BODA CASE NO. 58402
SBOT CASE NO. 20150293

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 was Laurie Guerra at the evidentiary hearing. Address: 14651 Dallas Parkway, Suite 925, Dallas.

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STATEMENT OF THE CASE

3. In 2012 Willingham hired Graham for criminal defense representation to respond to an indictment alleging of serious bodily injury to a child. The parties signed a contract to reflect the representation. Willingham failed to make timely payments under the terms of the representation contract, failed to keep contact with Graham, and failed to attend court eventually resulting in a warrant being issued for his arrest. While Graham was diligently working to set aside the warrant for Willingham's arrest and reinstate his bond, he decided to fire Graham and request a refund of funds paid to Graham by filing a grievance against Respondent. On October 6, 2016 an evidentiary hearing was conducted and the panel made the following erroneous findings: (i) Graham neglected Willingham's legal matter; (ii) Graham frequently failed to carry out completely the obligations owed to Willingham (iii) Willingham was not kept reasonably informed about the status of his criminal case and that Graham failed to promptly comply with reasonable requests for information from Willingham; (iv) Graham failed to surrender papers and property to Willingham as well as advance payments of the fee that had not been earned. On or around 11/9/2016, Graham filed a motion for new trial highlight errors in the evidentiary

panel's decision. On around 11/28/2016, Graham appealed the decision to the Board of Disciplinary Appeals.

STATEMENT OF JURISDICTION

4. 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

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

ISSUES PRESENTED

A. Should the panel have found neglect and failure to perform duties to client where Graham appeared at all court appearances and 1) attempted to talk with prosecutors informally several times about the bond reinstatement 2) attempted to approach the judge several times about bond reinstatement and 3) filed a motion for habeas corpus in the case to carry out obligations under the contract, where client Willingham failed to complete his obligations under the contract namely, nonappearance in court, failure to make payment, failure to let Respondent know his whereabouts and firing Graham in the middle of the representation?

B. Should the panel have found that Graham failed to keep Willingham reasonably informed about his case and failed to comply with reasonable requests for information when Graham conveyed information about his case through his wife as Graham had been instructed by Willingham, where there was no evidence that Willingham ever made a request to Graham for information about his case, and where there was no change in status on his case?

C. Should the panel have found Graham failed to surrender discovery papers and property where the Texas Code of Criminal Procedure strictly forbids it?

D. Should the panel have found that Graham failed to refund advance payment of fees, when said fees were earned because of work Graham did on the case; the amounts were disputed by Willingham; and where the representation contract and evidence indicate that the fees were a nonrefundable retainer and compensation for Graham's opportunity cost in handling the case?

STATEMENT OF FACTS

I. In or around the beginning of 2012 Willingham signed a standard contract for criminal representation in felony cases with Graham. (RR p. 9 l. 13-15) The most significant parts of the agreement stated there was to be a $2,500 pretrial fee and then an additional $2,500 fee if the case was to go to jury trial. (RR. p. 13 l.15-23); (RR p. 97 l. 15-19). This additional fee was the minimum amount that it was going to cost for representation and the amount of the representation could be a higher fee due to unforeseen circumstances. Furthermore, paragraph 4(c) of the agreement specified that if the additional trial fee was not paid then the attorney did not have any further obligation to prepare for trial. (RR p.68; 5.5.16 hearing Exhibits, Exhibit 14).

II. Graham consulted with Willingham numerous times regarding his case. (RR p.69 l.5-6). A fairly long interview was conducted at the time he signed the contract regarding the circumstances of his case and the defenses that likely could be asserted in the case. (RR p. 97 l.3-6). At the time he signed the agreement Willingham was out on bond and the case had not been indicted so there were no court dates. (RR p. 97 l. 6-10).

