

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**



FILED
Sep. 08, 2021

THE BOARD of DISCIPLINARY APPEALS
Appointed by the Supreme Court of Texas

**IN THE MATTER OF
WESLEY LINDON CLARKE,
STATE BAR CARD NO. 24014254**

§
§
§

CAUSE NO. 65865

PETITION FOR RECIPROCAL DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

Petitioner, the Commission for Lawyer Discipline (hereinafter called “Petitioner”), brings this action against Respondent, Wesley Lindon Clarke, (hereinafter called “Respondent”), showing as follows:

1. This action is commenced by Petitioner pursuant to Part IX of the Texas Rules of Disciplinary Procedure. Petitioner is also providing Respondent a copy of Section 7 of this Board’s Internal Procedural Rules, relating to Reciprocal Discipline Matters.

2. Respondent is a member of the State Bar of Texas and is licensed but unauthorized to practice law in Texas. Respondent may be served with a true and correct copy of this Petition for Reciprocal Discipline at Wesley Lindon Clarke, 12142 Hayland Farm Way, Ellicott City, MD 21042-6015.

3. On or about August 27, 2019, a Report and Recommendation of the Board on Professional Responsibility (Exhibit 1) was entered by the District of Columbia Court of Appeals Board on Professional Responsibility in a matter styled, *In the Matter of: Wesley L. Clarke, Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration*

No. 474594). Board Docket No. 19-BD-057, Disciplinary Docket Nos. 2016-D231, 2017-D288, 2018-D021, & 2018-D178; that states in pertinent part as follows:

The Board, acting through its Chair, and pursuant to D.C. Bar R. XI, § 12(b) and Board Rule 16.2, has reviewed Respondent's affidavit declaring his consent to disbarment and recommends that the Court enter an order disbarring Respondent on consent pursuant to D.C. Bar R. XI, § 12(b), effective on October 25, 2019. *See Order, In re Allen*, D.C. App. No. 12-BG-1148 (Aug. 23, 2012) (disbarring the respondent on consent, effective approximately six weeks after the Court's order).

4. On or about September 12, 2019, the District of Columbia Court of Appeals issued an Order (Exhibit 2) in Cause No. 19-BG-779 styled, *In Re Wesley L. Clarke, Respondent. Bar Registration Number 474594*, which states in pertinent part as follows:

On consideration of the affidavit of Wesley L. Clarke, wherein he consents to disbarment from the bar of the District of Columbia pursuant to D.C. Bar Rule XI, § 12, which affidavit has been filed with the Clerk of this court, and the Report and Recommendation of the Board on Professional Responsibility, it is

ORDERED that the said Wesley L. Clarke is hereby disbarred by consent effective October 25, 2019...

5. On or about August 5, 2020, a Notice of Motion and an Affirmation in Support of Motion for Reciprocal Discipline (Exhibit 3) were filed in the Supreme Court of the State of New York Appellate Division: First Judicial Department in matter styled: *In the Matter of Wesley L. Clarke, (admitted as Wesley Lindon Clarke), an attorney and counselor-at-law: Attorney Grievance Committee for the First Judicial Department, Petitioner, Wesley L. Clarke, (OCA Atty. Reg. No. 2525350), Respondent.*

6. Attached as Exhibit B to the Affirmation in Support of Motion for Reciprocal Discipline (Exhibit 3) was the Affidavit Required by D.C. Bar Rule XI, § 12(a), executed by Respondent, in which he stated that he was aware of allegations that he violated Rules 1.15(a) (failure to safeguard client funds), 1.15(d) (failure to safeguard disputed funds), 8.4(c) (conduct

involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (conduct that seriously interferes with the administration of justice). Respondent further acknowledged that the [D.C.] Disciplinary Counsel had sufficient evidence to prove that Respondent engaged in reckless misappropriation [of funds] and engaged in reckless dishonesty. Respondent further admitted that “the material facts upon which the [] allegations of misconduct are predicated are true.”

7. On or about November 19, 2020, an Order (Exhibit 4) was entered in the Supreme Court of the State of New York Appellate Division, First Judicial Department in Case No. 2020-03331, styled *In the Matter of Wesley L. Clarke (Admitted as Wesley Lindon Clarke) an attorney and counsel-at-law: Attorney Grievance Committee for the First Judicial Department, Petitioner, Wesley L. Clarke, (OCA Atty. Reg. No. 2525350) Respondent*, wherein the Court disbarred Respondent finding that “disbarment is commensurate with the discipline imposed in D.C. . . .”


8. A copy of the Report and Recommendation of the Board on Professional Responsibility entered by the District of Columbia Court of Appeals Board on Professional Responsibility (Exhibit 1), the Order issued by the District of Columbia Court of Appeals (Exhibit 2), the Notice of Motion and the Affirmation in Support of Motion for Reciprocal Discipline filed in the Supreme Court of the State of New York Appellate Division: First Judicial Department (Exhibit 3), and the Order entered by the Supreme Court of the State of New York Appellate Division: First Judicial Department (Exhibit 4) are attached hereto as Petitioner’s Exhibits 1, 2, 3, and 4 and made a part hereof for all intents and purposes as if the same was copied verbatim herein. Petitioner expects to introduce a certified copy of Exhibits 1, 2, 3, and 4 at the time of hearing of this cause.

9. Petitioner prays that, pursuant to Rule 9.02, Texas Rules of Disciplinary Procedure, that this Board issue notice to Respondent, containing a copy of this Petition with exhibits, and an order directing Respondent to show cause within thirty (30) days from the date of the mailing of the notice, why the imposition of the identical discipline in this state would be unwarranted. Petitioner further prays that upon trial of this matter that this Board enters a judgment imposing discipline identical with that imposed by the District of Columbia Court of Appeals and that Petitioner have such other and further relief to which it may be entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Luis J. Marín
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
Telephone: 512.427.1350
Telecopier: 512.427.4167
Email: lmarin@texasbar.com



Luis J. Marín
Bar Card No. 24108702

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that upon receipt of the Order to Show Cause from the Board of Disciplinary Appeals, I will serve a copy of this Petition for Reciprocal Discipline and the Order to Show Cause on Wesley Lindon Clarke by personal service.

Wesley Lindon Clarke
12142 Hayland Farm Way
Ellicott City, MD 21042-6015



Luis J. Marín



BOARD ON PROFESSIONAL RESPONSIBILITY

CERTIFICATION

Matthew G. Kaiser
Chair

Lucy Pittman
Vice Chair

Elissa J. Preheim
Sundeep Hora
Bernadette C. Sargeant
Sara K. Blumenthal
Margaret M. Cassidy
Robert L. Walker
Mary C. Larkin
Board Members

James T. Phalen
Executive Attorney

Re: In the Matter of Wesley L Clarke
Board Docket No. 19-BD-057
Disciplinary Docket Nos. 2016-D231, 2017-D288, 2018-D021 &
2018-D178
Bar Registration No. 474594

I, Karly R. Jordan, Case Manager of the Board on Professional Responsibility, do hereby certify that the attached is a true and correct copy of the Report and Recommendation of the Board on Professional Responsibility in *In the Matter of Wesley L Clarke*, Board Docket No. 19-BD-057, Disciplinary Docket Nos. 2016-D231, 2017-D288, 2018-D021 & 2018-D178 as filed with the District of Columbia Court of Appeals on August 27, 2019.

Karly Jordan

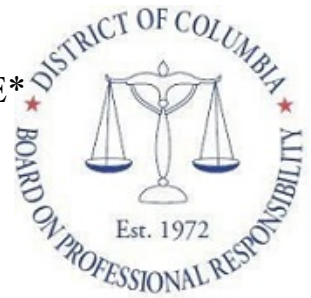
Karly R. Jordan
Case Manager

Dated: August 14, 2020

EXHIBIT

1

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*



DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of: :
 :
 WESLEY L. CLARKE, :
 :
 Respondent. : Board Docket No. 19-BD-057
 : Disciplinary Docket Nos. 2016-D231,
 : 2017-D288, 2018-D021, & 2018- D178
 A Member of the Bar of the :
 District of Columbia Court of Appeals :
 (Bar Registration No. 474594) :

Issued
August 27, 2019

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility (“Board”) on Disciplinary Counsel’s Motion to Accept Respondent’s Consent to Disbarment, filed pursuant to D.C. Bar R. XI, § 12(a) and Board Rule 16.1. Respondent’s affidavit of consent to disbarment, executed on August 21, 2019, is attached to the motion.¹ Respondent has requested, and Disciplinary Counsel has agreed, that Respondent’s disbarment not take effect until October 25, 2019, in order to allow Respondent to close his practice and transfer all client matters.²

¹ Respondent’s affidavit was notarized electronically, “a process whereby a notary affixes an electronic notary signature and seal information to an electronic document (such as a PDF or Word document). Once affixed to the electronic document, the document is rendered tamper evident such that unauthorized attempts to alter the document will be evident to relying parties.” Secretary of the Commonwealth of Virginia website, <https://www.commonwealth.virginia.gov/official-documents/notary-commissions/enotary-faq/> (visited on Aug. 26, 2019).

