THE GRIEVANCE PROCESS

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CHAPTER 28

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Texas Board of Law Examiners, Board Member (1993 to 2003), Chair (1999 to 2003)
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TABLE OF CONTENTS

1. INTRODUCTION 1

2. THE TEXAS RULES OF DISCIPLINARY PROCEDURE: LAWYERS REGULATE THE BAR 1

3. INQUIRIES AND COMPLAINTS 1
   A. Inquiries 1
   B. Complaints 1
   C. Practical Tip: Insurance Coverage 1

4. THE RESPONSE 2
   A. Make Certain You File a Response 2
   B. The Summary Disposition Panel: Prepare a Detailed, Annotated Response 2
   C. Practical Tip: Make Your Response Factually Accurate and Supported with Documentary Evidence 2

5. THE HEARING PROCESS 3
   A. Just Cause 3
   B. The Evidentiary Panel 3
   C. District Court Trial 4
   D. Separate Punishment Hearings 4
   E. Tips for the Hearing Process – A Quick Summary 5

6. APPEALS 5

7. EFFECT OF “JUST CAUSE” FINDING OR SANCTION 5

8. CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

The State Bar of Texas v. Kilpatrick, 874 S.W.2d 656 (Tex. 1994)........ 3

RULES

TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(8), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subitit., G app. A (Vernon Supp. 2006) 2

TEX. R. DISCIPLINARY P. at Preamble, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit., G app. A-1 (Vernon Supp. 2006) 1

TEX. R. DISCIPLINARY P. 1.02, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit., G app. A-1 (Vernon Supp. 2006)........ 1

TEX. R. DISCIPLINARY P. 1.06........ 1

TEX. R. DISCIPLINARY P. 1.06 (G) 1

TEX. R. DISCIPLINARY P. 1.06 (R)........ 1

TEX. R. DISCIPLINARY P. 1.06 (S)........ 1

TEX. R. DISCIPLINARY P. 1.06 (U) 3

TEX. R. DISCIPLINARY P. 1.06 (V) 1

TEX. R. DISCIPLINARY P. 1.06 (Y) 3

TEX. R. DISCIPLINARY P. 1.06 (Y)(8)........ 3

TEX. R. DISCIPLINARY P. 2.02........ 2,3

TEX. R. DISCIPLINARY P. 2.10........ 1, 2

TEX. R. DISCIPLINARY P. 2.13........ 3

TEX. R. DISCIPLINARY P. 2.14 (D) 3

TEX. R. DISCIPLINARY P. 2.15........ 3

TEX. R. DISCIPLINARY P. 2.17........ 3

TEX. R. DISCIPLINARY P. 2.17 (D) 3

TEX. R. DISCIPLINARY P. 2.17 (E)........ 3

TEX. R. DISCIPLINARY P. 2.17 (L)........ 3

TEX. R. DISCIPLINARY P. 2.18........ 4

TEX. R. DISCIPLINARY P. 2.24 4

TEX. R. DISCIPLINARY P. 2.25 4

TEX. R. DISCIPLINARY P. 2.28 4

TEX. R. DISCIPLINARY P. 3.01 4

TEX. R. DISCIPLINARY P. 3.03 4

TEX. R. DISCIPLINARY P. 3.06 4

TEX. R. DISCIPLINARY P. 3.08 (A) 4

TEX. R. DISCIPLINARY P. 3.08 (B) 4

TEX. R. DISCIPLINARY P. 3.08 (C) 4

TEX. R. DISCIPLINARY P. 3.08 (D) 4

TEX. R. DISCIPLINARY P. 3.09 4

TEX. R. DISCIPLINARY P. 3.10 ..... 3, 4

TEX. R. DISCIPLINARY P. 7.01 4

TREATISES

ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES (4th ed. 2001) 1

THE GRIEVANCE PROCESS

1. INTRODUCTION

The new rules of disciplinary procedure help many attorney-respondents who have had frivolous or spiteful grievances filed against them. There is incorporated into the rules a system that allows the Chief Disciplinary Counsel an opportunity to screen complaints and recommend dismissal to the local grievance committee prior to a full hearing. The rules of procedure, however, also contain safeguards to protect against the dismissal of meritorious, but inarticulate, claims asserted by lay complainants. In this article I will present you with an overview of the new procedure and offer you some things to consider if you are ever faced with a grievance.

