

How Not to Defend a Grievance
or the Future of Bar Discipline After Senate Bill 302

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Indiana University School of Law - J.D. 1978 - Law School Advisory Committee.
University of North Texas - MPA 1997 - Minor Political Science
Sam Houston State U. Criminal Justice Center - M.A. Crim. Justice - 1992
University of Texas, El Paso - Grad. Studies -Poly Sci.-Student Body President 1974-5
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Steve Fischer has served as Willacy County District Attorney, Aransas County School Trustee and been a Visiting Professor at the University of Texas- Permian Basin and other colleges. He has served the State Bar of Texas as an elected Director, and on many committees, and is currently a member of the Professional Rules Committee. He has lived and practiced law in El Paso, Denton, Raymondville, Rockport, Huntsville and Odessa. Steve is a frequent columnist for Texas Tribune and before that his columns have appeared in many Texas Newspapers.. He farms a pistachio orchard outside of El Paso, Texas.

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SCOPE:. This isn't so much a legal case law article, as a background and guide to the various components of the State Bar of Texas Disciplinary System. As of March, 2018, many of the aspects of SB 302 have not yet been implemented and of there is no case law interpreting these rules.

In 2017, when the State Bar of Texas came before the legislature for Sunset Review, it was not prepared for the rule changes, almost all of which involved Bar Disciplinary Rules and Procedures. Bar officials when testifying before the Sunset Committee, were asked "Why with so many more attorneys than 15 years ago, how come there are not more disciplinary actions?" An embarrassed and somewhat surprised Bar Official meekly responded "Because we are better behaved?".

The Legislature enacted SB302 which has dramatically altered the Disciplinary Process. This includes a training requirement for the State Bar Board of Directors, however it's somewhat vague as to when it must be completed and how it has to be done. The SBOT Professional Rules Committee advises that attorneys check the Bar's Law Practice Management Site (<http://texaslawpracticemanagement.com/>) as the "Standard" for Rules of Practice. The site isn't full of information at the present, however it does have guides for "Starting a Practice", "Growing a Practice" and finally selling a Practice which many attorneys erroneously believe is against the rules. The training manual must be submitted by the Executive Director and provided to the Bar Directors.

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This legislation also mandated an independent Ombudsman to be appointed by the Texas Supreme Court. This person will review complaints and procedures and make recommendations to the Court and Bar Direct, but can not take part in individual cases.

Another new feature will be sanction guidelines similar to the Federal Criminal Sentencing standards. The Chief Disciplinary Counsel is responsible for submitted then and each offense will have a range of punishment as well as aggravating and mitigating factors. Will this be an improvement? My guess is those who prefer the Federal System over the Texas scheme of criminal punishment will be positive while those preferring the state will not be so sanguine.

Sec. 81.083. SANCTION GUIDELINES. (a) The chief disciplinary counsel shall propose and the supreme court shall adopt by rule sanction guidelines to:

(1) associate a specific rule violation or ethical misconduct with a range of appropriate sanctions;

(2) provide aggravating and mitigating factors that justify deviating from the established sanctions; and

(3) provide consistency between complaints heard by a district grievance committee and complaints heard by a district court.

(b) The chief disciplinary counsel shall ensure that interested parties are provided an opportunity to comment on the proposed sanction guidelines.

(c) The sanction guidelines adopted under this section do not limit the authority of a district grievance committee or of a district judge to make a finding or issue a decision.

SB 302 also defines and expands the way Disciplinary Rules are created. Aside from a new disciplinary committee appointed mostly by the Bar and Texas Supreme Court, the Bar Directors can propose a rules, a petition signed by 10% of the bar members can initiate rules, as can 20,000 signatures from the public at large. The bill does not address whether online signatures are valid, nor are there any promulgated forms.

Along with the law management program, the Texas Ethics Hotline (800)532-3947 staffed by Ellen Pitluck and Brad Johnson, offers some of the most cogent advice available. Calls leaving a message as to the issue; will receive an answer often by the next day. This is much more than someone telling you what you can not do; they will help you craft a solution. Return calls may be delayed by high volume as in 2016 there were 6500 calls. I have asked The Bar to add an additional attorney in the future.

The Grievance Districts:



As you can see Texas is divided in four districts. Hearings can and should be scheduled near your place of practice, however SB 302 allows for hearings by teleconference. I would not recommend this, as its better to see one's accusers and interact with the panel personally. The typical panel will include a couple of local attorneys and a non-attorney public member. They have been appointed to a 3-year term by the State Bar Director for that district and serve staggered terms. Many are reappointed to a second or

third tenure.