² Disciplinary Counsel has agreed to Respondent’s request to delay the effective date of his disbarment because Respondent has agreed that he (1) will inform his current clients of his consent

footnote cont’d on following page

* Consult the ‘Disciplinary Decisions’ tab on the Board on Professional Responsibility’s website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

The Board, acting through its Chair, and pursuant to D.C. Bar R. XI, § 12(b) and Board Rule 16.2, has reviewed Respondent's affidavit declaring his consent to disbarment and recommends that the Court enter an order disbarring Respondent on consent pursuant to D.C. Bar R. XI, § 12(b), effective on October 25, 2019.³ *See Order, In re Allen*, D.C. App. No. 12-BG-1148 (Aug. 23, 2012) (disbarring the respondent on consent, effective approximately six weeks after the Court's order).

Respondent's attention should be drawn to the requirement to demonstrate compliance with the provisions of D.C. Bar R. XI, §§ 14 and 16, including the filing of the affidavit pursuant to D.C. Bar R. XI, § 14(g) (which must be served on Disciplinary Counsel and the Board), and to the fact that the period of disbarment will not be deemed to run for purposes of reinstatement until a compliant affidavit is filed. *See In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 
Matthew G. Kaiser
Chair

to disbarment before taking further action in those clients' matters, and (2) will not take on any new matters. These measures, together with the notice to potential clients provided by the Court's disbarment order, will protect the public prior to the effective date of Respondent's disbarment.

³ Disciplinary Counsel asserts in its motion that Respondent engaged in additional misconduct not admitted in his affidavit. If Disciplinary Counsel intends to introduce evidence of unadjudicated acts of alleged misconduct in a future reinstatement proceeding, it shall comply with the notice requirements in Board Rule 9.8. *See In re Yum*, Board Docket No. 15-BD-067, at 2-6 (BPR Dec. 22, 2017).

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

FILED 9/12/2019
District of Columbia
Court of Appeals

Julio A. Castillo

Julio Castillo
Clerk of Court

No. 19-BG-779

IN RE WESLEY L. CLARKE
Respondent.
Bar Registration Number 474594

DDN: 231-16; 288-17;
021-18; and 178-18

BEFORE: Glickman and Fisher, Associate Judges, and Nebeker, Senior Judge.

ORDER

(FILED – September 12, 2019)

On consideration of the affidavit of Wesley L. Clarke, wherein he consents to disbarment from the bar of the District of Columbia pursuant to D.C. Bar Rule XI, § 12, which affidavit has been filed with the Clerk of this court, and the Report and Recommendation of the Board on Professional Responsibility, it is

ORDERED that the said Wesley L. Clarke is hereby disbarred by consent effective October 25, 2019.

The Clerk shall publish this order, but the affidavit shall not be publicly disclosed or otherwise made available except upon order of the court or upon written consent of the respondent.

The Clerk shall cause a copy of this order to be transmitted to the Chairman of the Board on Professional Responsibility and to the respondent, thereby giving him notice of the provisions of Rule XI, §§ 14 and 16, which set forth certain rights and responsibilities of disbarred attorneys and the effect of failure to comply therewith.

PER CURIAM



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

-----X
In the Matter of Wesley L. Clarke,
(admitted as Wesley Lindon Clarke),
an attorney and counselor-at-law:

Attorney Grievance Committee
for the First Judicial Department,

NOTICE OF
MOTION

Petitioner,

Wesley L. Clarke,
(OCA Atty. Reg. No. 2525350),

Respondent.
-----X

PLEASE TAKE NOTICE that upon the annexed affirmation of Raymond Vallejo, Esq., dated August 5, 2020, petitioner will move, before a term of this Court at the Appellate Division, First Department Courthouse, located at 27 Madison Avenue, New York, New York 10010, on the 14th day of September 2020, or as soon thereafter as counsel can be heard, for an order, pursuant to the doctrine of reciprocal discipline as set forth in 22 NYCRR 1240.13, disciplining Wesley L. Clarke (respondent), predicated upon discipline imposed by the District of Columbia Court of Appeals, and directing him to demonstrate to this Court, pursuant to 22 NYCRR 1240.13(a) and (b), why discipline should not be imposed



for the underlying misconduct, disbarring respondent, or, in the alternative, sanctioning respondent as this Court deems just and proper under the circumstances.

PLEASE TAKE FURTHER NOTICE that, pursuant to 22 NYCRR 1240.13(b), respondent may, within twenty (20) days of the service of this notice, file an affidavit stating defenses to the imposition of discipline enumerated in 22 NYCRR 1240.13(b)(1),(2) and (3) and raising any mitigating factors.

PLEASE TAKE FURTHER NOTICE that service of copies of papers in response to this motion shall be made upon the undersigned via both hard copy and email at rvallejo@nycourts.gov not less than seven (7) days before the return date herein and shall be filed with the Clerk of the Court via both hard copy and electronically through the Digital Submission Portal in the New York State Courts Electronic Filing System (NYSCEF).

Dated: New York, New York
August 5, 2020

Respectfully,

JORGE DOPICO
Chief Attorney
Attorney Grievance
Committee for the First
Judicial Department
61 Broadway
New York, New York 10006
(212) 401-0800

RAYMOND VALLEJO
Of Counsel

TO: Wesley L. Clarke, Respondent pro se
1629 K Street, Suite 300
Washington, D.C. 20006-1631
By First Class Mail and electronically at wclarke@me.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

-----X
In the Matter of Wesley L. Clarke,
(admitted as Wesley Lindon Clarke),
an attorney and counselor-at-law:

Attorney Grievance Committee
for the First Judicial Department,

Petitioner,

Wesley L. Clarke,
(OCA Atty. Reg. No. 2525350),

Respondent.

AFFIRMATION IN
SUPPORT OF
MOTION FOR
RECIPROCAL
DISCIPLINE

-----X
RAYMOND VALLEJO, an attorney admitted to practice in the State of New
York, affirms the following under penalty of perjury.

1. I am a Deputy Chief Attorney in the Office of Jorge Dopico, Chief
Attorney to the Attorney Grievance Committee for the First Judicial Department
(Committee), the petitioner herein. As such, I am fully familiar with the facts and
circumstances pertaining to this matter.

2. Respondent was admitted to practice as an attorney and counselor-at-law
in the State of New York on January 11, 1993, by the Appellate Division, First

Judicial Department. This Court maintains jurisdiction over this matter by virtue of respondent's admission in the First Judicial Department. 22 NYCRR 603.1(a).

DISTRICT OF COLUMBIA DISCIPLINARY PROCEEDINGS

3. This disciplinary proceeding is initiated pursuant to Judiciary Law §90(2) and 22 NYCRR 1240.13 and is premised upon an order by the District of Columbia Court of Appeals, filed September 12, 2019, which ordered respondent disbarred. (A copy of the order is annexed as Exhibit A)¹

4. This disciplinary matter came before the Board on Professional Responsibility on Disciplinary Counsel's Motion to Accept Respondent's Consent to Disbarment, filed pursuant to D.C. Bar R. XI, §12(a) and Board Rule 16.1. Respondent's affidavit of consent to disbarment was executed on August 21, 2019. (A copy of Respondent's Affidavit is annexed as Exhibit B)

5. In his affidavit, Respondent consented to disbarment and requested that his disbarment become effective on October 25, 2019, so that he could wind down his practice. He also agreed not to take on any new clients or client matters. Respondent agreed to inform all of his current clients of his consent to disbarment

1. The Office of Disciplinary Counsel for the District of Columbia has informed the Committee that the statement of charges in this matter is under seal.

based on the pending disciplinary matters before taking any further action in those clients' matters. (Exhibit B)

6. Respondent stated that his consent to disbarment was freely and voluntarily rendered and that he had not been subject to coercion or duress and that he was fully aware of the implications of consenting to disbarment. Respondent acknowledged that he was aware that Disciplinary Counsel was currently investigating multiple matters involving his conduct. (Exhibit B)

7. In his affidavit, Respondent stated that he was aware that the allegations of misconduct in Disciplinary Docket No. 2016-D231 included that he misappropriated estate funds, in violation of Rules 1.15(a); and made false representations to the probate court and the Office of the Auditor Master about fees he collected, in violation of Rule 8.4(c) and 8.4(d). (Exhibit B)

8. Respondent stated that he was aware that the allegations of misconduct in Disciplinary Docket No. 2017-D288 included that he misappropriated disputed funds, in violation of Rules 1.15(a) and (d). (Exhibit B)

9. Respondent also stated that he was aware that the allegations of misconduct in Disciplinary Docket No. 2018.D021 included that he submitted false billings to both his client and to the Office of the Auditor Master, in violation of