III. The indictment in his case was filed on 8/31/2012 after which Graham appeared numerous times on his case for court. Graham went to court on Willingham's case on 10/25/2012, 11/19/2012 (no signature of Emund Willingham on this pass slip), 12/21/2012, 1/9/2013, 2/8/2013, 3/11/2013 (RR p. 100 l. 7-9). As the pass slip of 3/11/2013 indicates, Willingham did not appear at court on this day as the signature line on the included pass slip is blank where it says "Defendant." (RR p. 100 l.19-20); (RR 5.5.2016 Exhibits p.11). This is the justification that the court had in order to revoke his bond.

IV. As of a 3/11/2013, Willingham had only paid Graham $1,500. (RR p. 97 l.22-23). According to the representation contract, Willingham owed the Graham an additional $1,000 for pre- trial representation and an additional $2,500 if he wanted a trial in the case. Willingham wanted trial representation since he was unwilling to accept the 20-year penitentiary sentence offer that had been made by the prosecutor in the case. (RR p. 100 l. 13-17).

V. On 5/18/2013 Willingham produced $1,500. (RR 5.5.2016 Exhibits p.2). Willingham knew about the amount that he had to pay in order to go to trial, but he was slow in producing the remaining funds (RR p.97 l.22-25). He understood that the only thing left to do in the case was trial preparation.

VI. After this payment, Graham lost contact with Willingham. After he was updated on the status of his case and he was told about the necessity of the funds to prepare for trial, Graham did not receive further communications with Willingham until the later portion of 2014, when Willingham suspected that he might have a warrant for his arrest. (RR p. 98 l. 9-12).

VII. After Willingham's missed court date of 3/11/2013, Graham received no notice of any further court dates from the court or notice of any warrants for Willingham's arrest until September 2014 of the following year. (RR p. 100 l. 23-25; p. 100 l. 1-2).

VIII. On 11/6/2015 Willingham produced an additional $1750 towards representation due to concern about the warrant. (RR p. 75 l.3-5); (RR p. 94 l. 24-25; p. 95 l. 1-3). At this time, Graham consulted with Willingham concerning the case, how to deal with any warrant issues and trial. (RR p. 98 l. 19-21).

IX. After the consultation, Graham took various actions to lift the warrant and reinstate Willingham's bond: Graham attempted to approach the judge informally, but it proved difficult to as there was a change in court administrations during this time and it was the Christmas holidays. (RR p. 99 l. 1-4). Graham attempted to talk to the prosecutors about an informal bond reinstatement, but

prosecutor Pryor was either unavailable, in trial, or told Graham to come back in a few weeks once the trial was over. (RR p.99 l.5-11).

X. Around January 2015, Graham received a call from Willingham's wife indicating that he had been arrested. (RR p. 99 l. 12-15). Since Graham understood at this not to wait to pursue an informal bond reinstatement, Graham filed an application for habeas corpus on 2/2/2015 seeking his bond reinstatement. (RR 5.5.2016 Exhibits p. 83-87) When filing the habeas corpus, Graham was told by Attorney Andrew KaiKai that he had been retained on the case and not to take further action. As a result of the conversation with Attorney KaiKai, Graham took no further action on the case. (RR p. 99 l. 22-25; p. 100 l. 1-6).

XI. Graham never received any other communication from Mr. Willingham except for a copy of the grievance received on 4/29/2015 whereby he demanded a refund of all funds paid. (RR p. 102 l. 9-15).

SUMMARY OF ARGUMENT

6. The evidentiary panel's decision in this case is incorrect for the following reasons: 1) the overwhelming evidence does not support that Willingham's case was neglected and that Graham failed to carry obligations owed to Willingham, the evidence shows the opposite: that Graham was conscientious in his representation of Willingham and carried it out in accordance with their contract; 2) Graham complied with reasonable requests for information when Graham provided case information to Willingham's wife since Willingham designated her as his agent to receive information about his case on his behalf 3) Graham has no obligation to surrender discovery papers as complained of by Willingham since such surrender was prohibited by the Texas Code of Criminal Procedure 4) Graham was under no obligation to surrender payments made by Willingham since the amount paid were subject to dispute and earned upon receipt.

