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 6-1
of Dallas County, Texas

MOTION FOR LEAVE TO SUPPLEEMENT BRIEF/RESPONSE TO APPELLEE BRIEF/ APPELLANT BRIEF SUPPLEMENT

TO THE HONORABLE COURT:

CHRISTOPHER GRAHAM, Appellant, brings this MOTION FOR LEAVE TO SUPPLEMENT BRIEF/ RESPONSE TO APPELLEE BRIEF/APPELLANT BRIEF SUPPLEMENT according to Board of Disciplinary Appeals Internal Procedural Rules 4.05(e) and asks the court for leave to supplement appellant brief in order to respond to Appellee brief in support of this motion shows:

I. De Novo review is required of the panel's decision that Graham neglected a legal matter and failed to carry out obligations since the panel did not apply contractual

law, Texas Criminal Procedural Law and Tex. Disc. R. Prof.'l Conduct Rule Comment 7 to rule 1.01(a) correctly.

1. The de novo review is the correct standard to apply in this case, since the evidentiary panel applied incorrect law to the facts of this case. In re Caballero, 272 S.W.3d 595, 599 (Tex. 2008) (citing O'Quinn v. State Bar of Tex., 763 S.W.2d 397, 399 (Tex. 1988) (observing that "our disciplinary rules should be treated like statutes"); MCI Sales & Serv., Inc. v. Hinton, 329 S.W.3d 475, 500 (Tex. 2010) (noting that a "question of statutory construction is a legal one which we review de novo"). Legal conclusions are reviewed de novo. Schultz v. Comm'n Lawyer Discipline, No. 55649, 2015 WL 9855916 (Tex. Bd. Discip. App. Dec. 17, 2015). The panel did not apply Texas criminal procedural law, contractual law or Comment 7 to Tex. Disp. R. Prof'l. Conduct 1.01 which the panel was obligated to do. Comment 7 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.

2. The panel did not apply the exception to a misconduct finding in comment 7 of its decision which is required. There is no finding addressing the good faith of Respondent, there is no evidence Graham handled Willingham's case in bad faith, no findings or evaluations of whether Graham's actions in handing Willingham's case were tactical errors or otherwise. In Appellee's brief paragraph 8 p.20, the Commission places importance on the fact that an investigator was never hired. There was no deadline during which the investigator had to be hired or when the investigator had to commence work on the case. Appellee' tries to insinuate this is neglect when in reality the time period in which the investigator begins

work is a tactical decision of the attorney based on the developments in the case and therefore not subject to misconduct.

3. In appellee brief paragraph 8 p.20, Appellee claims that Graham's failure to appear at an alleged "hearing" amounted to neglect. This determination has to be made in light of the law concerning how adequate legal notice is given in criminal cases; the panel did not do this. 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 receive adequate notice. The 14th amendment of the US Constitution requires notice of 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 the Court may have tried to call Graham 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. This was never done. Additionally, Graham had reason to doubt there being a court date based on standard protocol of the courts and court settings: the attorneys schedule the court dates. And at that time Graham had not scheduled any court date for Willingham. (RR p. 112 l. 3-10). There is no misconduct and Graham acted in good faith.

4. Also, the evidentiary panel erred when it did not apply the law of contracts which also governed the relationship between Graham and Willingham. 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). At the time of the June 25, 2014 alleged "court appearance" Willingham had not appeared at his previous court appearance (RR p. 100 l.19-20), and he had not paid the amounts required under the terms of the representation agreement for trial representation (RR p.97 l.22-25). Consequently contract law allowed Graham the option of suspension of performance of obligations to Willingham, including the court appearance. The facts here point to Graham's good faith reliance on contract law in carrying out obligations to Willingham in conformity with the representation agreement. Thus there is no indication of Graham's bad faith here.

