

**MANDAMUS CONDITIONALLY GRANTED.**

**Opinion and Judgment Signed and Delivered March 23, 2009.**



**BEFORE THE BOARD OF DISCIPLINARY APPEALS**

**APPOINTED BY  
THE SUPREME COURT OF TEXAS**

**No. 43081**

**IN RE TEXAS ATTORNEY**

**On Petition for Writ of Mandamus**

**Argued En Banc December 12, 2008**

**COUNSEL:**

For Relator, Andrew M. Greenwell, Harris & Greenwell, L.L.P., Corpus Christi, Texas

For Real Party in Interest, Commission for Lawyer Discipline of the State Bar of Texas,  
Linda A. Acevedo, Chief Disciplinary Counsel, and Cynthia W. Hamilton, Assistant Disciplinary  
Counsel, Austin, Texas.

## OPINION AND ORDER:

This is an original proceeding arising from an ongoing disciplinary proceeding brought pursuant to TEX. R. DISCIPLINARY P. Part II<sup>1</sup> by the State Bar of Texas Commission for Lawyer Discipline against Relator Attorney.<sup>2</sup> Attorney asks this Board to vacate two orders of an evidentiary panel of a State Bar of Texas district grievance committee: (1) an order compelling him to produce all his trust account records for a period of six years and (2) an order denying Attorney's motion to strike the Commission for Lawyer Discipline's amended petition.<sup>3</sup>

For the reasons discussed below, we find (1) that this Board has jurisdiction to hear and determine a petition for mandamus relief from the actions of an evidentiary panel; and (2) that the panel's order compelling Attorney to produce certain trust account records is overbroad and therefore an abuse of discretion. Consequently, we conditionally grant mandamus relief.

### I.

#### BACKGROUND

##### A. The Grievance

Complainant filed a grievance against Attorney in August 2006 claiming mainly that Attorney had been hired by her granddaughter to represent granddaughter in a custody dispute as well as several criminal matters, and that Attorney had failed to account to Complainant for money she had given him on behalf of her granddaughter. Complainant included copies of

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<sup>1</sup> TEX. R. DISCIPLINARY P. 2.17-2.28, *reprinted* in TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (Vernon 2008).

<sup>2</sup> Because the ongoing evidentiary disciplinary proceeding is strictly confidential pursuant to TEX. R. DISCIPLINARY P. 2.16 unless and until public discipline is imposed, we refer to the Relator as "Attorney." All other identifying information has been omitted. Pronouns are intended to be gender neutral.

<sup>3</sup> Although Attorney also complains of the panel's denial of his motion for summary judgment as issue 3, he does not argue the point or request any relief from that order, thereby waiving this issue. TEX. R. APP. P. 38.1(h).

checks from Complainant to Attorney dated between August 2002 and August 2003 totaling \$563,187.50 in her complaint. Correspondence from Attorney in 2002 indicated that he had posted a cash bond of \$435,000 for granddaughter as a precondition to her having visitation with her two children, issued a check to granddaughter for \$32,500 for “child support,” was trying to get granddaughter into counseling, and was selling granddaughter’s BMW with the proceeds to go to Complainant. A letter dated 2004 to another attorney representing Complainant stated that Attorney would provide a complete accounting of funds “received on behalf of [granddaughter].”

Attorney responded to the grievance, acknowledging receipt of all checks referenced in the complaint with the exception of a \$5,000 check dated May 17, 2002 which was dishonored by Complainant’s bank. He provided copies of deposits for all the checks into his trust account and a list of disbursements made from his trust account to or on behalf of granddaughter between April 2002 and October 2006 totaling \$481,602.06. Many of the disbursements did not identify the payee. Attorney stated that he was assisting granddaughter in connection with motions to revoke two separate felony probations, hot checks totaling \$90,000, and attempts to obtain visitation with her two children living in Virginia. Attorney said that granddaughter had told him that the funds came from granddaughter’s trust account created by her grandfather’s will, that Attorney’s communications with Complainant concerning distributions to granddaughter had been “minimal,” and that granddaughter had delivered all checks to Attorney’s office.

The State Bar of Texas Chief Disciplinary Counsel’s office notified Attorney thereafter that it had found Just Cause<sup>4</sup> to believe that he had committed professional misconduct under the

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<sup>4</sup> “ ‘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. R. DISCIPLINARY P. 1.6U.

