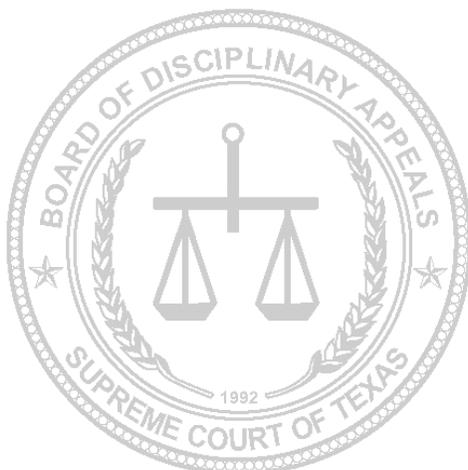


THE BOARD OF DISCIPLINARY APPEALS

APPOINTED BY THE SUPREME COURT OF TEXAS



REPORT 2007

CHAIR
KAREN L. WATKINS

VICE CHAIRMAN
PAUL D. CLOTE

MEMBERS
ALICE A. BROWN
YOLANDA DE LEÓN
ROBERT FLOWERS
JOSE I. GONZALEZ-FALLA
WILLIAM D. GREENHILL
CLEMENT H. OSIMETHA
THOMAS E. PITTS
CAROL E. PRATER
BEN SELMAN
CHARLES L. SMITH



EXECUTIVE DIRECTOR & GENERAL COUNSEL
CHRISTINE E. MCKEEMAN

DEPUTY DIRECTOR/COUNSEL
GAYLE RILEY VICKERS

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

August 31, 2007

The Honorable Chief Justice and the Honorable Justices of the Supreme Court of Texas
Mr. Gib Walton, President, State Bar of Texas
Mr. Travis Vanderpool, Chair, Board of Directors of the State Bar of Texas

On behalf of the Board of Disciplinary Appeals, I submit the accompanying report of the Board's activities for fiscal year 2006-2007. The report summarizes the Board's docket and the more than 2,200 decisions the Board made in attorney discipline matters during the preceding fiscal year. The Board members and staff worked very hard to dispose of pending matters expeditiously; the opinions and other decisions of the Board are available to lawyers and the public via the Board's website: www.txboda.org.

As you know, Board members devote many hours to doing the Board's work, generally serving for six consecutive years before stepping down. Because Board members have usually have their own active practices during their service and do not have as many years of experience in the disciplinary system as do our talented staff, the Board relies heavily on our staff for expertise in lawyer discipline law and for continuity. The Board is fortunate to have such a committed, hard-working staff.

As this fiscal year and my second term on the Board draw to a close, I want to thank the Court for having given me the opportunity to serve. The Board's members and staff feel strongly that our work helps maintain Texas' high standards of legal professionalism. Each Board member believes his or her time doing the Board's work is well spent.

I am available to discuss this report or the Board's work, in general, as is Paul Clote, who will be Chair of the Board for its 2007-2008 term. If you need any additional information about the Board or its work, or if either of us can answer any questions you may have, please do not hesitate to contact us.

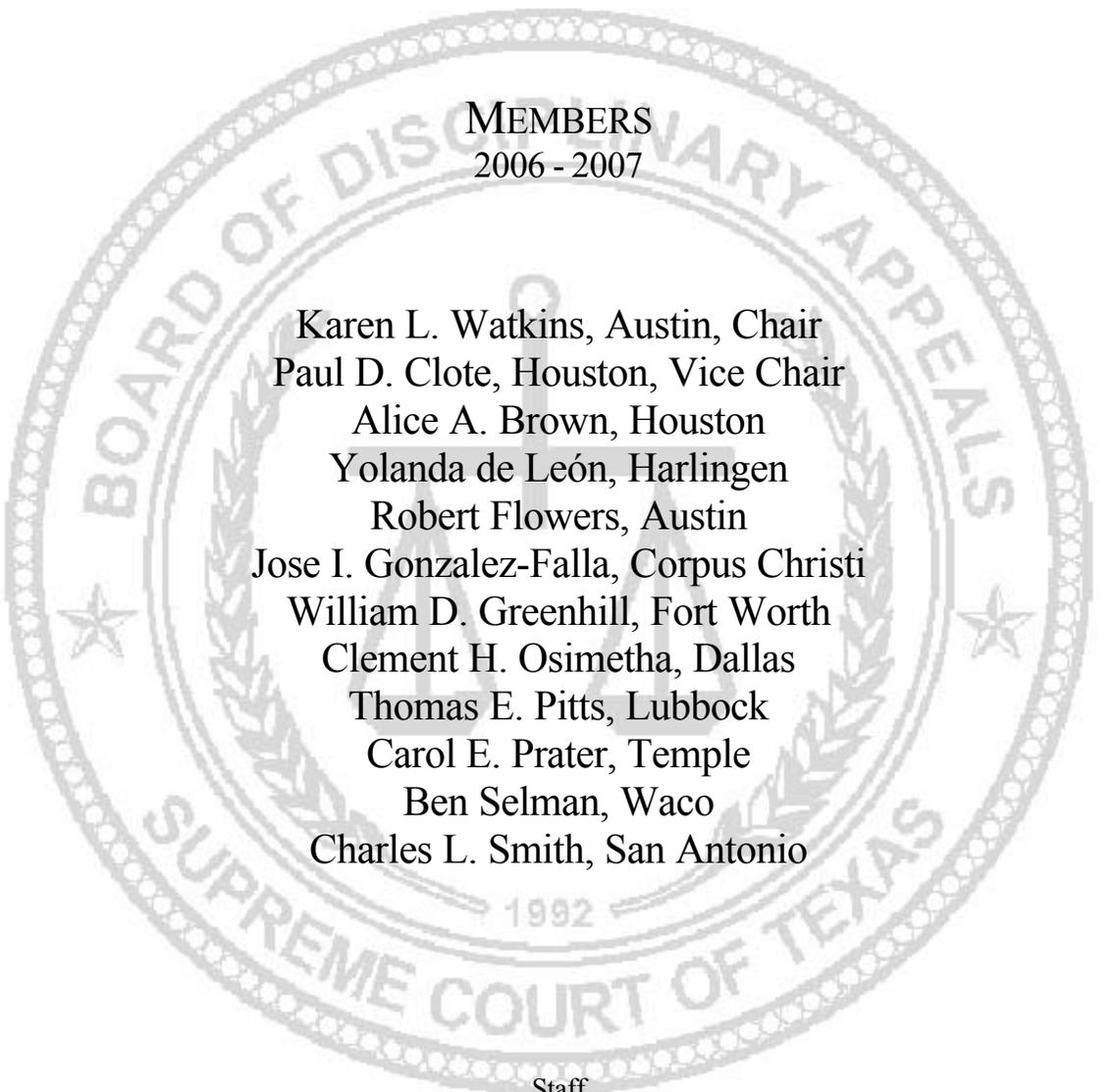
Sincerely,


Karen L. Watkins
Chair, 2006-2007

c: Mr. Gaines West, Chairman, Grievance Oversight Committee
Ms. Betty Blackwell, Chair, Commission for Lawyer Discipline
Mr. Jon Edwards, Executive Director, State Bar of Texas
Mr. John A. Neal, Chief Disciplinary Counsel, State Bar of Texas