ARGUMENT AND AUTHORITIES

STANDARD FOR LEGAL AND FACTUAL SUFFICIENCY REVIEW

7. 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*.

8. 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). The court reviews 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). The Court then sets 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. Graham kept Willingham reasonably informed and responded to reasonable requests for information about his legal matter through his designated agent

9. Graham did keep Willingham reasonably informed about his legal matter. Tex. Disp. R. Prof'l. Conduct 1.03(a) requires a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Tex. Disp. R. Prof'l. Conduct 1.03(b) requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Comment 2 to Rule 1.03 illustrates that it is not the quantity, but the quality and content of the communication that shows compliance with rule 1.03. Graham and Willingham had a meeting to discuss the actions that Graham would take on Willingham's behalf in order to obtain a recall of the warrant for his arrest. (RR p. 98 l. 19-21).Willingham made a decision to proceed forward with the representation as shown by his payment of $1750 for these services. (RR. 5.5.2016 Exhibit, Exhibit 3 p. 3). Due to the obstacles that Graham encountered at the end of 2015 and beginning of 2016 with reinstating the bond namely: 1) by not being able to get an agreement from the prosecuting attorney (RR p. 99 l.5-9) and 2) not being able to reach the judge on the matter of bond reinstatement (RR p.99 l.2-4) and an inability to immediately schedule the habeas corpus application for hearing due to the new attorney taking over the case (RR p. 99 l. 20-25) , there was no substantive change of status in the case that would have necessitated information from Graham for Willingham to make an

informed decision because the circumstances of the case had not changed. Willingham had already made the decision in the initial consultation that he wanted to avoid custody and that he wanted his bond reinstated. During the period of time that Graham made efforts at bond reinstatement, there was nothing else for Willingham to decide regarding his case, thus making communication unnecessary.

10. The crux of the rule is quality of the communication and not the quantity. This means that Graham was not under a duty to tell Willingham several times a day that there had been no change in status of the case, as the evidentiary panel's ruling seems to suggest. There is nothing in the rule that insinuates that Graham had to talk with Willingham a specified number of times within a certain period. The more appropriate reading of the rule is that quality communication is that communication necessary to permit the client to make an informed decision about a matter in his or her case, which normally occurs with a change of circumstances. Since there had been no change in circumstances, the communication that Graham had with Willingham was sufficient under the rule and did not constitute misconduct.

11. Furthermore, in order for Graham to comply with a reasonable request for information, there has to be a request for information made in the first place. There is no evidence introduced suggesting that Willingham ever transmitted or that Graham received a request for information from Willingham (RR p. 34 l. 20-23): there was no introduction of any phone records, phone calls, call logs, or mailing records evidencing that Graham ever received any request for communication from Willingham with which Graham was expected to comply. Therefore there insufficient evidence to support a finding that Graham failed to compy with a reasonable request for information when such request was never made.

12. Additionally, Willingham had given Graham approval to relay case information and make his wife as the point of contact for his case. (RR p. 67 l. 16-18) (RR p.33 l.6-8). Graham did in fact communicate with Willingham's wife several times regarding his case status. (RR p. 103 l. 3-8); (RR p. 33 l. 1-5). When Graham followed Willingham's wishes concerning to whom to communicate

information regarding his case, and he then complains about not receiving the information, the theory of estoppel prevents Willingham from being able to do this:

> Equitable estoppel (also called "estoppel in pais" or "estoppel by misrepresentation") prevents a party from changing its position when the party misrepresented facts to, or concealed facts from, the other party, knowing the other party would rely on the representation to its detriment. Equitable estoppel arises when, by the fault of one party, another party has been induced to change its position for the worse. Sefzik v. City of McKinney, 198 S.W.3d 884, 895 (Tex.App.—Dallas 2006, no pet.). Quasi- estoppel is an equitable doctrine that prevents a party from asserting, to another's disadvantage, a right inconsistent with a position the party previously took. Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 864 (Tex.2000); Bank of Am. v. Prize Energy Res., ___ S.W.3d ___ (Tex.App.—San Antonio 2014, pet. denied) (No. 04-13-00201-CV; 8-29-14).

