NO. 56375

Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas

JERRY W. SCARBROUGH,
APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,
APPELLEE

On appeal from the Evidentiary Panel
for the State Bar of Texas District 08-5
No. A0111214896 and A0111214897

BRIEF OF APPELLEE, COMMISSION FOR LAWYER DISCIPLINE

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TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

Appellee, the Commission for Lawyer Discipline ("the Commission"), submits this brief in response to the brief filed by Appellant, Jerry W. Scarbrough ("Scarbrough"). References to the record are labeled CR1-2 (clerk's record volume one or two), RR1-2 (reporter's record from evidentiary hearing volume one or two), RX1-5 (reporter's record exhibits from evidentiary hearing volume one through five); MTS RR (reporter's record from hearing on motion to stay); and AB

(Appellant's brief). References to rules refer to the Texas Disciplinary Rules of Professional Conduct[1] unless otherwise noted.

[1] *Reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app A-1 (West 2015).

STATEMENT OF THE CASE

Type of Proceeding:	Attorney Discipline
Petitioner/Appellee:	The Commission for Lawyer Discipline
Respondent/Appellant:	Jerry W. Scarbrough
Evidentiary Panel:	08-5
Judgment:	Judgment of Partially Probated Suspension
Violations found of Disciplinary Rules:	**Rule 3.03(a)(1):** A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.
	Rule 3.04(a): A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.
	Rule 3.04(d): A lawyer shall not knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.
	Rule 8.04(a)(1): A lawyer shall not violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship.
	Rule 8.04(a)(3): A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

STATEMENT OF THE ISSUES

Issue 1: Substantial evidence supports the Panel's denial of Scarbrough's Motion to stay.

Issue 2: The Panel's denial of Scarbrough's special exceptions was not an abuse of discretion.

Issue 3: The Panel did not err in applying collateral estoppel to prevent relitigation of whether Scarbrough obstructed the Pursers' access to evidence, but did err in applying it as to whether Scarbrough violated confidentiality order.

Issue 4: Substantial evidence supports the Panel's finding that Scarbrough violated Rule 3.03(a)(1) by making false statements to the trial court.

Issue 5: Scarbrough is collaterally estopped from challenging the sufficiency of the evidence to support the Panel's finding that he violated Rule 3.04(a) by concealing the existence of evidence.

Issue 6: Scarbrough waived his issue regarding alleged exclusion of evidence and fails to demonstrate error.

Issue 7: The finding that Scarbrough violated Rule 3.04(d) by violating a confidentiality order must be remanded for further proceedings.

Issue 8: Scarbrough waived his variance complaints and has failed to demonstrate harmful error, and substantial evidence supports the Panel's fact findings.

Issue 9: Substantial evidence supports the Panel's finding that Scarbrough violated Rule 8.04(a)(1).

Issue 10: Substantial evidence supports the Panel's finding that Scarbrough violated Rule 8.04(a)(3).

Issue 11: Because the Rule 3.04(d) violation must be remanded for further proceedings, the sanction must also be remanded.

STATEMENT OF FACTS

I. The lawsuit between Scarbrough and the Purser family

A. Background

Gary Purser, Sr., ("Purser") was a wealthy businessman who was married for nearly sixty years to Helen Purser, with whom he had several children. (RX1 163-64).[2] In 2009, Clayton Olvera, a former business associate of Purser, filed a lawsuit against Purser and several members of his family, including Helen. (RX1 169; CR1 2014). At that time, Purser was in his late seventies and had been exhibiting signs of dementia. (RX1 166; RR1 56). His condition caused memory loss, disinhibition, and hypersexuality, which caused inappropriate and uncharacteristic behavior. (RX1 166). He had begun seeing two women, Melissa Deaton, who was in her early forties, and Denise Steele, who was in her late twenties and was romantically involved with Olvera. (RX1 166-67). Purser had given the women considerable amounts money from the Pursers' estate. (RX1 166, 200; RX2 1-2).

[2] The Panel's application of collateral estoppel precluded development of the record as to certain relevant background facts. The Commission thus often cites to a bankruptcy court's opinion, discussed in greater detail below, that arose from the same facts, contains a detailed factual background, and was introduced at the evidentiary hearing without limitation. *See Advanced Messaging Wireless, Inc. v. Campus Design, Inc.*, 190 S.W.3d 66, 71 (Tex. App.—Amarillo 2005, no pet.) (evidence introduced without limitation may be considered for all purposes); *see also Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 642 (Tex. 1987).

When Purser's family learned of this involvement, they took measures to end the relationship. (RX1 166). They eventually filed a third-party petition against Deaton in June 2010, who hired Scarbrough to represent her in August 2010. (RX1 169; RR1 47-49; CR1 2014). Deaton, through prior counsel, counter-claimed against the Purser family and, through Scarbrough, filed a third-party petition against Elizabeth Purser Tipton, Purser's daughter. (RX1 169; RR1 49; CR1 2014).

