GRIEVANCE PROCEDURES: THE INVESTIGATORY HEARING

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CHAPTER 28

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Having over 40 years of experience in the practice of civil trial law, Mr. Valdez has been recognized by his peers, the legal profession, and the insurance industry as an outstanding and distinguished advocate. He has received the following recognitions and distinctions:

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• Texas Monthly Super Lawyer® in the areas of insurance law and civil defense;
• A.M. Best Recommended Insurance Attorney;
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Mr. Valdez is a frequent lecturer and author for the State Bar of Texas and the State Bar of New Mexico in various legal education programs. His papers and lectures include topics involving legal malpractice and State Bar grievance procedures, professional ethics (defending lawyers and judges in administrative grievances), insurance coverage matters, trucking litigation, premises liability litigation, and product liability.

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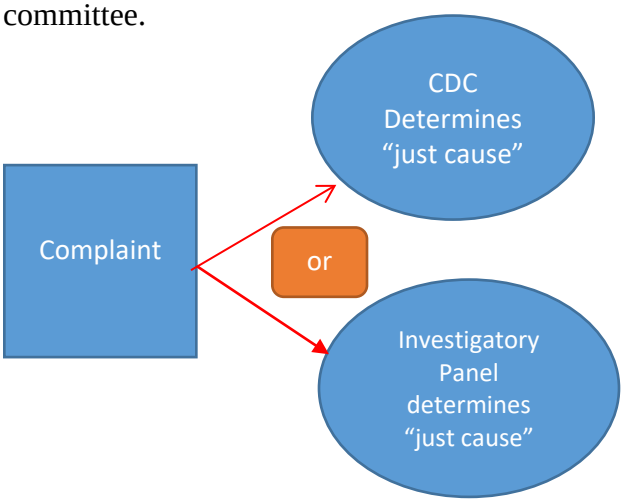
INTRODUCTION

What if I were to tell you that your client was invited (or subpoenaed) to appear at a hearing before a committee consisting of lawyers and laypersons who had the power 1) to determine whether your (lawyer) client committed a violation of a disciplinary rule and 2) to make recommendations on a sanction that affects your client's law license?[1] Would it make you feel any better that this hearing, an "Investigatory Hearing," is a "non-adversarial proceeding" at which the chair of the committee may "administer oaths" for "eliciting evidence" from witnesses as well as from your client?[2] What if I told you that the chair of the investigatory panel would warn you that if, in his (or her) opinion you became "adversarial," that you may be excluded from the hearing? Welcome to the new procedure adopted by the Texas Supreme Court for the investigation of grievances filed against attorneys practicing in this State (applicable to grievances filed on or after June 1, 2018).

An overview of the grievance system is outside the scope of this particular article. A few years ago, however, I did write such an overview for the Texas Bar Journal and I recommend it to those of you confronting a grievance for the first time.[3]

The investigatory hearing is a relatively new procedure, created in 2018 to facilitate the disposition of grievances filed against attorneys. Prior to the creation of the investigatory hearing, the State Bar's counsel (the Chief Disciplinary Counsel or CDC) was charged with the determination of "just cause" (a finding that a probable violation of the rule has occurred). Once that determination was made, it then fell upon the Respondent lawyer to elect whether to proceed before an evidentiary panel of the grievance committee or district court for the resolution of the grievance.

The investigatory hearing inserts itself between the determination that a "Writing" constitutes a "Complaint" and the State Bar's determination of "just cause." That is, once the CDC determines that a Writing constitutes a Complaint, the CDC may then set the matter for an investigatory hearing.[4] In effect, this procedure removes the burden of determining "just cause" from CDC and places it upon the grievance committee.



There are some real incentives for the Bar's counsel to set matters for investigatory hearings. Aside from the fact that the determination of just cause is moved to the grievance committee, the time limit for the

[1] *See* Tex. Rules Disciplinary P. R.2.12, *reprinted in* Tex. Gov't Code ann., tit. 2, subtit. G, app. A-1.
[2] *See* Tex. Rules Disciplinary P. R. 2.12 (F).
[3] Robert E. Valdez, *Defense Perspective—What You Need to Know about the Grievance Process—and How to Respond to a Complaint*, 76 Tex. B.J. 1063 (2013). You may access a copy of this article on my website: https://valdeztrevino.com/publications.html
[4] *See id.*

determination of just cause is moved from 60 days of the date that the Respondent's response to the Complaint is due,[5] to 60 days after the date that an investigatory hearing is completed.[6] Since there is no deadline for the completion of an investigatory hearing, this allows the State Bar wide latitude in setting matters for such hearings.