Graham relied on Willingham's wishes and relayed information about the case through the wife as requested. Then Willingham changed his position at the evidentiary hearing and says that Graham ought to be sanctioned because Graham was carrying out his instructions. Quasi-Estoppel prevents such a result disallowing Willingham to take a position contrary to a previous position: Graham relied to his detriment on Willingham's representation that information could be transmitted through his wife concerning his case. For this reason and the above mentioned reasons Graham's behavior is not sanctionable.

> **b. Graham did not neglect any legal matter nor did he frequently fail to carry out obligations to Willingham, such assertions are not supported by the evidence**

13. Graham did not neglect nor fail to carry out legal obligations in Willingham's legal matter. Comment 7 to Tex. Disp. R. Prof'l. Conduct 1.01(b) states the following concerning neglect:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Under paragraph (b), a lawyer is subject to professional discipline for neglecting a particular legal matter as well as for frequent failures to carry out fully the obligations owed to one or more clients. A lawyer who acts in good faith is not subject to discipline,

> under those provisions for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment.

There was no evidence to support that Graham neglected the legal matter or failed to carry out obligations to Willingham. As the testimony and the evidence suggests, Respondent went to Court on 10/25/2012 (RR 5-6-2016 Exhibits p. 6), 11/19/2012 (RR 5-6-2016 Exhibits p. 7) , 12/21/2012 (RR 5-6-2016 Exhibits p. 8), 1/9/2013 (RR 5-6-2016 Exhibits p. 9), 2/8/2013 (RR 5-6-2016 Exhibits p. 10), 3/11/2013 (RR 5-6-2016 Exhibits p. 11); Respondent had reviewed discovery (RR p. 84 l. 20-21) in the case and consulted numerous times (RR p.69 l.5-6) with Willingham before Willingham failed to appear at Court on 3/11/2013 (defendant signature on this pass slip is blank due to Willingham's nonappearance) (RR 5-6-2016 Exhibit p. 11). The testimony indicated that it was Willingham that absconded resulting in Respondent losing contact with him until the later portion of 2014 which was a violation of the representation agreement (RR p. 98 l. 9-12). According to terms of the representation contract between Graham and Willingham paragraph 4(c), Respondent is entitled to cease with representation until outstanding payments have been paid (RR 5-6-2016 Exhibits p. 68-69). Additionally, paragraph 13 of the representation between Willingham and Graham allows Graham to stop representation and ask for additional compensation to continue the representation where client has failed to cooperate. Here Willingham was not cooperating pursuant to the representation contract: he was not making payments, his whereabouts were unknown, and he failed to appear at court.

14. When the additional $1750 was paid in order to attempt to reinstate the bond, the testimony shows that Respondent's actions were anything but neglect: Respondent did not procrastinate but instead took action: 1) Respondent attempted to talk with prosecutors informally several times about the bond reinstatement (RR P. 99 l. 5-11) 2) Respondent attempted to approach the judge several times (RR p. 99 l. 1-4) 3) Respondent filed a motion for habeas corpus in the case ((RR 5-6-2016 Exhibit p. 83-88) at which point Willingham's new attorney told Graham that he had been fired from the case and that the new attorney was taking over on the case. (RR p. 99 l. 20-25). Graham relied in good faith on the statements of Willingham's new attorney advising Graham not to take any further action on the case since he was

new counsel. The evidentiary panel completely ignored the provisions of Comment 7 to 1.01(b) which states that a lawyer who acts in good faith is not subject to discipline, for isolated inadvertent or unskilled act or omission, tactical error, or error in judgment. The facts show anything but neglect and they do not show that Graham's actions were taken in bad faith. Furthermore, obligations to Willingham were defined by contract which Graham followed.

