

AFFIRM; Opinion Signed March 31, 2006.



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

No. 35426

JESSE R. MOLINA (State Bar Card No. 14256500)

v.

**COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS**

**On Appeal from the Evidentiary Panel
of the District 07A Grievance Committee
of the State Bar of Texas
SBOT Cause No. D0040423349**

OPINION AND ORDER

Argued En Banc November 4, 2005

COUNSEL:

For Appellant Jesse R. Molina, Danny D. Burns, Fort Worth

For Appellee, Commission for Lawyer Discipline of the State Bar of Texas, Linda A. Acevedo, Assistant Disciplinary Counsel, Austin

OPINION:

Appellant Jesse R. Molina appeals from a State Bar of Texas disciplinary judgment signed April 4, 2005 suspending him from the practice of law for six months with the suspension fully probated on certain terms and conditions.¹ An evidentiary panel of the State Bar District 07A grievance committee² found that Molina had violated three of the Texas Disciplinary Rules of Professional Conduct (“Professional Conduct Rules”)³ by failing to keep his client reasonably informed about the status of a matter and failing to promptly comply with reasonable requests for information, failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and failing to timely respond to the grievance. Professional Conduct Rules 1.03(a), 1.03(b), and 8.04(a)(8), respectively. Molina argues on appeal that the sanction is too harsh in light of the misconduct, sanctions in other disciplinary cases, his candor during the disciplinary proceeding, and his 32 years of practice without a prior disciplinary sanction.

The Commission has moved to strike the exhibits to Molina’s brief because they are not part of the record on appeal. We grant the motion to strike Exhibits A and B attached to Molina’s brief. We affirm the judgment because Molina has failed to show that the sanction imposed by the evidentiary panel was an abuse of discretion.

¹ Molina’s sanction was not stayed during this appeal, and he served the probated suspension beginning May 1, 2005 and ending October 31, 2005.

² See, TEX. R. OF DISCIPLINARY PROC. (“TRDP”) 2.17 et seq., *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A-1. This disciplinary proceeding arose under the amendments to the TRDP effective January 1, 2004. Supreme Court Misc. Order 03-9209 (12/29/2003).

³ TEX. DISCIPLINARY R. OF PROF’L CONDUCT (“Professional Conduct Rules”), *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A.

Underlying Grievance

A Tarrant County District Court appointed Molina in August 2003 to represent James Thomas Wright, Jr. in an application for post-conviction DNA testing (Wright had filed a pro se motion before the appointment). A jury had convicted Wright of two counts of sexual assault with a deadly weapon and one count of possession of a firearm by a felon.⁴ Wright appealed the sexual assault but not the possession of a firearm, and the conviction was affirmed.⁵

Wright filed the original grievance against Molina in March 2004 complaining that Molina had not worked on the matter or communicated with him about the status since the appointment. The State Bar Chief Disciplinary Counsel's office dismissed the complaint at screening as failing to allege professional misconduct, and Wright appealed the dismissal to the Board of Disciplinary Appeals. The Board classified the matter as a complaint, finding that the grievance on its face alleged that Molina failed to adequately communicate with his client. BODA Case No. 32582 (June 16, 2004).

The Chief Disciplinary Counsel then asked Molina to respond to the complaint, but he did not do so timely,⁶ waiting approximately four months, filing the response only after being contacted by a State Bar investigator. The Chief Disciplinary Counsel found just cause to believe that Molina had committed one or more acts of misconduct and notified him that he had twenty days in which to elect whether to proceed with the matter in district court or before the grievance committee. TRDP 2.15.

⁴ *The State of Texas v. James Thomas Wright*, Cause No. 0806025, Criminal District Court No. 1, Tarrant County, Texas.

⁵ *James Thomas Wright, Jr. v. The State of Texas*, No. 2-02-162-CR, 2003 Tex. App. LEXIS 4171 (Fort Worth May 15, 2003, pet. dism'd, untimely filed)(per curiam, not designated for publication).

⁶ The attorney must respond to the complaint within thirty days of receiving notice from the Chief Disciplinary Counsel's office to do so. TRDP 2.10.

