

## **LAWYERING FOR A LAWYER WITH A “DISABILITY” BEFORE THE STATE BAR OF TEXAS**

By: José R. Guerrero, Jr., Esq. and Bob Bennett  
The Bennett Law Firm  
515 Louisiana, Suite 200  
Houston, Texas 77002  
T: (713) 225-6000  
F: (713) 225-6001  
[contactus@bennettlawfirm.com](mailto:contactus@bennettlawfirm.com)

As a result of a 1987-88 review of the disciplinary procedures in other states, the Texas Grievance Oversight Committee concluded that the Texas disciplinary rules lacked a system to deal with lawyers impaired by mental illness or substance abuse. The previous rules did not make special provisions for the disabled lawyer, other than lawyers who had been adjudicated incompetent by the court system. In 1990, the Texas Supreme Court approved a revised Texas Rules of Disciplinary Procedure (TRDP) which includes a comprehensive system for protecting the public from lawyers who have become incompetent due to mental illness or substance abuse through the mechanism of a new sanction: indefinite disability suspension. This sanction operates to prevent a disabled lawyer from causing irreparable harm to the public, the courts, and the profession. Furthermore, disability suspension assures that the disabled lawyer will receive treatment for his condition before returning, if at all, to the practice of law. This article focuses on the procedural considerations of triggering a referral to the “disability docket” and successfully navigating the Texas disability rules when a lawyer faces a grievance complaint resulting from mental illness or substance abuse.

### **GENERAL FRAMEWORK OF THE TEXAS GRIEVANCE PROCESS**

When a grievance is filed against a Texas lawyer, it is carefully reviewed by the State Bar of Texas’ Office of Chief Disciplinary Counsel (OCDC) and, within thirty days, a determination will be made as to whether it contains allegations of professional misconduct. When a grievance fails to allege misconduct, it is classified as an “Inquiry” and is dismissed.<sup>i</sup> A grievance that successfully alleges professional misconduct is classified as a “Complaint,” and the respondent-attorney is given written notice of the alleged acts and/or omissions in the Complaint and any potential violations of the disciplinary rules.<sup>ii</sup> Upon receipt of such notice, the respondent-attorney must inform the OCDC whether he elects to have the Complaint heard in a district court of proper venue, with or without a jury, or by an Evidentiary Panel of the OCDC.<sup>iii</sup> The election must be in writing and served upon the OCDC no later than twenty days after receipt of notice. Failure to timely file an election will render the respondent-attorney subject to the Evidentiary Panel, by default.

In the instance where a respondent-attorney elects to have the Complaint heard in district court, the OCDC must, within sixty days of receipt of this election, file a “Disciplinary Petition” with the Clerk of the Supreme Court of Texas in the name of the Commission for Lawyer Discipline (CFLD),<sup>iv</sup> a permanent committee of the State Bar of Texas. Caution: if the respondent-attorney suffers from mental illness or substance abuse,

an election to proceed in district court will preclude him from being placed on the “disability docket,” as the district court lacks authority to refer the matter. Thus, a respondent-attorney must, at this stage of the proceeding, elect to have his Complaint heard by an Evidentiary Panel of the OCDC if he intends to have the matter referred to a special “disability” committee.

Within fifteen days of the earlier of either the date of OCDC’s receipt of respondent-attorney’s election or the day following the expiration of respondent-attorney’s right to elect an Evidentiary Panel, the chair of a grievance committee having proper venue shall appoint an Evidentiary Panel to hear the Complaint.<sup>v</sup> The OCDC must then file with the Evidentiary Panel an “Evidentiary Petition” in the name of CFLD which is served upon the respondent-attorney. The respondent-attorney is given no later than 5:00 p.m. on the first Monday following the expiration of twenty days after service of the Evidentiary Petition to file a response.<sup>vi</sup> In his response, it is crucial that the respondent-attorney make allegations concerning his “disability” in order to trigger a referral to the “disability docket.”

The OCDC or the Evidentiary Panel determines whether it is evident from the Complaint (or the response) that the respondent-attorney suffers from a “disability” to such an extent that either his continued practice of law poses a substantial threat of irreparable harm to a client or prospective clients; or he is so impaired as to be unable to meaningfully participate in the preparation of a defense.<sup>vii</sup> If the OCDC reasonably believes that the respondent-attorney suffers from a “disability,” it must seek authority from CFLD, to refer the Complaint to the Board of Disciplinary Appeals (BODA).<sup>viii</sup> After obtaining authority from CFLD, the OCDC then forwards the Complaint and any other relevant documentation to BODA. An Evidentiary Panel may also refer the matter to BODA if it finds that the respondent-attorney suffers from a “disability,” based on allegations made in his response to the grievance. In either case, a referral to BODA’s “disability docket” suspends the grievance process until BODA issues a final judgment on the matter. Prior to January 1, 2004, only the Investigatory Panel (no longer in existence) could make a “disability” referral, but now a referral may arise either during OCDC’s initial investigation of a Complaint or during the evidentiary hearing stage where the matter is not being heard by a district court.