B. Scarbrough failed to disclose highly probative audio recordings

At various times during the suit, Respondent responded to discovery requests on behalf of Deaton and represented her at depositions, many of which requested production of witness statements and audio recordings. (RR1 73, 189, 193; RX1 173; CR1 2014). Scarbrough repeatedly denied possession of any such items. (RR1 36-38, 73-74; RX1 120, 126, 173; RX2 2; CR1 2014). At a deposition on January 7, 2011, however, Deaton disclosed the existence of two audio recordings that had not been produced. (RX1 173; RR1 11, 193).

After the deposition, Scarbrough took the recording device used to make the recordings to an IT specialist, Shawn Richeson. (RX1 173; RR1 10). Richeson copied the recordings onto a computer and then burned them onto a CD/ROM, which he gave to Respondent along with the original recording device. (RX1 173-74). The CD/ROM contained the recordings disclosed by Deaton in her deposition and several additional recordings. (RX1 173-74; RR1 10).

One of those additional recordings, which came to be known as the "two good bitches" recording, went to the heart of the parties' claims. (RX1 171, 197; RR1 54, 64). It captured a lengthy conversation between Deaton, Steele, and Purser in May 2010 that Purser, 76 years old at the time, was unaware was being recorded. (RX1 171-72; RX2 73-112). The recording revealed Steele and Deaton's scheme to alienate Purser from his family and exploit him financially. It began with Steele recounting a story she had heard about a wealthy woman who had died and left her entire estate to a dog. (RX2 77). The women urged Purser not to leave his estate to a dog and instead to leave it to them, exclaiming, "You've got two good bitches right here!" (RX2 77). They then suggested that Purser give them millions of dollars from development of land Purser owned (RX2 83); advised him that he could not trust his family, including his wife and grandchildren, because they were after his money and planned to have him "institutionalized" (RX2 84, 90); repeatedly proposed that he leave his assets in a safe in Deaton's home or in a storage unit under Steele's family's name to prevent his family from accessing them (RX2 88-89, 91, 110-12); and described a salacious sexual fantasy involving the three of them. (RX2 97-104).

Respondent produced the recordings that Deaton had disclosed in her deposition but did not produce or disclose the additional recordings, including the "two good bitches" recording. (RX1 170; RR1 53). Further, neither Respondent nor Deaton preserved the device, which ultimately resulted in a spoliation instruction in

the jury charge. (CR1 192). However, Richeson produced the additional recordings to Jeff Ray, a friend of the Pursers, in April 2011, who gave them to the Pursers. (RX1 174; RR1 72, 76; RR2 107). The Pursers sent Scarbrough a letter again requesting production of any recordings of Purser, to which Scarbrough replied that he had already produced everything in his and Deaton's possession. (RX1 109, 174). The Pursers sought sanctions against Scarbrough and joined him as a third-party defendant to the lawsuit. (RR1 190; RX1 102, 174, 177).

C. Scarbrough made false statements at a sanctions hearing

At one of the sanctions hearings, Scarbrough testified and continued to deny the existence of the additional recordings. (RR2 20-21; RX1 109, 174; CR1 2014). He testified that he wasn't able to listen to the original recordings because they had "jammed" in the recorder so he didn't know what recordings he produced to the Pursers. (RX1 111-12). He claimed that he didn't receive a copy of the undisclosed recordings until a week before the hearing. (RX1 110). He was ultimately sanctioned $25,000 for his "repeated refusal and failure to produce audio recordings through discovery, and his intentional concealment and deception regarding the existence of the audio recordings." (RX1 174; RX4 86-87).

D. Scarbrough made false statements to Purser's niece

After Purser's funeral in July 2011, Respondent called Purser's niece, Carolyn Bolling. (RX1 177). He believed the Pursers had sent Bolling to see Deaton to

surreptitiously obtain information from her, and he wanted to question Bolling about it. (RR2 227-28). When Bolling asked him whom he represented, he stated that he represented Purser "probably more than anyone else in the world right now," despite that he had never represented Purser. (RR1 141; CR1 2015). Because Bolling believed that Scarbrough represented her deceased uncle, she engaged with him in a lengthy conversation regarding her family's private affairs. (RR1 142; RX1 177).

E. Scarbrough sanctioned for violating a confidentiality order

At some point in the litigation, the trial court entered a confidentiality order regarding Purser's medical records. (RR1 83; RX1 174). The record contains multiple orders from the trial court sanctioning Scarbrough for violating that order. (RX4 72-86; RX1 174).

F. Jury issued a multi-million dollar award against Scarbrough

After a two-week jury trial, the jury rendered a verdict against Scarbrough and awarded damages against him totaling over ten million dollars. (CR1 194-206; RR1 92, RX1 178-79). Among its various findings, the jury found that Scarbrough, along with Ms. Deaton and Steele, committed fraud by misrepresentation and fraud by failing to disclose a "material fact within [his] knowledge," for which it rendered a $2.25 million award against him.[3] (CR1 198-200).

