BODA CASE NO. 58401
SBOT CASE NO. 201306674

IN THE
BOARD OF DISCIPLINARY APPEALS
DALLAS, TEXAS

CHRISTOPHER L. GRAHAM
Appellant

v.

COMMISSION FOR LAWYER DISCIPLINE
Appellee

On appeal from Evidentiary Panel 6
of Dallas County, Texas

APPELLANT BRIEF

IDENTITY OF THE PARTIES

1. Pro se Appellant is Christopher L. Graham, hereinafter referred to as "Graham." Address: PO Box 226265, Dallas, Texas 75222; State Bar number 24047549.
2. Appellee is the Commission for Lawyer Discipline. Attorney representing Appellee at evidentiary hearing was Laurie Guerra. Address: 14651 Dallas Parkway, Suite 925, Dallas.

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STATEMENT OF THE CASE

9. At the end of 2013, Nancy Thomas had questions concerning representation for her son Christopher Rasberry, who was in the custody in federal jail. She was told there was a consultation fee to discuss the matter with the attorney. Furthermore, she was advised of the cost of representation for her son: $2,500 for pretrial representation and $2,500 additional should the case proceed to trial. She was told that attorney would not submit any documents or make any appearances in court until the full $2,500 dollar pretrial fee had been paid. Thomas called Graham approximately 40 times asking questions related to federal criminal law which Graham answered concerning topics such as the right to bail, meaning of the mail fraud statute, relationship between the federal case and Rasberry's preceding state law case;

rights concerning choice of court appointed attorney; disposition alternatives and trial proceedings to name a few. Thomas paid $900 as the consultation fee, and she was told that these funds would be applied to the $2,500 pretrial fee should they make a decision to move forward with the representation. Thomas then demanded her money back in spite of the consultation fee agreement and legal advice already received from Graham. In 2016, the Thomas and Graham entered into a settlement agreement where Thomas received a complete refund of her money paid. In spite of the fact that the funds were initially subject to dispute, that Thomas received a complete refund and there was a settlement agreement whereby Thomas was represented by independent counsel, after the evidentiary hearing of 11/3/2016 the evidentiary panel made the finding of a violation of Tex. R. Dis. Proc. 1.15(d): failure to return unearned fees. On or around 11/11/2016, Graham filed a motion for new trial highlighting errors in the evidentiary panel's decision. On or around November 28 2016, Graham appealed the decision to the Board of Disciplinary Appeals.

STATEMENT OF JURISDICTION

10. Tex. R. Disp. Proc. 2.24 allows Respondent in a grievance matter to appeal to the Board of Disciplinary Appeals for determination. This appeal is made pursuant to this provision.

STATEMENT REGRADING ORAL ARGUMENT

11. Oral argument is not requested by Appellant at this time.

ISSUES PRESENTED

12. Was the evidentiary panel correct in its decision to find that Graham committed misconduct by a failure to return unearned fees when the fees were in fact returned?

13. Can the evidentiary panel find misconduct when the parties Thomas and Graham entered into a settlement agreement concerning the disputed fees?

14. Was the panel incorrect in its decision of a finding of misconduct when Graham followed fee dispute procedures under Tex. R. Disp. Conduct 1.14(c)?

15. Was the panel incorrect in its decision of a finding of misconduct when Graham was entitled by way of quantum meruit to keep the $900 in fees when he consulted and gave legal advice and counsel to Thomas concerning federal criminal law issues such as the right to bail, meaning of the mail fraud statute, relationship between the federal case and Rasberry's preceding state law case; rights concerning choice of court appointed attorney; disposition alternatives and trial proceedings, when Graham told Thomas about the consultation fee and that Graham's legal services were not free

16. Should the evidentiary panel have considered non-final disciplinary history in arriving at its sanction decision when Graham's disciplinary history was on appeal?

STATEMENT OF FACTS

17. At the end of 2013, Nancy Thomas had questions concerning representation for her son Christopher Rasberry, who was in the custody in federal jail. (RR p. 16 l. 6-11). Graham, told her there would be a consultation fee in order to discuss.

