

What Texas Lawyers Need to Know About the Texas Grievance Process

Part two: litigation.

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Part one of this series summarized the classification and investigation of grievances filed with the Office of Chief Disciplinary Counsel, or CDC, and the use of summary disposition panels, or SDP, and investigatory panels, or IVH. While most grievances are resolved at the classification, SDP, and IVH stages, cases involving more egregious, or patterns of, professional misconduct will often result in formal charges requiring disposition through litigation. Part two of this article addresses the process used to dispose of complaints that have not been resolved prior to the litigation stage.

Election

If a complaint cannot be resolved by agreement after the finding of “just cause,” “[a]ll rights characteristically reposed in a client” vest in the Commission for Lawyer Discipline, or CFLD, which is thereafter represented by the CDC.¹ At this election stage, the matter is put on track for disposition by an administrative hearing before an evidentiary panel of a local grievance committee or by trial on the merits before a district court.²

At the election stage, the CDC provides the respondent with written notice of the acts or omissions allegedly engaged in by the respondent and the rules allegedly violated.³ Then the respondent has 20 days to elect whether to have the claims adjudicated by an evidentiary panel or a district court.⁴ If a respondent does not make a timely election, the matter will proceed by default to an administrative hearing before an evidentiary panel, or EVH.⁵ Each option for election carries different procedural rights and consequences for the respondent.

Matters proceeding before an evidentiary panel

When a matter proceeds before an evidentiary panel, the chair of the district grievance committee having proper venue shall appoint a panel whose members had not previously considered that grievance.⁶ Within 60 days of the election, the CDC must file an “Evidentiary Petition” in the name of the CFLD, at which time a formal disciplinary proceeding is initiated.⁷ The respondent must file a timely response to avoid a default.⁸

A respondent’s failure to timely respond to the petition will generate an order of default by the evidentiary panel with a finding of professional misconduct.⁹ Thereafter, the panel shall conduct a hearing to determine sanctions.¹⁰

If a respondent answers, the parties may conduct limited discovery,¹¹ with the CFLD carrying the burden to prove the

material allegations in the petition by a preponderance of the evidence.¹² The EVH must be set no later than 180 days after the filing of the respondent’s answer, except for good cause shown.¹³ Upon the conclusion of the EVH, the evidentiary panel shall issue a judgment within 30 days.¹⁴ If the evidentiary panel finds professional misconduct, its judgment shall make findings of fact and conclusions of law and identify the sanction to be imposed.

If the evidentiary panel orders disbarment or a suspension, it shall order the respondent to surrender the lawyer’s license and bar card.¹⁵ It must also require the respondent to make restitution before removal of a suspension or any reinstatement following disbarment based on misconduct involving the misappropriation of funds.¹⁶

Either party may appeal an evidentiary panel disposition using the corresponding post-verdict/judgment procedures set forth in the Texas Rules of Civil Procedure, or TRCP, as supplemented.¹⁷ An appeal by either party proceeds to the Board of Disciplinary Appeals, or BODA, and will be decided under a substantial evidence standard.¹⁸

An order of disbarment may not be superseded on appeal, but a respondent may petition the evidentiary panel to stay the suspension.¹⁹ The respondent assumes the burden to prove that the continued practice of law does not pose a continuing threat to the welfare of the respondent’s clients or the public. If the respondent satisfied its burden, the panel must stay the suspension and may otherwise condition the stay on reasonable terms.²⁰

On appeal, BODA may render a judgment affirming, modifying, or reversing the evidentiary panel’s decision.²¹ Any appeal from BODA’s disposition proceeds to the Texas Supreme Court.²²

Matters proceeding before district court

If a respondent elects to proceed in district court, the CDC must notify the presiding judge for the administrative region with venue of the matter. The CDC does so by transmitting a copy of a “Disciplinary Petition” in the name of the CFLD to the presiding judge.²³ As with matters before evidentiary panels, the CFLD then becomes the petitioner in whose name the disciplinary action is brought.

Once a disciplinary petition is received, the presiding judge shall assign an active judge whose district does not include the county of mandatory venue to preside over the action.²⁴ Texas Rule of Disciplinary Procedure, or TRDP, 3.02(A) describes who may be appointed and Rule 3.02(B) contains procedures

applicable after a successful challenge to venue. Upon the assignment of a judge, the CDC shall file the disciplinary petition with the district clerk in that venue.²⁵ The respondent shall then be served and ordered to answer on the schedule applicable to other civil cases.²⁶ With some exceptions,²⁷ discovery proceeds as in other civil cases, and both the CFLD and respondent (but not the complainant) have a right to request a jury trial.²⁸ Any trial must be set no later than 180 days after the respondent's answer is filed, except for good cause shown.²⁹ Finally, TRDP 3.08 notes special rules applicable to the trial of disciplinary actions, defining among other things the governing rules and burdens of proof.