Rule 8.4(c) and 8.4(d). (Exhibit B)

10. Respondent stated that he was aware that the allegations of misconduct in Disciplinary Docket No. 2018-D178 included his misappropriation of estate funds, in violation of Rule 1.15(a). (Exhibit B)

11. In his affidavit, Respondent also acknowledged that, based upon inaccuracies in billing that he generated for his clients, Disciplinary Counsel had sufficient evidence to prove that he engaged in reckless misappropriation and reckless dishonesty in three matters as described above [2016-D231, 2017-D288, and 2018-D178]. (Exhibit B)

12. Respondent acknowledged that the material facts upon which the above allegations of misconduct are predicated were true. Respondent also stated that he submitted his consent to disbarment because he knew that if disciplinary proceedings based on the alleged misconduct were brought, he could not successfully defend against them. (Exhibit B)

13. A Report and Recommendation of the Board on Professional Responsibility was issued on August 27, 2019. (A copy of the Report is annexed as Exhibit C)

14. Respondent had requested, and Disciplinary Counsel agreed, that

Respondent's disbarment not take effect until October 25, 2019, in order to allow Respondent to close his practice and transfer all client matters. Disciplinary Counsel agreed to Respondent's request to delay the effective date of his disbarment because Respondent had agreed that he (1) would inform his current clients of his consent to disbarment before taking further action in those clients' matters, and (2) would not take on any new matters. (Exhibit C)

15. The Board, acting through its Chair, and pursuant to D.C. Bar R. XI, §12(b) and Board Rule 16.2, reviewed Respondent's affidavit declaring his consent to disbarment and recommended that the Court enter an order disbarring Respondent on consent pursuant to D.C. Bar R. XI, § 12(b), effective on October 25, 2019. (Exhibit B)

16. In an order filed on September 12, 2019, the District of Columbia Court of Appeals ordered Respondent disbarred by consent effective October 25, 2019. (Exhibit A)

17. Parenthetically, Respondent failed to notify the Committee of his discipline in the District of Columbia as he was obligated to do pursuant to 22 NYCRR §1240.13(d).

Sanction

18. A review of the record establishes that respondent was afforded due process and that sufficient evidence establishes his misconduct. Respondent received notice of the allegations of professional misconduct against him and there is no evidence that he was denied the opportunity to answer them. Respondent's admissions in his consent to disbarment that he could not successfully defend the charges established that no infirmity of proof exists. He also requested that he be given the opportunity to close his practice and transfer all of his client matters.

(Exhibit C)

19. The conduct for which respondent was disciplined in the District of Columbia Court of Appeals would constitute violations of the following New York Rules of Professional Conduct [RPC]: 1.15(a) (misappropriation and commingling of client or third party funds); RPC 1.15(c) (failure to pay to a client or third party funds that the client or third person is entitled to receive); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and, RPC 8.4(d) (conduct prejudicial to the administration of justice). Thus, the imposition of reciprocal discipline is appropriate.

20. In reciprocal proceedings, this Court generally defers to the sanction

determination made in the State where the misconduct occurred. See Matter of Peters, 127 AD3d 103 (1st Dept 2015); Matter of Cardillo, 123 AD3d 147 (1st Dept 2014); Matter of Kulcsar, 123 AD3d 251 (1st Dept 2014). Only in rare instances will this Court depart from its general rule. Matter of Kim, 138 AD3d 8 (1st Dept 2016).

21. Here, disbarment is in accord with this Court's precedent involving similar misconduct. See Matter of Arnold, 180 AD3d 72 (1st Dept 2019) (reciprocal disbarment where attorney misappropriated client funds and failed to maintain complete records of his client's trust funds); Matter of Blumenthal, 165 AD3d 85 (1st Dept 2018) (reciprocal disbarment where attorney misappropriated client funds to pay for personal and unrelated business expenses); Matter of Frants, 160 AD3d 171 (1st Dept 2018) (reciprocal disbarment where attorney converted client funds); Matter of Reid, 149 AD3d 114 (1st Dept 2017) (attorney's failure to answer charges of, *inter alia*, improper use of escrow account resulted in his default and disbarment); Matter of Martin, 141 AD3d 77 (1st Dept 2016) (reciprocal disbarment where attorney misappropriated escrow funds); Matter of Obi, 138 AD3d 136 (1st Dept 2016) (reciprocal disbarment where attorney misappropriated third-party funds, failed to respond to the Office of Attorney Ethics' lawful

demands for records and failed to maintain records); Matter of Livingston, 133 AD3d 1 (1st Dept 2015) (reciprocal disbarment where attorney misappropriated client funds, failed to maintain required account records and failed to produce records for the New Jersey Office of Attorney Ethics); Matter of Hersh, 91 AD3d 144 (1st Dept 2011) (reciprocal disbarment where attorney executed a consent to disbarment to the New Jersey Office of Attorney Ethics acknowledging that he could not successfully defend against charges of knowing misappropriation of client funds); Matter of Ligos, 75 AD3d 78 (1st Dept 2010) (reciprocal disbarment where attorney executed a consent to disbarment in New Jersey stating that he could not successfully defend himself against charges of knowing misappropriation of escrow funds); Matter of Gentile, 46 AD3d 53 (1st Dept 2007) (reciprocal disbarment where attorney executed a consent to disbarment with the New Jersey Office of Attorney Ethics acknowledging that he could not successfully defend himself against charges that he knowingly misappropriated funds); Matter of Borakove, 187 AD2d 1 (1st Dept 1992) (attorney's failure to answer charges of conversion of client funds resulted in his default and disbarment).

WHEREFORE, based on the foregoing, petitioner respectfully requests, pursuant to 22 NYCRR 1240.13, that this Court issue an order finding that respondent has been disciplined by a foreign jurisdiction, disbarring respondent and directing him to demonstrate to this Court why discipline should not be imposed in New York for the underlying misconduct or, alternatively, sanctioning him as this Court deems appropriate, and grant such other and further relief as is just and proper.

Dated: New York, New York
August 5, 2020


RAYMOND VALLEJO

EXHIBIT A

SEP 12 2019

RECEIVED

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

FILED 9/12/2019
District of Columbia
Court of Appeals

Julio A. Castillo

Julio Castillo
Clerk of Court

No. 19-BG-779

IN RE WESLEY L. CLARKE

Respondent.

Bar Registration Number 474594

DDN: 231-16; 288-17;

021-18; and 178-18

BEFORE: Glickman and Fisher, Associate Judges, and Nebeker, Senior Judge.

ORDER

(FILED – September 12, 2019)

On consideration of the affidavit of Wesley L. Clarke, wherein he consents to disbarment from the bar of the District of Columbia pursuant to D.C. Bar Rule XI, § 12, which affidavit has been filed with the Clerk of this court, and the Report and Recommendation of the Board on Professional Responsibility, it is

ORDERED that the said Wesley L. Clarke is hereby disbarred by consent effective October 25, 2019.

The Clerk shall publish this order, but the affidavit shall not be publicly disclosed or otherwise made available except upon order of the court or upon written consent of the respondent.

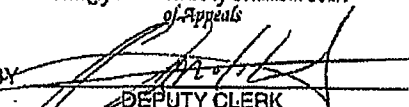
The Clerk shall cause a copy of this order to be transmitted to the Chairman of the Board on Professional Responsibility and to the respondent, thereby giving him notice of the provisions of Rule XI, §§ 14 and 16, which set forth certain rights and responsibilities of disbarred attorneys and the effect of failure to comply therewith.

PER CURIAM

A true Copy
Test:

Julio Castillo
Clerk of the District of Columbia Court
of Appeals

BY



DEPUTY CLERK
Julio Castillo
Clerk of the District of Columbia
Court of Appeals

EXHIBIT B

**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY**

In the Matter of	:	
	:	
WESLEY L. CLARKE, Esquire,	:	Disciplinary Docket Nos. 2016-D231;
	:	2017-D288;
Respondent	:	2018-D021;
	:	2018-D178.
Member of the Bar of the District of	:	
Columbia Court of Appeals	:	
Bar Number: 474594	:	
Date of Admission: October 12, 2001	:	

AFFIDAVIT REQUIRED BY D.C. BAR RULE XI, § 12(a)

I, Wesley L. Clarke, affiant, pursuant to D.C. Bar Rule XI, § 12 and in furtherance of my wish to consent to disbarment, declare as follows:

1. I hereby consent to disbarment and request that my disbarment become effective on October 25, 2019, so that I may wind up my practice. I will not take on any new clients or client matters. I will inform all of my current clients of my consent to disbarment based on the pending disciplinary matters before taking any further action in those clients' matters.

2. My consent is freely and voluntarily rendered. I am not subject to coercion or duress, and I am fully aware of the implications of consenting to disbarment.

3. I am aware that Disciplinary Counsel is currently investigating multiple matters involving my conduct. These matters include Disciplinary Docket Nos. 2016-D231, 2017-D288, 2018-D021 & 2018-D178.

