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THE BOARD of DISCIPLINARY APPEALS
Appointed by the Supreme Court of Texas

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

In the Matter of Joe Jesse Ponce III;
State Bar Card # 24014329

No. 62308

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 10-3
No. 201705565

BRIEF OF COMMISSION FOR LAWYER DISCIPLINE
RESPECTING STATUS OF BODA CASE NO. 62308

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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES 3

I. Introduction.....5

II. Factual Context.....5

III. Application of Law to Questions Posed by the Board.8

Question 1. Does the Board retain jurisdiction over an evidentiary appeal challenging a disciplinary judgment against a lawyer who has subsequently been disbarred in a separate case?8

Question 2. Would the evidentiary appeal become moot if the Fourth Court of Appeals, and the Supreme Court of Texas if subsequently appealed, affirms the judgment of disbarment?9

Question 3. Should the Board abate this evidentiary appeal pending final decision as to the disbarment judgment?.....15

IV. Conclusion.15

CERTIFICATE OF COMPLIANCE..... 16

CERTIFICATE OF SERVICE..... 16

CASES

INDEX OF AUTHORITIES

PAGE

Bahar v. Lyon Fin. Services, Inc.,
330 S.W.3d 379 (Tex. App.–Austin 2010, pet. denied).....13

Cantu v. Commission for Lawyer Discipline,
2020 WL 7064806 (Tex. App.- Corpus Christi-Edinburg 2020, no pet).....12

City of Farmers Branch v. Ramos,
235 S.W.3d 462 (Tex. App.–Dallas 2007, no pet.)9

Goldstein v. Comm'n for Lawyer Discipline,
109 S.W.3d 810 (Tex.App.-Dallas 2003, pet. denied)12

Heckman v. Williamson Cnty.,
369 S.W.3d 137 (Tex. 2012)9

Metropolitan Transit Authority of Harris County v. Douglas,
544 S.W.3d 486 (Tex. App.-Houston [14 Dist.] 2018,
pet. denied)9, 10, 14, 15

Mitchell v. Turbine Resources Unlimited, Inc.,
523 S.W.3d 189 (Tex. App.-Houston [14th Dist.] 2017, pet. denied)13

Olsen v. Commission for Lawyer Discipline,
347 S.W.3d 876 (Tex. App.-Dallas 2011, pet. denied)12

Rice v. Rice,
533 S.W.3d 58 (Tex. App.-Houston [14th Dist.] 2017, no pet.).....9

STATUTES

PAGE

Tex. R. Civ. P. 308.....13

Tex. R. Civ. P. 621.....13

TEX. RULES DISCIPLINARY P.R. 1.06(Y).....12

TEX. RULES DISCIPLINARY P.R. 1.06(FF)12

TEX. RULES DISCIPLINARY P.R. 2.128

TEX. RULES DISCIPLINARY P.R. 3.0912

TEX. RULES DISCIPLINARY P.R. 4.0810

| | |
|--|----|
| TEX. RULES DISCIPLINARY P.R. 7.08 | 8 |
| TEX. RULES DISCIPLINARY P.R. 11.01 | 14 |
| TEX. RULES DISCIPLINARY P.R. 11.03 | 14 |
| TEX. RULES DISCIPLINARY P.R. 11.05 | 14 |
| TEX. RULES DISCIPLINARY P.R. 11.05(G)..... | 14 |
| TEX. RULES DISCIPLINARY P.R. 17.01 | 12 |

SECONDARY MATERIALS

PAGE

| | |
|--|----|
| State Bar of Texas FAQs for the Public (texasbar.com)..... | 10 |
|--|----|

**BRIEF OF COMMISSION FOR LAWYER DISCIPLINE
RESPECTING STATUS OF BODA CASE NO. 62308**

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

I. Introduction.

By letter of January 31, 2022, Jenny Hodgkins, Executive Director and General Counsel of the Board of Disciplinary Appeals (Board), requested Mr. Ponce, his counsel, and counsel for the Commission for Lawyer Discipline (Commission) to provide briefing respecting the status of this case in light of the pendency of Case No. 04-20-00267-CV in the Fourth District Court of Appeals. The Commission respectfully presents this brief as requested.

