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Appointed by the Supreme Court of Texas

No. 67358

**Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas**

ANNETTE R. LOYD

STATE BAR OF TEXAS CARD No. 16731100,

APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,

APPELLEE

*On Appeal from an Evidentiary Panel
For the State Bar of Texas District 7
No. 202103038 [SBOT]*

**APPELLEE'S MOTION TO STRIKE EXTRA-RECORD EXHIBIT AND RESPONSE TO
APPELLANT'S SUPPLEMENTAL BRIEF**

SEANA WILLING
CHIEF DISCIPLINARY COUNSEL

MICHAEL G. GRAHAM
APPELLATE COUNSEL

ROYCE LEMOINE
DEPUTY COUNSEL FOR
ADMINISTRATION

OFFICE OF THE CHIEF DISCIPLINARY
COUNSEL
COMMISSION FOR LAWYER DISCIPLINE
STATE BAR OF TEXAS
P.O. Box 12487
AUSTIN, TEXAS 78711-2487
Michael.Graham@texasbar.com
T: (512) 427-1350; (877) 953-5535
F: (512) 427-4253

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TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

Appellee, the Commission for Lawyer Discipline, submits its Motion to Strike an extra-record exhibit submitted by Appellant, as well as its Response to the Supplemental Brief filed by Appellant, Annette R. Loyd. For clarity, this response refers to Appellant as “Loyd” or “Appellant”, and Appellee as “the Commission.” References to the record are labeled CR (clerk’s record), Supp CR (supplemental clerk’s record), RR Vol. 1 (reporter’s record of hearing held November 2, 2022), RR Vol. 2, Ex. ___, (reporter’s record exhibits from hearing held November 2, 2022), and

RR Vol. 3 (reporter's record of hearing held February 1, 2023). References to Appellant's initial Brief are labeled Apt. Br., and references to Appellant's Supplemental Brief are labeled Apt. Supp. Br. References to rules refer to the Texas Disciplinary Rules of Professional Conduct or the Texas Rules of Disciplinary Procedure, as appropriate¹.

¹ *Reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app A (West 2022), and TEX. GOV'T CODE ANN., tit. 2, subtit. G, app A-1 (West 2022), respectively.

MOTION TO STRIKE EXTRA-RECORD EXHIBIT

At the outset, the Commission notes its objection to Loyd’s inclusion of an extra-record exhibit in her Supplemental Brief, and requests the Board STRIKE the letter of Loyd’s appellate counsel, dated May 10, 2023, attached to Appellant’s Supplemental Brief as “Exhibit A” thereto.²

When, as here, the Board sits in appellate review of an evidentiary panel proceeding, it hears and determines such appeal “on the record from the judgment of [the] Evidentiary Panel.” TEX. RULES DISCIPLINARY P. R. 7.08(D); *see also*, BODA INTERNAL PROCEDURAL RULE 4.02(a). The letter attached to Loyd’s Supplemental Brief was not filed with the evidentiary panel and is not part of the record before the Board. An appellate court cannot consider documents attached as exhibits to briefs that are not a part of the appellate record. *Hall v. Green Ridge Townhouse Homeowners Assoc., Inc.*, 635 S.W.3d 697, 701 (Tex.App. – Texarkana 2021, pet. denied); *Till v. Thomas*, 10 S.W.3d 730, 734 (Tex.App. – Houston [1st Dist.] 1999, no pet.); *see also*, *Molina v. Comm’n for Lawyer Discipline of The State Bar of Texas*, BODA No. 35426, 2006 WL 6242393, at *1 (March 31, 2006).

For these reasons, the Commission asks that the Board strike the letter attached to Appellant’s Supplemental Brief as “Exhibit A”.

² The Commission also notes a nearly identical letter filed by Loyd’s appellate counsel with the Board in this matter on June 2, 2023. That letter was also not filed with the evidentiary panel and should likewise not be part of the appellate record associated with this case.

RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

Loyd's Supplemental Brief offers few (if any) arguments or issues not already raised in her initial brief. Further, those arguments that are raised, as was the case with Loyd's initial brief, are largely unsupported by references to the record.

