rules of Professional Conduct)<sup>3</sup> or an “Inquiry” (a writing that does not state such a violation).<sup>4</sup>

## A COMPLAINT

If the writing is determined to state a complaint, the disciplinary counsel provides the attorney with a copy of the complaint form along with any attachments submitted by the complainant.<sup>5</sup> It is amazing how many lawyers cannot bring themselves to open the letter containing the details of the complaint from the State Bar.

**Practice tip:** I have had several cases in which my client simply froze when they received a letter from the State Bar containing the complaint they knew was coming. They simply never responded to any of the several letters notifying them of the complaint, the hearing, and the sanction. The sad result in two of these cases: the respondent lawyers were disbarred by virtue of the failure to respond to the grievance. Open the letter! Or get someone to open it for you. Also remember to check your malpractice policy to see if it provides a defense for grievances.

## THE RESPONSE

The attorney who is the subject of a complaint (now called the respondent) has 30 days to file a response.<sup>6</sup> While the disciplinary counsel may be inclined to grant one continuance (a deadline extension) for the filing of a response, my experience is that the disciplinary counsel is not inclined to grant more than one.

Some attorneys feel as though the response should provide little information and should place the burden on the complainant to come forward with evidence of misconduct. While it is true that at the evidentiary hearing or in district court the Commission for Lawyer Discipline<sup>7</sup> bears the burden of proving the allegations of misconduct by a preponderance of the evidence,<sup>8</sup> the reality is that I do not want my clients to get to an evidentiary hearing or a court trial. I want a dismissal—or at least an amicable resolution of the complaint—long before we get to an administrative or judicial determination of the allegations contained in the complaint. Under our present disciplinary procedure,

the response is the only opportunity the lawyer has to convince the disciplinary counsel that the complaint is without merit and should be dismissed prior to any formal hearing.

**Practice tip:** I have found the following actions helpful in securing favorable resolutions for my clients:

- **Prepare a factual and accurate response.** Include affidavits, letters, telephone logs, or any other documents that establish disputed facts. Imagine creating a motion for summary judgment with appropriate summary judgment evidence.

**Example:** In one of our cases, the principal allegation against my client was neglect. Our response included telephone logs with notations of conversations between the respondent's paralegal and the complainant (his client), in addition to letters written on the client's behalf (to insurance adjusters) and legal memos contained in the file. Use this kind of documentary evidence instead of merely stating in your response, "Respondent denies neglecting complainant's case and made telephone calls and wrote letters on complainant's behalf."

- **Make no personal attacks.** Do not engage in an attack on the complainant (the disciplinary rules provide no contributory negligence defense!). Remember that the grievance committee is comprised of volunteers (one-third of the membership)<sup>9</sup> and personal attacks generally detract from the credibility of the response.

**Example:** Refrain from making statements about the complainant, such as "I have been practicing law for 20 years in this state, and I can't believe you people are actually giving credence to anything this lunatic says."

- **Personalize the respondent.** Include a detailed curriculum vitae with the response that lets the disciplinary counsel, as well as the grievance committee, know who the respondent is. Include the respondent's accomplishments in the legal field, as well as any civic activities and awards. The disciplinary counsel and the committee will want to know that the respondent is not a menace to society.

**Example:** In a case that alleged irregularities in the handling of client funds, we made certain the disciplinary counsel was aware of the respondent's extensive and long-standing con-

tributions to civic and charitable activities. This advanced our position that the irregularities were clerical mistakes that resulted in no harm to any client and represent no pattern of misappropriating client funds.

- **If you did it, 'fess up and promise never to do it again.** We are human. Sometimes we make mistakes. Not all misconduct warrants the most severe sanction. In my experience, the State Bar is interested in facilitating compliance with the rules in order to protect the public, and is not motivated by some animus against a respondent attorney. If you make a mistake, admit it, show the disciplinary counsel that you have taken, or are taking, the steps necessary to ensure that the problem does not recur, and state that you are willing to take additional continuing legal education courses (or take other preventative action) to assist you in avoiding this error in the future.

**Example:** My client missed a statute of limitations due to an inadvertent mis-calendar error—no ifs, ands, or buts! In the response, we agreed that the respondent missed the statute, but presented the respondent's letter to his client admitting, explaining, and apologizing for the mistake. He also provided, in the letter to his client, information concerning his malpractice carrier. The disciplinary counsel recommended dismissal of the case, finding evidence that respondent's conduct did not rise to the level of "intentional neglect" required under the disciplinary rules, but was a matter to be resolved in a civil malpractice action, if at all.