*Texas Disciplinary Rules of Professional Conduct*<sup>5</sup> involving the receipt of \$188,212.89 from Complainant. In March 2007 Attorney elected to proceed before an evidentiary panel of a grievance committee.<sup>6</sup> The State Bar Commission for Lawyer Discipline filed an evidentiary petition against Attorney in May 2007 alleging that he had accepted funds in the amount of \$188,212.89 from Complainant and had violated TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.02(d) and 1.02(e) [Scope and Objectives of Representation]; 1.14(a), (b), and (c) [Safekeeping Property]; 4.01(a) and (b) [Truthfulness in Statements to Others]; 4.03 [Dealing with Unrepresented Person]; and 8.04(a)(2) & (3) [Misconduct]. Attorney answered specifically denying each allegation.

In April 2008, Attorney, now represented by counsel, deposed Complainant, and she stated that she had no personal knowledge whether Attorney had misrepresented to her the use of any of the funds she had paid on granddaughter's behalf or whether he had acted dishonestly. She said that her only personal contact with Attorney was when she met him at one of granddaughter's probation revocation hearings.

Over eleven months after filing the complaint, the Commission filed an amended petition increasing the amount of funds at issue from \$188,212.89 to \$792,167.50. The amended complaint included four checks totaling \$169,000 which were not listed by Complainant in the original complaint. The amended petition also dropped the allegations that Attorney had violated TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.02(d) & (e).

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<sup>5</sup> TEX. DISCIPLINARY R. OF PROF'L CONDUCT, *reprinted* in TEX. GOV'T CODE, tit. 2, subtit. G, app. A (Vernon 2005 & Supp. 2008) (TEX. STATE BAR R. Art. X, § 9).

<sup>6</sup> TEX. R. OF DISCIPLINARY P. 2.15 provides that, following a determination of Just Cause, an attorney may elect to proceed to have the complaint heard either in district court or before an evidentiary panel of a grievance committee. In this case, Attorney obtained an extension of the deadline to elect and thereafter affirmatively elected to have the case heard by an evidentiary panel.

Attorney filed a Motion to Strike Petitioner's First Amended Petition as untimely under the *Texas Rules of Disciplinary Procedure*, which the panel denied. Attorney also filed a Motion for Traditional and "No Evidence" Summary Judgment to which the Commission objected on the ground that the Evidentiary Panel lacked authority to consider summary judgment without an express provision granting that power in TEX. R. DISCIPLINARY P. Part II. The panel sustained the Commission's objection.

The Commission filed two requests for production on March 31, 2008 and on May 19, 2008, which included a request for monthly statements from Respondent's IOLTA account from March 1, 2002 forward. Attorney specifically objected to this request on the grounds that the information requested was protected by the attorney-client privilege, that the State Bar could not require disclosure of privileged information if the client did not initiate the grievance, and that it was overly broad and not relevant. Attorney objected to most of the other requests on the grounds that the requests were overly broad, burdensome, beyond the scope of permissible discovery, vague, available from other sources, and privileged and/or work product. The Commission filed a Motion to Compel on July 25, 2008. Attorney objected to the Motion to Compel, arguing in part that the Commission was attempting to conduct an audit of his entire trust account. The panel sustained the objections in part and overruled them in part and ordered Attorney to produce all his IOLTA account records from March 1, 2002 forward, but with the names of other clients redacted.<sup>7</sup> Attorney then obtained a stay order from the panel allowing him to file his petition for mandamus relief with BODA.

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<sup>7</sup> The order was broader than the request. That part of the order is set out in III. A. below.

## B. Concurrent Civil Suits

Complainant sued granddaughter in 2005 in Nueces County Court to obtain a permanent injunction prohibiting granddaughter from contacting her, withdrawing funds from any checking or savings account, or accepting any property from Complainant. Attorney represented granddaughter in that case. Complainant pled that granddaughter had obtained money from her by falsely representing to Complainant that it would be used for dental work and then deposited the money into her credit union account. The parties agreed to a Final Judgment and Permanent Injunction signed September 28, 2005, which enjoined granddaughter from contacting Complainant in any manner, going to Complainant's residence, making withdrawals from any checking or savings account, and from taking and/or accepting any checks, cash, or other property from Complainant.