2. THE TEXAS RULES OF DISCIPLINARY PROCEDURE: LAWYERS REGULATE THE BAR

The Texas Rules of Disciplinary Procedure govern the adjudication of grievances filed against attorneys for professional misconduct.[1] While the inherent power for the regulation of the legal profession in our state lies within the Texas Supreme Court, the court has delegated that responsibility to the State Bar of Texas.[2]

3. INQUIRIES AND COMPLAINTS

All grievances start with a written complaint filed by a complainant with an office of the State Bar.[3] A sample form is found in downloadable PDF format at www.texasbar.com by following the links to "Client Grievance & Assistance" and clicking on the "Grievance Form." I have handled complaints against lawyers from anonymous sources, from courts, from the U.S. Attorney's Office, from fellow attorneys, from the attorney's client and from the attorney's opponents (opposing lawyers and clients). In short, anyone can file a complaint against a lawyer, and as long as it is in writing, it commences the grievance process.

A. Inquiries

The Chief Disciplinary Counsel is the one who gets to determine whether the written communication is classified as an "inquiry" or a "complaint." If he determines that the written matter, even if true, does not allege professional misconduct, the matter is classified as an inquiry[4] and the Complainant and the Attorney Respondent are notified that the matter will be dismissed.[5] The Complainant has thirty days from receipt of such notice to appeal to the Board of Disciplinary Appeals.[6] If the dismissal is affirmed, the Complainant has one opportunity to amend the complaint with new evidence of misconduct. There are no appeals or amendments permitted beyond this point.[7] The rules provide that the Chief Disciplinary Counsel "shall" refer the parties to a voluntary mediation when it dismisses inquiries;[8] however, I have not yet seen that procedure implemented.

B. Complaints

If the Chief Disciplinary Counsel determines that the written communication constitutes a "complaint;" that is, it alleges professional misconduct or disability under the State Bar Rules,[9] then the Bar must provide a copy of the written complaint to the attorney-respondent and the attorney must file his response to the complaint within thirty days of receipt of the notice of complaint.[10]

C. Practical Tip: Insurance Coverage

At this juncture you want to be particularly careful about notice. When you receive the first indication that a client may have filed a written complaint against you with the Bar, it is time to notify your partners—and consider notifying your insurance carrier. While legal malpractice concerns are outside the scope of this particular paper, recall that nearly all legal malpractice policies are claims made policies—that means that coverage depends upon when the insured receives and reports notice of a claim alleging professional negligence as opposed to when the alleged misconduct occurred.[11] You want to make certain that you preserve any coverage you have (particularly to a defense).

From the perspective of a respondent in a grievance action, however, you want to preserve any

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[1] *See* TEX. R. DISCIPLINARY P. 1.02, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 2006).

[2] *See id.* at Preamble.

[3] 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." *See* TEX. R. DISCIPLINARY P. 1.06 (R).

[4] *See id.* at 1.06(S).

[5] *See id.* at 2.10.

[6] *See id.* at 2.10.

[7] *See id.* at 2.10.

[8] *See id.* at 2.10.

[9] *See* id at 1.06 (G). "Professional Misconduct" is defined at *id*. at 1.06(V).

[10] *See id.* at 2.10.

[11] *See* ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES § 1:7 (4th ed. 2001).

rights to indemnity you may have for covered costs incurred in defending a grievance. Most attorneys do not realize that many legal malpractice policies provide coverage for defending against grievances. Policies are not uniform in this regard. I have seen some that provide varying amounts, from $1,000 to $25,000 for grievance defense. Some policies do not carry an obligation to defend the grievance, but do provide indemnity for certain covered costs. It is always worthwhile to check your policy for grievance coverage.

4. THE RESPONSE

A. Make Certain You File a Response

The Respondent "shall" deliver a response to the Chief Disciplinary Counsel and the Complainant within 30 days of receiving notice of the complaint.[12] The grievance committee is very sensitive about receiving a response to the complaint. While the grievance committees usually are reasonable in granting one continuance, my experience is that they do not grant more than one.

