ETHICS AND THE TEXAS LAWYER DISCIPLINARY PROCESS

Practical Tips For The Criminal Law Practitioner On Texas Lawyer Discipline

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ETHICS AND THE TEXAS LAWYER DISCIPLINARY PROCESS

PRACTICAL TIPS ON TEXAS LAWYER DISCIPLINE

This article is intended to provide the criminal law practitioner simple, general information about the Texas lawyer disciplinary process, and practical tips on how to handle a Grievance Complaint when one is received.

Those who practice criminal law are much more inclined to draw Grievance Complaints than those who practice in other areas, except personal injury and family law. Obviously, attorneys practicing in other areas are not immune from Complaints. Every attorney should know what to expect when faced with a Grievance Complaint, how to best defend him/herself and how to try to avoid them.

I. WHO CAN COMPLAIN?
Anyone; clients, former clients, partners, former partners, judges, opposing counsel, opposing counsel's client, business associates, etc. For most rule violations there is no "standing" requirement, nor is there any requirement that an attorney/client relationship exist for a Grievance to be filed and classified as a Complaint.

II. HOW DOES A GRIEVANCE GET FILED?
Grievances must be in writing, generally on a form provided by the State Bar. When the original Grievance is received, it is reviewed by State Bar staff to determine whether or not on its face it alleges Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct. A "four corners" test is required. If Professional Misconduct is even arguably alleged, the rules require both that the Grievance be classified as a Complaint, and that a hearing actually be held. There is no discretion here. Under the rules that went into effect in May, 1992, neither the State Bar nor the Grievance Committee has the authority to summarily dismiss a Complaint without a hearing. Once a Grievance becomes a Complaint, a hearing shall be held. This is true even when the attorney's response obviously disproves all of the Complainant's allegations of misconduct.

III. WHY IS A HEARING HELD WHEN THE COMPLAINT, AFTER RESPONSE, IS CLEARLY WITHOUT MERIT?
Because the rules require it! One should not form the opinion that the State Bar and the Grievance Committee are happy that hearings are mandated for Complaints that are obviously meritless. These people have more than enough to do already. Approximately 10,000 Grievances were received last year in Bar Districts across the state. The Dallas State Bar office will handle between 2,500 and 3,000 Grievances this year, all of which must be reviewed to determine if they arguably allege Professional Misconduct, and if so upgraded to Complaint, and an Investigatory Panel Hearing held. If a Grievance based on untrue or inaccurate allegations is upgraded to Complaint, one must try not to take it personally. One must understand that the State Bar is held to a "four corners" test, and remember that no one is particularly happy about hearing a Complaint that is obviously without merit. During the last "Sunset", (the legislative review process for state agencies through which continued agency viability is determined) much concern was voiced about the public's perception of the declining reputation of the legal profession as a whole, due partly to the perception by the public that in lawyer disciplinary proceedings, "the fox is guarding the hen house". It was determined that such a negative public perception might be improved in part by expanding a Complainant's role in the disciplinary process, in particular, assuring that a Complainant gets his/her "day in court". The requirements that every writing arguably alleging Professional Misconduct be classified as a Complaint, and a hearing actually held, were proposed as rule changes and passed by a majority vote of Texas attorneys. Due to the addition of rules of this nature, attorneys in Texas retained the right and privilege of self regulation, at least for now. Even non-prevailing Complainants more often tend to come away from the process with a more positive perception of the legal profession's disciplinary procedures.
IV. WHAT RULES ARE MOST FREQUENTLY VIOLATED?

1) 1.01(b) - General Neglect. Neglect may consist of an isolated instance or an ongoing pattern of conduct.

2) 1.03(a),(b) - Generally, inadequate communication with a client.

Note that none of the rules requires harm to the client or another party in order for an attorney to be sanctioned.

V. WHAT IF IT HAPPENS TO YOU?

You will be angry, your feelings will be hurt, you may be nervous, you may be anxious, you may feel personally and professionally insulted. You must focus on timely responding in the most accurate, coherent and thorough manner possible. Your written response must negate every allegation in the Complaint, be supported by documentary evidence, and must make common sense. Even the perfect response, however, cannot avoid the necessity of having a hearing. When you receive the hearing notice, keep your head. I am convinced that the lawyer who represents himself at any step of this disciplinary process has a fool for a client! Don't take a chance. When you receive a Grievance Complaint, find and retain a lawyer experienced in this area of representation.