Molina did not respond, and on December 27, 2004, the Chief Disciplinary Counsel served Molina with an Evidentiary Petition charging him with three counts of professional misconduct. Transmitting the Evidentiary Petition was a letter from the Chief Disciplinary Counsel notifying Molina that he must file a responsive pleading no later than Monday following the expiration of twenty days after receiving the petition. TRDP 2.17B.

Molina did not respond to the Evidentiary Petition and, on March 3, 2004, the Chief Disciplinary Counsel filed a motion for default judgment with the district grievance committee panel assigned to hear the case. The grievance committee convened on March 17, 2005, granted the default judgment, and, in the same hearing, heard argument on the appropriate sanction, imposing a six-month suspension beginning May 1, 2005, fully probated on certain terms and conditions.

The Chief Disciplinary Counsel personally served Molina with the judgment, and he timely filed a motion for new trial. TRDP 2.22. Molina admitted in his motion that he had received the election letter and the Evidentiary Petition. Molina asserted that he had intended to attend the hearing and that his failure to do so was the result of mistake and not conscious indifference, although he did not articulate the basis of the mistake. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939).⁷ Three days before the panel was set to hear the motion for new trial, Molina filed Respondent's Reply to Evidentiary Petition.

Molina appeared at the hearing and was allowed to testify on the merits of the complaint, but his testimony refuted any argument that his failure to answer the evidentiary petition was due to

⁷ *Craddock* requires that a defendant challenging a default judgment after proper service show: that the failure to answer or appear was the result of mistake or accident and was not intentional; that the defendant has a meritorious defense; and that a new trial will not cause delay or injury to the plaintiff. Molina has not challenged service.

mistake or accident. Molina explained that his failure to respond in all three instances was due in part to his campaigning for a seat on the Texas Court of Criminal Appeals between June 2003 and November 2004, and that he had “gotten behind.”

Denying that he had failed to keep the client informed about the status of his case or failed to respond to requests for information, Molina conceded that there was no excuse for the late response to the original grievance. He stated that he had communicated with Wright through a family member shortly after being appointed to the case. However, Molina admitted that he did not communicate directly with Wright until October 2004, at approximately the same time he responded to the grievance.

Molina also testified at the hearing that his delay in filing the post-conviction petition for DNA testing was due in part to his attempts to find some legal basis on which to justify the application. Molina believed Wright’s petition for DNA testing had no merit because identity was not an issue at trial; therefore, additional testing could not eliminate Wright as the assailant. In addition, no newer testing procedures were available than that used prior to trial, a prerequisite to obtaining an order for additional testing.

The evidentiary panel denied Molina’s motion for new trial, and he filed this appeal to the Board of Disciplinary Appeals.

Sanction

We find that Molina failed to meet his burden under *Craddock* to show that his failure to answer or appear was the result of accident or mistake, and that, therefore, the panel did not err in denying his motion for new trial. The effect of failing to timely answer the disciplinary petition is to admit the allegations of misconduct. TRDP 2.14C. However, BODA may still review the sanction

imposed for abuse of discretion. *See, Bastine v. Commission for Lawyer Discipline*, 1996 Tex. App. LEXIS (Tex. App.—Houston [1st Dist.] 1996, no writ) (not designated for publication); and *Minnick v. State Bar of Texas*, 790 S.W.2d 87 (Tex. App.—Austin 1990, writ denied).

Molina urges on appeal that the panel’s sanction of a six-month fully-probated suspension is too harsh in light of the minimal harm to the client, his long career of service to the community and to the Bar, and sanctions in similar disciplinary cases. The Commission argued at the original hearing that the sanction was warranted because Molina’s conduct, both during the disciplinary proceedings and toward his client, exhibited a pattern of unresponsiveness. However, the Commission also noted Molina’s previously unblemished disciplinary record in over thirty years of practice.

