

MEDIATING WITH THE OCDC – Is It Worthwhile Or A Waste of Time?

by Renée E. Moeller and Robert S. “Bob” Bennett

History of Mediation in Texas

Mediation is public policy in the State of Texas. The purpose of mediation is to provide a forum in which an impartial person, the mediator, facilitates communication between the parties to promote peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.^[1] Furthermore, “[i]t is the responsibility of courts to carry out the statutory policy.”^[2] One would expect that the office in charge of attorney discipline, the Office of the Chief Disciplinary Counsel (“OCDC”), would be interested in setting an example by using mediation whenever possible, especially in light of the “expenses” and State Bar attorneys’ fees that are ultimately incurred and sometimes recovered in varying degrees from a Respondent in cases where misconduct is found. Surprisingly there is one lone voice in the legal world that opposes mediation, the OCDC regarding disciplinary matters, as set forth below.

The OCDC’s regulation of attorney discipline often includes discipline for minor as well as major infractions. Although rule infractions, whether major or minor, must be addressed, there is a world of difference between a private reprimand and disbarment. It would seem that in many cases where there is a question of misconduct mediation would be an important step to effect and immediate resolution of the matter: i.e., correct past errors wherever possible, educate both attorneys and the public, and protect the public and the profession without incurring unnecessary time delays or expense. In light of the Rules of Disciplinary Procedure, case law, public policy and legislative intent to promote peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures, the OCDC should actively participate in mediation to resolve as many disciplinary matters as possible.

Mediation and the New Disciplinary Rules

While one of the main purposes of the restructuring of the grievance procedures was to reduce recourse to district court and to weed out non-serious cases, moving the serious cases along in a more-timely manner, that is not necessarily what happens. The new Texas Rules of Disciplinary Procedure that went into effect January 1, 2004, should encourage mediation; yet conflicts in the rules lessen the potential for resolution by ADR. While “[i]t shall be the policy of the commission to participate in alternative dispute resolution procedures where feasible,”^[3] this language only comes into play after a respondent attorney has received a finding of just cause and must make either an election for trial by Evidentiary Panel or in a district court. Respondent attorneys are not able to elect instead to first proceed with mediation and then, if no resolution is reached, go to trial

If the responding attorney makes the election for trial by Evidentiary Panel, Rule 2.17K controls: “[u]pon motion made or otherwise, the Evidentiary Panel Chair **may** order the Commission and the Respondent to participate in mandatory alternative dispute resolution as provided by Chapter 154 of the Civil Practice and Remedies Code or as otherwise provided by law when deemed appropriate.”^[4] (emphasis added) Therefore, alternative dispute resolution (“ADR”) is solely at the election of the Evidentiary Panel itself in evidentiary panel proceedings. While TRDP 3.08G provides that “it shall be the policy of the Commission to participate in alternative dispute resolution procedures where feasible,” the problem is that this rule was placed in Part III of the Rules, pertaining **only** to proceedings in district court. If the responding attorney has elected to proceed before an evidentiary panel, using ADR is at the Panel’s discretion. This defeats the hope under the revised rules that once a finding of just cause has been made, the new procedures would encourage responding attorneys to elect the evidentiary panel process, a supposedly faster system, rather than proceeding through district court.

Attorney and ethics expert, Lillian Hardwick, co-author of *Handbook of Texas Lawyer and Judicial Ethics*^[5] made a specific study of the 2003 Sunset Commission’s extensive review of the State Bar and its focus on the grievance system. Originally, Gib Walton (then chair of the State Bar Sunset Review Committee) and Guy Harrison (President of the State Bar at the time of the Sunset review) favored a moderated settlement conference that would occur at the investigatory stage. However, the Chief Disciplinary Counsel (“CDC”) opposed any formal provision for early ADR in the new rules, rejecting early ADR as being impractical. Arguing its opposition to mandatory mediation, the Commission for Lawyer Discipline (“CLD,” the “client” of the OCDC) stated that ADR could not be ordered at any specific time with any assurance that the relevant facts would be known. Additionally, the CLD argued that other deadlines set by the rules could be put at risk if mediation had to be accommodated. From the CDC’s viewpoint, ADR is only a possibility when there are no questions as to the relevant facts or concerns about deadlines. Therefore mediation may often take place only at the end of the process rather than early on, when resources needed for full-blown prosecution and defense need not be committed. This dilemma is underscored by a recent quote from Dawn Miller, Chief Disciplinary Counsel, and Dan Naranjo, former U.S. Magistrate, as well as former member of CLD and Board of Directors of the State Bar of Texas: “[t]he challenge for the Office of Chief Disciplinary Counsel posed by the new system is continuing to ensure that those cases than can be negotiated to a mutually acceptable result are resolved at the earliest possible juncture”^[6]

The problems with Alternate Dispute Resolution and the OCDC

The problem originates at the time when a responding attorney has received notice of a finding of Just Cause (i.e., a finding that he/she has more likely than not committed some act(s) of professional misconduct, and must now make an election to go forward in proceedings either before an evidentiary panel or a district court). Most courts maintain a mandatory mediation deadline, whereas again it is up to the evidentiary panel to decide whether or not to “allow”

mediation.^[7] While no one, not even a court, can order a party to mediate in good faith, if the CLD does not want to mediate a matter that is before an evidentiary panel, experience has shown that no matter what the responding party does, the evidentiary panel can and will refuse to order a mediation.