18. Graham advised Thomas of the cost of representation for her son: $2,500 for pretrial representation (RR p.17 l. 5-6) and $2,500 additional should the case proceed to trial (RR p. 48 l.24-25); (RR p. 49 l.1-2).

19. She was told that attorney would not submit any documents, make any appearances in court, nor would representation commence until the full $2,500 dollar pretrial fee had been paid (RR p.32 l. 22-25); (RR p. 33 l. 1). The pretrial fee was never paid to Graham (RR p. 31 l.8-10).

20. Thomas called and Graham consulted with Thomas numerous times answering questions related to federal criminal law. Graham answered questions related to topics such as the right to bail, meaning of the mail fraud statute, relationship between the federal case and Rasberry's preceding state law case;

rights concerning choice of court appointed attorney and removal of the court appointed attorney; disposition alternatives and trial proceedings to name a few. (RR p.55 l. 3-10) (RR. p.28 l. 21-22); (RR p. 28 l. 23 l.24-25; RR p. 29 l. 1-3); (RR. p.29 l. 24-25; RR. p. 30 l. 1-2); (RR p.32 l. 2-6); (RR p.53 l.9-11).

21. Thomas paid $900 as the consultation fee (RR p. 50 l. 5-14) not as a down payment for her son's representation (RR p.18 l. 1-2), and she was told that these funds would be applied to the $2,500 pretrial fee should they make a decision to move forward with the representation (RR p.54 l. 2-5).

22. On or around October 2013, after Thomas had consulted with Graham numerous times via telephone (RR Respondent Exhibit 1 p. 60-61) and received legal advice and after her son accepted a plea with his court appointed attorney, she then demanded her money back and filed a grievance in spite of the consultation fee agreement and legal advice already received from Graham (RR.p.33 1. 15-19); (RR p.37 l.1-7).

23. In the beginning of 2016, the parties entered into a settlement agreement where Thomas received a complete refund of her money paid, and with the assistance of her independent attorney she and Graham agreed to settle the dispute concerning the funds. (RR p. 21 l. 6-11); (RR p.22 l. 13-14); (RR Respondent Exhibit 2, p 62-65).

24. In spite of the fact that entitlement to the funds was disputed, that all funds were eventually refunded to Thomas, that there was a settlement agreement, and in spite of work having been performed in the nature of legal advice having been given to Thomas, after the evidentiary hearing of 11/3/2016 the evidentiary panel found Graham had violated Tex. R. Dis. Proc. 1.15(d): failure to return unearned fees. (RR p.84 l. 24-25) (RR p. 85 l. 1-2).

25. On or around 11/11/2016, Graham filed a motion for new trial highlight errors in the evidentiary panel's decision.

26. On or around November 28 2016, Graham appealed the decision to the Board of Disciplinary Appeals.

SUMMARY OF ARGUMENT

25. The Evidentiary Panel's decision in this case is wrong and must be overturned for the following reasons: 1) there is no evidence to support a violation of 1.15(d) (failure to return unearned fee) because the fees were returned 2) there was a settlement agreement for the resolution of the fee dispute that should be given effect, whereby Thomas was represented by independent counsel; 3) furthermore, Graham was entitled to charge a reasonable fee for consultation and he did perform and provide legal services during the consultation that entitled Graham to compensation under quantum meruit 4) retaining a disputed fee is not per se misconduct as the evidentiary panel alleges; there is a procedure for dealing with fee disputes between client and attorney under the rules; if every fee dispute were automatically misconduct it would eviscerate the disciplinary rules and make Tex. R. Disp. Conduct 1.14(c) moot; 5) in determining Graham's sanction, the panel was not permitted to consider other disciplinary history subject to appeal.