The TRDP define “sanction” to include disbarment, resignation in lieu of discipline, suspension for a certain term, probation of suspension, interim suspension, public or private reprimand, and may include restitution and attorneys’ fees. TRDP 1.06Y. TRDP 2.18⁸ also lists the factors that the evidentiary panel shall consider in assessing the appropriate sanction:

- The nature and degree of the professional misconduct for which the Respondent is being sanctioned
- The seriousness of and circumstances surrounding the Professional Misconduct
- The loss or damage to the client
- The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct
- The profit to the attorney
- The avoidance of repetition
- The deterrent effect on others
- The maintenance of respect for the legal profession
- The conduct of the Respondent during the course of the Disciplinary Proceeding
- The Respondent’s disciplinary record, including any private reprimands

⁸ Trial judges hearing disciplinary cases consider the same factors along with “the trial of the case” and “other relevant evidence concerning the Respondent’s personal and professional background.” TRDP 3.10.

The Rules do not otherwise provide guidelines for imposing a particular level of discipline or for determining the length of time for a suspension or probation,⁹ leaving those decisions to the discretion and fact-finding function of the tribunal. *Rangel v. State Bar of Texas*, 898 S.W.2d 1, 4 n. 3 (Tex. App.—San Antonio 1995, no writ). The appropriate sanction necessarily turns on the particular facts and circumstances of the case. *See, State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994).

Standard of Review

We review the sanction imposed for professional misconduct for abuse of discretion. *McIntyre v. Commission for Lawyer Discipline*, 169 S.W.3d 803, 807 (Tex. App.—Dallas 2005, no pet.). Trial courts (and, as in this case, evidentiary panels) have broad discretion to impose discipline, but a sanction may be so light or heavy as to constitute an abuse of discretion. *Kilpatrick*, 874 S.W.2d at 659. A court abuses its discretion when it acts in an unreasonable and arbitrary manner, without reference to any guiding principles. *McIntyre*, 169 S.W.3d at 807. The court and evidentiary panel must consider the factors set out in the TRDP, *Eureste v. Commission for Lawyer Discipline*, 75 S.W.3d 184, 202 (Tex. App.—Houston [14th Dist.] 2002, no pet.), and the fact that an appellate court might impose a sanction different from that imposed by the trial court does not show an abuse of discretion. *Love v. State Bar of Texas*, 982 S.W.2d 939, 944 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

⁹ Compare, ABA Standards for Imposing Lawyer Sanctions, *Lawyers' Manual on Professional Conduct* (ABA/BNA) 01:801 (which suggest level of sanction and time periods based on the relevant factors).

Harm to the Client

Molina argues that his failure to keep the client reasonably informed was a “minimal violation” because the petition for post-conviction DNA testing had no merit and was ultimately denied. This ignores both the fact that a lawyer’s duty to communicate with the client is one of the most important and fundamental obligations owed to a client, and the fact that the underlying misconduct in this case became part of a pattern of nonresponsiveness as Molina failed to respond to the Chief Disciplinary Counsel and to the disciplinary petition.

A lawyer’s duty to keep the client reasonably informed about the status of a matter does not depend on the relative strength of the case or on the client’s request for information. “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” Professional Conduct Rule 1.03 cmt 1. If, after research, investigation, or discovery, the lawyer concludes that the client’s position is weak, his duty to discuss the issues and strategy with his client is all the more urgent. Molina’s reliance on a family member to convey information to his client did not satisfy his obligations to explain matters and allow the client’s participation in the required decisions.

Failure to Respond to the Grievance Committee

Under the Professional Conduct Rules, the failure to respond to a request for information from a disciplinary authority constitutes professional misconduct separate from any alleged underlying misconduct. Professional Conduct Rules 8.01(b) and 8.04(a)(8) (subject to a timely good faith assertion of a privilege or other legal ground for failure to do so). Clearly, acknowledgment by members of the Bar of the Bar’s power to self-regulate is paramount to the Bar’s accomplishing its

purposes of protecting the public and maintaining the integrity of the profession. “Allowing complaining clients to see lawyers fail to respond to disciplinary proceedings without any serious consequence to the attorney could seriously damage the credibility of the profession and its ability to police itself.” *Rangel*, 898 S.W.2d at 4. In assessing a sanction, the evidentiary panel correctly considered Molina’s admission that he knowingly failed to timely answer the grievance or the evidentiary petition. This failure is a continuation of the pattern of behavior that was the basis for the client’s allegations of the Respondent’s failure to keep the client reasonably informed and respond to requests for information.