2015-2016 DIVERSITY SURVEY OF GRIEVANCE COMMITTEE MEMBERSHIP COMPARED WITH STATE BAR MEMBERSHIP

Gender	Committee	Attorney Committee Membership	SBOT Membership
Male	63%	68%	65%
Female	37%	32%	35%

Ethnicity	Committee	Attorney Committee Membership	SBOT Membership
White/Caucasian	66%	62%	81%
Asian	1%	0%	3%
African-American	7%	5%	5%
Native American	1%	1%	<1%
Hispanic	10%	12%	9%
Other	19%	16%	2%

Anecdotally I've often heard from minority attorney that they felt targeted by The Bar, however at least as far as the committee panels go, there is robust ethnic diversity. Perhaps more interesting and relevant, would be the area of practice breakdown of these committees. This could be easily tabulated from the application forms.

The State Bar receives over 7000 complaints each year only about 300 of them, which is about 5%, result in disciplinary action. While numerically this is a small, number the amount of stress caused by client threats and false complaints, takes a toll on both State Bar resources, and the well-being of our attorneys.

	16-17	15-16	14-15	13-14
Grievances Filed	7,559	7,760	7,512	7,394
Classified as complaints	2,125	2,383	1,495	1,567
Dismissed as inquiries	5,243	5,054	5,576	5,827
Elections	582	515	502	473
Total number of complaints resolved	545	560	433	429
Total number of disciplines (final sanctions):	342	328	321	320
Disbarments	20	22	27	23
Resignations	28	27	19	17
Suspensions	126	135	113	129
Public Reprimands	30	30	32	31
Private Reprimands	89	67	66	63
Grievance Referral Program	49	47	64	57

In that regard I have authored two reforms one has been referred out by the State Bar Disciplinary Rules of Professional Conduct Committee and the other partially enacted by recent State Bar President Frank Stevenson. They may both be part of the next State Bar Referendum. The first would require specific intent before disciplinary action could be brought against an attorney. A harmless oversight which might be currently fair game for the committee, would cease to be so.

The other involves the complaint filing itself. The allegations in many Bar Complaints are simply false. Nevertheless, attorneys are faced with these complaints and defending them can be costly, time consuming and extremely stressful. To partially "cure" this, I proposed that complainants file verified affidavits. Frank Stevenson had the forms approved however the Bar Counsel is not requiring complainants to sign and notarize them.

The Texas Board of Disciplinary Appeals – BODA

The Board of Disciplinary Appeals as it states on its website, is a statewide independent adjudicatory body of 12 attorneys appointed by the Supreme Court of Texas to hear certain attorney discipline cases and to promote consistency in interpretation and application of the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. Since 1992 the Board has heard and decided over 60,000 disciplinary matters including grievance screening decisions (classification appeals) by the State Bar of Texas Chief Disciplinary Counsel's Office, appeals from District Grievance Committee evidentiary panels, petitions to revoke probated license suspensions, compulsory discipline cases, reciprocal discipline cases, and disability cases.

BODA handles the following:

BODA has jurisdiction to decide six types of disciplinary matters, Tex. Gov't Code Sections 81.072-81.0751; TRDP Part VIII. "BODA shall have and exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining disciplinary proceedings." In re State Bar of Texas, 113 S.W.3d 730, 734 (Tex. 2003)(citing BODA IPR 1.02). With the exception of appeals from classification screening decisions, which are final, BODA decisions are appealable directly to the Supreme Court of Texas. BODA may decide any case other than classification appeals, with or without written opinion.

BODA has exclusive original jurisdiction to hear petitions for compulsory discipline filed by the State Bar of Texas Chief Disciplinary Counsel's Office on behalf of the Commission for Lawyer Discipline when an attorney has been convicted of, or placed on deferred adjudication for, an "Intentional Crime." TRDP, Part VIII. Compulsory discipline results in suspension of the attorney's license for the term of the criminal sentence or disbarment.

BODA has exclusive original jurisdiction to hear petitions for reciprocal discipline filed by the State Bar of Texas Chief Disciplinary Counsel's Office on behalf of the Commission for Lawyer Discipline. Texas attorneys who are licensed in another jurisdiction are subject to identical discipline in Texas following a disciplinary sanction in the second jurisdiction. TRDP, Part IX

BODA has exclusive original jurisdiction for the full term of a probated suspension imposed by a State Bar grievance committee to hear petitions to revoke the probation if the attorney violates

a term or condition of probation. TRDP, Part II. If revoked, the attorney is suspended for the full term without credit for time served on probation.

BODA has exclusive original jurisdiction to suspend indefinitely an attorney who is suffering from a disability: any physical, mental, or emotional condition, with or without a substantive rule violation, which results in the attorney's inability to practice law or otherwise carry out his or her professional responsibilities to clients, the courts, the profession, or the public. A district disability committee appointed by BODA holds a hearing to determine whether the attorney is disabled and certifies its finding to BODA. BODA has concurrent jurisdiction with district courts to hear petitions for reinstatement to terminate an indefinite disability suspension. TRDP, Part XII.

Looking over the past year's cases it seems compulsory and reciprocal discipline make up more than half. There really isn't much defense if an attorney has been convicted of a serious crime, especially when there has been a disbarment in another state.