## DETERMINATION OF JUST CAUSE

Once the response is filed, and assuming there are no supplemental complaints or responses filed, the CDC will make one of two determinations:

- 1) There is just cause to believe that the respondent violated the Texas Rules of Professional Conduct; or
- 2) The evidence warrants placement of the case on the summary dismissal docket of the Commission for Lawyer Discipline.<sup>10</sup>

If the CDC issues a finding of just cause, it will notify the respondent who will then elect whether to have the grievance heard before a local grievance committee or a district court (the venue for either is in the county of the respondent's principal place of business).<sup>11</sup> The grievance then proceeds forward.<sup>12</sup>

If the case is placed on the summary disposition panel docket, only the CDC appears and presents the case to the local grievance committee, which then decides whether to follow the disciplinary counsel's recommendation and dismiss the case or to decline to follow the recommendation and issue a determination of just cause.<sup>13</sup>

**Practice tip:** The whole point of preparing an extensive, fact-based response is to get your case on the summary disposition docket. While the disciplinary counsel recommendation for dismissal is not binding on the grievance committee, I certainly prefer having the disciplinary counsel on my side at this juncture. My experience is the vast majority of the cases placed on the summary disposition docket do get dismissed. The complainant cannot appeal a dismissal obtained from the summary disposition docket.

### THE ELECTION: EVIDENTIARY PANEL OR DISTRICT COURT

If the disciplinary counsel or the grievance committee determines that there is just cause to believe that the respondent has committed professional misconduct, the State Bar will send a detailed notice to the respondent. This is the hour of lead:<sup>14</sup> the respondent has 20 days to choose between presenting his case either to a local grievance committee consisting of attorneys and lay persons or to a district court.<sup>15</sup> Once again in this process, time is of the essence. So, as Bob Dylan once sang, “[Y]ou’d better hurry up and choose which of those...you want / Before they all disappear.”<sup>16</sup>

I ask my clients to consider the following when making their decision concerning the forum for the resolution of the grievance:

EVIDENTIARY PANEL	DISTRICT COURT
Chair controls the procedures governing the hearing; rules of evidence and court procedure may be only “loosely” followed. Discovery is limited and chair controls examination of witnesses. <sup>17</sup>	Texas Rules of Civil Procedure and Evidence apply, as in any other civil case, for discovery and the examination of witnesses. <sup>18</sup>
Private reprimand is an available sanction. <sup>19</sup>	No private reprimand is available; lowest sanction is the public reprimand. <sup>20</sup>
Misconduct and punishment are determined by the panel. <sup>21</sup>	Jury can determine issue of misconduct; district judge alone determines sanction (i.e., case is bifurcated). <sup>22</sup>
Appeal is to Board of Disciplinary Appeals (appointed 12-member body). <sup>23</sup>	Appeal as in any other civil case. <sup>24</sup>

**Practice tip:** A respondent facing his first grievance (no recent disciplinary history) who is not facing a complaint involving a trust account violation, misappropriation of client property, barratry, or misconduct involving serious harm to the client should consider electing to have his case heard by the evidentiary panel because private reprimands are available. Those facing more serious allegations should consider district court because its procedural and evidentiary safeguards generally will inure to the benefit of the respondent.

### THE TRIAL

In the presentation of the defense before the evidentiary panel or before a district court, respondents must be mindful of their audience. The evidentiary panel is composed of both attorneys and laypersons.<sup>25</sup> All are volunteers. My experience is that the chair and the members are not particularly interested in legal arguments. They are concerned with the facts. It is important to have the respondent fully prepared to answer questions not only from the disciplinary counsel, but from the chair and members of the evidentiary panel as well. The same rules that applied for the preparation of the initial response apply here: be accurate, be factual, do not attack the complainant, and rely on your documentary evidence and your fact witnesses as well as the respondent to prove your defense. Have character witnesses available to present to the evidentiary panel.

While the same may be said of trial in district court, my approach in court is similar to that which I take in any other civil case: have the case fully discovered and have your witnesses and the respondent well prepared for vigorous cross-examination from the disciplinary counsel. Also remember to have a complete list of witnesses for the sanction portion of the case in the event that the judge or jury finds that the respondent committed misconduct. These character witnesses are just as important as the witnesses you call in the misconduct portion of the case.

**Practice tip:** In cases before the evidentiary panel, as well as district court, I will have local lawyers, judges (who must be subpoenaed to comply with judicial rules),<sup>26</sup> civic leaders, and clients present evidence in support of the respondent for the purpose of considering appropriate sanctions. If there are allegations involving restitution, have the respondent consider making restitution long before the case is submitted to the fact finder. Likewise, letters of apology sent before the case is submitted may also be beneficial. When appropriate, have the respondent consider introducing evidence of malpractice insurance to demonstrate the mitigation of harm to the complainant.