ARGUMENT AND AUTHORITIES

STANDARD FOR LEGAL AND FACTUAL SUFFICIENCY REVIEW

26. When the court reviews the legal sufficiency of the evidence, it must consider all of the record evidence in a light most favorable to the party in whose favor the verdict has been rendered, and indulge in that party's whose favor the verdict has been rendered, and indulge in that party's favor every reasonable inference deducible from the evidence. Formosa Plastics v. Presidio Engineers, 960 S.W.2d 41, 48 (Tex. 1998). A legal sufficiency point must and may only be sustained when the record discloses: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a

vital fact is no more than a mere scintilla; and (4) the evidence established conclusively the opposite of the vital fact. Juliette Fowler Homes, Inc. v. Welch Assoc., 793 S.W.2d 660, 666 n.9 (Tex. 1990). If there is more than a scintilla of evidence to support the finding, the legal sufficiency challenge fails. Stafford v. Stafford, 726 S.W.2d 14, 16 (Tex. 1987). When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is not more than a scintilla and, in legal effect, is no evidence. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983). The test for the application of this no evidence/scintilla rule is: if reasonable minds cannot differ from the conclusion, then the evidence offered to support the existence of a vital fact lacks probative force, and it will be held to be the legal equivalent of no evidence. *Id*.

27. When the court reviews the factual sufficiency of the evidence, it considers, weighs and examines all of the evidence which supports or undermines the finding of the trier of fact. Plas-Tex, Inc. v. United States Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989). We review the evidence, keeping in mind that it is the fact finder's role, not ours, to judge the credibility of the evidence, to assign the weight to be given to testimony, and to resolve inconsistencies within or conflicts among the witnesses' testimony. Corpus Christi Teachers Credit Union v. Hernandez, 814 S.W.2d 195, 197 (Tex. App.--San Antonio 1991, no writ). We then set aside the verdict only when we find that the evidence standing alone is too weak to support the finding or that the finding is so against the overwhelming weight of the evidence that it is manifestly unjust and clearly wrong. Garza v. Alviar, 395 S.W.2d 821, 823 (1965).

a) No Misconduct because the Fees were Returned

28. There was no misconduct because Respondent refunded money back to Thomas in spite of the fact that Graham earned the funds. The testimony from Graham, Thomas and the plain language of the settlement agreement make clear that the funds were paid back to Thomas. (RR p. 21 l. 6-11); (RR p.22 l. 13-14); (RR Respondent Exhibit 2, p 62-65). Tex. R. Disp. Conduct 1.15(d) states as follows: (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other

counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. There is no evidence to support a violation of Tex. R. Disp. 1.15(d) when nothing was retained by Respondent. Furthermore, the rule does not address the time period when a refund must be made, if at all, if the funds are claimed to be earned by the attorney or if the funds are in dispute as was the case here. Generally speaking, there is nothing contained in this rule as to exactly when a refund has to be made: 5 days, 10 days or 30, just so long as the attorney has "taken steps" after the termination of representation. Moreover, Tex. R. Disp. Conduct 1.14(d) states: If a dispute arises concerning their respective interests [as to funds], the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately. In other words, Respondent was entitled to hold the funds until the dispute was resolved. Once the dispute was resolved through the settlement agreement, the funds were given back to Thomas. As a result there is no misconduct for any wrongfully withheld funds, and the Graham did not violate 1.15(d).

b) No Misconduct Because There was a Settlement Agreement Between Graham and Thomas as to the Disputed Funds

29. Thomas and hence the Commission should not have been able to continue with the grievance since the matter had been settled (RR Respondent Exhibit 2, p 62-65). Tex. R. Disp. Proc. 1.08(g) states: A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith. Graham and Thomas settled the matter as to the disputed $900 via a full and final settlement and release judgment. Furthermore, she was represented by independent counsel, Charles Grantham when she entered

into the agreement as required by Tex. R. Disp. Conduct 1.08(g) (RR p.21 l.21-23). And Thomas received a refund in accordance with the settlement agreement (RR p. 21 l. 6-11). Tex. R. Disp. Conduct 1.08(g) allows such agreements if the requisites have been followed, and the settlement agreement should have been given effect. The settlement agreement stated that:

> 1)NANCY THOMAS hereby accepts the above referenced payment in full settlement, compromise and release of any and all claims, grievances arising out of or in connection with Grievance Proceeding Case number 201306674,
>
> 2)NANCY THOMAS agrees, contracts and wishes not to pursue any grievance including but not limited to Grievance Proceeding Case number 201306674 against Christopher Graham.