[3] The jury also found that Scarbrough acted in concert and conspiracy with Steele and Deaton, defamed the Pursers, and acted with malice or gross negligence, and it awarded

II. The bankruptcy court found the award against Scarbrough nondischargeable

The same day the state-court trial began, Scarbrough filed for bankruptcy. (RX1 162). After the jury issued the award, Helen Purser filed a petition of nondischargeability in the bankruptcy court, alleging willful and malicious injury and fraud. (RX1 163, 179, 186). After a nine-day bench trial, the bankruptcy court granted Helen Purser relief and issued an order of nondischargeability with opinion. (RR1 52, 94; RX1 160-200). The opinion cited, as part of its basis for relief, Scarbrough's "repeated and knowing falsehoods" about the existence of the recordings and his violations of the confidentiality order. (RX1 192-95, 197-99; RX2 2; CR1 2015).

III. Disciplinary proceedings

The Commission brought a disciplinary action against Scarbrough, alleging numerous disciplinary violations:

> **Rule 3.03(a)(1)** by knowingly making a false statement of material fact in denying the existence of the recordings at the sanctions hearing;
>
> **Rule 3.04(a)** by (1) unlawfully obstructing the Pursers' access to evidence in failing to disclose the existence of the recordings and (2) in anticipation of a dispute, unlawfully altering, destroying or concealing a document or other material that a competent lawyer would believe has potential or actual evidentiary value, or counseling or assisting Deaton to do any such act, in failing to preserve the recording device;

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exemplary damages against him. (CR1 194-202). Deaton nonsuited all of her claims against the Pursers at trial. (RX1 170; RR2 216).

> **Rule 3.04(d)** by knowingly disobeying an obligation under a ruling by a tribunal except in violating the confidentiality order;
>
> **Rule 8.04(a)(1)** by violating various disciplinary rules; and
>
> **Rule 8.04(a)(3)** by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by falsely indicating to Bolling that he represented her deceased uncle.

(CR1 63-67).

The Commission moved for offensive application of collateral estoppel as to Rule 3.03(a)(1) (false statements to the court), Rule 3.04(a) (concealment the recordings themselves—but not as to the failure to preserve the recording device), and Rule 3.04(d) (violation of the confidentiality order), arguing that those issues had already been determined in prior litigation. (CR1 383). In support of the Rule 3.04(a) violation, the Commission cited documents from the underlying litigation, including the Pursers' petition, the jury charge, and the judgment. (CR1 396). In support of the Rule 3.03(a)(1) and Rule 3.04(d) violations, the Commission cited the bankruptcy court's order and opinion. (CR1 396-97). After an evidentiary hearing, the Panel granted collateral estoppel as to Rule 3.04(a) and Rule 3.04(d) and found violations of those rules accordingly. (CR1 1923).

After a two-day evidentiary hearing on the remaining alleged violations, the Panel further found that Scarbrough violated Rules 3.03(a)(1), 8.04(a)(1), and 8.04(a)(3). (CR1 2015; RR1 1; RR2 1). It issued a ten-year partially probated

suspension, which included two years' active suspension, and ordered Scarbrough to pay $12,000 in attorneys' fees. (CR1 2016, 2020).

SUMMARY OF THE ARGUMENT

The record provides ample evidentiary support for the Panel's findings that (1) Scarbrough's continued practice of law poses a threat to the welfare of the public and his clients; (2) Scarbrough made a false statement to the trial court in denying knowledge of the recordings in violation of Rule 3.03(a)(1); (3) he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by indicating he represented Purser to Purser's niece; and (4) he violated disciplinary rules in violation of Rule 8.04(a)(1). He fails to demonstrate that the Panel abused its discretion in denying his special exceptions. He waived is issue regarding any alleged exclusion of evidence, and fails to demonstrate either that evidence was excluded or that any alleged exclusion constituted harmful error. He similarly waived any complaint regarding alleged variance between the pleading the proof, fails to show harmful error, and the record supports the Panel's findings of fact.

The Panel did not err in applying collateral estoppel as to Scarbrough's violation of Rule 3.04(a) by concealing the recordings: that issue was fully and fairly litigated in the prior lawsuit and resolved by a jury against Scarbrough. The Commission concedes error, however, regarding the Panel's application of collateral estoppel as to the violation of Rule 3.04(d) (violation of the confidentiality order), thus the issue must be remanded to the Panel for further proceedings. Because the

record does not support one of the five rule violations, the sanction should also be remanded to the Panel for further proceedings.