Also recall that the failure to respond to a grievance is in itself professional misconduct.[13] I have represented several lawyers, each with over 20 years of practice, who have gotten into serious trouble with the Bar simply because they did not respond to the grievance complaints timely. One lawyer, with over 30 years of practice, was *disbarred* principally because he did not file a response or appear at the grievance hearing to defend himself. It was necessary to convince the committee to grant a new trial and allow us to present our defense to the grievance. While it is certainly disappointing to receive a grievance and embarrassing to discuss this matter with your partners or another lawyer, it is much worse to undergo some type of suspension (or worse) and have to notify the entire judiciary of your inability to practice law.

B. The Summary Disposition Panel: Prepare a Detailed, Annotated Response

This is no time for "general denials" or waiting to present your evidence at the hearing. Under the new rules of procedure, even after a written matter is classified as a complaint, there is another opportunity for the attorney-respondent to have the matter dismissed without the need of a full hearing. This is a dramatic change from the previous practice that required every single communication classified as a complaint to be set for a hearing.

The new rules provide that if the Chief Disciplinary Counsel, after investigation, determines that "just cause" does not exist to believe professional misconduct has occurred, then he may place a matter on a "summary disposition setting" before the local grievance committee.[14] At the summary disposition setting, the Chief Disciplinary Counsel appears alone—without the Complainant or the Respondent or his attorney—and presents the case (along with any evidence) to the grievance committee. If the grievance committee agrees with the recommendation, the case is dismissed and there is no appeal![15] If the committee does not agree with the recommendation, then the matter is set on the hearing docket.[16]

C. Practical Tip: Make Your Response Factually Accurate and Supported with Documentary Evidence

The responses I prepare are factually accurate and they contain numerous exhibits that serve as documentary evidence to support the position I take in my response. The response does not contain any attack whatsoever upon the complainant—my clients and I are very aware of the committee's perspective: "It is the attorney's conduct on trial here—not the complainant's."

I find it helpful to start my responses with a "background" section that gives a brief history of the respondent, his education, career, activities in the community, and grievance history (preferably lack thereof) etc. Remember that most members of the grievance committee (one-third are lay members[17]) may not know the respondent—tell them important background information that gives them a well-rounded perspective of the respondent.

It is important to support your position with affidavits from witnesses if such are necessary to prove your position. Do not be content simply to challenge the complainant with your version of the facts. For example, secretaries, paralegals, other lawyers, and lay witnesses all may supply necessary facts to support your response: DO NOT WAIT FOR THE HEARING. Get those statements for your response. If your documentary evidence is strong enough, you may well convince the Bar's counsel to dismiss the case. If

[12] *See* TEX. R. DISCIPLINARY P. 2.10.

[13] *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(8), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2006).

[14] *See* TEX. R. DISCIPLINARY P. 2.13.

[15] *See id.* Note, however, that once again the rule provides that upon dismissal the matter is referred to voluntary mediation. Despite numerous dismissals, I have not had matters referred to mediation under these circumstances.

[16] *See id.*

[17] *See id*. at 2.02.

not, the Bar counsel if empowered to negotiate an agreed sanction with you. It is to your advantage to be on good terms with the Bar counsel's office. In my experience, this is not the time for posturing and bravado.

5. THE HEARING PROCESS

A. Just Cause

If the grievance committee agrees with the Chief Disciplinary Counsel's determination that a complaint does not state, "just cause"[18] to believe the respondent has committed professional misconduct, then the complaint is dismissed and there is no further response necessary. [19] If the committee does not agree, then the matter proceeds to hearing either before an "evidentiary panel" of the grievance committee or to a district court of proper venue.[20] This election on how to proceed must be made by the respondent in writing. Defaults are sent to the evidentiary panels.[21] The Chief Disciplinary Counsel is required to give ("shall give") *written notice of the acts or omissions in which the respondent engaged and the rules that the respondent allegedly violated*.[22] This precise notice is required *before* the respondent is obliged to elect between proceeding before an evidentiary panel or a district court. You will want to have a precise articulation of the conduct and the rules the respondent allegedly violated before proceeding before an evidentiary panel or before a court. Beware of case law that holds that the Bar may amend its petition in court unless the respondent demonstrates surprise or prejudice, or the amendment alleges a new cause of action and thus is prejudicial on its face.[23] It appears to me that permitting the Chief Disciplinary Counsel to present in court allegations of misconduct that have not been reviewed administratively is prejudice. While there are no cases on point, it appears that allowing such an amendment is tantamount to circumventing a carefully crafted system that calls for the peer (and lay) review of professional misconduct claims before presenting them to a judicial fact-finder.