HOW IT BEGINS

Like any other grievance, it begins with a letter from the Chief Disciplinary Counsel notifying you that a Complaint has been filed against the Respondent (attorney) and asking for a response within 30 days. As I mentioned in my State Bar article, it is necessary to prepare a complete, annotated response to the Complaint.[7] This is important since the CDC has made it clear:

> It is the intention of CDC that most Complaints will go to an Investigatory Hearing unless the matters involved are too complex or have too many witnesses to handle in an informal setting or there is no chance that the Complaint will be resolved by agreement.

Procedural Guide ◊ Evidentiary Panel Proceedings ◊ Investigatory Hearing Panel Proceedings, Office of Chief Disciplinary Counsel, State Bar of Texas at page 28 (May 2019)(hereafter CDC Procedural Guide).

Once the CDC has reviewed the Response, it has a choice to make: he or she may place the matter on the "Summary Disposition" Docket[8] (this means that the CDC is recommending to the Commission on Lawyer Discipline that it dismiss the case), set the matter for an investigatory hearing (and defer to that panel the just cause determination),[9] or the CDC counsel may determine just cause.[10]

If the Commission for Lawyer Discipline dismisses the case on the Summary Disposition docket, there is no appeal.[11] If the CDC determines just cause on its own, then the Respondent lawyer will be put to the election of having the grievance resolved either by an evidentiary panel or by a district court.

If the CDC decides to set the matter for an investigatory hearing, it will provide written notice that the matter will be set for an investigatory hearing. The letter will sound something like this: "Hey, we're setting you for an investigative hearing." Actually, the letter will read more like this:

> Dear Mr. Valdez:
>
> Pursuant to Rule 2.12 of the Texas Rules of Disciplinary Procedure, please be advised that the above referenced grievance will be set for an Investigatory Hearing. An Investigatory Hearing is a non-adversarial proceeding before the local Grievance

[5] *See* Tex. Rules Disciplinary P. R. 2.12(A)(1).
[6] *See* Tex. Rules Disciplinary P. R. 2.12((A)(2)(c).
[7] *See* 76 Tex. B.J. at 1063-64.
[8] *See* Tex. Rules Disciplinary P. R. 2.13,
[9] *See* Tex. Rules Disciplinary P. R. 2.12(F).
[10] *See* Tex. Rules Disciplinary P. R. 2.12((A)(1).
[11] *See* Tex. Rules Disciplinary P. R. 2.13.

> Committee Panel that may result in an agreed resolution of this matter, dismissal or may lead to the finding of Just Cause and the matter proceeding to an Evidentiary Hearing or a trial in district court.
>
> Please be advised that our office's response to the COVID-19 State of Disaster has been to postpone all Investigatory Hearings until the Order is lifted or until we are able to coordinate with grievance panels, respondents, and complainants in an effort to start holding hearings by videoconference or teleconference. Once we have made that determination and are able to set your client's hearing, we will provide you with written notice of the date, time and location.
>
> Please do not hesitate to contact this office should you have any questions.
>
> Sincerely,
>
> Assistant Disciplinary Counsel

THE HEARING IS NON-ADVERSARIAL[12]

The preceding statement is can be misleading: the hearing is touted as non-adversarial. This may lull the uninitiated into a false sense of security believing that the "non-adversarial" hearing *may* result in an "agreed resolution."[13]

There are some very important points to consider in preparing your strategy for defending against such a "non-adversarial" hearing. First, the chair of the panel "may administer oaths and may set forth procedures for eliciting evidence, including witness testimony."[14] Prior to the commencement of the hearing, however, the Respondent attorney is not given any guidance on how the hearing will proceed.[15]

Second, the CDC, with the grievance committee's approval, "may issue a subpoena that relates directly to a specific allegation of attorney misconduct for the production of documents,

[12] I think it was the philosopher-poet George Strait who sang, "Now if you buy that / I've got some ocean-front property in Arizona . . ." See https://www.metrolyrics.com/ocean-front-property-lyrics-george-strait.html <accessed May 24, 2021>.

[13] *See* Tex. Rules Disciplinary P. R. 2.12 (F).

