BEFORE THE BOARD OF DISCIPLINARY APPEALS
Appointed By
THE SUPREME COURT OF TEXAS

ANNETTE R. LOYD	§	
State Bar of Texas Card No. 16731100	§	
	§	
v.	§	**CAUSE NO. 67358**
	§	
COMMISSION FOR	§	
LAWYER DISCIPLINE	§	

JUDGMENT

On the 28th day of July 2023, the Board of Disciplinary Appeals heard oral argument in Annette R. Loyd's appeal from a Default Judgment of Active Suspension issued by Evidentiary Panel 7-1 of the State Bar of Texas District 7 Grievance Committee on November 18, 2022. Appellant appeared through counsel. Appellee, the Commission for Lawyer Discipline, appeared though counsel. During the hearing, the Board's Chair announced that the Board **GRANTED** Appellee's Motion to Strike Extra-Record Exhibit. Appellant then made a motion requesting that the Board reconsider its ruling on Appellee's Motion to Strike Extra-Record Exhibit. Appellant's motion for reconsideration is **DENIED.** Exhibit A to Appellant's Supplement Brief is struck from the record in this appeal and was not considered in deciding this appeal.

Having considered the record, the briefs, and the parties' arguments, the Board finds that the judgment should be affirmed. It is therefore **ORDERED**, **ADJUDGED**, and **DECREED** that the Default Judgment of Active Suspension issued November 18, 2022, in Case No. 202103038, is hereby, in all respects, **AFFIRMED**.

SIGNED this 14th day of August 2023.

CHAIR PRESIDING

Board members Jennifer Caughey, Arthur D'Andrea, and Nancy Stone did not participate in this decision.

Jason Boatright, joined by Courtney Schmitz, dissenting:

When the government decides to take away someone's ability to earn a living, it needs to explain why. But an evidentiary panel suspended Loyd from practicing law for three years without pointing to any rule, evidence, finding of fact, or conclusion of law in support of its decision. The panel did not have discretion to do that, so I would reverse its judgment of suspension.

A. Background

Loyd has a long history of disciplinary problems. She has been put on probation or suspended many times over the past twenty years. Before this proceeding, her last run-in with the bar was in 2019, when she got a two-year probated suspension for neglecting her duties to a client, disobeying a prior disciplinary order, and failing to respond to a disciplinary complaint.

Her probation had three conditions. First, she had to pay $5,000 in restitution, fees, and costs. Second, she had to go to mental health counseling. And third, she had to take six extra hours of continuing legal education in law practice management.

When her probation ended, the Commission for Lawyer Discipline filed a new complaint against her, alleging that she failed to make the $5,000 payment and take the extra CLE. She did not respond to the complaint, so her case was assigned to an evidentiary panel. Then the office of

the Chief Disciplinary Counsel filed an evidentiary petition. Loyd had twenty days to file an answer, but she missed her deadline, so the CDC filed a motion for default.

On the day of the default hearing, Loyd finally filed her answer. She also filed a motion for continuance. The chair of the evidentiary panel denied her motion, then the CDC entered evidence in support of its motion for default.

At the close of its presentation, the CDC moved to bifurcate the hearing so that the panel could consider the issues of default and professional misconduct first, then hear evidence regarding sanctions in a separate hearing.

When it was time to present Loyd's case regarding default, her attorney tried to offer evidence against the facts alleged in the CDC's evidentiary petition, but the rules required the panel to take those allegations as true, so the CDC objected and the chair sustained the objections. The panel went into recess to deliberate and, when it returned, it found Loyd in default and sustained the allegations in the CDC's motion.

Then the panel opened the hearing on sanctions. The CDC provided evidence that Loyd had not completed the extra CLE or paid the $5,000 required by her 2019 probation. The CDC also cited evidence that Loyd failed to respond to warnings that she could face additional discipline unless she complied with her probation. The CDC argued that Loyd should be disbarred.

For her part, Loyd testified that she did comply with the terms of her probation. She also said she had mental health problems that prevented her from focusing on the proceedings. Her counsel argued that Loyd should undergo a psychological examination before the evidentiary panel imposed any sanctions.

At the end of the sanctions hearing, the panel went into recess to deliberate. When it returned, the panel voted to suspend Loyd for three years beginning immediately. The panel also ordered her to pay $6,700 in restitution, fees, and costs.

A couple of weeks later, the panel entered a default judgment of active suspension that was generally consistent with the decisions it had announced at the default and sanctions hearings.