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

MEMBERS
2006 - 2007



Karen L. Watkins, Austin, Chair
Paul D. Clote, Houston, Vice Chair
Alice A. Brown, Houston
Yolanda de León, Harlingen
Robert Flowers, Austin
Jose I. Gonzalez-Falla, Corpus Christi
William D. Greenhill, Fort Worth
Clement H. Osimetha, Dallas
Thomas E. Pitts, Lubbock
Carol E. Prater, Temple
Ben Selman, Waco
Charles L. Smith, San Antonio

Staff

Christine E. McKeeman
Executive Director and General Counsel

Gayle Riley Vickers
Deputy Director/Counsel

Jackie L. Truitt
Executive Assistant

Oath

Board of Disciplinary Appeals

“I do solemnly swear (or affirm) that I will faithfully execute my duties as a member of the Board of Disciplinary Appeals, as required by the Texas Rules of Disciplinary Procedure, and will, to the best of my ability, preserve, protect, and defend the Constitution and laws of the United States and of the State of Texas. I further solemnly swear (or affirm) that I will keep secret all such matters and things as shall come to my knowledge as a member of the Board of Disciplinary Appeals arising from or in connection with each Disciplinary Action and Disciplinary Proceeding unless permitted to disclose the same in accordance with the Rules of Disciplinary Procedure or unless ordered to do so in the course of a judicial proceeding or a proceeding before the Board of Disciplinary Appeals. I further solemnly swear (or affirm) that I have neither directly paid, offered, or promised to pay, contributed any money or valuable thing, or promised any public or private office to secure my appointment. So help me God.”

Board of Disciplinary Appeals

Appointed by the Supreme Court of Texas

Members 2006 - 2007

Karen L. Watkins, Chair, Austin

Karen L. Watkins was appointed to the Board in August of 2001 and reappointed in July 2004. She is a graduate of Baylor University (BA 1984) and Baylor Law School (JD 1990), where she was a member of the Baylor Law Review and the Order of Barristers. After serving a year as a briefing attorney at the Third Court of Appeals in Austin, Ms. Watkins joined McGinnis, Lochridge & Kilgore, L.L.P. in 1991, later becoming a partner of the firm and leader of the firm's Appellate Practice Group. Ms. Watkins is board certified in Civil Appellate Law and a past chair of the Austin Bar Association's Civil Appellate Law Section. Ms. Watkins is a life fellow of the Texas Bar Foundation, a founding life fellow of the Austin Bar Foundation, and a member of the Texas Supreme Court Historical Society. Ms. Watkins serves her community as a volunteer for Reading is Fundamental of Austin and as a member of the Professional Women's Council of the Long Center for the Performing Arts. Since her initial appointment to the Board, Ms. Watkins has worked to help found the National Council of Lawyer Disciplinary Boards and served as the president of that organization in 2006-2007.

Paul D. Clote, Vice Chair, Houston

Paul Clote was appointed in September, 2002. He received his J.D. with honors from the University of Texas at Austin in 1977. He graduated from Northwestern University in Evanston, Illinois with a Bachelor of Arts in history in 1974. From 1993 until 1999, Mr. Clote served as a member of the District 4A grievance committee for the State Bar of Texas. He is a Life Fellow of the Houston Bar Foundation and the Texas Bar Foundation. He is a member of the Association of Attorney-Mediators, Inc. and has taught Mediation and Conflict Resolution at Rice University. Mr. Clote is a member of the American Board of Trial Advocates. Since 1989, he has been a solo practitioner in Houston where he is also a mediator, arbitrator and special master in civil litigation matters.

Alice A. Brown, Houston

Alice A. Brown was appointed to the Board in February 2006 to fill an unexpired term and reappointed in the fall of 2006. She received her J.D. from the University of Houston College of Law in 1982, where she was a member of the Order of Barristers and a Justice on the Board of Advocates. She received her Bachelor of Arts from the University of Texas at Austin in 1982. Ms. Brown has experience as a criminal defense attorney and as an Assistant District Attorney in the Harris County District Attorney's Office. She was a Trial Counsel for Union Pacific Railroad Company and previously served as an Adjunct Professor at the University of Houston Law Center teaching Trial Advocacy. Currently, she works as counsel for Exxon Mobil Corporation in the Litigation Section managing and supervising commercial, personal injury and environmental litigation.

Yolanda de León, Harlingen

Yolanda de León was appointed in September, 2002. She graduated from the University of Houston College of Law in May of 1981. She received a Bachelor of Arts from the University of Houston in 1968. She is a member of the Cameron County Bar Association and the Texas District and County Attorneys Association where she serves on the Board of Directors and the Legislative Committee. She is also a member of the National District Attorneys Association. She is past chairperson and current vice chair of the South Texas HIDTA executive board. In addition, she is a member of the board of directors and chair of the Southwest Border HIDTA. Mrs. de León serves her community as a member of the Child Fatality Review Committee for two south Texas counties; as a member of the board of directors of the Child Advocacy Center of Cameron County; as a member of the Leadership Texas class of 1998; on the Harlingen Rotary Club and on the board of directors of the Harlingen Area Chamber of Commerce. In 1998, Mrs. de León was named Hispanic Woman of the Year by The Valley Morning Star. In 2000, she was named the Advocate of the Year by the Child Advocacy Center and in 2001 she received the Starfish Humanitarian Award by the Texas Department of Protective and Regulatory Services. She served as the County and District Attorney for Cameron County from 1997 until 2004.