After trial, if no findings establish professional misconduct, the court shall render judgment accordingly. But if the court finds that the respondent engaged in professional misconduct, the judge—not a jury—shall determine the appropriate sanction to be imposed. After imposing the sanction, the court shall transmit the judgment to the clerk of the Texas Supreme Court for notation on the lawyer's permanent record.³⁰ If the judgment orders disbarment or suspension, the court shall order surrender of the lawyer's license and bar card and shall enjoin the lawyer from practicing law or holding out as being eligible to practice law during the suspension or disbarment.³¹ The court must also order restitution when the respondent's conduct resulting in disbarment or suspension involved the misapplication of funds, conditioning the end of any suspension or reinstatement from disbarment until complete restitution is made.³² A judgment of disbarment or suspension may not be superseded, but a respondent may move to stay enforcement upon proof that continued practice would not pose a continued threat to the respondent's clients or the public.³³ Once a trial is completed, a final judgment may be appealed as in civil cases generally.³⁴

Practical considerations affecting a respondent's election

The election of which forum to use carries certain trade-offs. Perhaps the most significant involves the nature of confidentiality that may attach to proceedings in the different venues.

All "disciplinary proceedings,"³⁵ including proceedings before an evidentiary panel, are confidential unless and until the panel imposes any sanction other than a private reprimand.³⁶ Therefore, an evidentiary panel may impose a private reprimand as a sanction. By contrast, a private reprimand would not be available in a "disciplinary action"³⁷ filed in district court.³⁸

The corresponding trade-off for proceeding in court is the opportunity to have a local jury (or the assigned judge in a bench trial) decide whether the alleged acts or omissions constituted professional misconduct. Whether that option favors the election to proceed before an evidentiary panel or in district court is inherently case-specific and depends upon an analysis of the risks and rewards of each option.

The CFLD's role as client

Shortly before an EVH or a trial before a district court, the CDC will consult with the CFLD regarding the case. At this

time, the CFLD will consider and deliberate as to whether the case should be dismissed or whether it could be resolved by an agreed sanction. Offers of settlement from the respondent will be presented to the CFLD at this time. In the event that no agreeable resolution can be reached, the CFLD will authorize the CDC to attempt to settle within a given range of sanctions, and if unsuccessful, to proceed to trial and to request the appropriate sanction.

Sanctions

Part XV of the rules lists factors that should be taken into account when determining appropriate sanctions. Particularly, TRDP 15.01(A) sets forth the following standard for determining when attorney discipline is appropriate and serves as a reminder that the ethical duties owed by attorneys are not limited to their clients:

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.

Among the general factors to be considered are the duty violated, the respondent's level of culpability, any injury caused by the misconduct, and any aggravating or mitigating factors.³⁹

Conclusion

The purposes of the Texas grievance system are to protect the public from the unethical practice of law and to provide a fair and efficient process for lawyers to defend themselves against allegations of professional misconduct.

Opportunities for early, informal resolutions of grievances, as well as efforts to avoid the costs and delays of litigation when possible, remain important components of the disciplinary process and are fully aligned with the CDC's mission and duties owed to the public and to the profession.

Although most grievances against attorneys are resolved early in the disciplinary process, some cases are simply not appropriate for early resolution for a variety of reasons. In those instances where the respondent stands accused of serious, repetitive, or egregious misconduct, or when the respondent fails or refuses to engage in the process altogether, litigation becomes necessary. Fortunately, the procedures for resolving complaints in the litigation stage are not complicated; however, they can be costly for respondents.

Another key takeaway from parts one and two of this series is how the Texas attorney discipline system has been designed to ensure both fairness and efficiency for all participants. The "checks and balances" instilled throughout the decision-making process ensure that complaints against attorneys are resolved by balanced, neutral tribunals, who voluntarily serve without political agendas. Moreover, the rules safeguard due process so that respondents and complainants who participate in the process are treated fairly and given an opportunity to be heard. Part three of this series will highlight recurring professional misconduct issues that come before the CFLD

and reveal best practices to help attorneys improve their professionalism and limit their exposure to the most common grievances. **TBJ**

NOTES

1. Tex. R. Disciplinary P. 2.14, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 (TRDP).
2. *See* TRDP 2.14; 2.15.
3. *See* TRDP 2.14(D).
4. *See* TRDP 2.15.
5. *Id.*
6. *See* TRDP 2.17.
7. *See* TRDP 2.17(A).
8. *See* TRDP 2.17(B-C).
9. *See* TRDP 2.17(C).
10. *Id.*
11. *See* TRDP 2.17(D-I).
12. *See* TRDP 2.17(M).
13. *See* TRDP 2.17(O).
14. *See* TRDP 2.17(P).
15. *See* TRDP 2.18.
16. *See* TRDP 2.19.
17. *See* TRDP 2.21; *see also* TRDP 2.23.
18. *See* TRDP 2.23.
19. *See* TRDP 2.24.
20. *Id.*
21. *See* TRDP 2.25.
22. *See* TRDP 2.27; *see also* TRDP 7.11 (setting forth procedures applicable when an appeal proceeds to the Supreme Court).
23. *See* TRDP 3.01.
24. *See* TRDP 3.02.
25. *See* TRDP 3.03.
26. *Id.*
27. *See* TRDP 3.05(A-C).
28. *See* TRDP 3.06.
29. *See* TRDP 3.07.
30. *See* TRDP 3.09.
31. *See* TRDP 3.10.
32. *See* TRDP 3.11.

33. *See* TRDP 3.13.
34. *See* TRDP 3.15.
35. *See* TRDP 1.06(L).
36. *See* TRDP 2.16(A)(3).
37. *See* TRDP 1.06(J).
38. *See* TRDP 15.08(6).
39. *See* TRDP 15.02.



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