Loyd then filed a motion to set aside default judgment and for new trial or, alternatively, for reconsideration of suspension. Her motion was denied and this appeal followed.

I agree with the panel's decision to deny the motion to set aside and for new trial, but I disagree with its decision to deny the motion to reconsider her suspension.

B. Loyd did not satisfy the test for a new trial

On appeal, Loyd says she is entitled to a new trial under the Supreme Court's opinion in *Craddock v. Sunshine Bus. Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939), where the Court held that a defendant in default is entitled to a new trial if (1) the failure to file an answer was neither intentional nor the result of conscious indifference, (2) the defendant has a meritorious defense, and (3) a new trial would not injure the plaintiff. *Id*. at 126. Loyd had to satisfy all three elements to be entitled to a new trial. *Id*.

1. Loyd did satisfy the first element of the test

In her appellate brief, Loyd cites evidence that her attorney was out of the country for several weeks leading up to the default hearing. She also says her attorney thought the rules of civil procedure prohibited a default judgment against a party who makes an appearance prior to the entry of the judgment. She understands that this is not actually the case in disciplinary proceedings, but she says her attorney's reliance on the rules of civil procedure was just a mistake, and that the failure to file a timely answer was not intentional or the result of conscious indifference.

In response, the CDC cites evidence that Loyd was personally served with documents that warned her she had to file a timely answer. It also notes that she hired her lawyer after the deadline for filing an answer had already passed. Then the CDC cites evidence showing that Loyd had defaulted for failing to file a timely answer in previous disciplinary proceedings. It argues that this

is plenty of evidence to support the conclusion that Loyd's failure to file a timely was not just a mistake.

The CDC's evidentiary burden is governed by the substantial evidence rule. TEX. RULES DISCIPLINARY P. R. 2.23, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1. "Substantial evidence requires only more than a mere scintilla, and the evidence on the record may amount to substantial evidence even if it preponderates against the tribunal's decision." *R.R. Comm'n of Tex. v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995). The test under the substantial evidence rule is not whether the tribunal was correct, but whether some reasonable basis exists in the record for its action. *See City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994). Thus, we have to sustain the panel's decision if there is any reasonable basis for it in the record.

The record does contain evidence that Loyd was familiar with the rules governing the disciplinary process. Usually, this evidence would provide a reasonable basis to conclude that Loyd's failure to file a timely answer was intentional or the result of conscious indifference. But this case is unusual because there is evidence that Loyd had a disorder that hindered her ability to act on her knowledge of the rules.

Loyd testified that she suffers from an anxiety and depression disorder that made it difficult for her to deal with this proceeding. She also said her condition made her hesitant and almost freeze during this process. And she testified that her anxiety and depression issues made it somewhat difficult for her to focus on what is required of her when confronted.

She argues that her failure to file a timely answer was not intentional or the result of conscious indifference, but the result of her mental health problems. She says she hired an attorney in this disciplinary proceeding because of her condition.

The CDC acknowledges that Loyd testified that a mental health disorder contributed to her inability to file a timely answer in this proceeding, but it dismisses her testimony as "self-serving." The CDC also says she failed to present medical evidence that a disorder affected her ability to participate in the disciplinary process.

Then the CDC goes a step further. It suggests that Dr. Harry Klinefelter III, the psychologist who treated Loyd pursuant to the terms of her probation, testified that her participation in the disciplinary process was not affected by mental health issues. The CDC writes that, "when asked by Loyd's counsel whether any mental health issues Loyd might have had affected her abilities to participate in the disciplinary process, Klinefelter answered 'No.'" But that is not quite what happened.

The question that Loyd's counsel actually asked Dr. Klinefelter was, "In the past, have you seen that [Loyd's] anxiety and depression have affected her abilities to participate in the disciplinary process?" Dr. Klinefelter answered "No" to *that* question—a question about what he had seen "In the past."

Similarly, after the CDC's attorney asked Dr. Klinefelter, "did I understand you correctly when you said that [Loyd's] anxiety and depression has not hurt her ability to participate in these disciplinary proceedings?" Dr. Klinefelter answered, "Not that I knew of until this came up."

The natural interpretation of Dr. Klinefelter's testimony is that he had not known of Loyd's anxiety and depression hurting her ability to participate in these disciplinary proceedings—meaning these sorts of disciplinary proceedings—before now, but he does know that her anxiety and depression have hurt her ability to participate in this particular proceeding. If, as the CDC appears to think, Dr. Klinefelter was saying that Loyd's disorder has not affected her in this proceeding, the phrases "In the past" and "until this came up" would not make any sense.