15. Additionally, Graham was permitted to cease with representation of Willingham when Willingham materially breached the representation contract. Performance is excused if the defendant materially breaches the contract. Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195, 196 (Tex.2004); Mead, 615 S.W.2d at 689; Pelco Constr. Co. v. Chambers Cty., ___ S.W.3d ___ (Tex.App.—Houston [1st Dist.] 2016, pet. filed 7-22-16) (No. 01-14-00317-CV; 5-12-16). "Breach" means the failure, without legal excuse, to perform a promise that forms all or part of an agreement, the refusal to recognize the existence of an agreement, or the doing of something inconsistent with its existence. DeSantis v. Wackenhut Corp., 732 S.W.2d 29, 34 (Tex.App.—Houston [14th Dist.] 1987), rev'd in part on other grounds, 793 S.W.2d 670 (Tex.1990); see B&W Sup. v. Beckman, 305 S.W.3d 10, 16 (Tex.App.—Houston [1st Dist.] 2009, pet. denied); Bernal v. Garrison, 818 S.W.2d 79, 83 (Tex.App.—Corpus Christi 1991, writ denied). Neglects or refuses to perform contractual obligation. The defendant breaches a contract by neglecting or refusing to perform a contractual obligation. Tennessee Gas Pipeline Co. v. Lenape Res., 870 S.W.2d 286, 302 (Tex.App.—San Antonio 1993),rev'd in part on other grounds, 925 S.W.2d 565 (Tex.1996); Townewest Homeowners Ass'n v. Warner Comm., 826 S.W.2d 638, 640 (Tex.App.—Houston [14th Dist.] 1992, no writ). The defendant breaches a contract by voluntarily acting to make its performance of a contractual obligation impossible. See Stephenson v. Calliham, 60 S.W.2d 805, 807 (Tex.App.—Beaumont 1933, writ ref'd); Arlington Heights Rlty. Co. v. Citizens' Ry. & Light Co., 160 S.W. 1109, 1120 (Tex.App.—Amarillo 1913, no writ). A breach is material when the defendant does not substantially perform a material obligation or duty required under the contract. See, e.g., Cowman v. Allen Monuments, Inc., 500 S.W.2d 223, 226-27 (Tex.App.—

Texarkana 1973, no writ). Willingham's nonappearance at court, failure to make payment and his hiring of a new attorney thereby making it impossible for Graham to complete the task of reinstatement of his bond, were material breaches of the representation contract with Graham. At the time Willingham claimed to have had a court setting in his case in June 25, 2014 he was in material breach of the representation agreement as a result of his nonpayment and failure to appear previously at court. According to the law of contracts and the foregoing authority, Graham was permitted to suspend performance of the Willingham's representation. The evidentiary panel's decision here is tantamount to saying that following the law of contract is the equivalent to misconduct. Consequently, since Graham followed the terms of the contract and the law concerning contracts, Graham did not commit misconduct due to neglect or frequent failure to carry out obligations.

16. The Appellee argues that Graham's alleged failure to appear at the June 25, 2014 supposed hearing date amounts to neglect and failure to carry out obligations. However, there was no evidence presented that any notice of hearing was appropriately transmitted to Graham. (RR p. 100 l. 23-25; p. 101 l. 1-2). It is axiomatic that there can be no neglect for not appearing at a hearing of which one did not received adequate notice. The 14th amendment of the US Constitution requires notice or hearings. Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890). Furthermore, the documents presented at the evidentiary hearing suggest that Graham was called via telephone about the hearing date. (RR 5.5.2016 Hearing Exhibits, Exhibit R1 p. 89). Calling someone has never been an appropriate method of providing someone with notice of hearing. Tex. Code Crim Proc. 22.05 discusses how notice is to be given in a criminal case: notice to the defendant shall be deposited in the United States mail directed to the defendant at the address shown on the bond or the last known address of the defendant. Moreover, Tex. R. Civ. P. 21 only permits notice via email, fax, mailing and personal delivery; notice via phone call is not permitted. Hypothetically, if a call were in fact generated by the court to Respondent, there is no evidence as the number used to make the call: was the number used in fact Graham's phone number or some other number? Moreover, there is no indication or evidence as to

what steps were taken to assure that Graham received call. It made sense for Graham not to appear as well simply because of the typical protocol as to how hearings are scheduled in that court. Testimony stated that the attorneys schedule court settings in the court and that it was typical protocol for the court to send an email about a court setting and not make a phone call. (RR p. 112 l. 3-10). Since the notice was inadequate legally and not received by Graham, not appearing was not misconduct.