4. I am aware that the allegations of misconduct in 2016-D231 include: that I misappropriated estate funds in violation of Rules 1.15(a); made false representations to the

probate court and the Office of the Auditor Master about fees I collected in violation of Rule 8.4(c) and 8.4(d).

5. I am aware that the allegations of misconduct in 2017-D288 include: that I misappropriated disputed funds in violation of Rules 1.15(a) and (d).

6. I am aware that the allegations of misconduct in 2018-D021 include: that I submitted false billings to both my client and to the Office of the Auditor Master in violation of Rule 8.4(c) and 8.4(d).

7. I am aware that the allegations of misconduct in 2018-D178 include misappropriation of estate funds in violation of Rules 1.15(a).

8. Based upon inaccuracies in billing I generated for my clients, I acknowledge that Disciplinary Counsel has sufficient evidence to prove that I engaged in reckless misappropriation in three matters -- 2016-D231, 2017-D288, and 2018-D178 -- as described above.

9. Although I do not believe that I intentionally misled the client or the Court, I acknowledge that Disciplinary Counsel has sufficient evidence to prove that I engaged in reckless dishonesty in all four matters -- 2016-D231, 2017-D288, 2018-D021 and 2018-D178 -- as described above.

10. I acknowledge serious shortcomings in my representation in each of these cases, including the issuance of bills which, upon further review, contained significant inaccuracies. While I never intended to misrepresent any material fact or to misappropriate funds belonging to anyone, I recognize that Disciplinary Counsel has sufficient evidence to prove that I engaged in reckless misappropriation and reckless dishonesty.

11. I acknowledge that the material facts upon which the above allegations of misconduct are predicated are true.

12. I submit this consent because I know that if disciplinary proceedings based on the alleged misconduct were brought, I could not successfully defend against them.

Wesley Clarke

Wesley L. Clarke, Respondent

JURAT

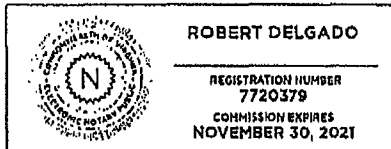
State/Commonwealth of VIRGINIA)
)
 City County of Fairfax)

On 08/21/2019, before me, Robert Delgado,
Date *Notary Name*

the foregoing instrument was subscribed and sworn to before me by:

Welsey L. Clarke
Name of Affiant(s)

Signature:  Robert Delgado
Notary Public



Notary Commission Number: 7720379

My Commission Expires: 11/30/2021

Notarized online using audio-video communication

DESCRIPTION OF ATTACHED DOCUMENT

Title or Type of Document: Affidavit Required by D.C. Bar Rule XI

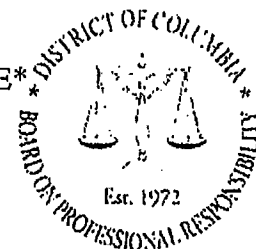
Document Date: 08/21/2019

Number of Pages (w/ notarial certificate): 4

EXHIBIT C

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY



In the Matter of: :
 :
 :
 WESLEY L. CLARKE, :
 :
 Respondent. : Board Docket No. 19-BD-057
 : Disciplinary Docket Nos. 2016-D231,
 : 2017-D288, 2018-D021, & 2018-D178
 A Member of the Bar of the :
 District of Columbia Court of Appeals :
 (Bar Registration No. 474594) :

Issued
August 27, 2019

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility (“Board”) on Disciplinary Counsel’s Motion to Accept Respondent’s Consent to Disbarment, filed pursuant to D.C. Bar R. XI, § 12(a) and Board Rule 16.1. Respondent’s affidavit of consent to disbarment, executed on August 21, 2019, is attached to the motion.¹ Respondent has requested, and Disciplinary Counsel has agreed, that Respondent’s disbarment not take effect until October 25, 2019, in order to allow Respondent to close his practice and transfer all client matters.²

¹ Respondent’s affidavit was notarized electronically, “a process whereby a notary affixes an electronic notary signature and seal information to an electronic document (such as a PDF or Word document). Once affixed to the electronic document, the document is rendered tamper evident such that unauthorized attempts to alter the document will be evident to relying parties.” Secretary of the Commonwealth of Virginia website, <https://www.commonwealth.virginia.gov/official-documents/notary-commissions/enotary-faq/> (visited on Aug. 26, 2019).

² Disciplinary Counsel has agreed to Respondent’s request to delay the effective date of his disbarment because Respondent has agreed that he (1) will inform his current clients of his consent

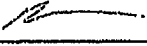
footnote cont’d on following page

* Consult the ‘Disciplinary Decisions’ tab on the Board on Professional Responsibility’s website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

The Board, acting through its Chair, and pursuant to D.C. Bar R. XI, § 12(b) and Board Rule 16.2, has reviewed Respondent's affidavit declaring his consent to disbarment and recommends that the Court enter an order disbarring Respondent on consent pursuant to D.C. Bar R. XI, § 12(b), effective on October 25, 2019.³ See Order, *In re Allen*, D.C. App. No. 12-BG-1148 (Aug. 23, 2012) (disbarring the respondent on consent, effective approximately six weeks after the Court's order).

Respondent's attention should be drawn to the requirement to demonstrate compliance with the provisions of D.C. Bar R. XI, §§ 14 and 16, including the filing of the affidavit pursuant to D.C. Bar R. XI, § 14(g) (which must be served on Disciplinary Counsel and the Board), and to the fact that the period of disbarment will not be deemed to run for purposes of reinstatement until a compliant affidavit is filed. See *In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 
Matthew G. Kaiser
Chair

to disbarment before taking further action in those clients' matters, and (2) will not take on any new matters. These measures, together with the notice to potential clients provided by the Court's disbarment order, will protect the public prior to the effective date of Respondent's disbarment.

³ Disciplinary Counsel asserts in its motion that Respondent engaged in additional misconduct not admitted in his affidavit. If Disciplinary Counsel intends to introduce evidence of unadjudicated acts of alleged misconduct in a future reinstatement proceeding, it shall comply with the notice requirements in Board Rule 9.8. See *In re Yum*, Board Docket No. 15-BD-067, at 2-6 (BPR Dec. 22, 2017).

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

ss:

COUNTY OF NEW YORK)

I, Tina M. Nardelli, being duly sworn, say:

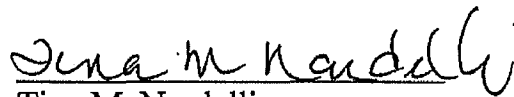
1. I am not a party to the action, am over 18 years of age and reside in Kings, County, New York.
2. On the 5th day of August 2020 I served the within:

**NOTICE OF MOTION & AFFIRMATION IN SUPPORT
OF MOTION FOR RECIPROCAL DISCIPLINE**

by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed at the last known address set forth for:

Wesley L. Clarke
1629 K Street
Suite 300
Washington, D.C. 20006-1631
Respondent Pro Se

VIA FIRST CLASS MAIL and EMAIL at wlclarke@me.com


Tina M. Nardelli

Sworn to before me this
5th day of August 2020



NOTARY PUBLIC

ROBERT F. MURPHY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MU6359097
Qualified in New York County
My Commission Expires 06-22-2021

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

In the Matter of Wesley L. Clarke,
(admitted as Wesley Linden Clarke),
an attorney and counselor-at-law:

Attorney Grievance Committee
for the First Judicial Department,

Petitioner,

Wesley L. Clarke,
(OCA Atty. Reg. No. 2525350),

Respondent.

NOTICE OF MOTION & AFFIRMATION IN SUPPORT
OF MOTION FOR RECIPROCAL DISCIPLINE

JORGE DOPICO
Chief Attorney
Attorney for Petitioner

ATTORNEY GRIEVANCE COMMITTEE
180 Maiden Lane - 17th floor
New York, New York 10006
(212) 401-0800

APPELLATE DIVISION SUPREME COURT FIRST JUDICIAL DEPARTMENT
STATE OF NEW YORK

MOND VALLEJO
Of Counsel

I, SUSANNA ROJAS, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on 8/5/20 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 7/26/21


CLERK

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Sallie Manzanet-Daniels,	J.P.,
Angela M. Mazzaelli	
Anil C. Singh	
Tanya R. Kennedy	
Saliann Scarpulla,	JJ.

Motion No.	2020-2587
Case No.	2020-03331

In the Matter of
WESLEY L. CLARKE,
(ADMITTED AS WESLEY LINDON CLARKE)
an attorney and counselor-at law:

ATTORNEY GRIEVANCE COMMITTEE FOR THE
FIRST JUDICIAL DEPARTMENT,
Petitioner,

WESLEY L. CLARKE,
(OCA ATTY. REG. NO. 2525350)
Respondent.

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent, as Wesley Lindon Clarke, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on January 11, 1993.

