REVERSED AND REMANDED, Opinion Signed August 18, 2006.

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

No. 34229

BONNIE F. SIMS (State Bar Card No. 18415700)

v.

COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS

On Appeal from the Evidentiary Panel
of the District 06A Grievance Committee
of the State Bar of Texas
SBOT Cause No. D0070321415

OPINION AND ORDER

Considered En Banc June 8, 2006

COUNSEL:

Appellant Bonnie F. Sims, *pro se*

For Appellee, Commission for Lawyer Discipline of the State Bar of Texas, Maureen E. Ray, Special Assistant Disciplinary Counsel, Austin

OPINION:

The only issue in this appeal is whether a default disciplinary judgment can withstand a direct attack for lack of proper service when service of the hearing charge and order was by certified mail, and the return receipt does not bear the respondent attorney's signature. We hold that, absent the respondent's signature on the return receipt, the evidentiary panel of the State Bar of Texas district grievance committee failed to acquire jurisdiction over the attorney. The default judgment of disbarment is therefore void. Accordingly, we reverse the default judgment against Sims and remand the case for a hearing on the merits of the underlying allegations.

Appellant Bonnie F. Sims appeals from a State Bar of Texas disciplinary judgment signed October 6, 2004 disbarring her from the practice of law.[1] The State Bar of Texas Chief Disciplinary Counsel's office, representing the Commission for Lawyer Discipline[2], attempted to serve Sims with the proposed hearing order and charge[3] by certified mail, return receipt requested. TRDP 2.16A. Delivery was not restricted to Sims, and Sims did not sign the return receipt.

Sims did not answer or appear at the evidentiary hearing. Her failure to timely answer the charges resulted in all the facts alleged in the complaint being taken as true.[4] TRDP 2.16B. The

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[1] This disciplinary proceeding arose under the Texas Rules of Disciplinary Procedure in effect before January 1, 2004. *See*, TEX. R. OF DISCIPLINARY PROC. ("TRDP") 2.17 et seq., *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (prior TRDP 2.16).

[2] The Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas charged with all the rights characteristically reposed in a client for disciplinary and disability proceedings. TRDP 4.01 & 4.06A.

[3] In an evidentiary proceeding arising before January 1, 2004, the proposed hearing order and charge are the jurisdictional equivalents of an original petition in a civil case.

[4] All facts alleged in the charging instrument are taken as true unless, within seven days after receiving the notice of default, the respondent files a verified motion asserting good

evidentiary panel of the State Bar District 06A grievance committee rendered a default judgment against Sims, finding that she had violated six of the Texas Disciplinary Rules of Professional Conduct ("Professional Conduct Rules")[5] in that she: neglected a legal matter entrusted to her (1.01(b)(1)); failed to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information (1.03(a)); failed to notify the client promptly upon receiving property in which the client had an interest (1.14(b)); failed to return a file when requested (1.15(d)); engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (8.04(a)(3)); and failed to timely respond to a grievance (8.04(a)(8)).

As a preliminary matter, the Commission also moves to strike the affidavit attached as an exhibit to Sims' brief because the affidavit is not properly part of the record. We agree that the Respondent's affidavit cannot be considered and grant the motion to strike it, although the exhibit is not necessary to determine the legal question before us.

Underlying Grievance

Beginning in 1997, Sims represented the complainant, Lydia de la Garza, in a divorce. Sims continued to represent de la Garza in connection with the ongoing performance of a property settlement. During this period de la Garza owed Sims for the legal services Sims had performed. A dispute apparently arose over the amount remaining due, and de la Garza fired Sims in April 2000. However, Sims thereafter represented de la Garza at a hearing on a motion to compel concerning the property settlement enforcement in January 2002. De la Garza requested a copy of her complete file

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cause for failure to timely respond or the evidentiary panel otherwise finds good cause exists for the failure to timely respond. TRDP 2.16B.

[5] TEX. DISCIPLINARY R. OF PROF'L CONDUCT ("Professional Conduct Rules"), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A.

from Sims in April 2003, as well as an accounting of all money Sims had received and disbursed. De la Garza was not satisfied that Sims had sent her all of the requested information, so she hired another attorney in May 2003 to make demand on Sims for the remaining items.

De la Garza filed her original grievance against Sims in July 2003. Sims did not respond to the grievance but appeared at the investigatory hearing in October 2003. The parties were unable to agree on a resolution of the complaint. By certified mail, the Chief Disciplinary Counsel ("CDC") sent Sims a notice in January 2004 of her right to elect to have the matter heard in district court. TRDP 2.13, 2.14. Sims did not sign the return receipt. Sims did not respond, and the CDC set the matter for hearing before an evidentiary panel of the grievance committee. TRDP 2.16.