Robert Flowers, Austin

Bob Flowers was appointed to the Board in 2001 and reappointed in 2004. Mr. Flowers is a graduate of Texas A&M University, where he received a Bachelor of Science. He received an LLB from the University of Texas School of Law. From 1953 until 1962, Mr. Flowers was a solo practitioner in Austin, Texas. From 1962 until 1972, he worked for the Office of the Attorney General for the State of Texas, serving in various capacities, including Chief of the Enforcement Division. From 1973 until 1979, Mr. Flowers was executive director of the Criminal Justice Division of the Office of the Governor. From 1979 until 1983, he was deputy director of the Criminal Justice Division of the Office of the Governor. From 1983 until 1999, he served as the executive director of the State Commission on Judicial Conduct. Mr. Flowers has served as a faculty member for the Texas Center for the Judiciary, College for New Judges, the Justice of the Peace Training Center, the Municipal Judges Training Center, Texas Association of County Governments Training for Constitutional County Court Judges and Commissioners. He is the former chair of the Public Law Section of the State Bar of Texas. He is a former chair of the Board of Directors of the National Association of Judicial Disciplinary Counsel and is a life member of that board.

Jose I. Gonzalez-Falla, Corpus Christi

Jose I. Gonzalez-Falla was appointed to the Board on August 29, 2003. He graduated Phi Beta Kappa from Trinity University in San Antonio with a Bachelor of Arts. He received his Juris Doctor in 1984 from Southern Methodist University. Mr. Gonzalez-Falla has been board certified in criminal law since 1989. From 1994 until 2000 he was a Director of the Texas Criminal Defense Lawyers Association. He is a frequent and popular speaker on federal crimes. He serves as the Supervisory Assistant Federal Public Defender for the Southern District of Texas in Corpus Christi.

William D. Greenhill, Fort Worth

Bill Greenhill began his service on the Board in 2001. He graduated from the University of Texas at Austin in 1969 with B.A. with High Honors in Government and History where he was a member of Phi Beta Kappa. He added a J.D. with Honors from the University of Texas School of Law in 1972 where he was a member of the Order of the Coif. Mr. Greenhill chaired the District 7A Grievance Committee of the State Bar of Texas. He is a member of the Corporate Securities section of the State Bar of Texas, and a member of the Tarrant County Bar Association and the American Bar Association. He serves his community as chairperson of the Fort Worth Zoning Commission and as a member of the board of directors of various other charitable organizations. Mr. Greenhill's practice of law focuses on representation of publicly and privately held companies and in public and private equity and debt financing. He also specializes in tax-exempt bond financings. He is a partner in Haynes and Boone, LLP in Fort Worth.

Clement H. Osimetha, Dallas

Clement Osimetha began his service on the board in September, 2002. He graduated from the University of Texas at Arlington with a Bachelors of Business Administration in Finance. He received a J.D. from Southern Methodist University School of Law in 1995 where he was a member of the Order of Barristers and is currently a member of the law school's Executive Board. He served as the the president of the J.L. Turner Legal Association in 2001. He is a fellow of the Texas Bar Foundation and the Dallas Bar Foundation. He served on the Fifth Circuit Judicial Conference Host Committee in 2002 and the steering committee for the Texas Minority Counsel Program in 2000. He was a member of the Board of Directors of the Dallas Bar Association from 1999 until 2001 and a committee chair for the Dallas Association of Young Lawyers in 1998. Mr. Osimetha was honored with a Distinguished Service Award from the Dallas Association of Young Lawyers in 1998 and the President award from the J.L. Turner Legal Association in 1998 and 1999. He is employed by Mary Kay Inc. as Director, Legal Resources and is the recipient of a Star of Excellence Award from the Company.

Thomas E. Pitts, Lubbock

Tom Pitts was appointed to the Board in August of 2003. He is a graduate of Texas Tech University with a Master of Education Administration (1975) and a Juris Doctor cum laude (1983). While at Tech Law School, he was awarded the William R. Moss Advocacy Award. Mr. Pitts served as a member of the District 16A Grievance Committee for the State Bar of Texas from 1993 until 1999 and as its chairman from 1997 until 1999. He served as a member of the Law Focused Education Committee of the State Bar of Texas for ten years (1987-1997). He was chairman of the Fee Dispute Committee for the Lubbock County Bar Association from 1990 until 1991. He was Secretary of the Lubbock County Bar Association from 1989 until 1990. He also served in several capacities for the Texas State Teachers Association. Mr. Pitts serves his community as Vice President and director of the Southwest Lubbock Rotary Club. He was a chapter advisor to the Phi Kappa Psi Fraternity. In his first career as an educator, Mr. Pitts was a mathematics instructor, business manager and high school principal. Mr. Pitts is a partner in Splawn Simpson Pitts in Lubbock.

Carol E. Prater, Temple

Carol Prater was appointed to the Board in August of 2003. She is a graduate of Baylor University, with a B.A. in 1969 and a Juris Doctor cum laude in 1970. She has been certified in Family Law by the Texas Board of Legal Specialization since 1977. She is a Fellow of the Texas Bar Foundation, past Secretary of the Bell-Lampasas-Mills County Bar Association. Mrs. Prater is a member of the Texas Academy of Family Law Specialists. She is frequent speaker on family law to civic and educational groups. She serves her community as a former member of the administrative board of the First Methodist Church in Temple. She is a partner in the firm of Prater & Ridley, Attorneys at Law in Temple, Texas.

Ben Selman, Waco

Ben Selman began his service on the Board in 1995 and served until August 31, 2001. During his first tenure on the Board, he served as chairman and vice chairman. He was reappointed in September 2006. In the interim, he served as chairman of a District Disability Committee of the Board of Disciplinary Appeals, on the Commission for Lawyer Discipline of the State Bar of Texas from 2003 until 2006, and as the Commission's vice chairman from 2004 until 2006. He received his Doctor of Jurisprudence degree from Baylor University School of Law in 1973. Mr. Selman has served as president of the Waco-McLennan County Bar Association. He also served on the District 8B Grievance Committee of the State Bar of Texas for nine years as member, chairman, and investigatory panel chairman, ending his service in 1995. He is a first responder in fire and rescue with the City of Woodway Public Safety Department, an unpaid police officer in uniformed service and a member of the department's SRT Team, as a countersniper. He is Board Certified by the Texas Board of Legal Specialization in Family Law and is an adjunct professor of law at Baylor University School of Law. He is a member of the Texas Association of Defense Counsel and the Texas Academy of Family Law Specialists. Mr. Selman has practiced law, primarily general litigation and family law litigation, in Waco and Temple for 32 years and is a shareholder in Naman, Howell, Smith & Lee, L.L.P.