Appearances:

Jorge Dopico, Chief Attorney,
Attorney Grievance Committee, New York
(Raymond Vallejo, of counsel), for petitioner.

Respondent, pro se.

Motion No. 2587 - October 19, 2020

IN THE MATTER OF WESLEY L. CLARKE, AN ATTORNEY

PER CURIAM

Respondent Wesley L. Clarke was admitted to the practice of law in the State of New York by the First Judicial Department on January 11, 1993, under the name Wesley Lindon Clarke. Although respondent's registered address is in the District of Columbia, this Court retains jurisdiction as the Judicial Department in which he was admitted to practice (Rules for Attorney Disciplinary Matters [22 NYCRR] § 1240.7[a][2]).

By order entered September 12, 2019, the District of Columbia Court of Appeals disbarred respondent by consent, effective October 25, 2019 (215 A3d 760 [2019]).

The Attorney Grievance Committee (AGC) now seeks an order, pursuant to 22 NYCRR 1240.13 and the doctrine of reciprocal discipline, finding that respondent has been disciplined by a foreign jurisdiction, directing him to demonstrate why he should not be disciplined in New York based on his discipline in the District of Columbia (D.C.), and disbarring him or, in the alternative, sanctioning him as this Court deems appropriate. Respondent opposes.

In 2019, the Office of Disciplinary Counsel for the District of Columbia (Disciplinary Counsel) filed a motion with the Board on Professional Responsibility (Board) to accept respondent's consent to disbarment. The motion was supported by respondent's affidavit in which he consented to his disbarment effective October 25, 2019. He acknowledged that his consent was freely and voluntarily rendered, he was not subject to coercion or duress, and he was fully aware of the implications of consenting to disbarment.

Additionally, respondent acknowledged that he was aware that Disciplinary Counsel was investigating multiple matters involving his conduct and the allegations against him included misappropriation of estate funds and disputed funds, false representations to the probate court and the Office of the Auditor Master (OAM) about fees he collected, and the submission of false billing to both a client and the OAM in violation of D.C. Rules of Professional Conduct 1.15(a) (failure to safeguard client funds), 1.15(d) (failure to safeguard disputed funds), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (conduct that seriously interferes with the administration of justice).

Respondent conceded that based upon inaccuracies in billing he generated for clients, the Disciplinary Counsel had sufficient evidence to prove that he “engaged in reckless misappropriation in three matters”; that while he did not believe that he intentionally misled the client or the court, the Disciplinary Counsel had sufficient evidence to prove that he “engaged in reckless dishonesty in ... four matters”; there were “serious shortcomings” in his representation in the cases at issue; while he never intended to misrepresent any material fact or to misappropriate funds, the Disciplinary Counsel had sufficient evidence to prove that he “engaged in reckless misappropriation and reckless dishonesty”; “the material facts upon which the ... allegations of misconduct [were] predicated [were] true”; and “if disciplinary proceedings based on the alleged misconduct were brought, [he] could not successfully defend against them.”

Respondent requested that his disbarment become effective on October 25, 2019 to allow him time to wind up his law practice during which he agreed not to take on any new clients or client matters and he would inform all of his current clients of his consent to disbarment based on the pending disciplinary matters before taking any further

action in their matters. Disciplinary Counsel agreed to respondent's request as these conditions protected the public.

Upon review of respondent's affidavit consenting to disbarment, the Board issued a decision recommending he be disbarred in accordance therewith.¹ Thereafter, the District of Columbia Court of Appeals adopted the Board's recommendation and disbarred respondent by consent, effective October 25, 2019.

In a proceeding seeking reciprocal discipline pursuant to 22 NYCRR 1240.13(b), respondent may raise the following defenses: (1) a lack of notice or opportunity to be heard in the foreign jurisdiction constituting a deprivation of due process; (2) an infirmity of proof establishing the misconduct; or (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state. The AGC argues that none of the enumerated defenses to reciprocal discipline apply herein because respondent received notice of the allegations against him and there is no evidence that he was denied opportunity to answer them, there is no infirmity of proof given his admissions underlying his consent to disbarment that he could not defend against the allegations at issue, and his alleged misconduct in the D.C. would also constitute misconduct in New York.

As to sanction, the AGC notes that in reciprocal discipline cases the Court generally defers to the sanction determination in the foreign jurisdiction and the AGC argues that disbarment is in accord with our case law involving comparable misconduct.

The AGC asserts that respondent failed to notify the Committee of his discipline in the District of Columbia in violation of 22 NYCRR 1240.13(d).

¹ The Board's decision noted that Disciplinary Counsel's motion alleged that respondent engaged in additional misconduct not reflected in his affidavit.

By an unsworn response, respondent opposes. Notwithstanding that he consented to disbarment in the D.C. disciplinary proceeding he argues that: he did not receive sufficient due process in the D.C. proceeding because there was no hearing and he believes that if there had, he would have been exonerated; his affidavit does not constitute “sufficient evidence” of misconduct and asserts that it was “procedurally lacking” because it was signed electronically while he was out of the country therefore there are issues as to its admissibility and “appropriateness,” nor was their witness testimony or evidentiary submissions²; “all the misconduct has not clearly been spelled out or established”; and the AGC has mischaracterized the allegations of misconduct (notwithstanding that the Committee’s descriptions thereof are taken directly from his affidavit in the D.C. proceeding).

Additionally, he asserts that: he did not receive the instant motion served by email (but does not deny that he received the motion the AGC served by mail at his registered address); as he executed his affidavit consenting to disbarment while outside of the country, he was unable to have counsel in the D.C. proceeding; and he was denied sufficient due process in the “collateral matter.”

Respondent argues that this Court does not have to impose the same discipline imposed by the District of Columbia (*see Matter of Kim*, 138 AD3d 8 [1st Dept 2016]; *Matter of Lowell*, 14 AD3d 41 [1st Dept 2004], *appeal dismissed* 4 NY3d 846 [2005], *lv denied* 5 NY3d 708 [2005]), and under the New York rules “the conduct [at issue] would at most be the subject of a reprimand” as support for which he cites *Matter of Gluck*

² Citing to the Secretary of Virginia’s website, the D.C. Board noted the validity of electronically notarized signatures.

(153 AD3d 301, 302 [1st Dept 2017]) and *Matter of Zhang* (142 AD3d 268 [1st Dept 2016]).

The AGC argues that respondent's asserted defenses of lack of due process and infirmity of proof are without merit because he waived his right to a hearing and consented to disbarment; his affidavit evidences that his consent was freely and voluntarily given without coercion or duress and with full awareness of the implications thereof; he admitted that the material facts upon which his alleged misconduct was predicated were true; and he acknowledged that if disciplinary proceedings were brought based therein he could not successfully defend against them. As to respondent's claim that he did not receive the motion served by email, the AGC has included emails memorializing his consent to service by email.

Respondent's assertions of lack of due process and infirmity of proof fail because respondent's affidavit in the D.C. proceeding evidences that he was fully aware of the allegations against him, he acknowledged that the underlying material facts were true and that he could not successfully defend himself against charges, he waived his right to a hearing and consented to disbarment. Further, the misconduct for which respondent was disciplined in D.C. would constitute misconduct in violation of New York Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.15(a), 1.15(b)(4) (failure to safeguard disputed funds), 1.15(c)(4) (failure to promptly pay to client funds which client is entitled to receive), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (conduct that is prejudicial to the administration of justice).

Accordingly, the only issue remaining is the appropriate sanction to impose and "significant weight should be given to the sanction imposed by the jurisdiction where

the misconduct occurred because the foreign jurisdiction has the greatest interest in fashioning sanctions for misconduct" (*Matter of Blumenthal*, 165 AD3d 85, 86 [1st Dept 2018]; *Matter of Jaffe*, 78 AD3d 152, 158 [1st Dept 2010]). Only in rare instances will this Court depart from its general rule (*Matter of McHallam*, 160 AD3d 89, 92 [1st Dept 2018]; *Matter of Lowell*, 14 AD3d at 48).

We find that the sanction of disbarment is commensurate with the discipline imposed in D.C. and is in accord with our precedent involving comparable misconduct (see e.g. *Matter of Arnold*, 180 AD3d 72 [1st Dept 2019]; *Matter of Blumenthal*, 165 AD3d at 86; *Matter of Frants*, 160 AD3d 171 [1st Dept 2018]; *Matter of Hersh*, 91 AD3d 144 [1st Dept 2011]; *Matter of Ligos*, 75 AD3d 78 [1st Dept 2010] [same]; *Matter of Gentile*, 46 AD3d 53 [1st Dept 2007] [same]; see also *Matter of Brandes*, 42 AD3d 655 [3d Dept 2007]).

Accordingly, the Committee's motion should be granted to the extent of disbarring respondent and striking his name from the roll of attorneys and counselors-at-law in the State of New York effective October 25, 2019.

All concur.