VI. IS IT OKAY TO DISCUSS THE GRIEVANCE WITH THE FILING PARTY?

Yes. A huge percentage of Grievances result from miscommunication or insufficient communication. Often, if you and your lawyer openly communicate with the complainant the problems can be solved, and the Grievance will ultimately be dismissed, but not before a hearing. If the Grievance is brought by a client regarding fees, discussions concerning reasonable adjustments are okay, as long as care is taken to avoid the appearance that the complainant is being "bought off"! Be aware that there is no procedure through which a Grievance can be withdrawn once it has been classified as a Complaint. Even the complainant's request to withdraw cannot result in a dismissal without a hearing. A hearing still must be held. Nevertheless, a complainant who becomes satisfied with your explanatory communication regarding the matters complained about is certainly free to write the Committee and say so. The Committee will weigh this quite heavily.

VII. IS IT OKAY TO CALL THE LOCAL STATE BAR OFFICE WITH QUESTIONS AFTER RECEIPT OF A COMPLAINT?

Yes. It is not unusual for attorneys to call and ask questions regarding procedures, ask what to include in a response, request a reasonable extension, of time, etc. However, it is important to call the State Bar office as early as possible if you need an extension for your response, or a re-scheduling of your hearing. The person with whom to communicate is the Investigator who signed the letter notifying the Respondent of the Grievance Complaint.

VIII. RESPOND TIMELY AND FULLY TO THE COMPLAINT.

Attach all documentary evidence supporting your response, including legal and court documents, telephone logs, memos memorializing conversations, settlement documents, etc. Also attach written statements from witnesses, such as opposing counsel, assistant district attorneys, judges, and anyone who can corroborate your response. Your response should briefly summarize when and for what purpose you were hired, concisely respond to the Complaint in chronological order, and be free of sarcastic remarks about the Complainant. It is not necessary to respond to personal insults contained in the Complaint itself. The State Bar staff and the Grievance Committees are fully aware that many Complainants can be difficult and untruthful. If you believe that you will not be able to respond within the 30 day time limit, call the Investigator, and follow-up with a written request for an extension as early as possible. Remember that failure to timely respond constitutes grounds for a separate Grievance Complaint, and your failure to do so may well sway the Committee to find the Complainant's story credible. The Committee will obviously conclude that the attorney who fails to timely respond likely failed to be responsive to his/her client.
IX. CONSIDER APPEALING TO THE BOARD OF DISCIPLINARY APPEALS THE STATE BAR’S DECISION TO CLASSIFY THE GRIEVANCE AS A COMPLAINT.

The Board’s twelve (12) attorneys (no public members in this group) last year granted nineteen percent (19%) of Respondents' appeals of complaint classification decisions statewide. The fact that an appeal is taken, however, will not stay the Grievance proceedings or extend the response time. An Evidentiary Panel Hearing, however, cannot be held until BODA has ruled on the appeal.

X. REMEMBER THAT UNLESS YOU HAVE BEEN FIRED OR HAVE WITHDRAWN, THE COMPLAINANT MAY STILL BE YOUR CLIENT, EVEN AFTER THE COMPLAINT HAS BEEN FILED.

You are still fully responsible for his/her case, and cannot neglect it just because a Grievance was filed. If you have a questions regarding continued representation, seek legal advice.

XI. PREPARE FOR THE HEARING.

Bring all relevant files, as well as any witnesses whose testimony will be important. Notify the State Bar office in writing of any expected witnesses as early as possible so that the Committee's docket will allow for sufficient time. Include a short summary of each witness' testimony. Do not expect that your witnesses will be allowed to actually testify. Witness testimony is taken at the Committee's discretion, and cumulative evidence will not be received. Written witness statements or affidavits are acceptable, usually preferable, and will be seriously considered by the Committee. If you have had witnesses appear and be sworn, they will be returned to the reception area during the hearing. It is perfectly acceptable for you or your lawyer to summarize for the panel what each such witness would say if he/she were to testify. The fact that the witnesses are present adds credibility to each such summary.