5. Appellee paragraph 9 p. 20 suggests that Respondent Graham was somehow neglectful in carrying out representation in Willingham's case because he did not return phone calls. And that the failure to return phone calls was the cause of Willingham's bond forfeiture. No evidence was admitted concerning how many calls were made to Graham, what phone number was used to call Graham, if the phone number used was even the correct phone number, nor is there any evidence whether any voicemail messages were left for Respondent in order to alert him as to the reason and nature of the call. No testimony from a court official was admitted to show the reasons why no voicemails were left, if Graham's phone actually received calls, or the reason why the court did not follow typical protocol of notifying Graham about court related information via written correspondence. In fact the evidence, in this case shows the opposite that Respondent did not receive any phone communications from the court. (RR p. 100 l. 23-25; p. 101 l. 1-2). Appellee goes on to state in its footnote 1 on page 20 that the court revoked the bond out of concern lawyer no longer trusted the client to comply with conditions of bond. This statement demonstrates how uninformed Appellee is concerning representation in criminal cases. The law is clear concerning when a court can revoke someone's bond. Before bond may be revoked it must be determined, by a preponderance of the evidence, that the defendant violated a condition of the bond imposed before revocation may occur Lee v. State, 39 S.W.3d 373, 2001 Tex. App. LEXIS 1024. The court in which a prosecution is pending may forfeit the bail of a defendant who fails to make an

appearance that is required by either the Code of Criminal Procedure or the court's order Tex. Code Crim Proc. A return call from the attorney is never a bond condition. No evidence was shown that it was a bond condition in this case. The only reason the Court forefeited Willingham's bond was due to his own neglect in not appearing for court and not that of Graham. Thus from a legal standpoint whether Respondent returned the court's phone calls is irrelevant to the issue of Willingham's bond forfeiture and is no evidence of misconduct that leading to Willingham's bond forfeiture.

6. Appellee Brief states in paragraph 12 p. 20 the results from Graham's "game plan" in how the bond forfeiture was handled proved to be an "abject failure" and as a result this constitutes neglect. The Commission is not applying Comment 7 to Tex. Disp. R. Prof.'l Conduct 1.01 correctly. The Commission confounds the result achieved with neglect and this is not the case. Black's Law Dictionary 2nd edition states that neglect "does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act… failure to do something that one is bound to do." The evidence shows Graham did act to resolve warrant situation for Willingham: 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). The manner in which Respondent dealt with resolving the warrant was a tactical decision not subject to discipline under comment 7. Graham disputes the appellation of "abject failure" used by Appellee to describe Graham's course of action in dealing with the bond forfeiture since Respondent was unable to complete out his "game plan" when Willingham terminated representation.

7. Appellee claims in paragraph 14 p. 21 of its brief that Respondent abandoned Willingham at the habeas corpus hearing. Graham had a good faith belief not to appear at the habeas corpus hearing. Graham relied on the hallway communication with attorney KaiKai not to take any further action on the case because he had been retained on the matter. (RR p. 99 l. 22-25; p. 100 l. 1-6). These fact were uncontroverted. There was no evidence to make any finding that Graham acted in bad faith for not

appearing at the hearing. The fact that attorney KaiKai may or may not have been retained or made an appearance is not relevant to the good faith determination nor is such language included in the rule. Good faith means the exercise of an honest judgment 5 WILLISTON ON CONTRACTS § 675A, at 189-90; Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 1976 Tex. LEXIS 221, 19 Tex. Sup. J. 318. Graham made an honest assessment not to continue to pursue representation. The panel completely ignored this portion of the rule and the Commission seemingly ignores it in its brief as well. Graham did not commit misconduct.

8. Appellee mentions in paragraph 15, p. 21, that it was some evidence of neglect and failure to carry out obligations when there was an alleged "failure to return" or assemble a client file and an alleged failure to return unearned fees. De novo review of the panel's decision is warranted here again since the panel did not apply the correct law. Tex. Code of Crim. Proc. Art. 39.14(f) applies in cases involving dissemination of client files in criminal cases. This rule restricts the copying or dissemination of discovery related materials in a criminal case and these were the items to which Willingham wanted access (RR p. 66 l. 8-10). Had the law been applied correctly in this case, the panel could not have used this information to support misconduct where Graham was prohibited by law from returning the client documents.

9. The second part of paragraph 15 p. 21 of Appellee's brief states that the failure to return fees is some evidence of neglect. Again the panel and the Commission have misapplied the law and the BODA should review the decision of the panel de novo. The panel failed to apply Tex. Disp. R. Prof. conduct 1.14(c) which allows for the retention of disputed funds until the dispute has been resolved. Furthermore, the panel and the Commission completely fail to apply quantum merit law which allows Respondent to recover for work done and services accepted where there is an implied agreement to pay for such services. Both Appellant and Appellee agree that Respondent performed services in attempting to secure the withdrawal of Willingham's warrant. As such these funds were recoverable by Respondent, or at least disputed. As a result, Graham was entitled to retain then and there no misconduct for neglect. Because

the correct law was not applied, the Board should review de novo the panel's finding of misconduct based on neglect and failure to carry out obligations. Application of the correct law lead to the inevitable conclusion of no misconduct by Graham.