It is Ordered that the Committee's motion is granted to the extent of disbarring respondent and his name is stricken from the roll of attorneys and counselors-at-law in the State of New York, effective October 25, 2019, and

It is further Ordered that respondent is commanded to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another; that respondent is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority; and that

respondent is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, and

It is further Ordered that respondent is directed to fully comply with the provisions of the Court's rules governing the conduct of disbarred or suspended attorneys (see 22 NYCRR 1240.15), a copy of which is made a part hereof, and

It is further Ordered that if the respondent has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15 (f).

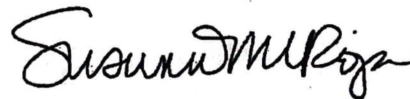
ENTERED: [November 19, 2020]

APPELLATE DIVISION SUPREME COURT FIRST DEPARTMENT
STATE OF NEW YORK

I, SUSANNA ROJAS, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on 11/19/20 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 4/12/21


CLERK



Susanna Molina Rojas
Clerk of the Court

INTERNAL PROCEDURAL RULES

BOARD OF DISCIPLINARY APPEALS

Current through June 21, 2018

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INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Current through June 21, 2018

I. GENERAL PROVISIONS

Rule 1.01. Definitions

- (a) “BODA” is the Board of Disciplinary Appeals.
- (b) “Chair” is the member elected by BODA to serve as chair or, in the Chair’s absence, the member elected by BODA to serve as vice-chair.
- (c) “Classification” is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a “complaint” or an “inquiry.”
- (d) “BODA Clerk” is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.
- (e) “CDC” is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.
- (f) “Commission” is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.
- (g) “Executive Director” is the executive director of BODA.
- (h) “Panel” is any three-member grouping of BODA under TRDP 7.05.
- (i) “Party” is a Complainant, a Respondent, or the Commission.
- (j) “TDRPC” is the Texas Disciplinary Rules of Professional Conduct.
- (k) “TRAP” is the Texas Rules of Appellate Procedure.
- (l) “TRCP” is the Texas Rules of Civil Procedure.
- (m) “TRDP” is the Texas Rules of Disciplinary Procedure.
- (n) “TRE” is the Texas Rules of Evidence.

Rule 1.02. General Powers

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining disciplinary proceedings. But TRDP 15.01 [17.01] applies to the enforcement of a judgment of BODA.

Rule 1.03. Additional Rules in Disciplinary Matters

Except as varied by these rules and to the extent applicable, the TRCP, TRAP, and TRE apply to all disciplinary matters before BODA, except for appeals from classification decisions, which are governed by TRDP 2.10 and by Section 3 of these rules.

Rule 1.04. Appointment of Panels

- (a) BODA may consider any matter or motion by panel,

except as specified in (b). The Chair may delegate to the Executive Director the duty to appoint a panel for any BODA action. Decisions are made by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing in these rules gives a party the right to be heard by BODA sitting en banc.

- (b) Any disciplinary matter naming a BODA member as Respondent must be considered by BODA sitting en banc. A disciplinary matter naming a BODA staff member as Respondent need not be heard en banc.

Rule 1.05. Filing of Pleadings, Motions, and Other Papers

- (a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.

- (1) Email Address. The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.

- (2) Timely Filing. Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.

- (3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.

- (4) Exceptions.

- (i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.

- (ii) The following documents must not be filed electronically:

- a) documents that are filed under seal or subject to a pending motion to seal; and

- b) documents to which access is otherwise restricted by court order.

- (iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.

- (5) Format. An electronically filed document must:

- (i) be in text-searchable portable document format (PDF);
- (ii) be directly converted to PDF rather than scanned, if possible; and
- (iii) not be locked.

(b) A paper will not be deemed filed if it is sent to an individual BODA member or to another address other than the address designated by BODA under Rule 1.05(a)(2).

(c) **Signing.** Each brief, motion, or other paper filed must be signed by at least one attorney for the party or by the party pro se and must give the State Bar of Texas card number, mailing address, telephone number, email address, and fax number, if any, of each attorney whose name is signed or of the party (if applicable). A document is considered signed if the document includes:

- (1) an “/s/” and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or
- (2) an electronic image or scanned image of the signature.

(d) **Paper Copies.** Unless required by BODA, a party need not file a paper copy of an electronically filed document.

(e) **Service.** Copies of all documents filed by any party other than the record filed by the evidentiary panel clerk or the court reporter must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

Rule 1.06. Service of Petition

In any disciplinary proceeding before BODA initiated by service of a petition on the Respondent, the petition must be served by personal service; by certified mail with return receipt requested; or, if permitted by BODA, in any other manner that is authorized by the TRCP and reasonably calculated under all the circumstances to apprise the Respondent of the proceeding and to give him or her reasonable time to appear and answer. To establish service by certified mail, the return receipt must contain the Respondent’s signature.

Rule 1.07. Hearing Setting and Notice

(a) **Original Petitions.** In any kind of case initiated by the CDC’s filing a petition or motion with BODA, the CDC may contact the BODA Clerk for the next regularly available hearing date before filing the original petition. If a hearing is set before the petition is filed, the petition must state the date, time, and place of the hearing. Except in the case of a petition to revoke probation under TRDP 2.23 [2.22], the hearing date must be at least 30 days from the date that the petition is served on the Respondent.

(b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the

request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23 [2.22], the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.

(c) **Setting Notices.** BODA must notify the parties of any hearing date that is not noticed in an original petition or motion.

(d) **Announcement Docket.** Attorneys and parties appearing before BODA must confirm their presence and present any questions regarding procedure to the BODA Clerk in the courtroom immediately prior to the time docket call is scheduled to begin. Each party with a matter on the docket must appear at the docket call to give an announcement of readiness, to give a time estimate for the hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

Rule 1.08. Time to Answer

The Respondent may file an answer at any time, except where expressly provided otherwise by these rules or the TRDP, or when an answer date has been set by prior order of BODA. BODA may, but is not required to, consider an answer filed the day of the hearing.

Rule 1.09. Pretrial Procedure

(a) Motions.

(1) Generally. To request an order or other relief, a party must file a motion supported by sufficient cause with proof of service on all other parties. The motion must state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other documents must be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. Unless otherwise required by these rules or the TRDP, the form of a motion must comply with the TRCP or the TRAP.

(2) For Extension of Time. All motions for extension of time in any matter before BODA must be in writing, comply with (a)(1), and specify the following:

- (i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;
- (ii) if an appeal has been perfected, the date when the appeal was perfected;
- (iii) the original deadline for filing the item in question;
- (iv) the length of time requested for the extension;
- (v) the number of extensions of time that have been granted previously regarding the item in question; and

(vi) the facts relied on to reasonably explain the need for an extension.

(b) **Pretrial Scheduling Conference.** Any party may request a pretrial scheduling conference, or BODA on its own motion may require a pretrial scheduling conference.

(c) **Trial Briefs.** In any disciplinary proceeding before BODA, except with leave, all trial briefs and memoranda must be filed with the BODA Clerk no later than ten days before the day of the hearing.

(d) **Hearing Exhibits, Witness Lists, and Exhibits Tendered for Argument.** A party may file a witness list, exhibit, or any other document to be used at a hearing or oral argument before the hearing or argument. A party must bring to the hearing an original and 12 copies of any document that was not filed at least one business day before the hearing. The original and copies must be:

- (1) marked;
- (2) indexed with the title or description of the item offered as an exhibit; and
- (3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

All documents must be marked and provided to the opposing party before the hearing or argument begins.

Rule 1.10. Decisions

(a) **Notice of Decisions.** The BODA Clerk must give notice of all decisions and opinions to the parties or their attorneys of record.

(b) **Publication of Decisions.** BODA must report judgments or orders of public discipline:

- (1) as required by the TRDP; and
- (2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.

(c) **Abstracts of Classification Appeals.** BODA may, in its discretion, prepare an abstract of a classification appeal for a public reporting service.

Rule 1.11. Board of Disciplinary Appeals Opinions

(a) BODA may render judgment in any disciplinary matter with or without written opinion. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and must be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be written. The names of the participating members must be noted on all written opinions of BODA.

(b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in

the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.

(c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this rule and may be issued without a written opinion.

Rule 1.12. BODA Work Product and Drafts

A document or record of any nature—regardless of its form, characteristics, or means of transmission—that is created or produced in connection with or related to BODA’s adjudicative decision-making process is not subject to disclosure or discovery. This includes documents prepared by any BODA member, BODA staff, or any other person acting on behalf of or at the direction of BODA.

Rule 1.13. Record Retention

Records of appeals from classification decisions must be retained by the BODA Clerk for a period of at least three years from the date of disposition. Records of other disciplinary matters must be retained for a period of at least five years from the date of final judgment, or for at least one year after the date a suspension or disbarment ends, whichever is later. For purposes of this rule, a record is any document, paper, letter, map, book, tape, photograph, film, recording, or other material filed with BODA, regardless of its form, characteristics, or means of transmission.