II. Factual Context.

The two cases about which the Board has inquired involve materially different fact situations and issues. In BODA Case No. 62308 (BODA Case) Appellant, Joe Jesse Ponce III, filed a notice of appeal, on July 26, 2019, challenging a default judgment of the District 10 Grievance Committee Evidentiary Panel that imposed a partially probated suspension for a period ending May 31, 2022. The Evidentiary Panel also awarded the State Bar of Texas its attorney's fees in the amount of \$4,228.50 for fees incurred in the trial, \$4,000 if the case is appealed to this Board, and \$2,000 if appealed to the Texas Supreme Court. The second case at issue is Ponce's appeal of the judgment of disbarment entered against him on February 18, 2020, by the 295th District Court of Bexar County, Texas, to the Fourth Court of Appeals.

The BODA Case stems from the complaint of Valerie Talamantes who claimed Ponce breached his duty of confidentiality to her by passing on information to third parties without her permission. Talamantes also alleged Ponce failed to account for the fees she paid.

The record in the BODA case shows Ponce failed to timely answer the Commission's Evidentiary Petition and Request for Disclosure, filed on April 24, 2018. The Evidentiary Panel concluded Ponce was in default and rendered a judgment that imposed a partially probated suspension. Ponce claims in his appeal to this Board that the Evidentiary Panel erred in denying his motion for new trial and that he has meritorious defenses to the claims of his former client, Talamantes.

The clerk's and reporter's records respecting the BODA Case have been filed with the Board, as have the Appellant's Brief and Appellee's Brief. The BODA case appears to be "at issue," but the Board has not notified the parties the matter has been submitted.

The second case, as mentioned above, is pending in the Fourth District Court of Appeals. *Ponce v. Comm'n for Lawyer Discipline*, Case No. 04-20-00267-CV. (Disbarment Case). In that case, Ponce appealed from a February 18, 2020, judgment of the 295th District Court of Bexar County, Texas, that imposed the sanction of disbarment. Appellant filed a notice of appeal on May 20, 2020. The court of appeals

denied oral argument, and the case was submitted on November 9, 2021, for panel decision on the briefs. No opinion has been rendered.

In that case, the record shows that Appellant represented Kathy Alcalá regarding claims relating to the wrongful death of her son. At Appellant's urging, Alcalá entered into a contingent fee contract with him despite knowing Alcalá had already entered a contingency fee agreement with attorney Pascual Madrigal. In her underlying complaint, Alcalá claimed that after entering into the contract, Ponce failed to communicate with her until she terminated his representation. According to Alcalá, only then did Appellant send communications to her in an attempt to retain her as a client. Finally, Alcalá claimed Appellant refused to return the client file to her that contained documents she provided to him for preparation of the lawsuit.

The trial court concluded Appellant violated rules 1.03(a) and (b), 1.08(a), 1.15(d), and 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct (TDRPC) as to his representation of Alcalá. Then, the trial court reviewed Appellant's record of professional discipline and rendered a judgment of disbarment. The core of Appellant's contentions on appeal is that there is "no evidence" to support the trial court's findings regarding Appellant's violations of the rules as to representation of Alcalá. He also claims the trial court abused its discretion when it imposed the sanction of disbarment.

III. Application of Law to Questions Posed by the Board.

The Commission offers the following analysis to the questions posed by the Board.

Question 1. Does the Board retain jurisdiction over an evidentiary appeal challenging a disciplinary judgment against a lawyer who has subsequently been disbarred in a separate case?

The Commission has the authority to prosecute any complaint on which just cause has been shown pursuant to Rule 2.12 of the Texas Rules of Disciplinary Procedure (TRDP). There is no bar to the Commission pursuing simultaneously several complaints against an individual lawyer. In practice, that occurs frequently.