## **INTERPLAY BETWEEN THE BOARD OF DISCIPLINARY APPEALS (BODA) & THE DISTRICT DISABILITY COMMITTEE (DDC)**

Appointed by the Supreme Court of Texas, BODA has served since 1992 as an independent statewide judicial body with appellate jurisdiction over certain types of attorney discipline cases and exclusive original jurisdiction in disability suspensions. BODA has the power to indefinitely suspend an attorney who suffers from a “disability,” defined by TRDP as “any physical, mental, or emotional condition that, with or without a substantive rule violation, results in the attorney’s inability to practice law, provide client services, complete contracts of employment, or otherwise carry out his or her professional responsibilities to clients, courts, the profession, or the public.” Generally, this definition encompasses a wide range of medical conditions including severe

depression, alcoholism, drug abuse, and other more traditional physical and mental manifestations of disease.

Following receipt of a “disability” referral, BODA appoints a District Disability Committee (DDC). The DDC is an ad hoc committee composed of one attorney, one doctor of medicine or mental health care provider holding a doctorate degree in the area of disability, and one public member who does not have any interest in the practice of the law other than as a consumer.<sup>ix</sup> After appointing the DDC, BODA notifies the respondent-attorney that a committee has been appointed and sends him a copy of any procedural rules that apply. If the respondent-attorney is not contesting the “disability” issue, at any time after notification from BODA, he can waive the disability hearing and enter into an agreed disability suspension with BODA, so long as he is competent to do so. This can be accomplished by submitting a sworn affidavit stating that he understands the consequences of his actions, is competent to waive the hearing, and is competent to agree to indefinite disability suspension.

BODA deputy director serves as the clerk for the DDC proceedings; she manages all filing deadlines, sets hearings, and handles all motions and requests for appointment of counsel. Within 20 days of BODA appointing the DDC, the OCDC must file with the DDC, a proposed hearing order containing a list of names and addresses of all witnesses expected to be called to testify and all exhibits expected to be offered.<sup>x</sup> The respondent-attorney, in turn, has 20 days from receipt of OCDC’s hearing order to file his own proposed order with BODA.<sup>xi</sup> The final hearing order may contain a provision directing the respondent-attorney to undergo a physical and/or psychiatric examination. Failure of the respondent-attorney to comply with an order to submit to examination will cause the finding of the local grievance committee to be final.

### **THE DISTRICT DISABILITY COMMITTEE (DDC) “DISABILITY” HEARING**

The DDC holds a *de novo* evidentiary hearing governed by Part VIII of BODA Internal Procedural Rules where the committee takes evidence on the disability issue to determine whether a “disability” exists.<sup>xii</sup> Where the referral is made by an evidentiary panel, the party asserting “disability” carries the burden of proof. After the respondent-attorney has been given reasonable notice of the hearing, he is afforded an opportunity to appear before and present evidence to the DDC, including evidence from his own medical expert regarding his particular disability. Upon timely request, BODA may appoint an attorney to represent the respondent-attorney’s interest during this closed disability hearing.

If the DDC finds that the respondent-attorney is not suffering from a “disability” at the present time, the entire record and findings are returned to the OCDC and the matter continues in the disciplinary process from the point where it was referred to BODA. Conversely, if there is a finding of “disability,” the DDC will certify such finding to BODA, who shall immediately enter an order suspending the attorney indefinitely. If, however, the attorney demonstrates that there is no likelihood of harm in his or her continued practice of law, the DDC may recommend a probated disability suspension conditioned on the attorney complying with certain terms and requirements. The DDC may also develop a monitoring plan for the attorney as a condition of the probation and require periodic reports to the OCDC, who will supervise the probation.<sup>xiii</sup> At any time

during the probationary period, the OCDC may request modification of the conditions or move to revoke the probation altogether. After indefinite suspension has been ordered, the CFLD will notify each jurisdiction where the respondent-attorney is admitted to practice law of the suspension and/or subsequent reinstatement.