Rule 1.14. Costs of Reproduction of Records

The BODA Clerk may charge a reasonable amount for the reproduction of nonconfidential records filed with BODA. The fee must be paid in advance to the BODA Clerk.

Rule 1.15. Publication of These Rules

These rules will be published as part of the TDRPC and TRDP.

II. ETHICAL CONSIDERATIONS

Rule 2.01. Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases

(a) A current member of BODA must not represent a party or testify voluntarily in a disciplinary action or proceeding. Any BODA member who is subpoenaed or otherwise compelled to appear at a disciplinary action or proceeding, including at a deposition, must promptly notify the BODA Chair.

(b) A current BODA member must not serve as an expert witness on the TDRPC.

(c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

Rule 2.02. Confidentiality

(a) BODA deliberations are confidential, must not be disclosed by BODA members or staff, and are not subject to disclosure or discovery.

(b) Classification appeals, appeals from evidentiary judgments of private reprimand, appeals from an evidentiary judgment dismissing a case, interlocutory appeals or any interim proceedings from an ongoing evidentiary case, and disability cases are confidential under the TRDP. BODA must maintain all records associated with these cases as confidential, subject to disclosure only as provided in the TRDP and these rules.

(c) If a member of BODA is subpoenaed or otherwise compelled by law to testify in any proceeding, the member must not disclose a matter that was discussed in conference in connection with a disciplinary case unless the member is required to do so by a court of competent jurisdiction

Rule 2.03. Disqualification and Recusal of BODA Members

(a) BODA members are subject to disqualification and recusal as provided in TRCP 18b.

(b) BODA members may, in addition to recusals under (a), voluntarily recuse themselves from any discussion and voting for any reason. The reasons that a BODA member is recused from a case are not subject to discovery.

(c) These rules do not disqualify a lawyer who is a member of, or associated with, the law firm of a BODA member from serving on a grievance committee or representing a party in a disciplinary proceeding or legal malpractice case. But a BODA member must recuse him or herself from any matter in which a lawyer who is a member of, or associated with, the BODA member's firm is a party or represents a party.

III. CLASSIFICATION APPEALS

Rule 3.01. Notice of Right to Appeal

(a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.

(b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

Rule 3.02. Record on Appeal

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and

all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

IV. APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01. Perfecting Appeal

(a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 [2.20] consistent with this requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21 [2.20].

(b) **Notification of the Evidentiary Judgment.** The clerk of the evidentiary panel must notify the parties of the judgment as set out in TRDP 2.21 [2.20].

(1) The evidentiary panel clerk must notify the Commission and the Respondent in writing of the judgment. The notice must contain a clear statement that any appeal of the judgment must be filed with BODA within 30 days of the date that the judgment was signed. The notice must include a copy of the judgment rendered.

(2) The evidentiary panel clerk must notify the Complainant that a judgment has been rendered and provide a copy of the judgment, unless the evidentiary panel dismissed the case or imposed a private reprimand. In the case of a dismissal or private reprimand, the evidentiary panel clerk must notify the Complainant of the decision and that the contents of the judgment are confidential. Under TRDP 2.16, no additional information regarding the contents of a judgment of dismissal or private reprimand may be disclosed to the Complainant.

(c) **Filing Notice of Appeal.** An appeal is perfected when a written notice of appeal is filed with BODA. If a notice of appeal and any other accompanying documents are mistakenly filed with the evidentiary panel clerk, the notice is deemed to have been filed the same day with BODA, and the evidentiary panel clerk must immediately send the BODA Clerk a copy of the notice and any accompanying documents.

(d) **Time to File.** In accordance with TRDP 2.24 [2.23], the notice of appeal must be filed within 30 days after the date the judgment is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.

(e) **Extension of Time.** A motion for an extension of time to file the notice of appeal must be filed no later than 15 days after the last day allowed for filing the notice of appeal. The motion must comply with Rule 1.09.

Rule 4.02. Record on Appeal

(a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.

(b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record on appeal by written stipulation filed with the clerk of the evidentiary panel.

(c) Responsibility for Filing Record.

(1) Clerk's Record.

(i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.

(ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each party, any postsubmission pleadings and briefs, and the notice of appeal.

(iii) If the clerk of the evidentiary panel is unable for any reason to prepare and transmit the clerk's record by the due date, he or she must promptly notify BODA and the parties, explain why the clerk's record cannot be timely filed, and give the date by which he or she expects the clerk's record to be filed.

(2) Reporter's Record.

(i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:

- a) a notice of appeal has been filed;
- b) a party has requested that all or part of the reporter's record be prepared; and
- c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.

(ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

(d) Preparation of Clerk's Record.

(1) To prepare the clerk's record, the evidentiary panel clerk must:

- (i) gather the documents designated by the parties'

written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);

(ii) start each document on a new page;

(iii) include the date of filing on each document;

(iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;

(v) number the pages of the clerk's record in the manner required by (d)(2);

(vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and

(vii) certify the clerk's record.

(2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.

(3) The table of contents must:

(i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;

(ii) be double-spaced;

(iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;

(iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and

(v) if the record consists of multiple volumes, indicate the page on which each volume begins.

(e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:

(1) file each computer file in text-searchable Portable Document Format (PDF);

(2) create electronic bookmarks to mark the first page of each document in the clerk's record;

(3) limit the size of each computer file to 100 MB or less, if possible; and

(4) directly convert, rather than scan, the record to PDF, if possible.

(f) **Preparation of the Reporter's Record.**

(1) The appellant, at or before the time prescribed for

perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.

(2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual for Texas Reporters' Records.

(3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.

(4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise

(6¹) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.

(g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.

(h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.

(i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

¹ So in original.

Rule 4.03. Time to File Record

(a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless

a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.

(b) If No Record Filed.

(1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.

(2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:

(i) the appellant failed to request a reporter's record; or

(ii) the appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record, and the appellant is not entitled to proceed without payment of costs.

(c) Extension of Time to File the Reporter's Record.

When an extension of time is requested for filing the reporter's record, the facts relied on to reasonably explain the need for an extension must be supported by an affidavit of the court reporter. The affidavit must include the court reporter's estimate of the earliest date when the reporter's record will be available for filing.

(d) **Supplemental Record.** If anything material to either party is omitted from the clerk's record or reporter's record, BODA may, on written motion of a party or on its own motion, direct a supplemental record to be certified and transmitted by the clerk for the evidentiary panel or the court reporter for the evidentiary panel.

Rule 4.04. Copies of the Record

The record may not be withdrawn from the custody of the BODA Clerk. Any party may obtain a copy of the record or any designated part thereof by making a written request to the BODA Clerk and paying any charges for reproduction in advance.

Rule 4.05. Requisites of Briefs

(a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.

(b) **Appellee's Filing Date.** Appellee's brief must be filed

within 30 days after the appellant's brief is filed.

(c) Contents. Briefs must contain:

- (1) a complete list of the names and addresses of all parties to the final decision and their counsel;
- (2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;
- (3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;
- (4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;
- (5) a statement, without argument, of the basis of BODA's jurisdiction;
- (6) a statement of the issues presented for review or points of error on which the appeal is predicated;
- (7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;
- (8) the argument and authorities;
- (9) conclusion and prayer for relief;
- (10) a certificate of service; and
- (11) an appendix of record excerpts pertinent to the issues presented for review.

(d) Length of Briefs; Contents Included and Excluded.

In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction, signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on leave of BODA. A computer generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

(e) Amendment or Supplementation. BODA has discretion to grant leave to amend or supplement briefs.

(f) Failure of the Appellant to File a Brief. If the appellant fails to timely file a brief, BODA may:

- (1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's

failure to timely file a brief;

(2) decline to dismiss the appeal and make further orders within its discretion as it considers proper; or

(3) if an appellee's brief is filed, regard that brief as correctly presenting the case and affirm the evidentiary panel's judgment on that brief without examining the record.

Rule 4.06. Oral Argument

(a) Request. A party desiring oral argument must note the request on the front cover of the party's brief. A party's failure to timely request oral argument waives the party's right to argue. A party who has requested argument may later withdraw the request. But even if a party has waived oral argument, BODA may direct the party to appear and argue. If oral argument is granted, the clerk will notify the parties of the time and place for submission.

(b) Right to Oral Argument. A party who has filed a brief and who has timely requested oral argument may argue the case to BODA unless BODA, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

- (1) the appeal is frivolous;
- (2) the dispositive issue or issues have been authoritatively decided;
- (3) the facts and legal arguments are adequately presented in the briefs and record; or
- (4) the decisional process would not be significantly aided by oral argument.

(c) Time Allowed. Each party will have 20 minutes to argue. BODA may, on the request of a party or on its own, extend or shorten the time allowed for oral argument. The appellant may reserve a portion of his or her allotted time for rebuttal.