ARGUMENT

I. Issue 1: Substantial evidence supports the Panel's denial of Scarbrough's motion to stay the judgment

A. Applicable law

On a motion to stay a judgment of suspension, the Respondent must prove, by preponderance of the evidence, "that the Respondent's continued practice of law does not pose a continuing threat to the welfare of Respondent's clients or to the public." TEX. RULES DISCIPLINARY P. R. 2.25. Although the rules do not expressly contemplate an appeal from an order denying a motion to stay and thus do not identify the standard of review, Texas Rules of Disciplinary Procedure Rule 2.24 sets forth the standard of review generally applicable to disciplinary appeals, which is the substantial-evidence standard.[4]

The substantial-evidence standard focuses on whether the record provides any reasonable basis for the administrative body's findings. *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994); *Granek v. Texas State Bd. of Med. Examiners*, 172 S.W.3d 761, 778 (Tex. App.—Austin 2005, pet. denied). Those findings are presumed to be supported by substantial evidence, and the party

[4] Rule 2.24 applies to appeals from evidentiary Panels' judgments following an evidentiary hearing, the standard of proof at which is preponderance of the evidence—the same standard applicable to supersedeas proceedings. *See* TEX. RULES DISCIPLINARY P. R. 2.17M & 2.25.

challenging the findings bears the burden of proving otherwise. *El Paso*, 883 S.W.2d at 185.

B. The record is replete with evidence demonstrating that Scarbrough's continued practice of law would pose a continuing threat to the welfare of his clients and the public

Scarbrough's behavior throughout the present and underlying litigation demonstrates that he is currently unfit to practice law. The seriousness of his misconduct and severity of its consequences cannot be overstated. The record reveals a pattern of self-serving deception that has injured the public, bench, and bar. By his repeated instances of misconduct, he has inflicted financial and emotional harm upon numerous individuals; interfered with the administration of justice and wasted judicial resources; and grossly compromised the integrity of the legal profession.

1. Scarbrough's concealment of the recordings substantially harmed the public and impeded the administration of justice

First, the recordings Scarbrough refused to disclose were critical to resolution of the underlying litigation. Specifically, the "two good bitches" recording was significant because it demonstrated that the women had engaged in ongoing efforts to exploit Purser financially. (RX2 73-114; RR1 56-63). In it, they attempt to alienate Purser from his family. (RR1 59). They suggest that Purser leave his estate to them and store his assets in Deaton's house. (RR1 57-58). They describe sexual fantasies "again" involving Deaton, Steele, and Purser. (RR1 59-63). The recording would

have therefore established the Pursers' claims and undermined the claims against them. (RR1 72-76; RR2 15-19).

Elizabeth Tipton and Jeff Ray, who represented the Pursers in the prior suit, testified extensively as to the significance of the recordings and consequences of Scarbrough's failure to disclose them. (RR1 64-82; RR2 15-18). They explained the centrality of the recordings to the Pursers' claims and the considerable expense the Pursers incurred litigating the issue. (RR1 74-76, 79-80; RR2 17-19). Tipton described how listening to a 28 year-old woman describe fantasies with her 76 year-old father makes her "sick at [her] stomach," is "very upsetting," and causes her heart "to race." (RR1 77-78). The litigation that resulted from Scarbrough's misconduct required her to hear them time and again. (RR1 78). Ray testified as to the devastating emotional impact Scarbrough's misconduct had on Helen Purser and that he had never witnessed behavior like Scarbrough's in Ray's 32 years of practice. (RR2 17, 50).

Indeed, so egregious was his misconduct that it resulted in a $25,000 sanction,[5] a multi-million dollar award, and a judgment of nondischargeability. (RX4 87; RX1 160). The bankruptcy court quoted the trial court's comments in

[5] Although the sanctions orders were not basis of collateral estoppel, they were introduced without limitation, thus the Panel was free to consider them for any purpose, including determination of sanctions. *See Campus Design*, 190 S.W.3d at 71; *Larson*, 730 S.W.2d at 642.

granting the sanctions: "Your actions, Mr. Scarbrough, strike at the fabric of the freedoms that people just a few miles from here fight for. Just a total disregard to the rule of law and the rules of evidence and the rules of discovery and the inherent powers of the Court. Not once, not twice, three times now and still I'm not locking you up." (RX1 174). The bankruptcy court also noted that Scarbrough's "discovery abuses do not make up the entirety of [Purser's] willful and malicious fraud claim, but they do factor into [his] larger scheme to harm her." (RX1 193). The court then detailed the "parade of horribles" surrounding his failure to disclose.[6] (RX1 192-95).

The bankruptcy court explained the significance of the evidence, noting that the recordings demonstrated the women's understanding of Purser's financial affairs and their role in depleting the community estate. (RX1 197). It observed that "[k]nowledge of the recordings and their contents at the time [Scarbrough]'s duty to produce them arose would have been extremely beneficial to Helen Purser" in the state-court action. (RX1 198). It would have made Deaton's position "nearly indefensible" and placed "immense" pressure on her to settle. (RX1 198). It described how concealment dramatically increased litigation costs and how disclosure would have also prevented "massive outflow" of community funds. (RX1 198-99).

[6] Given the length of the bankruptcy court's recitation of Scarbrough's bad acts, the Commission cites to the opinion rather than recounting every bad act enumerated therein.