Since there was a settlement of the issue of the disputed funds underlying this grievance, and there was a settlement agreement between the parties, and the settlement comports with rule 1.08(g) the panel should have given it effect, thus there can be no misconduct by Graham.

c) There is no misconduct since Graham followed the dispute resolution process in Tex. R. Disp. Conduct 1.14(d)

30. The evidentiary panel's decision is erroneous since it renders the fee dispute mechanism under Tex. R. Disp. Conduct 1.14(d) moot. The panel's decision is essentially that irrespective of the fact that the funds were claimed to be earned by Graham and subject to dispute, that when Graham failed to surrender the disputed funds immediately to Thomas on request, this constituted misconduct. Tex. R. Disp. Cond. 1.14(c) states the procedure an attorney is to follow if there is a dispute concerning funds: If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the

undisputed portion shall be distributed appropriately. The panel decision completely disregards the fee dispute process. There would be no need to have a section in the rules of conduct for fee dispute resolution if every fee dispute where the lawyer tries to protect his fee by not immediately issuing a refund were misconduct. Nowhere in the rules does it say that having a fee dispute with a client is automatic misconduct. Graham followed the rule 1.14(c) and issued the refund when the dispute between Graham and Thomas has been settled as the rules prescribe. Therefore it was not misconduct for Graham to keep the funds to which he was entitled.

d) Graham was entitled to charge a fee under Quantum Meruit

31. Graham was entitled to charge a reasonable fee for legal consultations to Thomas; Graham did perform and provide legal services during the consultation that entitled Graham to compensation under quantum meruit. Quantum meruit is an equitable theory of recovery that is intended to prevent unjust enrichment when there is an implied agreement to pay for benefits received. In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 740 (Tex.2005); Vortt Expl. Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex.1990); Barnett v. Coppell N. Tex. Court, Ltd., 123 S.W.3d 804, 817 (Tex.App.—Dallas 2003, pet. denied); see Bashara v. Baptist Mem'l Hosp. Sys., 685 S.W.2d 307, 310 (Tex.1985). The elements of an action for quantum meruit are the following: 1) The plaintiff provided valuable services or materials 2) The services or materials were provided for the defendant 3) The defendant accepted the services or materials 4) The defendant had reasonable notice that the plaintiff expected compensation for the services or materials. Attorney services are recoverable under quantum meruit. Shamoun & Norman, LLP v. Hill, 483 S.W.3d 767, 780-81 (Tex.App.—Dallas 2016, pet. filed 5-11-16) The plaintiff can recover the reasonable value of the services and materials. City of Houston v. Swinerton Builders, Inc., 233 S.W.3d 4, 10 n.7 (Tex.App.—Houston [1st Dist.] 2007, no pet.); LTS Grp. v. Woodcrest Capital, L.L.C., 222 S.W.3d 918, 920-21 (Tex.App.—Dallas 2007, no pet.); PIC Rlty. Corp. v. Southfield Farms, Inc., 832 S.W.2d 610, 616 (Tex.App.—Corpus Christi 1992, no writ). "Value" means the expenses incurred while

providing services and materials. See PIC Rlty., 832 S.W.2d at 616 (measure of damages was services provided, not increased value of land). The reasonable value of the services or materials is the reasonable price paid for them in the community. Campise v. Peden Builders Hardware Co., 452 S.W.2d 61, 62 (Tex.App.—Houston [1st Dist.] 1970, no writ) (materials).