Dr. Klinefelter's other testimony supports that conclusion. He testified that he started treating Loyd in 2021, which is after Loyd's prior proceedings. He also testified that people who suffer from Loyd's variety of anxiety or depression are "really good at taking care of other people and they have a hard time taking care of themselves." Then, when asked whether Loyd's mental health problems "affect her personally or in her interactions with others," or in "confrontations with herself or helping others," Dr. Klinefelter said "it doesn't interfere with her helping others" and "she's superconscientious about helping others." When read in the context of his testimony that he had not seen Loyd's mental health problems affect her ability to participate in disciplinary proceedings "In the past" and "until this came up," this testimony is evidence that Loyd has mental health issues that make it difficult to participate in this proceeding.

The CDC has not cited evidence to the contrary and there is none. Thus, the evidence shows that Loyd's failure to file a timely answer was the result of her mental health issues, not conscious indifference.

Loyd's excuse for failing to file a timely answer—that she has a mental health disorder making it difficult for her to participate in this proceeding—is a good one, but it did not have to be any good in order to suffice. *Fidelity & Guar. Inc. Co. v. Drewer Const. Co., Inc.*, 186 S.W.3d 571, 576 (Tex. 2006). And because there is no evidence—not even a scintilla—indicating that her failure to file a timely answer was the result of anything other than her mental health disorder, there is no reasonable basis to conclude that Loyd's failure to file a timely answer was intentional or the result of conscious indifference. *See City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994). Therefore, Loyd satisfied the first prong of the *Craddock* test. 133 S.W.d at 126.

2. Loyd failed the second element of the test

The second prong of the *Craddock* test required Loyd to set up a meritorious defense. *Id*. Her defense would be meritorious if it alleged facts that are supported by evidence providing prima

facie proof of the allegations in her defense. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 928 (Tex. 2009).

The petition alleged that Loyd did not satisfy the conditions of her probation and that she did not assert a legal ground for her failure to respond to the disciplinary complaint. Accordingly, Loyd would satisfy the second prong of *Craddock* if she pointed to evidence providing prima facie proof that she met the conditions of her probation and asserted a legal ground for her untimely response to the complaint. *Id*.

Loyd cited record evidence of her mental health disorder, which is a legal ground for her untimely response to the complaint. She also presented evidence that she completed the mental health counseling and made the $5,000 payment required by the terms of her probation. Her evidence was prima facie proof that she made the payment in compliance with the terms of her 2019 probation. *Id*.

But her probation also required her to take six hours of CLE in law office management by January 1, 2020, and there is no evidence that she satisfied that requirement. Instead, the record shows that she completed 4.75 extra hours in law office management, and that she did so after the deadline. She never asserted that her mental health disorder contributed to this violation of her probation.

Because Loyd did not allege facts supported by evidence providing prima facie proof that she completed the CLE, she failed to set up a meritorious defense and cannot satisfy the second element of the *Craddock* test. *Lerma*, 288 S.W.3d at 929-30.

The panel's decision to deny a motion for new trial is reviewed for abuse of discretion. *Id*. at 926. Loyd did not satisfy all elements of the *Craddock* test, so the panel did not abuse its discretion. *See id*. at 930. Now the question is whether the panel's decision to impose sanctions was an abuse of discretion.

C. Suspension was excessive and an abuse of discretion

The panel suspended Loyd for violating two disciplinary rules of professional conduct. The first is rule 8.04(a)(7), which prohibits lawyers from violating a disciplinary order or judgment. The second is rule 8.04(a)(8), which prohibits a lawyer from failing to furnish a response to the CDC unless he or she in good faith timely asserts a legal ground for failure to do so. Sanctions for violating an order are different from those for failing to respond, so I will discuss them separately.

1. Suspension for violating the disciplinary order was excessive

Three rules of disciplinary procedure govern sanctions for violating prior disciplinary orders. First, there is rule 15.02, which lists the general factors that a disciplinary tribunal is to consider when imposing sanctions. Rule 15.02 provides that, in imposing a sanction after a finding of professional misconduct, a disciplinary tribunal should consider the duty violated, the respondent's level of culpability, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors. Most of those considerations counsel against suspension here.