XII. ATTEND THE HEARING.

The rules do not mandate attendance by either the Respondent attorney or the Complainant, but both are routinely invited to appear by the Hearing Notice letter. Practically speaking, however, you must appear! If a Grievance is a swearing match, as they often are, and only the Complainant shows up, the Committee will likely find Professional Misconduct in your absence. Be aware that under the rules, continuances are granted only in exceptional circumstances. If you find you simply cannot attend the hearing, send or fax as early as possible to the Investigator at the State Bar office a written request for a continuance, stating the reason and giving details. Expect to have the basis for your request checked out. Hiring an attorney at the last minute before a hearing is usually not sufficient grounds for a continuance.

XIII. CONTROL YOUR EMOTIONS AT THE HEARING.

After you arrive for the hearing you may not have to wait at all, or you may have to wait quite a long time before your case is called. You will feel nervous, angry and frustrated, both at having to wait and at the situation in general. Do not take these feelings out on the Committee! Each volunteer member gives an average of 20 to 30 hours per month to the disciplinary system. They hear many hundreds of cases every year. These volunteers, 1/3 of whom are non-lawyer, or public members, care to spend no more time than you do to wait for and participate in this process.

Remember that in Grievance matters the Committee acts as judge. Treat the Committee with the same respect as you would a judge. Comport yourself in the same manner as you would in court. Although you may be very upset and emotionally involved in the matter, you must be able to maintain civility toward the Committee and the Complainant. It is always the better practice to be accompanied by a lawyer experienced in this area of practice. Public members in particular do not react favorably to the Respondent who is rude, obnoxious, arrogant or dismissive in his conduct at the hearing. The Golden Rule applies here big time!

XIV. WHAT IF THE COMMITTEE VOTES A SANCTION?

a) You will receive an offer letter spelling out the Committee's Findings of Fact and Recommended Sanction. Take the time to immediately read it
carefully, as there is little time, and many voted
sanctions are negotiable. You will be asked to
respond within ten (10) days. Communicate any
counter-offer within that time. You should initiate
this phone call to the State Bar. If you are unsure
of the available alternatives, call the State Bar
office or seek legal counsel. Your timely counter-
offer will be taken back to the Investigatory Panel
that heard your case for approval, further
negotiation or refusal. Once a final sanction
decision is made by the Investigatory Panel, you
will receive a written judgment. You will have
twenty (20) days from the date you receive it to
accept or reject it. This twenty (20) day time
frame is jurisdictional and cannot be expanded
upon, even by agreement. It is vital for an
attorney who has successfully negotiated a
sanction with the Committee to sign and return the
judgment within twenty (20) days. If, for
example, an attorney negotiates a private sanction
with the Committee, but fails to sign and return the
judgment within twenty (20) days, that private
sanction, by rule, is no longer available. Even if
an attorney has reached an agreement for some
type of public sanction, if the twenty (20) day time
frame runs before the paperwork is signed and
returned the Investigatory Panel loses jurisdiction
to settle the matter, and it must be taken either to
an Evidentiary Panel for an Evidentiary Hearing or
to District Court for a trial de novo. The
Evidentiary Panel is not bound by any sanction
previously voted or negotiated by the Investigatory
Panel, and the rules of procedure are radically
different! The sanction of Private Reprimand is
not available at the Evidentiary Panel or District
Court level.

b) If conditions of probation are included in your
Investigatory Panel Judgment, your failure to
comply with those conditions can result in a
revocation of probation and/or the filing of a new
Grievance. Calendar every condition of your
probation and strictly adhere to those conditions.
Call for any necessary extensions. Your Judgment
will be reviewed each month for compliance.
Communication during any such probationary
period is absolutely critical!

c) Current rules limit the number of Private
Reprimands, Public Reprimands and Fully
Probated Suspensions an attorney can receive. If
you are offered one of those sanctions, familiarize
yourself with the applicable limitations, found in
the internal operating rules of the Commission for
Lawyer Discipline, and Rule 15.13 of the Texas
Rules of Disciplinary Procedure.

d) Your failure to negotiate an agreed sanction at
the Investigatory Panel level will result in the case
moving on to a public forum, either in District
Court or before an Evidentiary Panel. Information
about these processes can be found in Rules 2.16 -
3.16. You will have 15 days to elect to proceed in
District Court, if that is your pleasure. A failure to
make this election means that the matter will
proceed before an Evidentiary Panel of the
Grievance Committee in the district of you
principal place of practice. This may or may not
be the same Grievance Committee from which the
Investigatory Panel had come.

e) Grievance proceedings at the Investigatory
Panel hearing stage are confidential and must
remain so, absent a Court Order. Under the
current rules, an attorney may not disclose the
existence or result of a Grievance filed, even to
defend him/herself in a legal forum, without first
obtaining a Court Order. If that situation arises,
you wish to disclose the fact that a Grievance
had been filed, or any disposition had thereof,
inform the Court that you wish to advise it of
relevant, but confidential information, and that a
Court Order is required for disclosure. Then send a
copy of the transcript or written order requiring
such disclosure to your State Bar office. By
following that procedure you will not be violating
any confidentiality requirement under the rules.