Charles L. Smith, San Antonio

Charlie Smith was appointed to the Board on September 1, 2006. He graduated from St. Mary's School of Law magna cum laude in 1955. He served as President of the State Bar of Texas from 1985-1986. He was a director of the State Bar of Texas from 1978 until 1987 and the Chairman of the Board of Directors from 1980-1981. He served as a member of the Texas Commission on Judicial Conduct from 1988 until 1994 and as its chairman from 1990 until 1994. He also served as a member of the Commission for Lawyer Discipline of the State Bar of Texas from 1995 until 1998 and as its chairman from 1997-1998. He served on the local grievance committee between 1968 and 1974 and served as chairman for five years. He is a member of San Antonio Bar Association, serving as its president from 1976-1977. He is a member of the Association of Defense Trial Attorneys and served as its president from 1978-1979. He is of counsel at Jenkins & Gilchrist, P.C. in San Antonio.

Staff

Christine E. McKeeman, Executive Director and General Counsel

Christine McKeeman has worked with the Board of Disciplinary Appeals since 1992. Ms. McKeeman graduated from the University of Texas summa cum laude in 1975 with a Bachelor of Arts in English and is a member of Phi Beta Kappa and Phi Kappa Phi. After graduating from the University of Texas School of Law in 1982, she served as a Briefing Attorney to Chief Justice Joe R. Greenhill and Justice Ted Z. Robertson of the Supreme Court of Texas. Prior to working for the Board, she was in private practice and board certified by the Texas Board of Legal Specialization in residential and commercial real estate. She was appointed by the Supreme Court of Texas to the Task Force on the Texas Disciplinary Rules of Professional Conduct in 2003 and served on the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar of Texas from 2003-2006. She is a director of the National Council of Lawyer Disciplinary Boards, Inc. and a member of the American Bar Association and the ABA Center for Professional Responsibility.

Gayle Vickers, Deputy Director/Counsel

Gayle Vickers joined the Board of Disciplinary Appeals staff in 1995. Her prior legal experience includes serving as an Assistant General Counsel for a trade association and private practice in Round Rock, Texas. She graduated from the University of Texas in 1980 with a Bachelor of Science degree in Speech and received her Juris Doctor from Southern Methodist University in 1989. Mrs. Vickers speaks at continuing legal education seminars on the subject of legal ethics, professionalism, and the disabled lawyer.

Jackie Truitt, Executive Assistant

Jackie Truitt joined the BODA staff in 2000 and assists with all aspects of office management, including case intake and management, docket control, hearings coordination, and requests for information.

BODA Educational Activities 2006-2007

In addition to the work of the Board, BODA members participated in educational activities across the country.

Seminars

William D. Greenhill

22nd Annual School Law Conference, University of Texas School of Law
9th Annual Telecom, Cable and Wireless Conference, University of Texas School
of Law
Garland Bar Association
Gardere Wynne Sewell LLP (in-house CLE)
Haynes and Boone, LLP (in-house CLE)
Texas Center for Legal Ethics and Professionalism Course for New
Lawyers

Karen L. Watkins

Texas Center for Legal Ethics and Professionalism Course for New
Lawyers (2)
National Council of Lawyer Disciplinary Boards, Inc. Annual Conference

National Council of Lawyer Disciplinary Boards

During 2006-2007, Karen L. Watkins, BODA's Chair, also served as President of the National Council of Lawyer Disciplinary Boards, a Texas nonprofit corporation which serves as a national forum for the exchange of information and ideas about the administration, conduct and improvement of formal disciplinary and related proceedings for lawyers admitted to practice law in one or more jurisdictions of the United States. In the coming year, Christine E. McKeeman, BODA's Executive Director and General Counsel, will serve as an elected director of NCLDB. The NCLDB was created in 2003 as a result of the vision of former BODA Chairman Gaines West and currently has 22 member jurisdictions.

The NCLDB holds an annual conference in conjunction with the American Bar Association mid-year meeting, most recently held in Miami in February 2007. Past programs have included sessions discussing training volunteer adjudicators, due process in disciplinary proceedings, probation monitoring, achieving consistency in sanctioning, disaster preparedness, disciplining lawyer speech, and related topics. Ms. McKeeman has served on every program committee to date, and BODA's staff have handled the administrative details of each meeting.

The NCLDB will hold its 5th annual meeting in Los Angeles in February 2008. More information is available about the purpose, structure, and operation of the Council at www.ncldb.org. This website is currently managed, on an interim basis, by BODA's Deputy Director and Counsel, Gayle Vickers.

Overview

This report summarizes the case dockets, dispositions, and educational activities of the Board during Fiscal Year 2006-2007 (June 1 - May 31). During 2006-2007, the Board of Disciplinary Appeals held 74 panel conferences and met en banc seven times. BODA decides over 200 matters monthly, consistently maintaining current dockets for all types of cases. Classification appeals are decided by panels of three members in telephone conference twice weekly to keep pace with the classification filings.

In addition to panel conferences, BODA meets en banc in Austin approximately every other month to hear compulsory and reciprocal cases, revocations of probation, and any other matter requiring a hearing. BODA also hears oral argument in appeals from evidentiary judgments en banc, decides classification appeals referred to the full board, deliberates, and discusses administration matters. Any matter may be heard en banc or be assigned to a panel of three members.

• Actively licensed attorneys [Source: State Bar R&D]	79,958
• Total complaints filed with State Bar [Source: State Bar CDC]	6,954
• Total BODA Dispositions	2,240
• Dismissed grievances appealed to BODA	2,191
• Complaint dismissals reversed on appeal by BODA	205
• Average time to decide classification appeal	13 days
• Other causes filed with BODA	34
• BODA panel conferences	74
• Hearings (en banc)	15
• Appeals from evidentiary judgments decided	24
• Opinions issued	4
• BODA actual funds expended [6 percent under budget]	\$384,765
• BODA/Total State Bar Public Protection Dollars*	less than 5%

Additional detailed information describing the work of the Board is available on www.txboda.org, including:

- Authority for the Board of Disciplinary Appeals
- Board structure and history
- Operations and Frequently Asked Questions
- BODA opinions
- Synopses of recent decisions
- Upcoming hearings docket
- Cumulative case docket 2006-2007
- BODA Internal Procedural Rules
- BODA Report 2006

* Source: State Bar Accounting. Includes Chief Disciplinary Counsel, Grievance Oversight Committee, Unauthorized Practice of Law, Advertising Review, Client Attorney Assistance Program, Texas Lawyers Assistance Program, and Board of Disciplinary Appeals