2. Scarbrough's efforts to mislead the court to avoid punishment

Scarbrough's refusal to disclose these recordings alone would have justified the Panel's denial of his motion for stay. But he then knowingly and repeatedly misrepresented to the trial court that he had not done so. (RX1 109, 120, 123; RR1 36). Instead of admitting his misconduct, he offered a long, disjointed narrative of events in an effort to explain his failure to disclose. (RX1 111-18; 121-28). He testified that once he received the additional recordings, he provided them "as quickly as possible," but "it was kind of late in the game." (RX1 127). Yet he then admitted that he first offered to produce them just days before the sanctions hearing in exchange for "call[ing] off the hearing Friday." (RX1 127-28). That demonstrates his disrespect of the court and disregard of the law.

3. Scarbrough's efforts to mislead Bolling for personal gain

Further supporting the Panel's decision is Scarbrough's act of calling Bolling, which he recorded without her knowledge, and misleading her in order to obtain information adverse to her family. (RR1 140; RX4 82). Bolling confirmed that Scarbrough's false statement that he represented Purser "more than anybody in the world" was the only reason she continued her conversation with him. (RR1 142). Indeed, Scarbrough explained his ulterior motives on closing at the evidentiary hearing:

> "I wanted to know why [Bolling] went to my client's beauty shop. I thought maybe she had been set up to do that and was prying. And so I wanted to know and so I got to talking to her. And you don't talk to people . . . and say I want to talk to you, I want you to answer my question . . . . [Y]ou have to let them know that you're on their side." (RR2 227-28)

Yet he continues to defend his conduct and contend that Bolling unreasonably interpreted and relied on his statements. (AB 66-67; RR2 206-07, 210). Even in the face of incontrovertible evidence, Scarbrough persists in his wholly unsupported positions, continuing to consume valuable judicial and bar resources.

4. Scarbrough's behavior during the disciplinary proceedings

His behavior during the evidentiary hearing also supports the judgment. He engaged in tactics designed to intimidate witnesses, for which he was repeatedly censured. During his questioning of Tipton, for example, the Panel chair sustained an objection that he was "harassing and intimidating" her by "standing right over her shoulder" and ordered him not to "hover over the witness." (RR1 104, 112, 118). He was also rebuked for his aggressive questioning of her, such as telling her, "I want to take you on cross-examination and . . . I want you testify the way I want you to testify." (RR1 111, 190). He eschewed decorum, calling Ray a "liar" when he disagreed with his testimony and repeatedly accusing the Pursers of murdering Gary Purser. (RR2 39, 207, 211-13). Furthermore, he routinely attempted to mislead the Panel with a circuitous and confusing narrative of events and adduce extraneous

evidence, much of which bore little relevance to the issue of his disciplinary misconduct. (RR1 9-35, 110-36; RR2 65-70, 95-101, 120-23, 186-216, 218).

Furthermore, the record shows that Scarbrough had made no effort to comply with the judgment from the time of entry to the time of the hearing on his motion to stay three months later,[7] revealing his disdain of the law. (MTS CR 115-116, 126).

5. Scarbrough refuses to admit wrongdoing and blames others

Despite the overwhelming evidence of malfeasance, Scarbrough continues to deny any wrongdoing. He instead blames everyone in his ambit—various members of the public, including the pursers, their relatives, and anyone who provided information adverse to him; other attorneys; the courts; and the Panel. (RR1 9-35; RR2 200-11, 223-29; AB passim). He also blamed his own client, explaining that he "can't beat up [his] client and say, oh, you lying hussy, you have to admit this" and arguing that both he and she "have a right to be silly." (RR2 224). His unrepentant and cavalier attitude further demonstrates the threat his continued practice of law would pose to the public and his clients.

6. Scarbrough fails to satisfy his burden on appeal

Scarbrough counters the evidence by rehashing the testimony and disputing the Panel's evaluation of the credibility of that testimony, the weight the Panel

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[7] The delay was caused by Scarbrough's multiple requests for continuances.

assigned to it, and the inferences the Panel drew from it. (AB at 15-23). However, those determinations are not subject to review. It is well established that, in a substantial-evidence analysis, a reviewing tribunal may not sit as a second factfinder: it may not reweigh evidence and judge witness credibility in support of finding additional or different facts. *See Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 565 (Tex. 2000); *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 231 (Tex. App—Houston [14th Dist.] 2000). It may not substitute its judgment on those matters for that of the Panel or resolve evidentiary ambiguities against the judgment. *Scally v. Texas State Bd. of Med. Examiners*, 351 S.W.3d 434, 451-52 (Tex. App.—Austin 2011); *Granek*, 172 S.W.3d at 778. Rather, the sole inquiry is whether the record provides a reasonable basis for the Panel's findings. *El Paso*, 883 S.W.2d at 185. Because the record provides more than a reasonable basis for the Panel's finding that Scarbrough's practice of law would pose a continuing threat to his clients or the public, his first issue must be overruled.