B. The Evidentiary Panel

The chair appoints the evidentiary panel that hears the grievance.[24] If the grievance proceeded through a summary disposition hearing, the evidentiary panel may not consist of any members that sat on the summary disposition panel.[25] The evidentiary panel must consist of at least three members and must have a ratio of at least 2 lawyers to every layperson on the panel.[26]

The election set before the respondent whether to proceed before an evidentiary panel or to proceed in district court is a critical stage in the grievance process. The most significant factor that favors the presentation of a case to an evidentiary panel, in my opinion, lies in the range of sanctions available to it. The evidentiary panel alone has the ability to impose a sanction of a *private* reprimand—the remedy is not available to a district court, which by its very nature is a public proceeding.[27]

The disadvantages to the evidentiary panel lies in the fact that it has limited procedural safeguards that otherwise attend a jury trial. There is limited discovery[28] and broad discretion vested in the committee chair in the admission of evidence.[29] The decision to proceed before the evidentiary panel depends then upon whether one believes that he can convince a panel of lawyers and laymen to dismiss a case, or to impose at most a private reprimand. It also depends upon the make-up of the evidentiary panel and the chair of that panel. For those of you who do not believe that it is important to know and vote for your district directors of the State Bar, realize that it is the President of the State Bar who appoints the members of the grievance committee upon the nomination of the local director.[30] If bad grievance committees plague a particular locale, it is up to the local membership to bring such matters to the local director.

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[18] *See id.* at 1.06(U) ("reasonably intelligent and prudent person" would believe that respondent has committed act of professional misconduct requiring sanction).

[19] *See id*. at 2.13.

[20] *See id*. at 2.15.

[21] *See id*. at 2.15.

[22] *See id*. at 2.14 (D).

[23] *The State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994).

[24] *See* TEX. R. DISCIPLINARY P. 2.17.

[25] *See id.*

[26] *See id.*

[27] *See id.* at 1.06(Y). The term "sanction" includes a private reprimand. *See id.* at 1.06(Y)(8). The evidentiary panel in Rule 2.18 is permitted to conduct a separate hearing to determine the appropriate "sanction," without limitation to be imposed. The rules specifically deny to district courts the ability to impose private reprimands. *See id.* at 3.10.

[28] *See id.* at 2.17(D) and (E). The detailed procedures governing the presentation of a case to an evidentiary panel are contained in Rule 2.17 generally.

[29] *See id.* at 2.17(L).

[30] *See id.* at 2.02.

Appeals from judgments of the evidentiary panel are made to the Board of Disciplinary Appeals,[31] a tribunal of twelve lawyer members appointed by the supreme court.[32] Appeal from the Board of Disciplinary Appeals is to the supreme court.[33] There is no *supersedeas* or stay available from an order of disbarment.[34] The evidentiary panel may stay an order of suspension under appropriate circumstances.[35]

C. District Court Trial

The respondent has the right to a district court[36] jury trial[37] in county of his principal place of practice.[38] A disciplinary action is a civil case[39] governed generally by the Texas Rules of Civil Procedure.[40] The burden of proof in a disciplinary action is upon the Commission for Lawyer Discipline[41] and the standard of proof is preponderance of evidence.[42]

The advantage to having the action proceed in district court lies in the formality attendant to a district court proceeding. The rules of evidence and procedure are enforced as in any other civil case and the appeal is not to an administrative body, but rather, to the court of appeals and then to the supreme court.

D. Separate Punishment Hearings

In both the evidentiary panel hearings and the district court cases, the respondent has the opportunity to have separate hearings on the issue of the appropriate sanction.[43] Note that in a district court jury trial, the jury determines the issue of whether misconduct occurred, but the judge decides the appropriate sanction for such misconduct.[44]

While many attorneys are understandably concerned about defending against the substantive allegations of misconduct, it is prudent to prepare for the "punishment phase" of the case as well. This should include, in the very first response filed in a grievance, letters of support or testimonials from other lawyers, judges, and clients that offer evidence helpful in assessing the factors relevant to the imposition of sanctions. These include:

- The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned;
- The seriousness of and circumstances surrounding the Professional Misconduct;
- The loss or damage to clients;
- The damage to the profession;
- The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found;
- The profit to the attorney;
- The avoidance of repetition;
- The deterrent effect on others;
- The maintenance of respect for the legal profession;
- The conduct of the Respondent during the course of the Disciplinary Proceeding; and
- The Respondent's disciplinary record.