Case Activity

June 1, 2006 - May 31, 2007

BODA consistently maintains current dockets for all types of matters:

	Classifications		Compulsory		Revocations		Reciprocals		Evidentiary		Disability		Other*	
	F	D	F	D	F	D	F	D	F	D	F	D	F	D
June	205	218	1	5			1		3	4		1		
July	210	195						1	3	4	1			
Aug	187	223		3				2	1	3				
Sep	179	136	1				2			2				
Oct	145	199	3											
Nov	146	116	1	3					3	2		1		1
Dec	193	130							1	1		1		
Jan	145	198	1	1				1	1	2				
Feb	184	189	1						1	1				
March	196	171	1	2				1		3			1	1
April	217	261	1		1				2					
May	184	204	1						2	2				
Total	2,191	2,240	11	14	1	--	3	5	17	24	1	3	1	2

F = Filed D = Decided

Average Disposition Times Largest Dockets

Classification Appeals	Days
Classification appeal decision	13
From date copy of grievance received from State Bar to BODA decision	
To process classification appeal	12
Between date complaint requested and received from CDC	
Total classification appeal process	27
From date appeal filed until disposition	
 Other Matters	 Days
Compulsory discipline	91
From date petition filed to date of judgment	
Appeal from evidentiary judgment**	233
From date notice of appeal filed to date of judgment	

* Includes mandamus and bill of review.

** Appeals from evidentiary judgments require a minimum of 90 days from the date of appeal to file the record and the briefs of the parties.

BODA Opinions 2006-2007

All BODA opinions are available at www.txboda.org.

Shelton v. Commission for Lawyer Discipline (June 9, 2006)

Appeal from evidentiary judgment

Evidentiary default judgment of disbarment reversed as void and the cause remanded for a hearing on the merits because affidavit in support of motion for substituted service of the evidentiary petition did not strictly comply with Texas Rule of Civil Procedure 106(b). Consequently, service of process on the respondent attorney was invalid, and the evidentiary panel lacked jurisdiction over the respondent to render the default judgment.

Sims v. Commission for Lawyer Discipline (August 18, 2006)

Appeal from evidentiary judgment

Evidentiary default judgment of disbarment reversed as void and the cause remanded for a hearing on the merits because the hearing charge was served on the respondent attorney by certified mail, and the proof of return of service (the return receipt) did not bear the attorney's signature as required by Texas Rule of Civil Procedure 107. Consequently, service of process on the respondent attorney was invalid, and the evidentiary panel lacked jurisdiction over the respondent to render the default judgment.

In re Mercier (November 3, 2006)

Compulsory discipline

Texas Rules of Disciplinary Procedure 8.05 and 8.06 give BODA discretion either to suspend or disbar an attorney convicted of an Intentional Crime whose criminal sentence is fully probated (straight probation or deferred adjudication). Respondent was convicted of barratry under the Texas Penal Code, an Intentional Crime under the Texas Rules of Disciplinary Procedure. BODA determined, based in part on Respondent's prior disciplinary record including a conviction for theft and in part on the fact that the crime was related to Respondent's practice of law, that disbarment was the appropriate sanction. Respondent's appeal of the BODA decision to the Supreme Court of Texas is still pending as of the date of this report.

Cafiero v. Commission for Lawyer Discipline (May 10, 2007)

Appeal from evidentiary judgment

Evidentiary judgment of partially-probated suspension reversed as void and the cause remanded for a new hearing because the hearing panel lost the statutory quorum of one public member present for every two attorney members present during the misconduct phase of the hearing, thereby losing authority to render judgment. BODA also noted that the ancillary sanction of restitution permitted under the Texas Rules of Disciplinary Procedure does not include the equitable remedy of fee forfeiture articulated in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). BODA remanded the cause to a statewide grievance committee, and the hearing on remand remains pending.

Compulsory Discipline Summary 2006-2007

Petitions for compulsory discipline were filed against 10 attorneys during 2006-2007, including convictions for:

- **Misdemeanor theft** (Roxane E. Martinez, #13144210, BODA No. 33736); attorney suspended for term of criminal probation
- **Aggravated assault** (Kenneth Alan Thomas, #19857100, BODA No. 37431); attorney placed on interlocutory suspension pending outcome of appeal of criminal conviction. Attorney will be disbarred if conviction affirmed.
- **Felony theft** (Ronald B. Manning, #12940990, BODA No. 37444); attorney placed on interlocutory suspension pending outcome of appeal of criminal conviction. Attorney will be disbarred if conviction affirmed.
- **Attempt to commit premeditated murder and conspiracy to commit premeditated murder** (Barry W. Brown, #24045566, BODA No. 37539), attorney placed on interlocutory suspension pending outcome of appeal of criminal conviction. Attorney will be disbarred if conviction affirmed.
- **Conspiracy to commit barratry** (Eugene X. Mercier, #19857100, BODA No. 38020); attorney placed on interlocutory suspension pending outcome of appeal of criminal conviction. Attorney will be disbarred if conviction affirmed. BODA opinion at www.txboda.org. BODA judgment on appeal to Supreme Court of Texas.
- **Organized criminal activity (gambling promotion)** (Hayward M. Rigano, #16915960, BODA No. 38583); Commission for Lawyer Discipline nonsuited before hearing.
- **False statement on income tax return** (Gene Burd, #03362900, BODA No. 38739); attorney resigned in lieu of discipline before hearing.
- **Conspiracy to commit mail and bank fraud** (W. Allan Craig III, #04986600, BODA No. 38740); attorney disbarred.
- **Mail fraud** (Roland Caballero, #03569280, BODA No. 38821); attorney disbarred. BODA judgment on appeal to Supreme Court of Texas.
- **Burglary of a habitation** (Jon D. Curry, #05272300, BODA No. 39267); attorney suspended for term of criminal probation.

Evidentiary Appeals Summary 2006-2007

Cause No.