## THE APPEAL

The appeal from an evidentiary panel's decision is to the Board of Disciplinary Appeals, a 12-person committee consisting of lawyers appointed by the Texas Supreme Court.<sup>27</sup> Appeals to BODA are governed by the Texas Rules of Disciplinary Procedure as well as BODA's internal rules.<sup>28</sup> Appeals from district court go to the appropriate court of appeals and are governed by the Texas Rules of Civil Procedure.<sup>29</sup>

## SANCTIONS

The sanctions for violations of disciplinary rules include everything from private reprimands to disbarment. As noted above, the evidentiary panel has the ability to assess a private reprimand, and the district judge does not. Note also that the evidentiary panel and the district court can suspend a respondent from the practice of law and may probate periods of suspension. A respondent also may be assessed attorneys' fees, costs, and restitution as part of the sanction for misconduct. There is no supersedeas or stay from an evidentiary panel's or a trial court's judgment of disbarment; however, a respondent may petition for a stay of an order of suspension.<sup>30</sup>

## A SHORT-HAND RENDITION OF DEFENSE PERSPECTIVE

- Open the letter!
- Check to see if your malpractice policy provides a defense for grievance actions;
- Prepare a concise, factual response with appropriate exhibits;
- Focus on persuading the disciplinary counsel to recommend the summary disposition panel;
- Make a timely election between the evidentiary panel and district court;
- Remember that evidentiary panels can give a private reprimand; district courts give you procedural and evidentiary safeguards;
- In any trial (evidentiary panel or district court), remember to list character witnesses to present evidence relevant to the issue of appropriate sanctions;
- Consider suggesting alternatives to harsh sanctions (actual suspensions or disbarment), such as additional continuing legal education courses, attorney monitors or mentors (to assist in office procedures or to provide consults), letters of apology, and proof of malpractice insurance.

My experience is that State Bar attorneys are not motivated by a punitive view of the disciplinary system. Rather, they view their job as protection of the public. The job of the respondent or the respondent's attorney is to demonstrate to the State Bar that the respondent did not commit the misconduct alleged or, alternately, recognizes the error of his ways, has made amends, and if given the opportunity, will sin no more.<sup>31</sup> **TBJ**

## NOTES

1. A "Grievance" is a "written statement, from whatever source, apparently intended to allege Professional Misconduct by a lawyer, or lawyer Disability, or both, received by the Office of the Chief Disciplinary Counsel." Tex R. Disciplinary P. 1.06(R), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (Vernon 2013).
2. See Tex R. Disciplinary P. 2.10.
3. See Tex R. Disciplinary P. 1.06(G).
4. See Tex R. Disciplinary P. 1.06(S).
5. See Tex R. Disciplinary P. 2.10.
6. See *id.*
7. The Commission for Lawyer Discipline is a committee of the State Bar of Texas. See Tex R. Disciplinary P. 1.06(D). The prosecution of cases before an evidentiary panel or in district court is brought in the name of the Commission. See Tex R. Disciplinary P. 2.17(A).
8. See Tex R. Disciplinary P. 2.17(L).
9. See Tex R. Disciplinary P. 2.02, which provides in pertinent part: Each committee must consist of at least nine members, two-thirds of whom must be attorneys licensed to practice law in the State of Texas and in good standing, and one-third of whom must be public members. All committee panels must be composed of two-thirds attorneys and one-third public members.
10. See Tex R. Disciplinary P. 2.13.
11. See Tex R. Disciplinary P. 2.11.
12. See Tex R. Disciplinary P. 2.14.
13. See Tex R. Disciplinary P. 2.13.
14. See No. 372 ("After great pain, a formal feeling comes") by Emily Dickinson.
15. See Tex R. Disciplinary P. 2.15.
16. "The Ballad of Frankie Lee and Judas Priest" by Bob Dylan. A respondent who fails to file a timely election defaults into having the grievance heard by the evidentiary panel. See Tex R. Disciplinary P. 2.15.
17. See Tex R. Disciplinary P. 2.17(K).
18. See Tex R. Disciplinary P. 3.05 and 3.08. The respondent does have the right to a jury trial. See Tex R. Disciplinary P. 3.06. The right to a jury trial is limited to the issue of misconduct. See Tex R. Disciplinary P. 3.09.
19. While there is no express provision allowing or denying the evidentiary panel the sanction of private reprimand, the rules state that the sanction of a private reprimand is denied only to the district court. See Tex R. Disciplinary P. 3.10.
20. See *id.*
21. See Tex R. Disciplinary P. 2.17(O).
22. See Tex R. Disciplinary P. 3.09.
23. See Tex R. Disciplinary P. 2.24.
24. See Tex R. Disciplinary P. 3.16.
25. See Note 9, *infra*.
26. See Texas Code Jud. Conduct, Canon 2(B), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. B (Vernon 2013).
27. See Tex R. Disciplinary P. 7.01.
28. See Tex R. Disciplinary P. 7.08(D); see also, Board of Disciplinary Appeals, Internal Procedural Rules 3.01-4.11.
29. See Tex R. Disciplinary P. 3.16.
30. See Tex R. Disciplinary P. 2.25 and 3.14.
31. See John 8:11.



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