II. Issue 2: The Panel's denial of Scarbrough's special exceptions was not an abuse of discretion

After a hearing, the Panel denied Scarbrough's special exceptions to the Commission's evidentiary petition. (CR1 1919). The record demonstrates that the Panel did not err in concluding that the Commission's petition was sufficient.

A. A tribunal must determine whether a pleading provides "fair notice" of claims of misconduct, which is reviewed for an abuse of discretion

A tribunal's ruling on special exceptions challenging the sufficiency of a pleading is reviewed for an abuse of discretion. *James v. Comm'n for Lawyer Discipline*, 310 S.W.3d 598, 608 (Tex. App.—Dallas 2010). A tribunal abuses its discretion when it acts without reference to any guiding rules and principles. *Id*. The petition must be construed liberally, and all factual allegations must be accepted as true. *Id*.

An evidentiary petition in a disciplinary case must provide "[a] description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to the Respondent of the claims" of misconduct. TEX. RULES DISCIPLINARY P. R. 2.17(A)(4). It must list the specific disciplinary rules allegedly violated by the conduct. *Id*. 2.17(A)(5).

The "fair notice" pleading standard is satisfied when the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). It does not require that evidentiary matters be pled "with meticulous particularity" or that a party "plead his entire case, with exactness . . . ." *Bowen v. Robinson*, 227 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2006); *James*, 310 S.W.3d at 608. If the opposing party wishes to obtain additional information regarding the allegations set forth in a pleading, discovery tools are available to him.

State Fid. Mortg. Co. v. Varner, 740 S.W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

B. The Panel did not abuse its discretion in finding that the Commission's petition provided fair notice

The Commission's petition described in considerable detail the factual allegations and alleged conduct that formed the basis of its claims. (CR1 64-65). It then set forth the specific rules that the alleged conduct violated. (CR1 65). The Panel thus did not abuse its discretion in concluding that the petition was sufficient under the disciplinary rules and fair-notice standard.

Scarbrough seems to complain generally that the petition was deficient because the Commission did not tie individual facts to individual rule violations. However, he cites no authority for such a requirement, and the law does not demand such "meticulous particularity" in a pleading. *See Bowen*, 227 S.W.3d at 91. A petition need only give notice of the basic controversy and what evidence might be relevant, a standard the Commission's petition plainly satisfied. *Horizon*, 34 S.W.3d at 896.

Specifically, Scarbrough argues that the pleading did not specify the evidence central to the Rule 3.04(a) allegation. (AB 27). But the petition plainly identified the evidence as the recordings contained on the CD/ROM Richeson had prepared for Scarbrough following Deaton's deposition. (CR1 65).

Scarbrough also complains that the petition failed to specify which individual fact alleged in the petition formed the basis of the 3.04(d) violation. (AB 27-28). But the petition specifically alleged that Scarbrough twice violated the trial court's confidentiality order by disclosing Purser's medical records. (CR1 65).

His complaint regarding the Rule 8.04(a)(3) suggests various allegations against which he was required to defend. (AB 28). But his argument fails because the Commission was limited to proving a violation by the facts alleged. Scarbrough thus need have prepared a defense against only those allegations, which included that he misled Bolling to believe that he represented Purser. (CR1 65).

Finally, nothing in the record demonstrates that Scarbrough lacked sufficient notice of the allegations against him. Scarbrough never objected to the admission of any evidence on the basis of surprise or lack of notice. *See Varner*, 740 S.W.2d at 480 (pleadings sufficient where record did not reveal that party was surprised by the evidence). Instead, the record shows that Scarbrough was prepared to defend against the allegations by his responses to the Commission's evidence and by the voluminous evidence he introduced in his defense. (RR1-2 passim and exhibits).

Because Scarbrough fails to demonstrate that the Panel abused its discretion in denying his special exceptions, his second issue must be overruled.

III. Issue 3: The Panel did not err in applying collateral estoppel to prevent relitigation of whether Scarbrough obstructed the Pursers' access to evidence, but did err in applying it as to whether Scarbrough violated confidentiality order

Scarbrough challenges the Panel's application of collateral estoppel in finding that he violated Rule 3.04(a) by obstructing the Pursers' access to the recordings and Rule 3.04(d) by violating the medical-records confidentiality order. He contends that the issues have not been fairly and fully litigated; that BODA should disregard binding authority that permits application of collateral estoppel when the underlying judgment is on appeal; and that application of collateral estoppel violated his due-process rights.

The Commission contends that the Panel did not abuse its discretion in applying collateral estoppel as to Rule 3.04(a), but concedes error as to Rule 3.04(d) for reasons discussed below. The remainder of Scarbrough's complaints must be overruled because appellate tribunals are required to follow binding authority, and his constitutionality argument undermines the very purpose of collateral estoppel.