Affirmed

Tiffany L. Lewis v. CLD	35370	Disbarment
Harold V. Dutton v. CLD	36727	Probated suspension
James S. Hershberger v. CLD	36933	Public reprimand
Timothy W. Sorenson v. CLD	37595	Partially probated suspension
Arthur L. Jackson v. CLD	38259	Disbarment

Reversed

Bonnie Sims v. CLD	34229	Disbarment	Return defective
Catherine M. Shelton v. CLD	36059	Disbarment	Service defective
Everett J. McClain v. CLD	36831	Active suspension	Agreed reversal and remand
Christopher John Cafiero v. CLD	37811	Partially-probated suspension	No statutory quorum
Laura Holliday v. CLD	37882	Partially-probated suspension	No evidence of unconscionable or illegal fee

Dismissed by Agreement

Leo Bierwirth v. CLD	35277
Leo Bierwirth v. CLD	35316

Dismissed for Lack of Jurisdiction

Ronald Evans Harden v. CLD	37602	Notice of appeal untimely filed
William J. Fay v. CLD	38144	Attempted appeal by complainant

Dismissed for Want of Prosecution

Amy D. Smith v. CLD	36336	Disbarment
Elizabeth A. Darnell v. CLD	36377	Partially probated suspension
Garry L. Washington	36378	Disbarment
Gordon M. White v. CLD	37921	Disbarment
Phillip E. Layer v. CLD	38096	Fully probated suspension
Robert A. Forester v. CLD	38340	Disbarment
Cornelius Austin Long v. CLD	39158	Partially probated suspension

Dismissed as Moot

Armando Trevino v. CLD	38066	Judgment set aside by grievance committee
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Withdrawn

Gaylyn Leon Cooper v. CLD	38939
Derek Kent Harmon v. CLD	39133

More information is available at www.txboda.org

Classification Appeals Summary 2006-2007

Total grievances dismissed at screening by State Bar	4,445
Dismissed grievances appealed to BODA	2,191
Percent of dismissed grievances appealed	49%
Grievance dismissals reversed by BODA	205
Reversal rate	9%
Average decision time	13 days

Classification Appeals by State Bar Office

SBOT Regional Office	Writings Filed	Writings Classified	Writings Dismissed	Appeals Filed	Appeals Decided	Dismissals Reversed	Reversal Rate
Austin	670	148	486	236	237	22	9%
Dallas	2,631	669	1,885	970	978	102	10%
Houston	2,012	958	999	477	507	29	6%
San Antonio	1,641	472	1,075	508	518	52	9%
Total	6,954	2,247	4,445	2,191	2,240	205	9%

Subsequent results in grievance dismissals*

Dismissed grievances reversed between 1/1/2005 - 5/31/2007

Total grievance dismissals reversed	497
Summary Disposition panel dismissals	360
Commission for Lawyer Discipline decisions not to prosecute	19
Disciplinary judgments**	12
Pending (at time of report)	68
Dismissed due to resignation	2
Abated (due to disability suspension)	1

* Source: Office of the Chief Disciplinary Counsel

** Some complaints added to existing disciplinary action against same attorney

BODA Jurisdiction

Original Jurisdiction

Compulsory Discipline

The Texas Rules of Disciplinary Procedure direct the Chief Disciplinary Counsel of the State Bar to file compulsory discipline charges with BODA on behalf of the Commission for Lawyer Discipline when an attorney has been convicted of, or placed on deferred adjudication for, an Intentional Crime. “Intentional Crime” includes any “Serious Crime” requiring proof of knowledge or intent as an essential element and any crime involving misapplication of money or other property held as a fiduciary. “Serious Crime” includes barratry, any felony involving moral turpitude (*per se*)¹, any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property, or any attempt, conspiracy, or solicitation of another to commit any of the foregoing. No statute of limitations exists for compulsory actions. Since promulgation of the TRDP in 1992, BODA has exclusive original jurisdiction to hear compulsory cases.

“Intentional Crimes” do not include felonies requiring only a reckless *mens rea*, crimes of moral turpitude that do not involve dishonesty, fraud, deceit, misrepresentation, or deliberate violence, or that do not reflect adversely on an attorney’s honesty, trustworthiness, or fitness as an attorney.² “A lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.”³

BODA hears compulsory cases en banc, sitting as a trial court. Cases are routinely set for the next available en banc date at least 30 days after the date the petition is served on the respondent attorney. BODA’s average time to hear and decide a compulsory case from the filing of the petition until judgment is 91 days from the filing of the petition. BODA may continue a compulsory hearing for good cause. The appeal of the criminal conviction does not constitute good cause, because the Rules of Disciplinary Procedure expressly provide for suspension during the appeal.

Compulsory cases, although based on a criminal conviction, are civil proceedings. Respondents are not entitled to be present at the hearing as a matter of right or to have attorneys appointed to represent them. Respondents also have no right to juries in compulsory disciplinary proceedings. The CDC must prove by the greater weight of the credible evidence the conviction, the nature of the offense, the punishment received, and the identity of the respondent. The conviction, which

¹ *In re Humphreys*, 880 S.W.2d 402, 409 n. 7 (Tex. 1994).

² *In re Lock*, 54 S.W.3d 305, 308 (Tex. 2001).

³ *Id.*

conclusively establishes the attorney's guilt, may be proved by a certified copy of the judgment of conviction or order of deferred adjudication.

If the criminal conviction for an offense determined to be an Intentional Crime is not fully probated, the Board must disbar the attorney. In any case in which the attorney convicted received a fully probated sentence (either "straight" probation or deferred adjudication), the Board has the discretion either to suspend the attorney for the concurrent term of the criminal probation or to disbar. A respondent eligible for suspension may offer evidence in mitigation to support a plea for suspension during the term of the criminal probation.

If a suspended attorney's criminal probation is revoked before completion of the term, disbarment is mandatory, and the CDC will so petition BODA. Early termination of probation does not automatically result in a termination of the suspension. If a respondent's criminal conviction is on appeal when the compulsory decision is made, the Board may nevertheless suspend the attorney pending disposition of the appeal. By issuing an interlocutory order of suspension, the Board retains jurisdiction to enter a final order when the appeal concludes. The interlocutory order typically also states what the final judgment will be – either suspension or disbarment – in the event that the conviction is affirmed. If, at the conclusion of the appeal the conviction is affirmed, the CDC must file a motion for entry of final judgment to conclude the compulsory case. If the attorney does not dispute the finality of the conviction when the motion for final judgment is filed, the Board may enter that judgment without a hearing.

If the conviction is overturned on appeal, the Board will terminate the suspension when the attorney files a motion including a certified copy of the court's mandate. The Board cannot, however, reinstate an attorney's license, which is held by the Clerk of the Supreme Court. The attorney must first comply with all other licensing requirements and satisfy the State Bar membership department that all dues, occupational taxes, and continuing legal education requirements are current before receiving his license and bar card.