During the year ending May 31, 2017 1435 cases were filed and 155 were dismissed (one because the attorney died), so there is a slightly better than 10% chance of success. My impression on cases where the attorney is successful on appeal is often where there was a bad outcome on the case however the attorney didn't commit a specific act. Some appeals were successful where the grievance was filed too late.

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At the close of 2017 and beginning of 2018, two cases were decided concerning the standard for disciplinary action; the burden of proof.

In Hamlett v Commission for Lawyer Discipline No. 07-16-00256CV, 7th Court of Appeals Amarillo.. December 28, 2017 Hamlett filed 32 Motions to Recuse a judge, who she said would never grant her deferred probation for minor offenses, because he was biased against her. In fact, he had granted such, and she used one of those Motions for delay a day before trial.

Tirrez v Commission for Lawyer Discipline NO. 03-16-00318-CV. 3rd Court of Appeals Austin January 12, 2018 Tirrez was accusing of using his employee to solicit cases specifically a car accident case. (a), and 8.04(a)(1). 24 months' suspension (21 probated) and \$18,700 in attorney's fees.

Both Tirrez and Hamlett challenged the “Preponderance of the Evidence” standard claiming disciplinary proceedings are quasi-criminal and should be proved by “Clear and convincing” evidence. Tirrez cited *In re Ruffalo* (390 US 544, 1968) which upheld the language “quasi-criminal”.

1. Preponderance of the Evidence recent attacks Hamlett wanted “Clear and Convincing”. As did Tirrez “judgment stating that disciplinary proceedings are quasi-criminal and must be proved by clear and convincing evidence.” Tirrez relied on US Supreme Court case *See In re Ruffalo*, 390 U.S. 544 (1968). The courts held that disciplinary hearings were held to the same civil standards as other cases... Preponderance of the Evidence.

I. New Rule 2.12(B) concerning pre-hearing investigatory subpoenas does not implement the legislative directive in Section 81.080 of the Government Code and violates the due process rights of the respondent.

Finally. There are new rules in the process of approval . I’d like to focus on a portion of Jeanne Huey’s memorandum to the Texas Supreme Court concerning subpoena power. Jeanne is Dallas attorney who devotes much of her practice to grievance defense.

New Rule 2.12(B) is intended to implement the Section 81.080 of the Government Code quoted above, which provides for a subpoena power during the investigation of a Complaint. The New Rule fails to implement the statutory directive and will lead to violations of the due process rights of the respondent.

A. Rule 2.12(B) does not implement Section 81.080(b).

Rule 2.12(B) does not even attempt to satisfy the requirement in Section 81.080(b) that the CDC provide a process for the respondent to object to a subpoena. There is no provision for prior notice to the respondent that a subpoena has been requested, no provision for the filing of a contest, and no provision for setting a hearing to determine the contest or for any interlocutory appeal of an adverse ruling. Without a specific process defined in the New Rules there is no guarantee that the respondent will be able to exercise his or her right to contest the subpoena.

B. Rule 2.12(B) grants vastly greater subpoena powers than are authorized by Section 81.080(a).

Rule 2.12(B) permits the issuance of a much broader subpoena than that authorized by Section 81.080(a). Section 81.080(a) only allows a subpoena that “relates directly to a specific allegation of attorney misconduct.”

Rule 2.12(B), in contrast, allows a subpoena that “that relates to the Complaint.” Even a grievance that has been classified as a “Complaint” may contain allegations or claims that do not relate to professional misconduct. Such allegations are beyond the CDC’s investigatory authorization.¹ By allowing a subpoena for any matters “related to the Complaint” the New Rule 2.12(B) grants the CDC authority to engage in investigations whose scope may include matters far beyond its investigatory authority.

This problem is compounded by the standard by which the chair of the district committee (“Committee Chair”) is supposed to evaluate a subpoena; that is, whether it is “material” to the matters in the Complaint, not whether it is material to matters are within the CDC’s investigatory authority. The result is a subpoena power untethered to any specific violation of professional misconduct.

The new rules and the legislation envisioned have only been partly implemented. No one knows what will ultimately happen. It’s safe to say, as explained in my presentation, if you receive a grievance, try to remain calm. Take a few days to gain some perspective and by all means answer the complaint. Many attorneys have been disbarred after failing to respond. If you can’t do these things; hire an attorney (and not me- I offer free advice but do not generally handle these cases.

¹ Govt. Code §81.075 permits the CDC to investigate only Complaints. Whether a grievance is a “Complaint” depends on whether it alleges Professional Misconduct, which is defined in Rule 1.06(CC). Similarly, Rule 1.06(Z) defines “just cause” in terms of “Professional Misconduct.” The CDC’s authorization to investigate Complaints to determine Just Cause means that for the purpose of this discussion the CDC is limited to investigating allegations of Professional Misconduct.