32. When Thomas came to Respondent in 2013 she had numerous legal questions concerning her son's case. Testimony showed that those concerns were answered (RR. p.28 l. 21-22); (RR p. 28 l. 23-25; RR p. 29 l. 1-3); (RR p.32 l. 2-6); (RR p.53 l.9-11); Evidence also shows Thomas had contacted Respondent almost 40 times for information (RR Respondents Exhibit 1 p. 60-61); that Respondent discussed with her the possibility of bail, of substituting attorneys, of the relationship between the state jail felony case and the federal case; the steps in a criminal case; the wire fraud statute and sentencing. Graham also conducted research on these issues (RR. p.54 l. 22-25; p.55 l.1-9) Thus, Respondent undeniably performed and provided legal services and advice to Thomas concerning her son's case, consequently satisfying the first 2 elements of quantum meruit recovery. As already stated pursuant to Shamoun & Norman, LLP v. Hill, 483 S.W.3d 767, 780-81 (Tex.App.—Dallas 2016, pet. filed 5-11-16) legal services are recoverable services under quantum meruit theory. Thomas accepted the legal services: there was no testimony from her indicating that she did not receive answers to her questions; respondent's testimony indicates that she received and accepted the information. Also the Respondent's and Graham's testimony makes clear that payment was discussed for legal service. Thomas' testimony makes clear that payment was discussed for legal services and she reasonable knew that Graham as a licensed attorney was not providing legal services for free. (RR p. 50 l. 5-14) (RR. p.18 l. 1-2). As a result quantum meruit has been satisfied. Graham was entitled keep the earned portion of the fees or at least in the alternative keep the fees until the dispute resolution process has taken place pursuant to Tex. R. Disp. Conduct 1.14(d). The evidentiary panel has ignored the salient, undisputed evidence in this case that work was performed here and that the status of the funds was disputed. This is not the hypothetical case where a person goes

into the law office pays a consultation fee and then later says “I changed my mind” without having received any kind of legal services whatsoever. There was no violation of 1.15(d).

33. Based on Graham’s background and experience he could charge $900 for the consultations that he had with Thomas. Graham is an attorney licensed in multiple states, having over 8 years experience in criminal defense legal practice, and fluent in multiple languages: the consultation fee was reasonable for approximately 3 hours of work at Graham’s rate of $400/hour. This price is reasonable based on Graham’s experience and credentials. Nevertheless, the panel wrongfully decided that Graham was not entitled to any fee for the legal advice given, that Respondent’s time and expertise in answering Thomas’ questions was worth nothing; the time that Respondent spent answering the innumerable calls from Thomas was worth nothing. Furthermore, in spite of the fact that the funds were earned by Graham, Graham returned the funds them anyway. The facts do not support misconduct.

e) The Panel was not permitted to consider Disciplinary History subject to appeal

34. The panel was not allowed to consider a past disciplinary case number 201502093 against Respondent in assessing sanctions in this case since it was not a final judgment. The judgment against Respondent in case number 201502093, signed on 10/19/2016 is not a final judgment and is still subject to appeal by the Respondent. The term “final judgment” is used to describe a judgment that is no longer subject to modification or cancellation by the trial court except by bill of review because of the expiration of the time periods during which the court has plenary power over the judgment , *see* Tex. R. Civ. P. 329b(f). The Texas Rules of Disciplinary Procedure allows an accused 30 days after the judgment in which to file an appeal. Tex. R. Disp. Proc. 2.24. Introduction of this judgment by Petitioner should not have been permitted in the sanctions phase of the hearing because it permitted the panel to consider a judgment that may be overturned on appeal in assessing the sanction. The panel should not have been permitted to consider this judgment of sanction. As a result the sanction was too harsh and erroneous.

WHEREFORE PREMISES CONSIDERED Graham requests that the Board of Disciplinary Appeals reverse the finding of the Evidentiary Panel of misconduct by the Respondent; render a decision of no finding of misconduct; that the complaint against Respondent be dismissed; that the Commission take nothing by way of attorneys fees or any other fees against the Respondent; that Graham's public attorney profile be changed to reflect no disciplinary sanction in this case and for all further relief in law or inequity.

Respectfully submitted,

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By: 

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