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DUE PROCESS DENIED

Loss of Investigatory Hearing Means Loss of Confrontation Rights

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"A good name is more desirable than great riches; to be esteemed is better than silver or gold."
— Proverbs 22:1

Asking almost any lawyer to identify his single most valuable asset invariably will yield the same the answer: his law license. The good will and reputation built over the course of a career are essential to that asset.

Few things will do more to damage a great legal career than an accusation of unethical conduct. Logic should suggest that lawyers closely monitor the procedures that apply to the granting and revocation of their law licenses, but last year Texas lawyers lost a valuable right and, for the most part, did not notice. That loss was the abolition of the investigatory hearing.

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To understand the significance of this loss, lawyers first need to understand the differences between the Texas and federal disciplinary systems. Lawyers subject to discipline in federal court receive far greater protections, including, at a minimum, procedural due process — notice and an opportunity to be heard in a meaningful time and meaningful manner.

The most cited case on the standards governing treatment of attorneys in federal disciplinary proceedings is *In the Matter of Ruffalo*. In 1968, the U.S. Supreme Court reversed an attorney's disbarment in a case in which the Ohio State Bar Association's Board of Commissioners added a charge against Ruffalo midway through his disciplinary proceeding. The court held that the lack of fair notice of the added charge and the precise nature of the violations alleged against Ruffalo deprived him of due process, and an after-the-fact opportunity to respond to the new charge was not sufficient to provide due process. Instead, the court stressed that "these are adversary proceedings of a *quasi*-criminal nature," which entitled a party to procedural due process.

Since *Ruffalo*, courts have expanded these due-process guarantees in disciplinary proceedings in federal court to include: 1. fair notice of the disciplinary rules allegedly violated; 2. ample opportunities for the attorney to explain and defend himself or herself; 3. strict construction of the disciplinary rules resolving any ambiguity in favor of the attorney charged; 4. a disinterested prosecutor; 5. an impartial decision maker; 6. an increased burden of proof requiring proof of all elements of a violation by clear and convincing evidence; and 7. the right to confront the accuser.

State courts across the country apply procedural due-process standards in disciplinary proceedings — but not in Texas. Texas Rule of Disciplinary Procedure 3.08 states that disciplinary actions are "civil in nature" and require proof by only a "preponderance of the evidence." The Texas Supreme Court has accepted this standard with little discussion.

A Good Name

For all complaints filed after Jan. 1, 2004, the State Bar of Texas will not hold an investigatory hearing. With this change, lawyers have lost the opportunity to confront their accusers while the matter is still confidential. Under the old rules, if the Bar's Office of the Chief Disciplinary Counsel (OCDC) determined that the grievance stated a complaint, the accused attorney filed a written response, and then an investigatory panel held a confidential hearing to determine whether just cause supported the grievance. During the investigatory hearing, the attorney had a right to appear, to be represented by counsel, to present evidence, and, to a limited extent, to ask questions and cross-examine the complainant. Additionally, the confidential investigatory hearings gave the accused attorney an opportunity to test the credibility, veracity and character of the complainant in a setting that protected the accused attorney's reputation. If the investigatory panel ultimately dismissed the grievance, no record of the grievance existed. Texas Government Code §81.072(o) allowed the accused attorney to deny the grievance existed.

The significance of the loss of the confidential investigatory hearing can be seen in two hypothetical examples.

In the first hypothetical, assume a tenant retains a lawyer to write a letter to a landlord who owns an attack dog that the tenant says prevents the tenant from entering his apartment. The lawyer undertakes representation of the tenant but takes six weeks to write the letter. The tenant complains to the OCDC that the lawyer was not

diligent. The lawyer admits, in his grievance response, that it took him six weeks to write the letter. If the new rules are used and that is the sum total of the facts available for the OCDC to consider, it is likely the OCDC will find just cause for the complaint, subjecting the lawyer to a possible sanction for violating Disciplinary Rule 1.01 (lack of diligence), or forcing the lawyer to challenge the accusation in a nonconfidential setting.

Now consider what happens if the matter occurred under the old rules, and the accused lawyer testifies as follows at an investigatory hearing:

Q: "What kind of attack dog was it?"

A: "Teacup poodle."

Q: "How did the tenant client say that the attack command was given?"

A: "Telepathically."

Under the old rules, the testimony would demonstrate the complainant's lack of credibility, and the investigatory panel would quickly dismiss the complaint. But under the new rules, without the benefit of live testimony, a dismissal of the disciplinary matter is unlikely, and the complaint in all probability will become a matter of public record. While it may seem bizarre that a claim involving a telepathic poodle could adversely affect a lawyer's license, it is simply wishful thinking to expect that the OCDC will uncover the facts as well as the great engine of truth, cross-examination. The OCDC just does not have the resources or the incentive that is present with cross-examination.

Similarly, when a complainant's truthfulness is suspect, further potential tarnish can affect the lawyer's license. In this second hypothetical, assume a complainant asserts she can communicate with her lawyer only through an interpreter. During the meeting now at issue between the lawyer and client, no interpreter was present. The client files a grievance with the OCDC and accuses the lawyer of violating Disciplinary Rule 1.03 (failure to communicate reasonably). In his response, the lawyer states that he is not bilingual, but the client understood far more English than the client admits. On the face of the grievance and the response, there would be no clear answer to whether a just-cause finding is appropriate. However, suppose there was a hearing with live testimony. During the hearing an interpreter translated all questions and responses into the client's native language. In an offhand comment a question is addressed to the lawyer in English:

Q: "Didn't that happen on Wednesday?"

Before the lawyer is able to respond, the complainant responds:

A: "No. That happened on Tuesday."

That objective demonstration of the complainant's bilingual ability will not occur under the new rules until after the confidentiality rules within the disciplinary system have evaporated.

A good name is the real value behind a law license. In Texas, attorneys have not protected that asset nearly as well as our brethren in other states nor as well as the federal courts. Will Texas lawyers continue to lose the few protections left to their licenses in the state disciplinary system? If so, we are just one step closer to losing all that really matters — our good names. TBJ

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