The CDC attempted to serve Sims by certified mail three times before the evidentiary hearing: with the evidentiary charge and proposed hearing order on July 8, 2004; with a notice of default on August 12, 2004; and with an order containing the hearing notice on September 8, 2004. None of the deliveries were restricted to Sims, and she did not sign any of the return receipts.

Sims did not attend the evidentiary hearing on October 6, 2004. Although the assistant disciplinary counsel asked the panel to actively suspend Sims for three years, the panel elected, instead, to disbar Sims. After unsuccessful attempts to serve Sims personally with the judgment, the disciplinary counsel obtained an order for substituted service from the evidentiary panel. Sims was served with the judgment when a copy of it was left with someone at her place of business on December 2, 2004. She timely filed this appeal to the Board of Disciplinary Appeals.

The TRDP provide that the charge and proposed hearing order for an evidentiary hearing "shall be served by U.S. certified mail, return receipt requested, upon the Respondent or upon his or her attorney . . . or by any other means of service permitted by the Texas Rules of Civil Procedure

. . . ," but are silent as to return of service. Because the question whether the record demonstrates that the evidentiary panel acquired jurisdiction over the respondent is a legal issue, the standard of review is *de novo*. ***Coronado v. Norman***, 111 S.W.3d 838, 841 (Tex. App.—Eastland 2003, pet. denied).

Sims argues that the default judgment of disbarment is void for lack of personal jurisdiction because the return of service for the evidentiary charge and proposed hearing order, a return receipt in this case, does not contain her signature. She urges that, absent proper service evident from the face of the record, a default judgment must be reversed.

The Commission argues that service was proper because the TRDP do not expressly require that a return receipt evidencing service of the charge and proposed hearing order contain the respondent attorney's signature. They also argue that the judgment should stand because Sims had actual notice of the proceedings and because she waived her right to complain about lack of service on appeal by not raising the issue before the evidentiary panel. We dispose of the last two arguments first.

Service and Return of Service

The TRDP applicable to this case provide that, in proceedings before an evidentiary panel, service of a

> written statement of the specific charge or charges against the Respondent . . . shall be served by U.S. certified mail, return receipt requested, *upon the Respondent* or upon his or her attorney, if an attorney has entered an appearance before the Committee on behalf of the Respondent, or by any other means of service permitted by the Texas Rules of Civil Procedure. At the time of service *upon the Respondent*, the Chief Disciplinary Counsel shall also file with the Committee and serve *upon the Respondent* a proposed hearing order . . . .

TRDP 2.16A (emphasis added). Rule 2.16B(I) requires that a notice of default be sent to any Respondent who fails to respond to the charge and refers to "receipt of notice of such default" by the

Respondent. Rule 2.16C requires that the final hearing order be sent to the Respondent and refers to "actual receipt" of that order by the Respondent.

A statute or rule is to be construed according to its plain language.[6] ***Argonaut Ins. Co. v. Baker***, 87 S.W.3d 526, 529 (Tex. 2002); ***Lewis v. Jacksonville Building & Loan Ass'n***, 540 S.W.2d 307, 310 (Tex. 1976). In addition, rules and statutes should be interpreted, if possible, in a manner avoiding constitutional infirmity. ***Quick v. City of Austin***, 7 S.W.3d 109, 115 (Tex. 1999). The plain wording of these rules appears to require personal service on the respondent absent an express authorization or approval for alternate service. This result is consistent with methods authorized by the Texas Rules of Civil Procedure generally, which require proof of diligent attempts at service by personal service or actual delivery to the defendant before resorting to constructive service. ***Sgitcovich v. Sgitcovich***, 150 Tex. 398, 241 S.W.2d 142, 146 (1951) ("The right to resort to constructive service of process is based on the ground of necessity, and it is limited and restricted to cases where personal service cannot be had . . . by the exercise of reasonable diligence . . . .").