[14] *See id.*

[15] Indeed, when this process was still in its very early stages, it appeared as though the chairs of the investigatory panels were unsure of the procedure to be applied. Some would allow the CDC to make an opening statement and then proceed directly into soliciting evidence from Respondent attorney. It was not until I invoked the ancient legal principle of *meum no potted plantum* (think—Col. Oliver North / Iran-Contra hearings—Attorney Brendan Sullivan) that the chair allowed me to make an opening statement before questioning began. See Joel Coen, "I'm not a potted plant—or am I?" https://www.huffpost.com/entry/im-not-a-potted-plant-or-_b_7443442 <accessed May 28, 2021> (interesting discussion of role of counsel in congressional hearings).

electronically stored information, or tangible things or to compel the attendance of a witness, including the Respondent, at an investigatory hearing."[16] This is for sworn testimony. There is no provision for the Respondent to have such power for any pre-hearing discovery. In fact, at one hearing I was not supplied with documentary evidence used to cross examine my client (the Respondent attorney) prior to the hearing. When I cried, "Foul," and demanded the documents that the State Bar's counsel was using, the chair continued the hearing and allowed me to have the documents to prepare for the examination of my client.

Third, it is important to bear in mind the true purpose of the investigatory hearing: to determine "just cause".[17] The committee conducting the investigatory hearing may not *impose* a sanction on the Respondent; rather, it may *negotiate* a sanction after finding just cause.[18] This has a truly profound effect on how you may want to prepare for this "non-adversarial" investigatory hearing. In addition to preparing an effective defense on the issue of "just cause," you may well want to develop evidence relevant to any sanction that the committee may recommend. That is, you may want to have your letters of support from community leaders, other lawyers, other clients, etc. to mitigate any sanction that might be recommended. Unfortunately, there is very little guidance on the extent to which the panel conducting the investigatory hearing will negotiate (i.e., Does the chair have the power to negotiate? Are offers subject to additional review or vote by the investigatory panel? Is the provision to "negotiate" a sanction yet another illusory procedure—the reality being that the Respondent may take it or leave it?)

The following is a summary of the procedural rules for the investigatory hearing:

CDC'S RIGHTS	**RESPONDENT'S RIGHTS**
Set hearing.	No input.
Subpoena documents, data, witnesses (sworn testimony), including Respondent, to hearing.	No right to subpoena documents, data, witnesses, etc.
Enforcement of subpoena in district court.	Limited objections. Subject to attorney's

[16] *See* Tex. Rules Disciplinary P. R. 2.12 (B).

[17] *See* Tex. Rules Disciplinary P. R. 2.12 (G). Recall that "just cause" means "such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation." Tex. Disciplinary Rule Prof'l Conduct R. 1.06(Z*), reprinted in* Tex. Gov't Cod Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X §9).

[18] *See* Tex. Rules Disciplinary P. R. 2.12 (G).

	fees for bad faith.

THE HEARING

The hearing will take place in the county in which the alleged misconduct occurred in whole or in part (i.e., does not need to be in the county of the Respondent's principal place of practice).[19] Aside from the provision that the hearing is to be non-adversarial, there is little guidance concerning the actual hearing itself.[20] Generally, the chair will introduce himself (or herself) and the members of the panel. The chair will most often recite that the committee has been provided with the Complaint and the Response on file. The advice I provided to you in the State Bar Journal article remains true: make certain that you have filed a factual, accurate response that contains all of the documentary evidence relevant to "just cause" as well as to possible sanctions.[21] You will want the committee to have all of this information before them when you are presenting your case.

You want to make certain your client (or you!) understand the following:

- The Respondent attorney will be questioned under oath;
- The hearing will be recorded;
- Examination of the Complainant or other witnesses will be controlled by the chair;
- The committee will make a determination on "just cause";
- If "just cause" is found, the committee will make a recommendation regarding the sanction.

SANCTIONS

The following are the general factors to be considered by the grievance committee in imposing (or in our case, recommending) sanctions

> (a) the duty violated;
> (b) the Respondent's level of culpability;
> (c) the potential or actual injury caused by the Respondent's misconduct; and
> (d) the existence of aggravating or mitigating factors.

Tex. Rules Disciplinary P. R. 15.02.

The rules then set our considerations and specific guidelines for the imposition of sanctions

[19] *See* Tex. Rules Disciplinary P. R. 2.11 (A).