A. Standard of review

A trial court has broad discretion in determining whether to allow a plaintiff to use collateral estoppel offensively. *Goldstein v. Comm'n for Lawyer Discipline*, 109 S.W.3d 810, 812-13 (Tex. App.—Dallas 2003, pet. denied) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 7 (Tex. 1986)). A trial court abuses its discretion only when its action is

arbitrary and unreasonable, without reference to guiding rules or principles. *Id*. (citing *Beaumont Bank, N.A. v. Buller,* 806 S.W.2d 223, 226 (Tex.1991)).

B. Offensive collateral estoppel

Offensive application of collateral estoppel prevents a defendant from relitigating an issue that the defendant litigated and lost in prior litigation with another party. *Parklane,* 439 U.S. at 330; *Goldstein,* 109 S.W.3d at 813-14. In seeking application of collateral estoppel, a party must establish that the issue sought to be litigated in the second action (1) is identical to an issue in the prior action, (2) was essential to the judgment in the prior action, and (3) was actually litigated. *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 579 (Tex.2001); *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985).

Collateral estoppel may be used offensively in disciplinary proceedings. *Goldstein,* 109 S.W.3d at 813-14. In determining whether to apply collateral estoppel offensively, the tribunal must also determine whether the plaintiff could have easily joined the first action and whether application of collateral estoppel would be unfair to a defendant. *Parklane,* 439 U.S. at 329-31. Considerations regarding the fairness determination relevant to the present case are (1) the defendant's incentive in the first action to vigorously defend the suit, particularly if future suits are not foreseeable, and (2) the availability of procedural safeguards in

the second suit that were not available in the first suit that "could readily cause a different result." *Id*. at 330-31.

In the present case, Scarbrough seeks to relitigate whether he obstructed the pursers' access to evidence by failing to disclose the existence of the recordings, and whether he violated a court order by disclosing confidential medical information.

1. <u>Rule 3.04(a)</u>: The state-court judgment that Scarbrough committed fraud by failing to disclose the recordings demonstrates that he obstructed the Pursers' access to evidence

a. The nondisclosure issue was identical to an issue actually litigated at trial and was essential to the judgment in the prior suit

The issue that was the subject of collateral estoppel—whether Scarbrough failed to disclose the recordings—was litigated in a two-week jury trial. (RR1 92). In that case, the Pursers raised the issue in their petition by alleging that Scarbrough had committed fraud by failing to disclose the existence of the recordings despite repeated discovery requests. (CR1 411, 414). Evidence was adduced on the issue. (RX 2 178). The issue was submitted to the jury, which answered in the affirmative. (CR1 429-30). That finding was memorialized in a final judgment. (CR1 440). *See Van Dyke*, 697 S.W.2d at 384 (an issue is "actually litigated" when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined"). Because the issue of whether Scarbrough had failed to disclose that information was the first element of the fraud finding, it was essential to the judgment. *See Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962

S.W.2d 507, 521 (Tex. 1998) ("If a cause of action in the second lawsuit involves an element already decided in the first lawsuit, that cause of action is barred.").[8]

Here, the Commission alleged that Scarbrough unlawfully obstructed the Pursers' access to evidence by failing to disclose the existence of the recordings despite repeated discovery requests in violation of Rule 3.04(a).[9] (CR1 64-65). Thus, the issue raised in this case is identical to the issue decided by the jury in the prior action. *Johnson*, 962 S.W.2d at 521 ("[T]he claims or causes of action need not be identical, only the specific issue of fact or law of which a party is seeking to estop relitigation.").

b. Application of collateral estoppel was fair

Because the Commission could not have joined the first action,[10] the only remaining issue is whether the Panel abused its discretion in determining that

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[8] Similarly, in Helen Purser's nondischargeability action against Scarbrough in the bankruptcy court, Scarbrough's failure to disclose the existence of the recordings was "at the heart of Helen Purser's fraud claim." (RX1 197). Scarbrough again denied that he knowingly failed to disclose the recordings. (RX1 197). Relying on the underlying litigation, the court rejected that defense and concluded that he had caused "willful and malicious injury" and committed fraud by, inter alia, failing to disclose the recordings. (RX1 195; RX4 561).

[9] The Commission's petition alleged that Scarbrough possessed a CD/ROM containing several recordings and that he sent two of the recordings to the Pursers (the two that Deaton had disclosed in her deposition), "but failed to disclose the additional recordings, through discovery or any other means, to the Purser family." (CR1 65).

[10] The first action was a suit for damages brought by private litigants; the Commission could not have initiated disciplinary proceedings in that action. *See* TEX. RULES DISCIPLINARY P. Parts II & III.

application of collateral estoppel would not be unfair to Scarbrough. *Parklane,* 439 U.S. at 329. Application of the relevant factors demonstrates it did not.