Purpose of Service

"Service of process" (or citation in civil matters) is the formal process by which a party is informed that it has been sued, providing the defendant with notice of the charges, an answer date, and, most importantly for purposes of this case, a command to answer or appear before the tribunal. ***Texas Nat'l Resource Conservation Comm'n v. Sierra Club***, 70 S.W.3d 809, 813 (Tex. 2002); Tex. R. Civ. Pro. 99. In the absence of proper service, the tribunal does not acquire personal jurisdiction

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[6] The disciplinary rules have the force and effect of statutes. ***O'Quinn v. State Bar of Texas***, 763 S.W.2d 397, 399 (Tex. 1988).

over the defendant.[7] ***Wilson v. Dunn***, 800 S.W.2d 833, 836-837 (Tex. 1990). Regardless of the method used to accomplish service, due process requires that it be reasonably calculated under the circumstances to afford the party a fair opportunity to appear and defend his interests. ***Cunningham v. Parkdale Bank***, 660 S.W.2d 810, 813 (Tex. 1983) *citing* ***Sgitcovich v. Sgitcovich***, 150 Tex. at 404, 241 S.W.2d at 146. "[F]undamental fairness dictates that a party must be given a reasonable opportunity to be heard on the merits of his case; such an opportunity must be granted at a meaningful time and in a meaningful manner." ***Id.***

Strict Compliance Required for Service to Support a Default Judgment

When a defendant directly attacks a default judgment, the reviewing court employs no presumptions of valid issuance, service, or return of service. ***Primate Construction, Inc. v. Silver***, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam); ***McKanna v. Edgar***, 388 S.W.2d 927, 929 (Tex. 1965). For a default judgment to withstand challenge, strict compliance with the applicable rules for service of the petition must appear on the face of the record. ***Primate Construction, Inc. v. Silver***, 884 S.W.2d at 152; ***Wilson v. Dunn***, 800 S.W.2d at 836. "Strict" means literal compliance. ***Union Pacific Corp. v. Legg***, 49 S.W.3d 72, 77 (Tex. App.—Austin 2001, no pet.). This "hyper-technical rule" is grounded in public policy, which favors an "increased opportunity for trial on the merits." ***Verlander Enterprises, Inc. v. Graham***, 932 S.W.2d 259, 262 (Tex. App.—El Paso 1996, no writ).

Proper service is not determined from an examination of the contents of the record "as a whole." ***Id.*** at 261. "It is the responsibility of one requesting service, not the process server, to see that service is properly accomplished. This responsibility extends to seeing that service is properly

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[7] Of course, the defendant may moot the issue of service by waiving it or by voluntarily appearing.

reflected in the record." ***Primate Construction, Inc. v. Silver*** 884 S.W.2d at 153; ***Benefit Planners, L.L.P. v. Rencare, Ltd.***, 81 S.W.3d 855, 860 (Tex. App.—San Antonio 2002, pet. denied). "Failure to affirmatively show strict compliance with the Rules of Civil Procedure renders the attempted service of process invalid and of no effect." ***Uvalde Country Club v. Martin Linen Supply Co., Inc.***, 690 S.W.2d 884, 885 (Tex. 1985) (per curiam) *citing* ***McKanna v. Edgar***, 388 S.W.2d at 929; Tex. R. Civ. Pro. 124.

Defective Service not Waived

The defendant may raise defective service resulting in a default judgment for the first time on appeal. ***Wilson v. Dunn***, 800 S.W.2d at 837. A motion for new trial is not required to attack a default judgment for invalid service to preserve the issue for appeal, as it is not a complaint on which evidence must be heard. ***Bronze & Beautiful, Inc. v. Mahone***, 750 S.W.2d 28, 29 (Texarkana—1988, no writ); ***American Universal Ins. Co. v. D.B. & B., Inc.***, 725 S.W.2d 764, 767 (Tex. App.—Corpus Christi 1987, writ ref'd, n.r.e.). Rather, for a default to withstand direct attack, the face of the record must affirmatively show service in strict compliance with applicable law. ***Wilson v. Dunn***, 800 S.W.2d at 836.

Actual Knowledge Does Not Relieve Plaintiff of Duty to Properly Serve

The Commission urges that Sims must have known about the evidentiary proceedings, because she had attended the investigatory hearing and had "notice of the status of the complaint." The record contains no evidence that Sims had actual notice of the evidentiary charges or of the October 6, 2004 hearing at which the panel disbarred her. Even if the record reflected that Sims had actual notice of the charges and of the hearing, that notice, without proper service, conferred no jurisdiction on the tribunal to render a default judgment. ***Id.*** at 837. The respondent's actual knowledge of a proceeding

does not relieve the plaintiff of the duty to serve the respondent in strict compliance with the applicable rules. ***P & H Transportation, Inc. v. Robinson***, 930 S.W.2d 857, 859 (Tex. App.—Houston [1st Dist.] 1996, writ denied). Without proper service, the respondent - even if she has actual knowledge of the proceedings - has no duty to participate in the ensuing proceedings, diligently or otherwise. ***Ross v. Nat'l Center for the Employment of the Disabled***, 49 Tex. Sup. J. 760 (June 16, 2006); ***Caldwell v. Barnes***, 154 S.W.3d 93, 97 n.1 (Tex. 2004).