This Board has jurisdiction of appeals from the judgment of an “Evidentiary Panel.” TRDP 7.08. Right now, the Disbarment Case has been submitted on briefs to the Fourth District Court of Appeals. No decision has been announced. While the BODA Case has been fully briefed and is at issue, no notice of submission has been sent to the parties. The record in each case shows the respective fact situations are unique. The fact that the BODA Case is an appeal from a judgment of suspension and the case pending in the Fourth Court of Appeals addresses a sanction of disbarment does not impede the resolution of either case.

Question 2. Would the evidentiary appeal become moot if the Fourth Court of Appeals, and the Supreme Court of Texas if subsequently appealed, affirms the judgment of disbarment?

No. Were the judgment of disbarment to become final after exhaustion of the Texas appellate process, the BODA Case would not be moot. There are two reasons the BODA Case should not be deemed moot now, nor should it be deemed moot were the Disbarment Case to be affirmed. First, the award of attorney's fees to the State Bar in the BODA Case is a "live" issue and an asset of the State Bar. Second, one cannot anticipate how future, unknown events could affect either case.

According to the case law, an appeal is moot only when there "is no longer a live controversy between the parties and appellate relief would be futile." *Metropolitan Transit Authority of Harris County v. Douglas*, 544 S.W.3d 486, 493 (Tex. App.-Houston [14 Dist.] 2018, pet. denied) (citing *Rice v. Rice*, 533 S.W.3d 58, 61 (Tex. App.-Houston [14th Dist.] 2017, no pet.)). The Court of Appeals in *Douglas* continued its explanation saying, "Stated differently, a case is moot when the court's action on the merits cannot affect the parties' rights or interests. *Id.* (citing *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 162 (Tex. 2012)); *see also City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 469 (Tex. App.-Dallas 2007, no pet.) ("The mootness doctrine dictates that courts avoid rendering advisory opinions by only deciding issues that present a 'live' controversy

at the time of the decision.”). *Metropolitan Transit Authority of Harris County v. Douglas*, 544 S.W.3d at 493.

As indicated above, there are at least two reasons the BODA Case would not be moot were the judgment of disbarment affirmed. First, the judgment in the BODA Case includes not only the sanction of suspension, but it includes a significant award of attorney’s fees and cost to the State Bar. That award reimburses the State Bar for the resources it has expended in pursuing the discipline of Ponce. Also, it must be considered that the State Bar has a statutory obligation to administer the discipline of lawyers and to allocate funds to operate the disciplinary system.¹ The primary source of State Bar’s resources is dues and license fees paid by members of the State Bar.²

The judgment provides in part the following:

“ . . . IT IS FURTHER ORDERED *Respondent shall pay all reasonable and necessary attorney’s fees and direct expenses to the State Bar of Texas in the amount*

¹ See TRDP 4.08. “Funding The State Bar shall allocate sufficient funds to pay all reasonable and necessary expenses incurred in the discharge of the duties of the Commission; of the Chief Disciplinary Counsel; of the Board of Disciplinary Appeals; of Committees and their individual members; and of witnesses. Further, the State Bar shall allocate funds to pay all other reasonable and necessary expenses to administer the disciplinary and disability system effectively and efficiently.”

² See State Bar of Texas | FAQs for the Public (texasbar.com), “The State Bar receives no tax dollars and is not a part of the state appropriations process. The State Bar is completely funded through membership dues, continuing legal education fees, sales of books and legal forms, advertising income from the *Texas Bar Journal*, advertising income from our website, texasbar.com, and other sources.” Available at <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/FAQ/default.htm#taxes>, (Last accessed February 4, 2022).

of Four Thousand Two Hundred Twenty-Eight and 50/100 Dollars (\$4,228.50). The payment shall be due and payable on or before December 1, 2019, and shall be made by certified or cashier's check or money order. Respondent shall forward the funds, made payable to the State Bar of Texas, to the Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701). PONCE 101 Judgment of Partially Probated Suspension.

IT IS FURTHER ORDERED that *in the event of an unsuccessful appeal of this judgment by Respondent to the Board of Disciplinary Appeals ("BODA"), Respondent shall pay an additional Four Thousand and 00/100 Dollars (\$4,000.00) in attorney's fees to the State Bar of Texas, due 30 days after the date of BODA's decision. IT IS FURTHER ORDERED that in the event Petitioner is required to respond to an unsuccessful petition filed by Respondent for review by the Supreme Court of Texas, Respondent shall pay an additional Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) in attorney's fees to the State Bar of Texas due upon the issuance of a mandate.*" (Emphasis added), See Clerk's Record in BODA Case, at 96-194.