The panel found that Loyd violated her duty by not completing the required CLE on time and by failing to make the $5,000 payment. There can be no question that Loyd violated the duty to complete the CLE, but she presented evidence in her motion for new trial that she did make the $5,000 payment. Thus, the duty Loyd violated was possibly more limited—and certainly no more expansive—than the one the panel had in mind when it sanctioned her.

As for the level of Loyd's culpability, the record shows that she had a mental health disorder that made it difficult for her to participate in disciplinary proceedings. Loyd's condition likely reduced her culpability, but the panel's findings of fact do not mention it. Accordingly, the record suggests that Loyd had a lower level of culpability than the panel's decision presumed.

Turning to the potential or actual injury her misconduct caused, there is no allegation anywhere in the record that Loyd injured anyone. Her failure to complete the additional hours of CLE on time would not injure anyone, of course. And although it is possible to conceive of ways in which failing to make the $5,000 payment could injure someone, Loyd submitted evidence that she did make that payment. Besides, the findings of fact do not mention injury in any way.

Finally, there are both aggravating and mitigating factors here, but it stands to reason that the mitigating factors would have more force than the aggravating ones. That is because the aggravating factors—mainly Loyd's disciplinary history and pattern of misconduct—would be aggravating only to the extent that they indicate a high level of culpability, like intentionality or conscious indifference. And because the main mitigating factor—Loyd's mental health disorder—suggests that her misconduct could not be intentional or the result of conscious indifference, her disciplinary history and pattern of misconduct have less force here than they would absent the evidence of Loyd's mental health disorder.

Thus, the rule 15.02 factors tend to weigh in favor of a lighter sanction.

The second rule of disciplinary procedure that governs the imposition of sanctions is rule 15.09, which, like rule 15.02, allows a disciplinary body to consider aggravating and mitigating factors in deciding what sanction to impose.

And then there is rule 15.08, which provides that, "Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02," six different sanctions may be appropriate in cases involving prior discipline. One of these sanctions is suspension, which "is generally appropriate," according to rule 15.08, "when a Respondent has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."

The CDC has never alleged that the misconduct Loyd committed—failing to complete the required CLE and, perhaps, the $5,000 payment—is the same or similar misconduct for which she was reprimanded before. And there is no allegation or finding that there was any injury or potential injury. Therefore, suspension would generally not be appropriate in Loyd's case under rule 15.08.

Above all, there is evidence that Loyd has a mental health disorder that made it difficult for her to participate in this proceeding. In fact, the 2019 probation order required her to see a mental health counselor. This suggests that any consideration of her violation of the 2019 order should take her mental health into account.

Somehow, though, the findings did not say a word about Loyd's mental health issues. Several members of the evidentiary panel did ask Loyd about her mental health during the sanctions hearing, so it is possible that the panel considered those issues before it decided to suspend her. But if the panel did consider her mental health, such consideration was omitted from the findings.

Because there is no record of any allegation or finding that Loyd's violation of the 2019 order could injure anyone or that it was similar to her violation of a prior order, suspension is not an appropriate sanction under rule 15.08. Furthermore, the factors the panel should have applied under rule 15.02 counsel against a sanction as severe as suspension. And the mitigating factors under rule 15.09 outweigh the aggravating factors. Thus, the sanction the panel imposed was not appropriate—it was excessive.

2. Suspension for failing to respond was excessive

"Absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02," four different sanctions could be appropriate when an attorney fails to respond to a disciplinary agency. TEX. RULES DISCIPLINARY P. R. 15.07(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1. Suspension is generally appropriate when an attorney knowingly

engaged in conduct that is a violation of a duty owed as a professional and caused injury or potential injury to a client, the public, or the legal system. *Id*.

Once again, there is no allegation or finding of injury in the record, so suspension would generally not be an appropriate sanction. Nor do the findings of fact mention the effect that Loyd's mental health issues might have had on her ability to "knowingly" fail to respond. Therefore, the suspension was inappropriate under rule 15.07 and excessive under the factors listed in rules 15.02 and 15.09.

3. Suspension was an abuse of discretion

Sanctions are reviewed for abuse of discretion. *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994). Under this lenient standard of review, evidentiary panels have discretion to impose sanctions that others might find inappropriate. In fact, the Legislature has made it clear that the sanctions guidelines in the rules of disciplinary procedure "do not limit the authority of a district grievance committee or of a district judge to make a finding or issue a decision." TEX. GOV'T CODE § 81.083(c). Consequently, the guidelines sometimes use words like "should" and "may" and "generally appropriate" rather than shall, must, and required.