According to the TRDP, a “disability” determination by BODA shall be reviewed under the “substantial evidence rule.” Under this rule, the findings and conclusions of an administrative body are presumed to be supported by substantial evidence, and the party challenging the findings and conclusions must bear the burden of proving otherwise.<sup>xiv</sup> In determining whether there is substantial evidence to support the findings and conclusions of the administrative body, the reviewing court may not substitute its judgment for that of the administrative body, but must consider only the record upon which the decision is based.<sup>xv</sup> The administrative body's action is sustained if the evidence shows that reasonable minds could have reached the conclusion that the administrative body must have reached in order to justify its action.<sup>xvi</sup> And although there must be more than a “mere scintilla” of evidence to support the administrative body's decision, it may be true that the evidence actually preponderates against the decision, but still amounts to enough evidence to pass the substantial evidence test.<sup>xvii</sup> The record of all disability proceedings must be under seal and must remain confidential, except as to the respondent-attorney; only the final judgment and order of indefinite suspension is to be made public. Any statute of limitations applying to the disciplinary matter will be tolled during the period of any disability suspension.

## **REINSTATEMENT AFTER DISABILITY SUSPENSION**

Disability suspension differs from disbarment or resignation, in that, the latter requires that the disbarred attorney re-take the Texas bar exam, but only after five years have elapsed since the matter giving rise to disbarment is resolved. Conversely, a suspended attorney may file for reinstatement at any time after the imposition of an indefinite disability suspension by filing a verified petition with BODA or with a state district court of proper venue (BODA shares concurrent jurisdiction with the state district court).<sup>xviii</sup> The petition must have attached; a certified copy of any court order relating to the attorney's competence, an affidavit from a mental health care provider as to the attorney's current condition, and, if the suspension was related to alcohol or drug abuse, a report from a physician on the attorney's current condition.<sup>xix</sup> Such attachment is not considered evidence, per se, but is a requirement of the pleading. The suspended attorney must prove by a preponderance of the evidence that the reasons for the suspension no longer exist and that terminating the suspension will not endanger the public or the profession. If the attorney meets the burden of proof, BODA or the district court, as the case may be, shall order a termination of the suspension.<sup>xx</sup>

BODA holds an evidentiary hearing *en banc* to determine whether the attorney meets the requirements for terminating the suspension and may require that he undergo an examination by an appropriate health care provider.<sup>xxi</sup> The adjudicatory body can grant or deny the reinstatement, or place the lawyer on a probated disability suspension for a fixed term. If the reinstatement petition is denied, within 14 days after the attorney receives notice of the denial, he may appeal the decision to the Texas Supreme Court. If an attorney is reinstated to the practice of law, all pending grievance matters which were

not disposed of may be re-considered by the OCDC to determine what action should be taken, if any. Furthermore, if the reinstated attorney was suspended for two or more consecutive years, he may be ordered to re-take and pass the professional responsibility portion of the bar exam, and/or take courses at a law school or through continuing legal education courses.

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<sup>ii</sup> TEX. R. DISCIPLINARY P. 2.10.

<sup>ii</sup> TEX. R. DISCIPLINARY P. 2.10.

<sup>iii</sup> TEX. R. DISCIPLINARY P. 2.15.

<sup>iv</sup> TEX. R. DISCIPLINARY P. 3.01.

<sup>v</sup> TEX. R. DISCIPLINARY P. 2.17.

<sup>vi</sup> TEX. R. DISCIPLINARY P. 2.17 (B).

<sup>vii</sup> TEX. R. DISCIPLINARY P. 2.14 (C).

<sup>viii</sup> TEX. R. DISCIPLINARY P. 2.14 (B).

<sup>ix</sup> TEX. R. DISCIPLINARY P. 12.02, 12.03.

<sup>x</sup> BODA INTERNAL PROCEDURAL RULES 8.01 (a)

<sup>xi</sup> BODA INTERNAL PROCEDURAL RULES 8.01 (b)

<sup>xii</sup> TEX. R. DISCIPLINARY P. 12.03.

<sup>xiii</sup> TEX. R. DISCIPLINARY P. 12.06 (H).

<sup>xiv</sup> *El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994).

<sup>xv</sup> *R. R. Comm'n of Tex. v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995); *Tex. State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988).

<sup>xvi</sup> *Tex. Health Facilities Comm'n v. Charter Med. - Dallas*, 665 S.W.2d 446, 452 (Tex. 1984).

<sup>xvii</sup> *El Paso*, 883 S.W.2d at 185.

<sup>xviii</sup> TEX. R. DISCIPLINARY P. 12.06 (A), (D).

<sup>xix</sup> TEX. R. DISCIPLINARY P. 12.06 (B).

<sup>xx</sup> TEX. R. DISCIPLINARY P. 12.06 (E).

<sup>xxi</sup> TEX. R. DISCIPLINARY P. 12.06 (C).