Rule 4.07. Decision and Judgment

(a) Decision. BODA may do any of the following:

- (1) affirm in whole or in part the decision of the evidentiary panel;
- (2) modify the panel's findings and affirm the findings as modified;
- (3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or
- (4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:

- (i) the panel that entered the findings; or
- (ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.

(b) Mandate. In every appeal, the BODA Clerk must issue a mandate in accordance with BODA's judgment and send it to the evidentiary panel and to all the parties.

Rule 4.08. Appointment of Statewide Grievance Committee

If BODA remands a cause for further proceedings before a statewide grievance committee, the BODA Chair will appoint the statewide grievance committee in accordance with TRDP 2.27 [2.26]. The committee must consist of six members: four attorney members and two public members randomly selected from the current pool of grievance committee members. Two alternates, consisting of one attorney and one public member, must also be selected. BODA will appoint the initial chair who will serve until the members of the statewide grievance committee elect a chair of the committee at the first meeting. The BODA Clerk will notify the Respondent and the CDC that a committee has been appointed.

Rule 4.09. Involuntary Dismissal

Under the following circumstances and on any party's motion or on its own initiative after giving at least ten days' notice to all parties, BODA may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal:

- (a) for want of jurisdiction;
- (b) for want of prosecution; or
- (c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

V. PETITIONS TO REVOKE PROBATION

Rule 5.01. Initiation and Service

(a) Before filing a motion to revoke the probation of an attorney who has been sanctioned, the CDC must contact the BODA Clerk to confirm whether the next regularly available hearing date will comply with the 30-day requirement of TRDP. The Chair may designate a three-member panel to hear the motion, if necessary, to meet the 30-day requirement of TRDP 2.23 [2.22].

(b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23 [2.22], the TRCP, and these rules. The CDC must notify BODA of the date that service is obtained on the Respondent.

Rule 5.02. Hearing

Within 30 days of service of the motion on the Respondent, BODA must docket and set the matter for a hearing and notify the parties of the time and place of the hearing. On a showing of good cause by a party or on its own motion, BODA may continue the case to a future hearing date as circumstances require.

VI. COMPULSORY DISCIPLINE

Rule 6.01. Initiation of Proceeding

Under TRDP 8.03, the CDC must file a petition for compulsory discipline with BODA and serve the Respondent in accordance with the TRDP and Rule 1.06 of these rules.

Rule 6.02. Interlocutory Suspension

(a) **Interlocutory Suspension.** In any compulsory proceeding under TRDP Part VIII in which BODA determines that the Respondent has been convicted of an Intentional Crime and that the criminal conviction is on direct appeal, BODA must suspend the Respondent's license to practice law by interlocutory order. In any compulsory case in which BODA has imposed an interlocutory order of suspension, BODA retains jurisdiction to render final judgment after the direct appeal of the criminal conviction is final. For purposes of rendering final judgment in a compulsory discipline case, the direct appeal of the criminal conviction is final when the appellate court issues its mandate.

(b) **Criminal Conviction Affirmed.** If the criminal conviction made the basis of a compulsory interlocutory suspension is affirmed and becomes final, the CDC must file a motion for final judgment that complies with TRDP 8.05.

(1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.

(2) If the criminal sentence is not fully probated:

- (i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or
- (ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.

(c) **Criminal Conviction Reversed.** If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

VII. RECIPROCAL DISCIPLINE

Rule 7.01. Initiation of Proceeding

To initiate an action for reciprocal discipline under TRDP Part IX, the CDC must file a petition with BODA and request an Order to Show Cause. The petition must request that the Respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction, including a certified copy of the order or judgment rendered against the Respondent.

Rule 7.02. Order to Show Cause

When a petition is filed, the Chair immediately issues a show cause order and a hearing notice and forwards them to the CDC, who must serve the order and notice on the Respondent. The CDC must notify BODA of the date that service is obtained.

Rule 7.03. Attorney's Response

If the Respondent does not file an answer within 30 days of being served with the order and notice but thereafter appears at the hearing, BODA may, at the discretion of the Chair, receive testimony from the Respondent relating to the merits of the petition.

VIII. DISTRICT DISABILITY COMMITTEE HEARINGS

Rule 8.01. Appointment of District Disability Committee

(a) If the evidentiary panel of the grievance committee finds under TRDP 2.17(P)(2), or the CDC reasonably believes under TRDP 2.14(C), that a Respondent is suffering from a disability, the rules in this section will apply to the de novo proceeding before the District Disability Committee held under TRDP Part XII.

(b) Upon receiving an evidentiary panel's finding or the CDC's referral that an attorney is believed to be suffering from a disability, the BODA Chair must appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. BODA will reimburse District Disability Committee members for reasonable expenses directly related to service on the District Disability Committee. The BODA Clerk must notify the CDC and the Respondent that a committee has been appointed and notify the Respondent where to locate the procedural rules governing disability proceedings.

(c) A Respondent who has been notified that a disability referral will be or has been made to BODA may, at any time, waive in writing the appointment of the District Disability Committee or the hearing before the District Disability Committee and enter into an agreed judgment of indefinite disability suspension, provided that the Respondent is competent to waive the hearing. If the Respondent is not represented, the waiver must include a statement affirming that the Respondent has been advised of the right to appointed counsel and waives that right as well.

(d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee must be filed with the BODA Clerk.

(e) Should any member of the District Disability Committee become unable to serve, the BODA Chair must appoint a substitute member.

Rule 8.02. Petition and Answer

(a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service must comply with Rule 1.06.

(b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.

(c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the chair of the District Disability Committee and send notice of the hearing to the parties.

Rule 8.03. Discovery

(a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.

(b) **Physical or Mental Examinations.** On written motion by the Commission or on its own motion, the District Disability Committee may order the Respondent to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. Nothing in this rule limits the Respondent's right to an examination by a professional of his or her choice in addition to any exam ordered by the District Disability Committee.

(1) **Motion.** The Respondent must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.

(2) **Report.** The examining professional must file with the BODA Clerk a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the CDC and the Respondent.

(c) **Objections.** A party must make any objection to a request for discovery within 15 days of receiving the motion by filing a written objection with the BODA Clerk. BODA may decide any objection or contest to a discovery motion.

Rule 8.04. Ability to Compel Attendance

The Respondent and the CDC may confront and cross-examine witnesses at the hearing. Compulsory process to compel the attendance of witnesses by subpoena, enforceable by an order of a district court of proper jurisdiction, is available to the Respondent and the CDC as provided in TRCP 176.

Rule 8.05. Respondent's Right to Counsel

(a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for reasonable expenses directly related to representation of the Respondent.

(b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

Rule 8.06. Hearing

The party seeking to establish the disability must prove by a preponderance of the evidence that the Respondent is suffering from a disability as defined in the TRDP. The chair of the District Disability Committee must admit all relevant evidence that is necessary for a fair and complete hearing. The TRE are advisory but not binding on the chair.

Rule 8.07. Notice of Decision

The District Disability Committee must certify its finding regarding disability to BODA, which will issue the final judgment in the matter.

Rule 8.08. Confidentiality

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

IX. DISABILITY REINSTATEMENTS

Rule 9.01. Petition for Reinstatement

(a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.

(b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension

contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.

(c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

Rule 9.02. Discovery

The discovery period is 60 days from the date that the petition for reinstatement is filed. The BODA Clerk will set the petition for a hearing on the first date available after the close of the discovery period and must notify the parties of the time and place of the hearing. BODA may continue the hearing for good cause shown.

Rule 9.03. Physical or Mental Examinations

(a) On written motion by the Commission or on its own, BODA may order the petitioner seeking reinstatement to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. The petitioner must be served with a copy of the motion and given at least seven days to respond. BODA may hold a hearing before ruling on the motion but is not required to do so.

(b) The petitioner must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.

(c) The examining professional must file a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the parties.

(d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.

(e) Nothing in this rule limits the petitioner's right to an examination by a professional of his or her choice in addition to any exam ordered by BODA.

Rule 9.04. Judgment

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof as directed by BODA. The judgment may include other orders necessary to protect the public and the petitioner's potential clients.

X. APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS

Rule 10.01. Appeals to the Supreme Court

(a) A final decision by BODA, except a determination that a statement constitutes an inquiry or a complaint under TRDP 2.10, may be appealed to the Supreme Court of Texas. The clerk of the Supreme Court of Texas must docket an appeal from a decision by BODA in the same manner as a petition for review without fee.

(b) The appealing party must file the notice of appeal directly with the clerk of the Supreme Court of Texas within 14 days of receiving notice of a final determination by BODA. The record must be filed within 60 days after BODA's determination. The appealing party's brief is due 30 days after the record is filed, and the responding party's brief is due 30 days thereafter. The BODA Clerk must send the parties a notice of BODA's final decision that includes the information in this paragraph.

(c) An appeal to the Supreme Court is governed by TRDP 7.11 and the TRAP.