The Commission's argument also fails to acknowledge the procedural and due process differences between the investigatory phase of a grievance proceeding and the evidentiary phase. Because the investigatory committee cannot impose discipline, those proceedings have no finality, and due process does not attach. ***Weiss v. Comm'n for Lawyer Discipline***, 981 S.W.2d 8, 14 (Tex. App.—San Antonio 1998, pet. denied); ***Minnick v. State Bar of Texas***, 790 S.W.2d 87, 90 (Tex. App.—Austin 1990, writ denied). The respondent's participation in or awareness of any events (investigation, hearings, negotiations or communications with disciplinary counsel) prior to the service of the evidentiary charge and proposed hearing order cannot grant the evidentiary panel jurisdiction to render judgment.

It is well settled, however, that attorneys are entitled to due process in disciplinary proceedings that are accorded finality. ***Weiss v. Comm'n for Lawyer Discipline***, 981 S.W.2d at 14, *citing* ***In re Ruffalo***, 390 U.S. 544, 551-52 (1968). Therefore, when the matter continues to a hearing before the tribunal with authority to impose discipline – either a district court or an evidentiary panel of the grievance committee – the respondent attorney must be served with the pleading through which the tribunal acquires personal jurisdiction over the respondent in a manner affording the respondent a fair opportunity to appear and defend against the charges against her. ***Id.***; Tex. R. Civ. Pro. 124.

Properly Executed Return Is Necessary to Support Default

Although the TRDP are silent as to proof of return of service, service necessarily involves two elements in a default proceeding: the service and the proper proof by return. ***See, Walker v. Brodhead***, 828 S.W.2d 278, 282 (Tex. App.—Austin 1992, writ denied). The return of service is not a trivial document, as the recitations contained therein are prima facie evidence of the facts and cannot be rebutted by the uncorroborated testimony of the defendant. ***Primate Construction, Inc. v. Silver***, 884 S.W.2d at 152; Tex. R. Civ. Pro. 107. Thus, the procedural rules concerning service of process and return must be "read in harmony." ***TAC Americas, Inc. v. Boothe***, 94 S.W.3d 315, 319 (Tex. App.—Austin 2002, no pet.) ("We may not isolate one rule and disregard the others in order to force a meaning the other rules would not permit.").

In civil proceedings, the Rules of Civil Procedure prescribe the only methods authorized for service absent express court approval of substituted or constructive service. Tex. R. Civ. Pro. 106 and 124; ***see, Sgitcovich v. Sgitcovich***, 150 Tex. at 404, 241 S.W.2d at 146. The methods of service specified in the Rules of Civil Procedure meet the requirements of due process. Inasmuch as TRDP 2.16 expressly refers to "means of service permitted by the Texas Rules of Civil Procedure," we find that the requirement under the Rules of Civil Procedure that a return receipt bear the defendant's signature when the plaintiff relies on certified mail to take a default judgment should also apply to disciplinary proceedings.[8] The Commission has offered no argument or justification for departing from this fundamental requirement. Their position, in effect, allows an attorney to be disbarred by default with no proof of an attempt at personal service. That result violates basic procedural due process.

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[8] Tex. R. Civ. P. 107 requires in part that "[w]hen the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature."

We hold that the return of service, and consequently, the service accomplished in this case, are insufficient to support a default judgment, because the return receipt does not bear the Respondent's signature and therefore fails to satisfy due process. The default judgment is therefore void. Accordingly, we grant the motion to strike and reverse the Default Judgment of Disbarment in Cause No. D0070321415 and remand the cause for further proceedings consistent with this opinion.

Sims, by appearing to attack the default, submitted herself to the jurisdiction of the evidentiary panel. No new service of the hearing order and charge are required. Notice of the new hearing date will be required.

IT IS SO ORDERED.

James S. Frost, Chairman

Kathy J. Owen, Vice Chairman

William D. Greenhill

Robert Flowers

Karen L. Watkins

Paul D. Clote

Yolanda de León

Clément H. Ossmotha

Jose I. Gonzalez-Falla

Thomas E. Pitts

Carol E. Prater

Alice A. Brown