[20] While there is no provision in the procedural rules for the taping of the investigatory hearing, my experience is that the prev-Covid hearings were videotaped. *Cf.* Tex. Rules Disciplinary P. R. 2.17(N)(allowing for the recording of evidentiary hearings). The record of an Investigatory Hearing is confidential and may be released only for use in a disciplinary matter. *See* Tex. Rules Disciplinary P. R. 2.12 (F). I take this to mean that the record of the Respondent attorney's testimony may be used to impeach him / her in any later evidentiary or trial testimony.

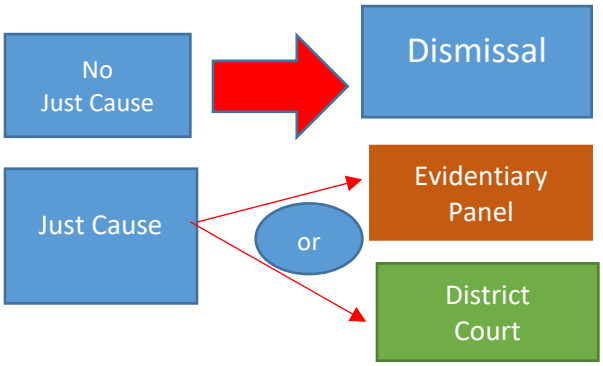
[21] 76 Tex. B. J. at 1063.

for the violation of specific categories of rules. For example, if the "just cause" finding is for "lack of diligence," a private reprimand "is generally appropriate when a Respondent does not act with reasonable diligence in representing a client, communicating with a client, providing competent representation or abiding by client decisions and causes little or no actual or potential injury to a client." [22]

Suspension, on the other hand, is generally appropriate when:

> (a) a Respondent knowingly fails to perform services for a client, fails to adequately communicate with a client, fails to provide competent representation, or fails to abide by client decisions and causes injury or potential injury to a client, or
>
> (b) a Respondent engages in a pattern of neglect with respect to client matters, inadequate client communications, lack of competent representation, or failure to abide by client decisions and causes injury or potential injury to al client.

Tex. Rules Disciplinary P. R. 15.04(A)(2). The rules set forth guidance for sanctions for lack of diligence,[23] failure to preserve client's property,[24] failure to preserve client confidences,[25] failure to avoid conflicts of interest,[26] and lack of candor.[27]



Note that the procedural guide provides that the CDC's lawyer or investigator (but not the Respondent or his / her attorney) "will remain for deliberations."[28] If there is no agreed judgment between the parties, the matter must then be resolved, upon election of the Respondent, by an evidentiary panel or district court. No panel member who heard the investigatory hearing may participate in any evidentiary hearing.[29] If there is a determination of "just cause" against the Respondent attorney and a recommendation for a sanction that is not acceptable, then consult the considerations that I have set forth for you in the Bar Journal article.[30]

POCKET SUMMARY

While the investigatory hearing is touted as non-adversarial, it is any but that.

- Be prepared to make opening statement presenting factual overview of case.

[22] Tex. Rules Disciplinary P. R. 15.04(A)(4).
[23] Tex. Rules Disciplinary P. R. 15.04(A).
[24] Tex. Rules Disciplinary P. R. 15.04(B).
[25] Tex. Rules Disciplinary P. R. 15.04(C).
[26] Tex. Rules Disciplinary P. R. 15.04(D).
[27] Tex. Rules Disciplinary P. R. 15.04(E).
[28] See CDC Procedural Guide at page 29 (Deliberations).
[29] See *id.* at page 29 (No Agreed Judgment).
[30] See 76 Tex. B. J. at 1064-65.

- Prepare a detailed, factual response at the outset since this will be what is presented to the investigatory panel (this is critical).

- Prepare Respondent for sworn and taped cross examination by CDC—and for testimony from Complainant.

- Obtain letters of support / character and reference letters.

- Be prepared to present a closing statement outlining your position on "just cause" and your recommendations regarding sanctions.

CONCLUSION

When I think about a non-adversarial proceeding, I think about a mediation: no one is placed under oath; no one is questioned by an opposing lawyer; no record is made of the proceeding; and everything said is confidential unless such is specifically waived. I do not think about an investigatory hearing for all of the reasons recounted in this short article. Be forewarned: do not go gentle in that hearing. Be prepared. Be nice. But do not assume the position of a potted plant.