Recently, two cases handled out of the same regional office of the OCDC had entirely different results. In the case pending before an evidentiary panel, despite three different attempts to obtain an order for ADR, alternate dispute resolution was denied. Instead of working out a mediated agreement for resignation, a costly, full-blown 3-day evidentiary panel trial took place ending in disbarment. The result was the same in that the attorney in question no longer practices law. It was unfortunate that so much time and resources were expended needlessly to achieve that result. On the other hand, in a case involving multiple allegations of misconduct, some of which were already pending in district court, the OCDC agreed to mediation and eventually all matters were resolved without further delay and undue expense.

The carrot used by the OCDC to draw attorneys into an Evidentiary is the minimum sanction available at an evidentiary panel is a private reprimand (under the old rules the minimum was a public reprimand), whereas the district court proceeding is a matter of open, public record; therefore a private reprimand is not possible as a minimum sanction even if the circumstances warrant a minimum sanction. The reprimand, whether public or private, is the minimum sanction for misconduct. While evidentiary proceedings are closed and confidential, as opposed to proceedings in district court; *any* evidentiary proceeding that results in a sanction greater than a private reprimand may be disclosed. Therefore, the allure of being able to maintain confidentiality by using the evidentiary process is not as significant as one might assume initially. More importantly, if the ADR opportunity presented by Rule 2.17K is only illusory, i.e. ADR is in actual occurrence truly available only in the district court where mediation is a matter of the docket control order and one cannot go to trial without going through mediation, then the Bar's goal of reducing recourse to district court will be thwarted. If panel chairs will order ADR only when presented with cases that appear to favor the respondent attorney, such actions will frustrate the more serious ends of fairness and due process.^[8]

Conclusion

What is the solution to the OCDC's refusal to use mediation as a more efficient and effective means of resolving grievance matters? Both the OCDC and responding attorneys should be encouraged to make use of mediation in the resolution of disciplinary matters at the earliest opportunity. Although it is obviously a case-by-case matter, if the allegations and facts support any type of sanction, let alone possible suspension or disbarment, mediation should be used –it is virtually guaranteed to be a part of the district court process thereby making the initial election of the responding attorney to proceed in district court or before an Evidentiary Panel all the more crucial. This is obviously a strategy call to be made by the responding attorney and representing counsel and yet another reason why attorneys benefit from the experience of independent counsel in grievance matters. A grievance is a serious matter that requires more than a *pro se* representation – even when the responding attorney truly believes he or she has done absolutely nothing wrong and has not committed professional misconduct. The response must carefully address any Disciplinary Rule that the complaint may apply to, even though the responding attorney is not advised of any specific rule violation (or alleged rule violation) until after there is a finding of just cause. The new procedural rules may be successful at processing complaints in a timelier manner, but the responding attorney must make a comprehensive response (while partially blind to the actual rule violations he/she may be facing), in order to avoid a finding of just cause. Personal detachment is an absolute requirement that is virtually impossible for the *pro se* responding attorney. Meanwhile, it is hoped that the OCDC will meet its challenge and will refine its policies so that as many cases as possible will be mediated to a mutually acceptable result and resolved at the earliest possible juncture, thus following the dictates of legislative history, case law and public policy.

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^[1] CPRC § 154.002 and 154.023(a); **Cadle Co. v. Castle**, 913 S.W.2d 627, 632 (Tex.App.—Dallas 1995, rehearing denied); **Keene Corp. v. Gardner**, 837 S.W.2d 224, 232 (Tex.App.—Dallas, 1992, writ denied); **Downey v. Gregory**, 757 S.W.2d 524, 525 (Tex.App.—Houston [1st Dist.] 1988, orig. proceeding).

^[2] Tex. Civ. Prac. & Rem. Code Ann. § 154.003 (Vernon 1997); **Avery v. Bank of America, N.A.**, 72 S.W.3d 779, 797

^[3] Tex. R. Disc. P. 3.08G.

^[4] Tex. R. Disc. P. 2.17K.

^[5] Robert Schuwerk and Lillian Hardwick, *Handbook of Texas Lawyer and Judicial Ethics*, West Publications 2004.

^[6] *Attorney Disciplinary Procedure in Texas: Competing Interests and Philosophies 1988-2004*, 26 ST. MARY'S L.J 4 pg. 1067

^[7] Tex. R. Disc. P. 2.17K.

^[8] Lillian B. Hardwick: Opinion: Role of Mediator/Alternative Dispute Resolution in the New Grievance Process.