The State Bar has the right to be reimbursed for its expenses as a sanction. The State Bar, through the Commission, performed its duties to pursue disciplinary matters as provided by statute and the Texas Disciplinary Rules of Professional

Conduct and the Evidentiary Panel was fully empowered to award attorney's fees as a sanction.³

As recited in the judgment, the State Bar has been awarded \$4,228.50. Were the BODA Case to be affirmed by the Board, an additional \$4,000 would be owed by Ponce and if the Texas Supreme Court were to review this case and affirm the judgment, an additional \$2,000 would be due and owing to the State Bar.

This judgment and award of attorney's fees made by the Evidentiary Panel has "the force of a final judgment of a district court."⁴ Additionally, a district court has the power to enforce the judgment of an Evidentiary Panel and "has available to it all writs and processes, as well as the power of contempt, to enforce the judgment as if the judgment had been the court's own."⁵ Further, a district court's power that

³ See *Cantu v. Commission for Lawyer Discipline*, 2020 WL 7064806 (Tex. App.- Corpus Christi-Edinburg 2020, no pet). "Texas Rules of Disciplinary Procedure vest the determination of appropriate sanctions in a disciplinary proceeding with the trial court. See TEX. RULES DISCIPLINARY P. R. 3.09 ('If the court finds that the Respondent's conduct does constitute Professional Misconduct, the court shall determine the appropriate Sanction or Sanctions to be imposed.'). The term 'Sanction' may include restitution and the 'Payment of Reasonable Attorneys' Fees and all direct expenses associated with the proceedings.' See *id.* R. 1.06(FF)." See also, *Olsen v. Commission for Lawyer Discipline*, 347 S.W.3d 876, 890 (Tex. App.-Dallas 2011, pet. denied), "Under Texas Rule of Disciplinary Procedure 1.06(y), a proper sanction may include payment of attorneys' fees and all direct expenses associated with the proceeding. TEX. RULES DISCIPLINARY P.R. 1.06(Y); see *Goldstein v. Comm'n for Lawyer Discipline*, 109 S.W.3d 810, 815 (Tex.App.-Dallas 2003, pet. denied)."

⁴ See TRDP 17.01. "Enforcement of Judgments The following judgments have the force of a final judgment of a district court: final judgments of an Evidentiary Panel and judgments entered by the Board of Disciplinary Appeals. To enforce a judgment, the Commission may apply to a district court in the county of the residence of the Respondent. In enforcing the judgment, the court has available to it all writs and processes, as well as the power of contempt, to enforce the judgment as if the judgment had been the court's own."

⁵ *Id.*

could be exercised respecting an Evidentiary Panel judgment includes the “. . . post-judgment power to enforce its judgment and to aid the judgment creditor in his efforts to collect on that judgment can last until the judgment is satisfied.”⁶ Accordingly, assuming the disciplinary judgment in the BODA Case is affirmed, the State Bar may proceed to collect the attorney’s fees owed it by Ponce. That award of attorney’s fees is an asset of the State Bar that should not be vacated by rendering a dismissal of the BODA Case on the supposition that it is moot.

Second, aside from the award of attorney’s fees, it is unclear at this point if the BODA Case judgment is moot because one cannot forecast what, if any, action the Respondent attorney might take after exhaustion of the Texas appellate process. The Commission does not foresee that any federal review of the Disbarment Case would be in order, but until all time limits have run respecting both cases, mootness of the BODA Case should not be considered. Also, as the Board is aware, a disbarred attorney may seek reinstatement five years after disbarment by filing a petition for reinstatement in a Texas district court. The petitioner’s disciplinary history is