II. BODA needs to review the evidentiary panel's determination that Respondent violated Tex. Disp. R. Prof'l Conduct 1.03(a) de novo since the panel apply 1.03(b) and Comment 1 and 2 to rule 1.03 when evaluating this in the case

10. BODA should review the evidentiary panel's determination that Respondent violated Tex. Disp. R. Prof'l Conduct 1.03(a) de novo. The panel and the Commission in its brief did not read and apply 1.03(b) and Comment 1 and 2 to rule 1.03 in the case. Appropriate application of the law would have lead to a result of a finding of no misconduct. Application of the appropriate law also refutes Appellee's claims in paragraph 3 of its brief beginning on page 21.

11. Tex. Disp. R. Prof'l. Conduct 1.03(b) only requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. In Eureste v. Comm'n for Lawyer Discipline, 76 S.W.3d 184, 200, 2002 Tex. App. LEXIS 2738 the Court interprets Comment 2 to Rule 1.03 to illustrate that it is not the quantity, but the quality and content of the communication that shows compliance with rule 1.03. Comment 1 to rule 1.03 limits the amount of communication to the client: [the client] should hav[e] sufficient information to participate intelligently in decisions concerning the objectives of the representation. The comment goes on to state when communication is required in a criminal case: a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. Also, Comment 2 of Rule 1.03 states a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail.

12. If the appropriate law had been applied the statements in Appellee's brief lose all significance. In paragraph 2 p. 22, Appelle states that "Graham ceased meaningful contact for several months." Under the rules there is no obligation to communicate with the client just for the sake of communicating. At this

time, there was no decision to be made concerning the objectives of the representation since Willingham had not been indicted and he had had a thorough interview at the time of signing the contract of representation. Nor was there a plea offer which the comment 1 requires to be communicated. As a result there is no misconduct for not communicating with Willingham when there were no decisions to be made concerning the objectives to the representation. Moreover, the timing of when Graham was going to employ the investigator was an issue of trial tactics and negotiation strategy that Graham was under no duty to disclose in detail according to comment 2.

13. Appellee brief paragraph 3 p. 22 states that Willingham learned of information about the case being set for hearing. As aforementioned no such information had been communicated to Graham by the Court concerning a court date or hearing. (RR p. 100 l. 23-25; p. 101 l. 1-2). Graham cannot be sanctioned for lack of communication of information he does not have, especially when the court has a responsibility to inform of court dates in writing. 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. There was no evidence that adequate notice was given by the Court or that written notice was forwarded to Graham when the court had an obligation to do so. Graham cannot be sanctioned for misconduct when the court failed to give appropriate notice of the court date. In fact, Paragraph 4 of Appellee's brief p.22 shows that Graham did have communications with Willngham concerning the objectives of his representation via text message: that additional trial funds were needed to go to trial in his case.

14. Appellee's paragraph 5 neglects to take in consideration and apply the law concerning notice of bond forfeiture. For notice requirements to be satisfied for bond forfeiture purposes, citation must be issued and notice be given in other civil cases: in other words notice is to be effected by personal service, citation by publication or citation by certified mail. Tex. Code Crim. Proc. Art. 22.05. There is no evidence that the court notified Graham in this manner as Willingham's representative. Since the legally

required notice did not take place, Graham cannot be held to have received notice of the bond forfeiture, and thus there was no duty to communicate with Willingham.

15. In Paragraph 6 p. 22 of the Appellee brief, there is again a misapplication of the law by the Commission. Tex. Disp. R. Prof.'l Conduct 1.03 does not require that a certain mode of communication be made to the client: jail communication versus nonjail communication, direct communication versus indirect communication through an intermediary. Undisputed testimony indicated that Willingham chose his wife as designated intermediary to receive information about his case. (RR p. 67 l. 16-18) (RR p.33 l.6-8). Furthermore, undisputed testimony confirmed that communication did in fact take place with his wife concerning his case. (RR p. 103 l. 3-8); (RR p. 33 l. 1-5). Additionally, the panel did not apply the law of quasi-estoppel which would prevent a finding of misconduct against Respondent since Willingham would have been disallowed 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 and that is what was done. Quasi-estoppel prevents Willingham from then coming to the evidentiary panel hearing and stating that he did not receive communications when he made the designation.