Sanctions in Other Disciplinary Cases

Molina cites other disciplinary cases with published judgments which he contends illustrate his point that similar misconduct has resulted in less severe sanctions. Molina did not offer this evidence at the hearing, and it is arguably waived. However, even if we were to consider the argument, we note that similar conduct, at least on cursory review, has also resulted in more severe sanctions than Molina received.¹⁰

Moreover, abstracts of other disciplinary cases are not persuasive because the cases are intensely fact specific. The judgments or published abstracts do not provide enough information for comparison. In addition, a sanction may turn on factors not disclosed on the face of the judgment; for

¹⁰ The Commission for Lawyer Discipline cites the following examples in its brief: Annette R. Loyd (Vanicek) (Bar Card #16731100) (F0010313527), 67 TEX. BAR J. 905 (Nov. 2004) (one-year fully-probated suspension for failure to communicate and failure to respond to the grievance); Aline L. Abbinanti (Bar Car #24009929) (2004-36057), 68 TEX. BAR. J. 83 (Jan. 2005) (one-year fully-probated suspension for failure to communicate); Stephen G. Kennedy (Bar Card #24010155) (S0010210086), 68 Tex. Bar. J. 168 (Feb. 2005) (one-year active suspension for failure to communicate and failure to respond to the grievance); and Anna L. Cavazos (Bar Card #04022827) (S2120211523), 68 TEX. BAR. J. 267 (March 2005) (one-year partially probated suspension for failure to communicate and failure to respond to the grievance).

example, the Chief Disciplinary Counsel and the respondent may have negotiated a particular sanction in return for other charges being dropped.

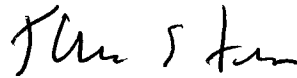
Respondent's Other Factors in Mitigation

Molina also urges his otherwise exemplary history of practice, service to the Bar, and achievement of certification by the Texas Board of Legal Specialization in mitigation for a lesser sanction than that imposed. The record indicates, however, that the evidentiary panel considered Molina's lack of prior discipline when deciding the sanction. The additional information was either not raised at the hearing and is therefore waived or is not part of the record on appeal.

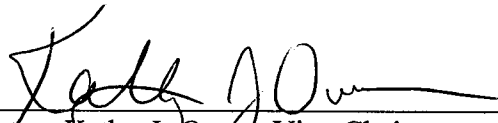
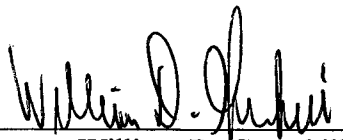
Conclusion


Accordingly, we grant the Commission's motion to strike and overrule Molina's issue that the sanction imposed is so severe in relation to the misconduct found as to constitute an abuse of discretion. The record indicates that the evidentiary panel considered the relevant factors as required by the TRDP, including mitigating evidence, and did not act in an arbitrary or unreasonable manner in tailoring the sanctions imposed.

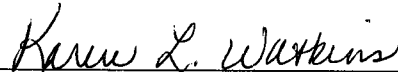
IT IS SO ORDERED.




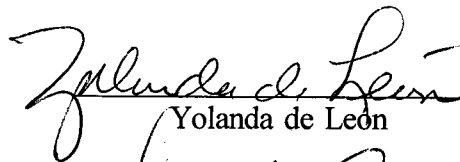
James S. Frost, Chairman



Kathy J. Owen, Vice Chairman
William D. Greenhill



Robert Flowers

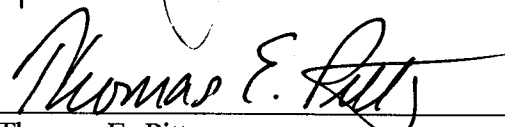

Karen L. Watkins

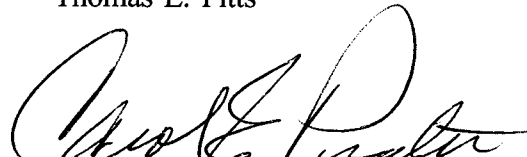

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