⁶ See *Mitchell v. Turbine Resources Unlimited, Inc.*, 523 S.W.3d 189, 197 (Tex. App.-Houston [14th Dist.] 2017, pet. denied.) “Even after plenary power has expired, however, a trial court retains the power to enforce its judgments. See Tex. R. Civ. P. 308. This power extends to enforcement of the judgment by execution or other appropriate process when necessary. Tex. R. Civ. P. 621. “The court’s post-judgment power to enforce its judgment and to aid the judgment creditor in his efforts to collect on that judgment can last until the judgment is satisfied.” *Bahar v. Lyon Fin. Services, Inc.*, 330 S.W.3d 379, 387 (Tex. App.–Austin 2010, pet. denied).” *Mitchell v. Turbine Resources Unlimited, Inc.*, 523 S.W.3d 189, 197 (Tex. App.-Houston [14th Dist.] 2017, pet. denied)

relevant to the trial judge's evaluation of the petitioner's fitness for reinstatement. TRDP 11.03.⁷ Unquestionably, the discipline imposed by the Evidentiary Panel in the BODA Case will be relevant in any proceeding for reinstatement.

In summary, it is clear at this point that a final judgment in the Disbarment Case will not render any decision in the BODA Case one that "cannot affect the parties' rights or interests." *Metropolitan Transit Authority of Harris County v. Douglas*, 544 S.W.3d at 493. The attorney's fee award is "live."⁸ Further, unforeseen events could arise between now and the exhaustion of all remedies respecting the Disbarment Case. Accordingly, the Commission respectfully requests that the Board not declare the BODA Case moot and that it proceed to render its decision.

⁷ See TRDP 11.03. (The person seeking reinstatement has the burden of proof to show, "by a preponderance of the evidence that the best interests of the public and the profession, as well as the ends of justice, would be served by his or her reinstatement. The court shall deny the petition for reinstatement . . . if the petitioner fails to meet the burden of proof."); See also, TRDP 11.03. (The trial court's decision as to reinstatement are to be based upon the factors as described in TRDP 11.05. The trial court is not limited to considering specific factors. Rather, the trial court may consider "other evidence relevant" to fitness, including "the likelihood that the petitioner will not engage in further misconduct." TRDP 11.05(G).). See TRDP 11.01. the person seeking reinstatement has the burden of proof to show, "by a preponderance of the evidence that the best interests of the public and the profession, as well as the ends of justice, would be served by his or her reinstatement. The court shall deny the petition for reinstatement . . . if the petitioner fails to meet the burden of proof." TRDP 11.03. The trial court's decision as to reinstatement are to be based upon the factors as described in TRDP 11.05. The trial court is not limited to considering specific factors. Rather, the trial court may consider "other evidence relevant" to fitness, including "the likelihood that the petitioner will not engage in further misconduct." TRDP 11.05(G).

⁸ *Id.*

Question 3. Should the Board abate this evidentiary appeal pending final decision as to the disbarment judgment?

No. For the reasons identified above, the BODA Case is “a live controversy between the parties and appellate relief would [not] be futile.”⁹ Abating the BODA Case would not resolve any issues for the parties. Abatement would merely prolong the timeline for disposition of both appeals. Since the BODA Case is “at issue,” the Commission respectfully suggests the Board proceed to render its decision.

IV. Conclusion.

The Commission respectfully suggests that the Board proceed to consider and render its decision in the BODA Case.

RESPECTFULLY SUBMITTED:

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⁹ Quoting with the insertion of “not” to demonstrate the point. *Metropolitan Transit Authority of Harris County v. Douglas*, 544 S.W.3d at 493.

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STATE BAR CARD NO. 11895500

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

Pursuant to the Board of Disciplinary Appeals Internal Procedural Rules, the foregoing brief contains approximately 2,870 words (total for all sections of brief that are required to be counted). Counsel relies on the word count of the computer program used to prepare this petition.

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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing brief of Appellee, the Commission For Lawyer Discipline has been served on Joe Jesse Ponce, III, by and through his attorney of record, Ed Stapleton 2401 Wildflower Drive, Suite C, Brownsville, Texas 78526, by email to stapletonstapleton@icloud.com on the 14th day of February, 2022.

Douglas S. Lang

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