I. The evidentiary panel acted within its discretion in assessing a 3-year Active Suspension.

First, Loyd offers a slight variation on her initial argument that the evidentiary panel's imposition of a 3-year active suspension was "excessive and inappropriate". [Apt. Br. 14-17]. Loyd asserts that the panel was **obliged** to enter a finding of "Disability" for her and refer the matter to BODA pursuant to Texas Rule of Disciplinary Procedure ("TRDP") 2.17(P)(2), instead of issuing its Default Judgment of Suspension. [Apt. Supp. Br. 3]. But TRDP 2.17(P) simply sets forth the panel's discretionary *options* after hearing a case and does not support Appellant's contention:

Decision: After conducting the Evidentiary Hearing, the Evidentiary Panel shall issue a judgment within thirty days. In any Evidentiary Panel proceeding where Professional Misconduct is found to have occurred, such judgment shall include findings of fact, conclusions of law and the Sanctions to be imposed. The Evidentiary Panel may:

1. dismiss the Disciplinary Proceeding and refer it to the voluntary mediation and dispute resolution procedure;
2. find that the Respondent suffers from a disability and forward that finding to the Board of Disciplinary Appeals for referral to a district disability committee pursuant to Part XII; or

3. find that Professional Misconduct occurred and impose Sanctions.
- TEX. RULES DISCIPLINARY P. R. 2.17(P)

As was the case with her initial brief, Loyd's argument relies almost exclusively on her own conclusory statements that she "has suffered from a disability," largely unsupported by references to the record. [Apt. Supp. Br. 1-3]. The few record references she does provide are mainly limited to her testimony before the evidentiary panel during the sanctions hearing that followed the panel's default finding of professional misconduct. However, even that testimony fails to support Loyd's claim that she had a "Disability" within the meaning of TDRP 1.06(I), as she confirmed she was able to interact with members of the Chief Disciplinary Counsel's (the "CDC") compliance staff. [RR Vol. 1, 65-66].

Indeed, as was previously explained in the Commission's initial brief, Loyd's arguments in this regard are also controverted by testimony she offered from Dr. Harry F. Klinefelter, III, a psychologist she was seeing pursuant to the terms of one of her six (6) prior disciplinary judgments, at the subsequent hearing on her motion to set aside the panel's judgment. When asked by Loyd's counsel whether any mental health issues she may have had affected her abilities to participate in the disciplinary process, Klinefelter answered "No." [RR. Vol. III, 13]. Moreover, Loyd has argued and/or presented testimony - in the sanctions hearing, the hearing on her motion to set aside the panel's judgment, all the way through to her Supplemental

Brief - that any alleged mental health issues she may have or have had, **do not** affect her ability to practice law, or at worst, *only* affect her ability in the very narrow context of responding to allegations of professional misconduct.³ [RR. Vol. 1, 74-75] [RR. Vol. III, 13-14] [Apt. Supp. Br. 2].

The only other record reference cited by Loyd is to another one of the prior default disciplinary judgments, which she received in early 2019. [Apt. Supp. Br. 1]. Included amongst the probationary terms in that judgment was a requirement that Loyd submit to monthly counseling sessions for the duration of that one-year probationary period. [CR 309]. However, it does not follow logically (or legally) from the imposition of that probationary term in a prior disciplinary judgment, that Loyd has/had a “disability” within the meaning of TRDP 1.06(I).

Whether this variation on Loyd’s argument regarding the propriety of the evidentiary panel’s judgment constitutes a new or unique argument from that already set forth in Loyd’s initial brief is debatable. The bottom line is, Loyd’s Supplemental Brief does not point to anything in the record that demonstrates the evidentiary panel *abused its discretion* in imposing a three-year active suspension for her professional misconduct in this matter. *See McIntyre v. Comm’n for Lawyer Discipline*, 169 S.W.3d 803, 814-16 (Tex.App. – Dallas 2005, no pet.); *Eureste v. Comm’n for*

³ And even then, are only *sometimes* a hindrance, “The findings of professional misconduct against Appellant are the result of her disability, **which at times**, prevented her from carrying out her professional responsibilities to the profession.” [Apt. Supp. Br. 2] (emphasis added).

Lawyer Discipline, 76 S.W.3d 184, 201-03 (Tex.App. – Houston [14th Dist.] 2002, no pet.); *Love v. State Bar of Texas*, 982 S.W.2d 939, 944-45 (Tex.App. – Houston [1st Dist.] 1998, no pet.); *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994); *see also*, *Molina*, 2006 WL 6242393. And Loyd’s late attempt in her Supplemental Brief to reference the extra-record letter sent by her appellate counsel to the undersigned on May 10, 2023 (over five months after the panel issued its judgment), to push the narrative that she suffered a disability (in contrast to her prior testimony, Dr. Klinefelter’s prior testimony, and arguments from her counsel in both the sanctions hearing and the hearing on her motion to set aside the judgment) does not support her contention that she suffered from a “Disability” at the time the panel issued its Default Judgment of Suspension.

II. The Commission’s authority to refer *appropriate* matters for potential disability suspension is irrelevant in this appeal.