XV. HOW DO I AVOID A GRIEVANCE?

a) Often the criminal law practitioner can’t! The
best practice is to read the Texas Rules of
Professional Conduct and Texas Rules of
Disciplinary Procedure. Read the Rules again.
Not surprisingly, but unfortunately, many
attorneys who end up with sanctions don’t know
where to even find the rules! They are in your
Texas Rules of Court.

b) Non-binding, oral ethics opinions for
attorneys may be had by calling the State Bar
ethics attorney, Steve Moyik, at 1-800-532-3947.
c) Written ethics opinions may be had by writing the Professional Ethics Committee, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

d) If you advertise, write the Advertising Review Committee (ARC) for an advisory statement before you send your ad in for publication. The initial grace period has ended. If you send the ARC the proper form and required $50.00 fee after your ad is published, and the ARC believes it violates the rules, they will send your file to the State Bar with a request that a Grievance be filed. You will have paid $50.00 for that special privilege!

e) Keep files. The statute of limitations for Grievances is four (4) years (absent fraud). It is not unusual for a client to file a second Grievance against an attorney long after the first one was dismissed. You may have a valid collateral estoppel argument.

f) Make and retain phone logs documenting your incoming calls and when you returned them, as well as notes of the conversation.

g) Memorialize all important conversations in writing. Send these memos to your client and put a copy in the file.

h) Keep your client fully informed about developments in his/her case, and make written notes in the file. This resolves swearing matches at hearings, and may also avoid Grievances in the first place. The strongest memory is weaker than the palest ink!

i) Return phone calls and all written correspondence with reasonable promptness.

j) Treat your client, other attorneys and judges with respect. Do not be rude, arrogant or condescending, and do not use profane language. Avoid intimate or business relationships with clients! I repeat, avoid intimate or business relationships with clients! Remember that you are to work for, not on the client! Take the attention off yourself and put it on the client.

k) Train your staff to appropriately receive clients. Your office will never have a second chance to make a first impression! The failure of an attorney to properly train and supervise his/her staff is another frequently seen complaint. You are responsible for the conduct of your staff!

l) Call the Professionalism Enhancement Program Committee for needed help before you receive a Grievance, in anticipation of receiving a Grievance, if you are in need of a particular resource, or if you simply need help on a certain case. The PEP Committee may be able to solve or mediate your problem, get you a mentor and/or refer you to helpful resources. These people get things done, and you do not have to go through the disciplinary system to get to them. Call your local State Bar office for the time and place of PEP Committee meetings.

m) If drugs, alcohol or some emotional situation is affecting your ability to practice, seek help! This can be done confidentially, and without fear of being reported to the State Bar by attending Lawyers Concerned For Lawyers (LCL) meetings. In Dallas they are held every Thursday, beginning at noon, in the basement of First United Methodist Church, at the corner of Ross & Harwood. Call the Texas Lawyers Assistance Program at 1-800-343-8527.

n) Consider going to the Fee Dispute Committee of your local Bar Association if the circumstances suggest that the Complainant’s problem centers on fee issues.

XVI. SUMMARY

Knowing the rules, maintaining the spirit and integrity of the rules and following the rules, whether you agree with each one or not, is what allows attorneys in this state to maintain the privilege of self regulation. If you do not agree with the rules, work in a constructive manner to change them. If you do not understand the rules, review them thoroughly and seek information through your State or local Bar Association. If you fail to understand the Committee’s actions, or feel they are unfair, volunteer to serve on your local Grievance Committee. Don’t be the proverbial "clanging cymbal"! Get involved in the process.
Look for sweeping changes in the State Bar's Grievance procedure in the near future. Good changes are badly needed. However, bad changes are inevitable if we lose the right to self-regulate our disciplinary process.