See TEX. R. DISCIPLINARY P. 2.18 AND 3.10. As a practical matter, I have had clients do the following things in a (successful) effort to minimize the sanction imposed by a committee and court:

- Letters of apology to the client;
- Proof of restitution or legal malpractice insurance to cover proven losses;
- Audits of files to demonstrate competent procedures for the monitoring of deadlines, phone calls, status reports, etc.
- Attendance at substantive courses or ethics courses above that required for licensure;

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[31] *See id.* at 2.24.

[32] *See id.* at 7.01.

[33] *See id.* at 2.28.

[34] *See id.* at 2.25.

[35] *See id.* The burden is upon the respondent to persuade the panel to stay a suspension, and it may impose limitations upon the respondent's practice during any appeal. *See id.*

[36] *See id.* at 3.01

[37] *See id.* at 3.06.

[38] *See id.* at 3.03. This provision governs venue generally in a disciplinary case.

[39] *See id.* at 3.08(A).

[40] *See id.* at 3.08(B).

[41] *See id.* at 3.08(D).

[42] *See id.* at 3.08(C).

[43] *See id.* at 2.18 (evidentiary panel) and 3.10 (district court).

[44] *See id.* at 3.09.

- Professional counseling; and
- Periodic review by attorney "mentors."

The effect of this type of evidence depends upon the particular grievance committee hearing the case or court. I have found, however, that the grievance committees are generally interested in getting a lay complainant back to the position he was before the attorney misconduct. The successful resolution of a grievance case is focuses upon getting the committee to feel that this has been done at the conclusion of the case.

E. Tips for the Hearing Process – A Quick Summary

- Make a timely election choosing between the evidentiary hearing and a trial in district court.
- Evidentiary panels can assess private reprimands. Assess the election bearing in mind that respondents found responsible for first offenses or misconduct that does not result in serious prejudice to the complainant may well receive private reprimands.
- Review the members of the evidentiary panel, particularly assess the character and reputation of the chair of the evidentiary panel that will assess your case (note: the panel is not assigned until *after* you elect to go before the evidentiary panel.)
- District courts are governed generally by the civil rules of procedure and evidence. Technical procedural arguments or evidentiary arguments are best made and preserved in district court.
- Respondents may have a jury trial in district court on the issue of misconduct.
- The judge determines appropriate punishment in a district court case, not the jury.
- *Supersedeas* and stays are not available in a judgment resulting in disbarment; in judgments of suspension, a stay is possible following a hearing.
- Restitution and the Bar's attorney's fees may be recovered against a respondent.

6. APPEALS

A. Evidentiary Panel: the appeal is to the Board of Disciplinary Appeals.

B. District Court: appeal is like that in any other civil case, to the appropriate court of appeals.

C. Generally, there is no *supersedeas* of the judgment of disbarment. The stay of a suspension order is within the purview of the evidentiary panel or the district court depending upon which heard the case in chief.

7. EFFECT OF "JUST CAUSE" FINDING OR SANCTION

Aside from the stigma attached to the sanction of a lawyer for professional misconduct, the lawyer is obligated to obey the sanction; that is, subject himself to the reprimand or other sanction, pay the Bar's attorney's fees, and generally comply with any other lawful order of the grievance committee or district court.

In addition, the Board of Legal Specialization requires its members to report findings of misconduct in its annual reporting. This report may then trigger a hearing before the Board of Legal Specialization to determine whether it will require additional sanctions (or remove the member from the role of specialists). I know from experience in representing several members before the Board that it takes grievance sanctions very seriously and often requires it members to undergo a full evidentiary hearing before the Board in Austin to assess its members who have been sanctioned.

Likewise, most legal malpractice insurers require their insureds to report grievance sanctions either upon an annual review or at renewal of the policy. Suffice it to say that a competent practitioner who regards his law license undergoes a myriad of indignities upon a finding of professional misconduct. It is therefore preferable, in my opinion, to take every accusation of misconduct seriously, to respond to such allegations forcefully and vigorously, and to assess early whether some type of conciliation should be attempt with the grievance committee to rectify any errors of professional judgment that may have taken place.

8. CONCLUSION

I hope that this outline will give you a ready reference to assist you if ever necessary.