c. Graham was under no Obligation to Return Funds Since they had been earned

17. Graham did not commit misconduct by failing to refund money Willingham paid since such amounts had been earned 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. 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). Graham provided Willingham with valuable legal service

when he went to court several times to talk with prosecutors about the bond reinstatement several times (RR p. 99 l.5-9) 2) when Graham went to court and to approach the judge about reinstating the bond (RR p.99 l.2-4) and 3) when Graham researched, drafted and later went to court to file a motion for habeas corpus to address Willingham's bond reinstatement (RR p.99 l.20-25). Before Graham attempted to reinstate Willingham's bond, there was an agreement to pay $1750 for legal services related to bond reinstatement and during Graham's efforts to reinstate the bond (RR p. 94 l. 24-25, p. 95 l. 1-3), Willingham to not object to these services (RR 5.5.2016 Exhibit, Exhibit 3 p. 3). As a result, all of the elements of quantum meruit relief have been met by Graham.

18. During Willingham's testimony, he conceded that the pretrial fee of $2500 had been earned for the 5 court appearances made and discovery review (RR p. 71 l. 7-9) . The evidentiary panel made a determination that the $2500 pretrial fee was earned since they did not order its return. (RR Sanctions hearing p. 49 l. 15-16). Even so, inexplicably, the panel decided that Graham is not entitled to any compensation for work performed and the court appearances made towards attempting to reinstate the bond. The panel's decision is incongruous since, on the one hand, it did not order the return of the $2500 pretrial fee as a result of the 5 previous court appearances Graham made in the case. Excluding consideration of other work that Graham performed in the case, namely the consultations with Willingham, legal research as well as review of discovery in the case, the panel placed a value of $500 per court appearance made at pretrial. However, inexplicably the panel does not want to accord any value on the 6 court appearances Respondent made to reinstate the bond in this case: three attempts to reinstate the bond by attempting to talk to a prosecutor, two attempts to approach the judge informally and the research, drafting and filing of the habeas corpus application in court. The panel basically has decided that Graham's legal services are of zero value. If the panel's previous court-appearance valuation is applied, the 6 court appearances at a rate of $500 would have a value of $3000. As a result, there would have been no unused funds to return to Willingham. The panel is essentially saying that the pretrial legal work has one value and legal work in a different circumstance has no value.

d. Graham did not have to return funds since they were a nonrefundable retainer, earned on receipt

19. The panel was wrong in sanctioning Graham because there is no guidance, rhyme or reason as to how the panel determined the amount of the refund of $2,250 to Willingham. Furthermore, the law is well settled on this issue of when a fee can be considered as earned immediately upon receipt. An opinion by the Texas Committee on Professional Ethics discusses the difference between a retainer and an advance fee. *See* Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986). The opinion explains that a true retainer "is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment." *Id.* The opinion goes on to state that "[i]f the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received." *Id.* If a fee is not paid to secure the lawyer's availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer. *Id*. If the (true) retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney's account." *Id.* However, money that constitutes the prepayment of a fee belongs to the client until the services are rendered and must be held in a trust account. Tex. Disp. R. Prof'l. Conduct 1.14 cmt. 2. There was a contract of representation that designated the amounts paid by Willingham as non-refundable in bold, underlined letters. (RR 5.5.2016 Exhibits, Exhibit 14 p. 68). Furthermore, undisputed testimony from Graham indicated that the fee should have been considered a retainer earned immediately on receipt since there was the opportunity costs associated with taking the case: “the flat fee was charged because these cases get much more involved and I am taking the risk of that” (RR p.105 l 15-20). Graham is indicating that there is an opportunity cost associated with taking this case since it may prove to much more involved with respect to his time than originally foreseen, clients are paying for direct access to Graham via telephone, as well as the possibility the case could be more difficult. (RR p. 83 l. 14-18). As a result since Willingham was paying Graham not only for the work performed under quantum meruit but also lost opportunity cost to