Even so, an evidentiary panel does not have unfettered discretion when it imposes sancions. In *Furr's Supermarkets, Inc. v. Bethune*, the Supreme Court held that tribunals abuse their discretion when they act in an unreasonable or arbitrary manner, or when they act without reference to any guiding principles. 53 SW.3d 375, 379 (Tex. 2001). Applying those criteria to this case reveals an abuse of discretion. To see how, consider the default judgment of active suspension.

The judgment cites several rules regarding default and professional misconduct, but none regarding sanctions. Similarly, it cites evidence that supports its decision on misconduct and default, but none in support of its decision to impose suspension.

And then there are the findings of fact. The judgment says the findings are the basis of the panel's only conclusion of law, which was that Loyd violated disciplinary rules of professional conduct 8.04(a)(7) and 8.04(a)(8). Loyd's violation of those rules was the subject of the CDC's evidentiary petition and the default hearing that addressed it. Under rule of disciplinary procedure 2.17(C), the panel was required to deem all of the allegations in the evidentiary petition as true. Consequently, the panel did not admit any evidence or allow any argument about anything else during the default hearing. It decided that Loyd defaulted and committed professional misconduct based solely on facts in the CDC's petition that it had to take as true.

Thus, the only findings in the judgment were based on deemed facts regarding misconduct and default. None of the findings involved—or could have involved—any of the testimony, documentary evidence, or legal argument the panel heard during the hearing on sanctions.

The judgment does say the panel imposed sanctions after considering evidence, but rule of civil procedure 299 provides that findings of fact form the basis of the judgment on all grounds. The rule also says that judgments may not be supported on appeal by a presumed finding on any ground of recovery or defense, no element of which has been included in the findings of fact. But the findings in this case are nothing more than deemed facts regarding misconduct and default, so there is no basis or support in the judgment for imposing a suspension.

That is a particular problem when suspension is generally not appropriate under the guidelines. The panel did have discretion to follow or deviate from the guidelines upon consideration of the general factors listed in rule 15.02 and the mitigating and aggravating factors in rule 15.09, but the findings say nothing about anything related to those factors—or to the guidelines themselves.

The panel's decision cites no finding of fact, evidence, or rule regarding sanctions. It relies entirely on the CDC's allegations. Those allegations were automatically deemed true and they

relate to misconduct and default, not sanctions. Thus, the panel suspended Loyd without reference to guiding principles. In doing so, the panel abused its discretion. *Bethune*, 53 SW.3d at 379.

D. Disciplinary proceedings need to take mental illness seriously

Regardless of whether one thinks the panel abused its discretion, it may be tempting to assume that Loyd invented or exaggerated her mental health issues to avoid the consequences of her actions. After all, it does seem convenient to be too ill to deal with the bar and get punished, but well enough to deal with the courts and get paid.

However, if Loyd is faking her issues, there is no evidence of it. In fact, all of the evidence regarding Loyd's mental health suggests that she suffers from a disorder that has made it difficult for her to participate in this disciplinary proceeding. I think the evidence of her mental health issues is important.

Today, lawyers are inundated with messages from various bar groups about the importance of mental health. Meanwhile, the Supreme Court and Court of Criminal Appeals have created the Judicial Commission on Mental Health, and the Legislature has established mental health courts. These efforts suggest that we should take mental health issues very seriously.

But in this proceeding, the CDC does not appear to have taken Loyd's mental health seriously at all. The CDC's brief did not address whether her mental health problems could be a mitigating factor or a relevant consideration of any kind. Instead, it relegated her mental health to a footnote, where it called Loyd's testimony regarding her anxiety and depression "self-serving" and dismissed her mental health problems as merely "alleged." And the CDC did so even though a psychologist—who counseled Loyd pursuant to a prior disciplinary order—testified that he was treating her for anxiety and depression. The CDC continued to try to get Loyd disbarred even after it was confronted with evidence of her mental health disorder.

It seems to me that the CDC's aggressive prosecution in this case is not only inappropriate under the sanctions guidelines, it is out of step with the efforts of the Legislature and courts to get all of us to take attorney mental health seriously.

E. Conclusion

In the future, the CDC should seek sanctions that are appropriate under the guidelines and factors listed in the rules of disciplinary procedure. Evidentiary panels need to impose appropriate sanctions supported by findings, evidence, and rules. And when mental health is an issue, everybody ought to act like it matters.