In 2008, Complainant sued Attorney and his professional corporation in Nueces County District Court for fraud and breach of fiduciary duty alleging that she had paid substantial sums of money to Attorney based on his material misrepresentations and that he had failed to account to her for the funds. Attorney's summary judgment was granted September 23, 2008.<sup>8</sup>

## II.

### MANDAMUS AUTHORITY

Whether the Board of Disciplinary Appeals has mandamus authority to consider the actions of an evidentiary panel of a grievance committee is a question of first impression. An adjudicatory

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<sup>8</sup> Relator asserts the fact of the granting of the summary judgment by attaching a copy of the order to his supplemental petition. The Commission did not object to or contradict this fact. In this original proceeding we look to the *Texas Rules of Appellate Procedure* for guidance. An appellate court normally accepts as true the facts stated in an appellate brief unless the opposing party contradicts them. *Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 124 (Tex. 2006); TEX. R. APP. P. 38.1(G).

body, such as this Board, always has jurisdiction to determine its own jurisdiction. *Lipshy Motorcars, Inc. v. Sovereign Assocs., Inc.*, 944 S.W.2d 68, 71-72 (Tex. App.—Dallas 1997, orig. proceeding); *In re Filippov*, BODA Case No. 30611 at 3 (January 22, 2004). BODA authority to hear and determine attorney disciplinary proceedings derives directly from the inherent power of the Supreme Court of Texas to regulate the practice of law granted by the *Texas Constitution* as aided by the *State Bar Act*. TEX. CONST. art. II, § 1; TEX. GOV'T CODE § 81.011(b) (Vernon 2008); *In re State Bar*, 113 S.W.3d 730, 732 (Tex. 2003) (orig. proceeding). The Supreme Court created BODA by promulgating the *Texas Rules of Disciplinary Procedure* in 1991, “a regulatory scheme in which the power to regulate the practice of law is delegated to BODA.” *In re State Bar*, 113 S.W.3d at 732. The Supreme Court, in delegating this power declared that, “BODA shall have and exercise all the powers of either a trial court or appellate court, as the case may be, in hearing and determining disciplinary proceedings.” *In re State Bar*, 113 S.W.3d at 734; BODA INTERNAL P. R. 1.02.

BODA has exclusive appellate jurisdiction over cases tried by evidentiary panels of the State Bar district grievance committees. TEX. GOV'T CODE § 81.0751(a)(1). No other tribunal or department of Texas government has the jurisdiction or the mechanism to correct a decision of the grievance committee except the Supreme Court of Texas. A district court lacks subject-matter jurisdiction to hear matters or claims that will interfere with a pending grievance proceeding, and the Supreme Court will grant mandamus relief when a lower court interferes with the disciplinary process. *In re State Bar*, 113 S.W.3d at 733.<sup>9</sup> The *Texas Constitution* gives the Supreme Court express power to issue writs of mandamus “as may be necessary to enforce

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<sup>9</sup> Courts still have subject matter jurisdiction over claims which do not infringe on the Supreme Court's inherent regulatory power in a particular case such as those challenging the constitutionality of the disciplinary rules. *State Bar of Tex. v. Jefferson*, 942 S.W.2d 575, 576 (Tex. 1997) (orig. proceeding); *Goldberg v. Comm'n for Lawyer Discipline*, 265 S.W.3d 568, 577 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2008, pet. filed).

its jurisdiction.” TEX. CONST. art. V, § 3. The Supreme Court has previously consolidated and heard argument on a mandamus petition with the direct appeal from a compulsory discipline case heard by BODA. *Duncan v. Bd. Of Disciplinary Appeals*, 898 S.W.2d 759 (Tex. 1995).

Attorney, citing TEX. R. OF DISCIPLINARY P. 2.24, urges that BODA necessarily has mandamus authority through its express appellate jurisdiction over evidentiary proceedings. We agree. In contrast, the Commission argues that BODA “might lack” mandamus authority because it is an administrative agency created by Part VII of the *Texas Rules of Disciplinary Procedure* and can only exercise those powers the law confers and implied powers reasonably necessary to fulfill its express duties. TEX. R. DISCIPLINARY P. 7.08D. The Commission argues that BODA INTERNAL P. R. 1.02 cannot grant mandamus authority because “an agency can adopt only such rules as are authorized and consistent with its statutory authority.” This argument fails to consider that the Supreme Court promulgates both the *Texas Rules of Disciplinary Procedure* and the BODA *Internal Procedural Rules* as part of its power to create a comprehensive scheme regulating the practice of law. TEX. R. DISCIPLINARY P. 7.08A.