Graham. Such testimony was undisputed. The funds paid became earned immediately when received. Graham did not commit misconduct for not releasing the funds.

e. Graham's Conduct of keeping funds did not amount to Misconduct since Tex. Disp. R. Prof'l. Conduct 1.14(c) was followed

20. It is not sanctionable to keep funds that Graham believed he was entitled to. Graham earned the funds under quantum meruit, and therefore Graham was right to retain them. Also, there is no evidence Graham ever received a dispute about funds from Willingham, so therefore there was no way to know what funds needed to be returned or the amount that that the client claimed as being unearned. At the evidentiary panel hearing Willingham did make a claim that funds were in dispute; therefore, the dispute resolution rule applies. (RR p. 71 l. 10-13). The Texas Disciplinary Rules of Professional Conduct establish a process that must be followed when funds are in dispute:

> Rule 1.14(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. 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.

In this instance, Willingham terminated the representation arrangement when he hired new counsel. At no point was there a claim by Willingham that funds were in dispute, or that he had made a claim that he was entitled to funds before he filed a grievance complaint (RR p. 52 l.3-15). Willingham also did not indicate how much money he was disputing or how much money that he claimed to be entitled to (RR p. 52 l.3-15). If there is no notification of a dispute concerning funds, then it is implausible to think that the funds would be returned to him when it is clear that work had been performed to secure Willingham release, and the funds had been earned. Additionally, had Willingham given notice to Graham that he was contending that certain funds were disputed, under Tex. Disp. R. Prof'l. Conduct 1.14(c), Graham had a responsibility not to disburse the disputed funds until the dispute had been resolved. The ruling of the evidentiary panel makes moot rule 1.14(c); it basically says that even though the funds were disputed,

Graham had to return them to Willingham. Such a ruling makes rule 1.14(c) ineffectual since there would be no need for a dispute process if failure to return disputed funds to a client was automatic misconduct. As a result Graham's not returning the funds does not amount to misconduct.

f. Willingham was not entitled to any papers or discovery evidence gathered in his case since such disclosure is prohibited under the Texas Rule of Criminal Procedure.

21. Willingham was not entitled to the discovery evidence gathered in his case of which he complains (RR p. 66 l. 8-10). Texas Code of Criminal Procedure Art. 39.14(f) restricts the copying or dissemination of discovery related materials in a criminal case. The statute states the following:

> **(f)** The attorney representing the defendant, or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant, may allow a defendant, witness, or prospective witness to view the information provided under this article, but may not allow that person to have copies of the information provided, other than a copy of the witness's own statement. Before allowing that person to view a document or the witness statement of another under this subsection, the person possessing the information shall redact the address, telephone number, driver's license number, social security number, date of birth, and any bank account or other identifying numbers contained in the document or witness statement. For purposes of this article, the defendant may not be the agent for the attorney representing the defendant.

Willingham was charged with a criminal offense: serious bodily injury to a child. Therefore the aforementioned restrictions on the dissemination of discovery would apply. There was no witness statement Willingham made in the case that the statute allowed to be delivered. Willingham received copies of all documents that Graham was permitted to provide by law. Consequently, by law, Graham was not permitted to furnish Willingham with copies of the discovery documents. Thus Graham did not commit misconduct when he followed the Texas Code of Criminal Procedure.

WHEREFORE PREMISES CONSIDERED Graham requests that the Board of Disciplinary Appeals reverse the finding of the Evidentiary Panel of misconduct by the Respondent on each allegation; render a decision of no finding of misconduct by Respondent; 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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