16. Paragraph 7 of the Appellee brief indicates that Graham was required to give Willingham a call after the habeas corpus hearing. Comment 1 of rule 1.03 provides when communication must be made in a criminal case: when a plea offer has been made. No plea offer had been made or discussed shortly before the time of the habeas corpus hearing. Furthermore 1.03(b) requires information to be transmitted to help the client to make a informed decision about the representation. Appellee has misapplied the rule since it applies to making decisions in the future or prospective decisions and not decisions that have already been made by the client. At this point Willingham had already made a decision to terminate representation, attorney Kaikai had already told Graham not to take further action on the case. Moreover, any communication made would not have been "about the representation" since the representation had been terminated. As a result there should be no finding of misconduct due to lack of communication.

III. The correct law was not applied in the panel's finding that Graham failed to return the client file as well as failed to return unearned fees, as a result the Court should review the panel's decision using the de novo standard. Application of the correct law would have lead to a finding of no misconduct by Graham.

17. Arguments in Appellee's brief paragraph 4 (a) are wholly irrelevant. The brief contains an entire section that discusses why a finding of abandonment should be upheld. However, a review of the panel's decision makes no such finding of there being a finding of abandonment or that Graham failed to take steps to protect the clients interests. Paragraph 7 in the findings of fact section of the judgment of fully probated suspension simply states that there was a finding of a "failure to surrender papers and property" and a failure to refund "advance payments of unearned fees." Therefore paragraph 4(a) of appellee's brief is immaterial to review of the panel's decision since what Appellee discusses was not decided.

18. Appellee's brief curiously ignores and has no argument to address restrictions imposed by the Tex. Code of Crim. Proc. 39.14(f) of dissemination of discovery information to a defendant in a criminal case. The panel's failure to apply this law in its consideration of whether there is misconduct entitles Graham to de novo review of the panel's decision finding a violation of 1.15(d). The law prohibited dissemination of the discovery information that Willingham was requesting. The panel's decision is tantamount to saying that following the Tex. Code of Crim. Proc. is misconduct .

19. Appellee alleges in the paragraph b p. 24 that Graham's fees were "fictitious." It was uncontroverted that Graham performed the following work to resolve the situation of Willingham's revoked bond issue: Graham went to court several times to talk with prosecutors about the bond reinstatement(RR p. 99 l.5-9) 2) Graham went to court and to approach the judge about reinstating the bond (RR p.99 l.2-4) and 3) 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). 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 or the filing of the motion for habeas corpus. The panel's decision is incongruous, unsupported by the evidence in the case, so too is Appellee's statement that work Graham performed was "fictitious." Thus there is no evidence to support the panel's decision that Graham committed misconduct for failing to return unearned fees.

20. Also, Appellee paragraph (b)(1) p. 24 mischaracterizes the elements of the application of quantum meruit. There is no legal authority nor has Appellee pointed to any indicating that the ultimate result obtained negates the application of quantum meruit. Since quantum meriut applied, Graham was entitled to keep the fees and there was no misconduct. The evidentiary panel was in error not to apply quantum meriut to the determination of the fee dispute. Consequently, the panel's erroneous decision finding a violation of 1.15(d should be reviewed de novo.

21. Appellee in paragraph IV(b)(3) p.25 tries obfuscate the error in the panel's decision. In the judgment of probated suspension findings of facts paragraph 7, the panel made the decision that Graham "failed to refund advance payments of the fee that had not been earned." The only issue here is under what circumstances can the fees be withheld: Tex. Disc. R. Prof.'l Conduct 1.14(c) says that the fees can be withheld in the instance of a dispute and once the dispute is resolved, then the undisputed portion of the fees can be distributed appropriately. There are no requirements that there be a signed written contract between the parties (even though a copy of the lost contract was produced at trial), or that there be time reporting, or that the dispute be bona fide. These requirements are simply not contained the rule 1.14(c). Willingham did not notify anyone of the dispute until 3 years after representation began when he filed the grievance against Graham. The "resolution" of the dispute and a severance of interests was not determined until the panel rendered its decision in the case. And the panel erroneously found misconduct for following rule 1.14(c). If it is misconduct every time there is a fee dispute and fees are retained then

there would be no need for the rule. In spite of the fact that Graham withheld the fee in reliance with rule 1.14(c) the panel found misconduct anyway, effectively eviscerating rule 1.14(c).

WHEREFORE PREMISES CONSIDERED Graham requests that the Board of Disciplinary Appeals reject the claims in Appellee's brief, 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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