The Commission relies on *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999) (orig. proceeding), for its argument that BODA lacks mandamus authority because even courts which have been granted mandamus authority cannot issue writs beyond their specific grants of constitutional or statutory authority. The Commission’s reliance on *Nolo Press* confuses the Court’s administrative regulation of the practice of law with its judicial appellate jurisdiction of specific disciplinary cases. *Nolo Press* did not involve a disciplinary proceeding against an attorney under the *Texas Rules of Disciplinary Procedure*. Rather, Petitioner Nolo Press, in seeking mandamus, challenged the Court’s administrative order making records of its Unauthorized Practice of Law Committee confidential. Nolo Press asked the Court to compel the



committee to disclose documentation relating to its general operations as well as its investigation into whether Nolo's publications constituted the unauthorized practice of law in particular.<sup>10</sup> Unlike BODA, the UPL Committee is not a tribunal but is "empowered not to adjudicate whether activities constitute the unauthorized practice of law, but to seek adjudication of that issue in appropriate forums and to provide information concerning such activities to this Court and the State Bar of Texas." *Id.* at 772. The Supreme Court held that it did not have mandamus power to compel the UPL Committee to produce the documentation because its regulation of the committee fell under its administrative power rather than its jurisdictional/judicial power. *Id.* at 776.

Logically, the Supreme Court's broad delegation of power to BODA would include the power to review acts of an evidentiary panel that constitute a clear abuse of discretion for which there is no adequate remedy at law. This result is also consistent with the Court's creation of BODA as an intermediate appellate body functioning like a court of appeals for attorney disciplinary proceedings as well as the Supreme Court's precedent of requiring, where concurrent jurisdiction exists, that relief first be sought in the appellate court, absent a compelling reason to go directly to the Supreme Court. TEX. R. APP. P. 52.3(e); *In re State Bar*, 113 S.W.3d at 732 (citing TEX. GOV'T CODE § § 22.220(a) - 22.221); *Thiel v. Harris County Democratic Executive Comm.*, 534 S.W.2d 891, 895 (Tex. 1976) (orig. proceeding).

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<sup>10</sup> Ultimately, although the Court dismissed the mandamus petition, it granted the relief sought by vacating its prior administrative order and issuing a new one with the opinion. *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d at 779; Misc. Docket No. 99-9082.

### III.

#### MANDAMUS RELIEF IS AVAILABLE

Attorney complains that the panel's actions on Petitioner's Motion to Compel and Respondent's Motion to Strike constitute an abuse of discretion warranting mandamus relief.<sup>11</sup> The issue before BODA for each order is not simply whether the ruling was correct, but whether it constitutes a clear abuse of discretion or the violation of a duty imposed by law for which there is no adequate remedy on appeal. *In re State Bar* 113 S.W.3d at 733; *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). *Walker* distinguished between "abuse of discretion" with respect to factual issues ("The relator must establish that the trial court could reasonably have reached only one decision," *Walker v. Packer* 827 S.W.2d at 840) and legal principles ("a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ." *Id.*). A trial court has no discretion to misinterpret or misapply the law. *In re Tex. Dep't of Family and Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006) (orig. proceeding) (citing *Walker*).

Generally, an appeal is inadequate if the parties will permanently lose a substantial right if limited to that remedy. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding) (per curiam) (defendants had no adequate remedy by appeal where the trial court erroneously consolidated the toxic tort claims of 20 plaintiffs against them). The Supreme Court revisited the concept of "adequate remedy by appeal" in *In re Prudential*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding), and stated that "the operative word 'adequate' has no

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<sup>11</sup> Attorney did not file a record with his Petition as set out in Tex. R. App. P. 52.7, but all documents material to his claim for relief are contained in his Appendix which his attorney verified. The Commission has not objected to the lack of a separate record or to the authenticity of the documents contained in the Appendix. In the absence of any factual dispute as to the authenticity of the record, the tribunal can suspend the requirement of the separate record. *In re Health Discovery Corp.*, 148 S.W.3d 163, 165-166 n.4 (Tex. App.—Waco 2004, orig. proceeding).

comprehensive definition.” Noting that “flexibility . . . is the remedy’s principal virtue,” *Id.*, the Court articulated the circumstances where mandamus relief may be appropriate:

Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is “adequate” when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

*Id.* The Court noted that the issue in *Prudential* (whether a pre-suit waiver of trial by jury is enforceable) was particularly suitable to mandamus review because it was an issue of law, one of first impression yet likely to recur, and could not be remedied by appeal because the party seeking to enforce the waiver, if forced to try its case to a jury, would lose its right. *Id.* at 138.