Compulsory proceedings are not exclusive. The State Bar may also pursue a grievance proceeding against the attorney under Part II of the TRDP based on the underlying conduct which resulted in the conviction if it constitutes professional misconduct under the Texas Disciplinary Rules of Professional Conduct. The attorney may be disciplined in both proceedings, unless disbarment in one renders the other moot. If the conviction does not involve an Intentional Crime, the State Bar can pursue discipline, if any, only through the standard grievance process unless the four-year statute of limitations on the underlying conduct has not expired.

Compulsory decisions are appealable directly to the Supreme Court. The party desiring to appeal must file the notice of appeal with the Clerk of the Supreme Court within 14 days of receiving the BODA judgment. BODA prepares and files the clerk's record with the Supreme Court. The Supreme Court may decide appeals from BODA compulsory decisions with or without opinion.

To date, compulsory appeals are the only disciplinary appeals from BODA on which the Court has issued opinions.

Reciprocal Discipline

BODA has exclusive original jurisdiction pursuant to Part IX of the Texas Rules of Disciplinary Procedure to hear petitions for reciprocal discipline filed by the State Bar Chief Disciplinary Counsel's office on behalf of the Commission for Lawyer Discipline. Attorneys licensed in Texas and another jurisdiction are subject to reciprocal discipline in Texas following a disciplinary sanction in the second jurisdiction.

After the Commission for Lawyer Discipline initiates the case by filing a petition through the State Bar Chief Disciplinary Counsel including a certified copy of the order or judgment of discipline from the other licensing jurisdiction, BODA issues an Order to Show Cause requiring the respondent attorney to answer within 30 days and show why the imposition of identical discipline in Texas is not warranted. If the attorney fails to answer, BODA may enter judgment imposing discipline identical, to the extent possible, to that imposed in the second jurisdiction. Reciprocal cases are set for hearing en banc at the first available hearing following the answer date. Continuances may be granted for good cause.

A final judgment that an attorney has committed misconduct in another jurisdiction is conclusive for purposes of reciprocal discipline. To defend a reciprocal action, respondents must prove one of the available defenses under the Rules of Disciplinary Procedure by clear and convincing evidence:

- the procedure followed in the other jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
- there was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that BODA should not accept as final the conclusion on the evidence reached in the other jurisdiction;
- the imposition of identical discipline in Texas would result in grave injustice;
- the misconduct warrants substantially different discipline in this state; or,
- the misconduct in the other jurisdiction does not constitute professional misconduct in Texas.

If the respondent prevails, BODA may enter such order as it deems necessary and appropriate. BODA may impose a sanction as a result of reciprocal discipline regardless of whether the respondent has competed the discipline (suspension, probated or partially-probated suspension) in the other jurisdiction. BODA reciprocal decisions may be appealed directly to the Supreme Court of Texas within 14 days of the date that the respondent receives notice of the judgment.

Revocations of Probation

BODA has exclusive original jurisdiction pursuant to Rule of Disciplinary Procedure 2.23 to hear petitions to revoke probated suspensions imposed by State Bar grievance committees. BODA retains jurisdiction to revoke for the full term of the probated suspension.⁴ The Commission for Lawyer Discipline of the State Bar initiates a probation revocation by filing a motion with BODA alleging that the respondent attorney has materially violated the terms and/or conditions of his or her probation.

BODA hears motions to revoke probation en banc at the first available hearing date following service on the respondent. The matter must be heard within 30 days of the date that the respondent is served; however, continuances may be granted for good cause. BODA conducts an evidentiary hearing to determine whether the Commission has proved by a preponderance of the evidence that the attorney has committed a material violation of the terms or conditions of probation.

If BODA finds that the respondent has materially violated the terms or conditions of probation, BODA must actively suspend the attorney for the full term of the probation as originally assessed, without credit for any portion of the probationary period already served. BODA cannot extend the probation, impose additional terms and conditions, or otherwise amend or modify the original judgment. BODA decisions in revocation matters are directly appealable to the Supreme Court of Texas within 14 days of the date that the respondent attorney receives notice of the judgment.

Disability Cases and Reinstatements

BODA has exclusive original jurisdiction pursuant to Part XII of the TRDP to suspend indefinitely an attorney who is suffering from a disability. A disability is any physical, mental, or emotional condition, with or without a substantive rule violation, which results in the attorney's inability to practice law or otherwise carry out his or her professional responsibilities to clients, the courts, the profession, or the public.

A disability referral may arise either during the initial investigation of a complaint or during the evidentiary hearing stage. A disability referral suspends the disciplinary process until BODA issues a final judgment concerning the disability. If, during its investigation of a complaint, the CDC reasonably believes that the respondent suffers from a disability, it must seek authority from the Commission for Lawyer Discipline to refer the respondent to BODA for a District Disability Committee hearing. The CDC forwards the complaint and any other relevant documentation to BODA. An evidentiary panel may also find that a respondent is suffering from a disability and

⁴ *In re State Bar of Texas*, 113 S.W.3d 730, 733-734 (Tex. 2003); TRDP 2.20.

forward that finding to BODA. The party asserting that the attorney suffers from a disability bears the burden of proof by a preponderance of the evidence. Expert testimony is typically received.

At any point in the disability process a respondent attorney who is competent to do so may waive the District Disability Committee hearing and agree to an indefinite suspension. The respondent must be capable of swearing that he understands the consequences of his actions, is competent to waive the hearing, and is competent to agree to the suspension.

When BODA receives a disability referral from either the Chief Disciplinary Counsel or an evidentiary panel, the chair appoints a District Disability Committee to proceed *de novo* to determine whether the disability exists at the present time. Members of these committees include an attorney, a medical doctor or mental health care professional holding a doctoral degree, trained in the appropriate area, and one public member with no direct or indirect interest in the practice of law. The BODA deputy director serves as the clerk for the District Disability Committee proceedings, managing all filing deadlines, setting hearings, and handling all motions and requests for appointment of counsel. Within 20 days of the appointment of the District Disability Committee, the CDC must file a proposed hearing order and serve it on the respondent. The respondent has 20 days from receipt of the CDC's order to file his own proposed order with BODA. The respondent attorney may request that BODA appoint an attorney to represent him during the disability proceeding.