Next, Loyd argues that the Commission was **obliged** to refer her to a disability screening committee pursuant to TRDP 4.06(I). [Apt. Supp. Br. 4-5]. However, Loyd offers no authority in support of her proposition that *the Commission’s exercise* (or lack thereof) of any such prerogative somehow provides grounds for reversal or modification of *the evidentiary panel’s* judgment on appeal.

Further, Loyd does not offer any reference(s) to the record in support of this contention. Instead, she asks the Board to consider only the extra-record letter sent by her appellate counsel to the undersigned counsel on May 10, 2023 (over five

months after the panel issued its judgment), which is the subject of the Commission’s motion to strike, *supra*.⁴ As such, Loyd’s argument in this respect is irrelevant to this appeal or whether the evidentiary panel was “obliged” to forward the matter to BODA per TRDP 2.17(P)(2), at the time the panel entered its Default Judgment of Suspension per TRDP 2.17(P)(3) on November 5, 2022.

Moreover, Loyd’s reliance on the language of TRDP 4.06(I) mistakenly conflates “duties” and “responsibilities” with “authority.” When properly read in conjunction with TRDP 2.14(C), regarding investigations in which the CDC reasonably believes a respondent attorney is suffering from a disability, and TRDP Part XII, regarding disability suspensions, the warrant granted the Commission by TRDP 4.06(I) is clearly not an imperative. Rather, it is a license to invoke the procedure set forth in Part XII, *when appropriate*. And contrary to Loyd’s assertion that the Commission’s “[r]esponsibilities under TRDP 4.06(I) are independent from the Evidentiary Panel, CDC, or any other committees in Texas professional disciplinary and disability system,” the Rules make clear that any such referral into the disability suspension process involves the interplay of multiple players in the disciplinary and disability system. TEX. RULES DISCIPLINARY P. R. 2.14(C) & 12.02.

⁴ Additionally, to be clear, Loyd’s statement that “[A]ppellee’s counsel indicated that Appellee’s hands were tied because the Evidentiary Panel did [not] make a disability finding,” misrepresents Appellee’s counsel’s communications with Loyd’s counsel on this subject, both in substance and in context.

III. The record in this appeal does not support granting any of Loyd's requested relief.

To conclude her Supplemental Brief, Loyd requests that the Board either *sua sponte* “refer this matter to a District Disability Committee,” or reverse and remand so that the panel “may enter a finding on Appellant’s disability.” [Apt. Supp. Br. 5-6]. TRDP 2.25, Disposition on Appeal, sets forth the alternative avenues that the Board may take in resolving an appeal of the judgment of an evidentiary panel. Even if the record in this case supported it, **which it does not**, those alternatives do not include a direct reference of the matter to a District Disability Committee. TEX. RULES DISCIPLINARY P. R. 2.25. Further, by finding that Professional Misconduct occurred and imposing sanctions in this matter, the evidentiary panel at least implicitly found that Loyd **did not** suffer from a disability within the meaning of the Rules. TEX. RULES DISCIPLINARY P. R. 2.17(P).

As explained in the Commission’s initial brief, under the substantial evidence standard that governs the Board’s review in this matter, the Board may not substitute its judgment for that of the evidentiary panel and must consider only the record upon which the decision is based. *R.R. Comm’n of Tex. v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995); *Tex. State Bd. of Dental Exam’rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988), *cert. denied*, 490 U.S. 1080 (1989). The ultimate question is not whether the panel’s decision is correct, but only whether the record

demonstrates a reasonable basis for its decision. *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994).

Here, the record supports both the panel's findings of professional misconduct against Loyd, and its imposition of a three-year active suspension as sanction for that misconduct. Loyd has pointed to nothing in the record, and offered no persuasive argument, in support of her contention that the panel abused its discretion in any way. The Board should affirm the panel's judgment in this matter.

IV. The *ad hominem* attacks against the evidentiary panel and the Commission in Loyd's Supplemental Brief are neither persuasive in support of her arguments, nor are they appropriate.