A. The Commission’s Order Compelling Production is Overbroad

Attorney complains of the following ruling in the panel’s order compelling production of all his trust account records between March 2002 and the date the order was signed in 2008:

**Request for Production 1:** The Respondent’s objections are overruled. The Respondent is HEREBY ORDERED to produce copies of the monthly statements of Respondent’s IOLTA account number [xxxxx] from March 1, 2002 to the present. This includes the production of all attachments to those statements including, but not limited to, copies of deposit slips, transfer requests or disbursements which would have been attached to the statements when those statements were received by the Respondent from the bank. However, Respondent shall redact any and all names or addresses on the statement or attached documents which identifies any **client** of Respondent other than [grandmother] or [granddaughter]. Respondent is not to redact identifying information of persons or entities who were not his clients. If the Statements or attached documents contain client identifiers such as numbers, codes or file numbers which delineate which matter the funds, deposits or payments are associated with but which do not reveal the identity of those clients without reference to undisclosed documents, those numbers, codes or file numbers shall not be redacted. (emphasis in the original).

Attorney argues that this order allows a prohibited fishing expedition. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding). “[An] order that compels overly broad discovery well outside the bounds of proper discovery is an abuse of discretion for which mandamus is the proper remedy.” *In re Allstate County Mut. Ins. Co.*, 227 S.W.3d 667, 668-669 (Tex. 2007) (per curiam) citing *In re Graco Children’s Prods., Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (per curiam) (Court held that much of the discovery requested had no “relation or relevance” to the parties’ dispute). “[R]equests must show a reasonable expectation of obtaining information that will aid the dispute’s resolution. [citation omitted] Thus, discovery requests must be ‘reasonably tailored’ to include only relevant matters.” *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (per curiam). “[R]equests for document production may not be used simply to explore.” *Id.* “Overbroad requests for irrelevant information are improper whether they are burdensome or not.” *In re Allstate County Mut. Ins. Co.*, 227 S.W.3d at 670.

Although Attorney’s original objections to the Commission’s discovery requests included assertions of privilege as well as objections that the requests were overbroad, his mandamus argument relies mainly on overbreadth and lack of relevance. The Commission argues that the panel’s order compelling production is proper because, by allowing Attorney to redact other client’s names, it was “narrowly tailored,” and also because Attorney failed to demonstrate that the trust account records were privileged. However, the Court found in *Allstate* that the defendant’s unfounded objection concerning standing did not obscure (and thereby waive) its objection regarding relevance and overbreadth. *Id.*

Based on this record, the Commission has not shown how trust account records of any of Attorney’s other clients were relevant to resolving the issues in this particular case. We also note that there was no confidentiality order in place to protect the other clients’ information. This

record lacks any evidence demonstrating how the documentation the evidentiary panel compelled Attorney to produce was calculated to lead to the discovery of admissible evidence in this case.

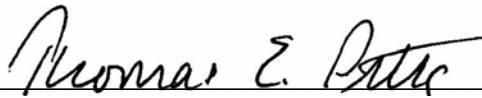
**B. Relief from Refusal to Strike Amended Petition Denied**

Attorney argues that the panel abused its discretion in denying his motion to strike the amended evidentiary petition. We deny relief on this point.

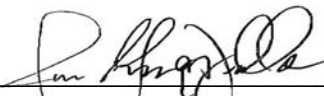
**Conclusion**

Because we find that the Board has authority to review actions of an evidentiary panel for abuse of discretion for which there is no adequate remedy on appeal, and we find that the order compelling production of Attorney's trust account records and all attachments to those records is overly broad, we conditionally grant the writ of mandamus and direct the evidentiary panel to vacate its Order as to Petitioner's Motion to Compel.

**IT IS SO ORDERED.**



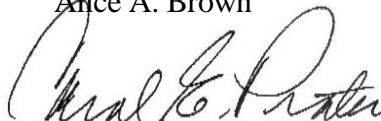
Thomas E. Pitts, Chairman



Jose I. Gonzalez-Falla, Vice Chairman



Alice A. Brown



Carol E. Prater



Ben Selman



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Charles L. Smith



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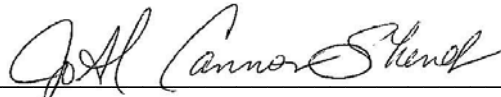
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Thomas J. Williams



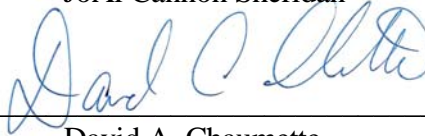
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Kathy J. Owen



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David A. Chaumette