The District Disability Committee conducts a closed hearing on the record to take evidence on the disability issue. The CDC may request an order directing the respondent attorney to undergo a physical and/or psychiatric exam, or the committee may so order the respondent on its own. The respondent may offer evidence from his own expert. The District Disability Committee certifies to BODA its finding whether or not the respondent is presently suffering from a disability. If the attorney demonstrates that there is no likelihood of harm in his or her continued practice of law, the committee may recommend a probated disability suspension conditioned on the attorney's complying with certain terms and requirements. The committee may develop a monitoring plan for the attorney as a condition of the probation and require periodic reports to the State Bar Chief Disciplinary Counsel's office, who supervises the probation. During a probation, the CDC may request modification of the conditions or move to revoke the probation.

Following receipt of the disability committee's finding regarding disability and recommendations, if any, BODA enters a judgment either suspending the attorney indefinitely, placing the attorney on a probated suspension, or – in the event of a finding of no disability – returning the case to continue in the disciplinary process from the point at which it was referred.

BODA has concurrent jurisdiction with state district courts to hear petitions for reinstatement after an indefinite disability suspension. A respondent may petition for reinstatement at any time after the imposition of an indefinite disability suspension. The attorney must prove by a preponderance

of the evidence that the reasons for the suspension no longer exist and that terminating the suspension will not endanger the public or the profession. BODA holds an evidentiary hearing en banc to determine whether the respondent has met the requirements for terminating the suspension and may require the respondent to undergo an exam by an appropriate health care provider.

The record of all proceedings on disability must be sealed and remain confidential, except as to the respondent. Only an order of indefinite suspension may be made public. BODA disability judgments and reinstatement judgments may be appealed directly to the Supreme Court of Texas within 14 days of the date that the respondent receives notice of the judgment.

Appellate Jurisdiction

Grievance Screening and Classification Appeals

The office of the State Bar of Texas Chief Disciplinary Counsel screens every writing it receives that alleges professional misconduct to determine whether the writing describes conduct which, if true, would violate the Texas Disciplinary Rules of Professional Conduct. The CDC dismisses writings which it finds do not allege misconduct. If the CDC dismisses a writing, the complainant can appeal that decision to BODA.

The CDC informs the complainant that an appeal to BODA is available when it sends notice that the grievance has been dismissed and includes the BODA appeal form with the disposition notice. The complainant may sign the form and must mail, fax, or deliver it to BODA within 30 days of receiving the dismissal. BODA enters notices of appeal and transmits the information to the CDC regional offices daily. Each regional office then forwards a copy of the original grievance to BODA. Because BODA evaluates only the initial screening decision on appeal, it reviews only the grievance and supporting documentation, if any, as originally filed. BODA cannot consider material submitted after the grievance was screened or independently investigate the allegations of misconduct.

BODA decides more than 200 classification appeals monthly by randomly assigning cases to three-member panels who discuss and decide the cases by telephone conference twice weekly with either the Executive Director or the Deputy Director. BODA notifies parties to any dismissed writing of its decision on the appeal by letter on the day following the meeting. BODA generally disposes of appeals within two weeks from receipt of the grievance file from the State Bar, except for those appeals referred to the full Board for consideration, and its decisions are final.

If BODA affirms a decision to dismiss a grievance, the complainant may refile the grievance with the CDC one time. If BODA grants the appeal and reverses the decision to dismiss a grievance, the matter returns to the CDC for additional investigation. The CDC typically asks the attorney to provide a written response to the complaint. If the additional investigation refutes the allegations of

misconduct, the matter is set for Summary Disposition before a panel of the appropriate district grievance committee. If the Office of the CDC finds just cause to believe that misconduct has occurred after additional investigation, it may attempt to negotiate a sanction with the attorney or proceed to an evidentiary hearing or a trial in district court, if the attorney affirmatively so elects.

Appeals from Evidentiary Judgments

BODA has appellate jurisdiction to review final judgments issued by evidentiary panels of State Bar of Texas district grievance committees. A respondent attorney against whom discipline has been imposed may appeal the finding(s) of professional misconduct, the sanction(s) imposed, or both. The Commission for Lawyer Discipline of the State Bar of Texas, represented by the Chief Disciplinary Counsel at the evidentiary hearing, may likewise appeal the finding(s), sanction(s), or decision to dismiss.

Appeals to BODA from evidentiary judgments proceed similarly to civil appeals with a notice of appeal, record, briefs, and oral argument. Section 4 of BODA's Internal Procedural Rules governs evidentiary appeals and generally follows the TEXAS RULES OF APPELLATE PROCEDURE. In addition, the Rules of Appellate Procedure apply to the extent relevant unless expressly changed by the Internal Rules. BODA's average time to decide an evidentiary appeal is 233 from the date the notice of appeal is filed.

An appellant must file its notice of appeal with BODA within 30 days after the date of judgment, except where a motion for new trial has been filed. The filing of such a motion extends the time for filing the notice of appeal to 90 days after the date of the judgment. The appellant must request, pay for, and file the reporter's record from the evidentiary hearing with BODA within 30 days of the date on which the notice of appeal is filed. The CDC, which acts as the clerk, must file the clerk's record within 30 days of the notice of appeal. The appellant's brief is due 30 days after the filing of the record, and the appellee's brief is due 30 days thereafter. Parties may request filing extensions for good cause or by agreement with the other side. BODA may strike a brief that does not conform to the requirements set out in the Internal Rules or require a party to rebrief.

If a party fails to timely file the record or brief, BODA issues a show cause order describing the omission and requiring the party to show within 30 days why the appeal should not be dismissed. Failure to respond can result in the appeal being dismissed without further notice or hearing. If one of the parties requests oral argument, the clerk sets the matter for the next available hearing date following filing of the appellee's brief and a period to brief the case. BODA has the discretion to deny oral argument but has never done so. BODA may also require argument on its own motion. Each side is allowed 20 minutes to argue. BODA routinely considers evidentiary appeals en banc although an evidentiary appeal (like any BODA matter) may be decided by a panel of three members. BODA reviews issues on appeal involving the sufficiency of evidence under the substantial

evidence standard which requires BODA to determine whether there is some reasonable basis in the record for the action taken below. BODA reviews questions of law *de novo*.

BODA may dismiss the appeal, affirm the decision in whole or in part, modify and affirm as modified, reverse in whole or in part and enter a finding it determines that the panel should have entered, or reverse and remand the cause for further proceedings. BODA may remand for a rehearing before a statewide grievance committee composed of six members, four attorneys and two non-attorneys, randomly selected from districts other than the one from which the appeal arose. BODA may decide evidentiary appeals with or without opinion. BODA decisions may be appealed directly to the Supreme Court. The appellant must file the notice of appeal directly with the clerk of the court within 14 days of receiving the BODA decision.