Ad hominem attacks on courts, opposing parties, and/or opposing counsel are inappropriate. *See e.g., Johnson v. Johnson*, 948 S.W.2d 835, 840-41 (Tex.App. – San Antonio 1997, writ denied) (attorney's denigrating comments regarding trial judge's competency and integrity violated TEX. DISCIPLINARY R. PROF. CONDUCT 8.02(a) and warranted sanctions and referral to the State Bar of Texas for investigation); *In re Maloney*, 949 S.W.2d 385, 388 (Tex.App. – San Antonio 1997, no writ) (en banc) (per curiam) (attorney's comments ascribing improper political motivations for the appellate court's decision and implying that the court misrepresented the record in its opinion violated TEX. DISCIPLINARY R. PROF. CONDUCT 8.02(a) and warranted referral to the State Bar grievance process); *Sears v. Olivarez*, 28 S.W.3d 611, 616-17 (Tex.App. – Corpus Christi 2000, no pet.);

Gleason v. Isbell, 145 S.W.3d 354, 356-61 (Tex.App. – Houston [14th Dist.] 2004, no pet.) (Frost, J., concurring in part and dissenting in part).⁵ Statements denigrating tribunals, such as an evidentiary panel in an attorney disciplinary proceeding, as well as statements denigrating other parties, demonstrate a lack of respect for the legal system and the administration of justice. *Gleason*, 145 S.W.3d at 360, fn. 8 (citing *Standards for Appellate Conduct*, “Lawyers’ Duties to Lawyers,” 1, and *Standards for Appellate Conduct*, “Lawyers’ Duties to the Court,” 10).⁶

Here, Loyd’s Supplemental Brief is peppered with statements denigrating the competence and/or integrity of: (1) the evidentiary panel, in reaching a judgment with which she disagrees; and (2) the Commission, in pursuing a disciplinary proceeding in a manner with which she disagrees. [Apt. Supp. Br. *passim*]. Those statements include, but are not limited to her assertion that, “Texas’ professional disciplinary system cannot survive if its commissions and committees remain **willfully ignorant** to the disabilities of the attorneys it prosecutes, and **willfully disobedient** to the rules mandating their notice and response when an attorney appears before them with a disability.” [Apt. Supp. Br. 5] (emphasis added).

⁵ See also, *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997) (reh’g order) (citing with approval *Johnson v. Johnson*, 948 S.W.2d at 840-41, and *In re Maloney*, 949 S.W.2d at 388).

⁶ See also, *Standards for Appellate Conduct*, “Lawyers’ Duties to Lawyers,” 5 (“Counsel will not make personal attacks on opposing ... parties.”); *The Texas Lawyer’s Creed*, III. 10. (“I will avoid disparaging personal remarks or acrimony towards opposing ... parties.”)

Through such statements, Loyd’s Supplemental Brief characterizes exercises of discretion by the evidentiary panel and/or the Commission, both expressly and by implication, as purposeful efforts to frustrate the proper functioning of the attorney disciplinary and disability process. Loyd does not offer *any* factual basis in support of any such charges. Importantly, her arguments as a whole, and certainly the *ad hominem* attacks, presume something the record does not demonstrate (and the panel did not find) – that Loyd suffered from a “disability” within the meaning of the Rules.

CONCLUSION AND PRAYER

For the foregoing reasons, as well as those previously set forth in its opening brief, the Commission prays that the Board strike the extra-record exhibit attached to Loyd’s Supplemental Brief as “Exhibit A” and affirm the judgment of the District 7-1 Evidentiary Panel of the State Bar of Texas.

RESPECTFULLY SUBMITTED,

SEANA WILLING
CHIEF DISCIPLINARY COUNSEL

ROYCE LEMOINE
DEPUTY COUNSEL FOR ADMINISTRATION

MICHAEL G. GRAHAM
APPELLATE COUNSEL

OFFICE OF THE CHIEF DISCIPLINARY
COUNSEL
STATE BAR OF TEXAS

P.O. Box 12487
AUSTIN, TEXAS 78711
Michael.Graham@texasbar.com
T: (512) 427-1350; (877) 953-5535
F: (512) 427-4253



MICHAEL G. GRAHAM
STATE BAR CARD NO. 24113581
ATTORNEY FOR APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to the Board of Disciplinary Appeals Internal Procedural Rules, the foregoing Appellee's Motion to Strike Extra-Record Exhibit and Response to Appellant's Supplemental Brief contains approximately 2,409 words, which is less than the total words permitted by the Board's Internal Procedural Rules. Counsel relies on the word count of the computer program used to prepare this petition.



MICHAEL G. GRAHAM
APPELLATE COUNSEL
STATE BAR OF TEXAS

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Appellee's Motion to Strike Extra-Record Exhibit and Response to Appellant's Supplemental Brief has been served on Appellant, Annette R. Loyd, by and through her counsel of record, Mr. Gaines West, West, Webb, Allbritton & Gentry, P.C., 1515 Emerald Plaza, College Station, Texas 77845, by email to Gaines.west@westwebb.law on the 14th day of July, 2023.



MICHAEL G. GRAHAM
APPELLATE COUNSEL
STATE BAR OF TEXAS