First, Scarbrough had sufficient incentive to vigorously defend against the allegations in the prior suit. *Parklane,* 439 U.S. at 330. In that suit, Scarbrough faced—and ultimately incurred—a multi-million nondischargeable judgment that included significant damages for his failure to disclose the existence of the recordings alone. (CR1 429-31; RX1 161). Although the disciplinary action entailed different consequences, the consequences of the prior action provided ample incentive to demonstrate that he did not knowingly fail to disclose that fact. *See Goldstein*, 109 S.W.3d at 813 (finding that $4.8 million in damages "was more than adequate incentive" to defend vigorously). Further, disciplinary action was foreseeable because the conduct alleged regarding the first element of the fraud-by-nondisclosure claim in the prior case—failure to disclose the existence of the recordings—constituted a violation of Rule 3.04(a). (CR1 429). *See Schultz v. Commission for Lawyer Discipline*, No. 55649, 2015 WL 9855916, *2 (Tex. Bd. Disp. App. December 17, 2015) ("[F]ailure to disclose information otherwise required by law to be disclosed, regardless of intent, constitutes unlawfully obstructing another party's access to evidence in violation of Rule 3.04(a)."); Rule 3.04 cmt. 1 (discussing prohibition against concealment of evidence).

Second, Scarbrough identifies no procedural safeguards that were unavailable to him in the prior action that would have been available to him in the disciplinary action, let alone safeguards that "could readily cause a different result." *Parklane*, 439 U.S. at 331. Rather, he received the full panoply of procedural protections in the prior action: the issue was one of several litigated in a two-week jury trial; Scarbrough was represented by counsel, who Scarbrough believed put on a "brilliant" defense; and he was entitled to offer evidence and argue his position, which he did. (CR1 446-58). Thus, the prior action afforded him procedural protections that were at least as protective as those afforded him in the administrative disciplinary proceeding.

c. The sanctions order in the state-court suit was not the basis of collateral estoppel

Scarbrough argues that the Panel erred in applying collateral estoppel to the issue of whether he concealed the recordings in violation of Rule 3.04(a). (AB 34-41). However, his entire argument rests on his erroneous assumption that the basis of collateral estoppel was a sanctions order issued by the trial court in the prior case. Rather, as discussed below, the jury findings and final judgment in that case were. (CR1 390-91).

He further argues that "spoliation instructions do not provide 'ultimate issues,'" referring to a spoliation instruction included in the jury charge in the prior case. (AB 34 n.7). But the spoliation instruction did not decide the issue in dispute;

it instructed only that Scarbrough failed to preserve or produce the *recorder* and that the jury could thus presume that such evidence would have been unfavorable to him.[11] (CR1 423). That was a different issue from the one submitted to the jury, which asked whether Scarbrough failed to disclose the existence of the additional *recordings*.[12] (CR1 429). Accordingly, the Commission also alleged a second violation of Rule 3.04(a) by failure to preserve the recording device itself.[13] (CR1

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[11] The "Spoliation Presumption" in the jury charge read as follows:

> You are instructed that Denise Steele, Melissa Deaton and Jerry Scarbrough intentionally did not preserve or failed to produce the digital recorder when they knew or should have known that a claim had been filed and that the digital recorder in their possession or control would be material and relevant to that claim.
>
> Under such circumstances, the failure of Denise Steele, Melissa Deaton and Jerry Scarbrough to preserve or produce evidence within her or his control raises the presumption that if such evidence were produced, it would operate against Denise Steele, Melissa Deaton and Jerry Scarbrough.

(CR1 423) (emphasis deleted).

[12] The jury charge instructed that "fraud" occurs when "a party fails to disclose a material fact within the knowledge of that party . . . ." (CR1 429). There was evidence that the recorder contained additional recordings that the Pursers never received that were spoliated by Scarbrough's failure to preserve the recorder. (RR2 28-30, 110, 123-25, 218). Indeed, the jury could have found (but did not) that Scarbrough had disclosed the recordings despite that he had failed to preserve the recorder.

[13] The Commission's petition alleged that, in addition to Scarbrough's failure to disclose the existence of the additional recordings, "neither [Scarbrough] nor Deaton preserved the device, which eventually resulted in a spoliation instruction to the jury." (CR1 65).

65). That allegation was not the subject of collateral estoppel and was instead litigated at the evidentiary hearing.[14] (RR1 7, 26-35, 219-220).

d. The sufficiency of evidence supporting underlying judgment is not subject to challenge in this proceeding

The remainder of Scarbrough's argument challenges the sufficiency of the evidence supporting the underlying judgment. (AB 35-37). However, such attempts to relitigate an issue already fully and fairly decided are precisely what the doctrine of collateral estoppel precludes him from doing. *Goldstein,* 109 S.W.3d at 814-15. Rather, the proper mechanism for challenging the underlying judgment is appeal from that judgment, which Scarbrough has undertaken. (RX2 175, RX4 1-15). He may not relitigate the issue here in an effort to obtain a different result. *Parklane*, 439 U.S. 326 (collateral estoppel protects litigants from burden of relitigating resolved issues); *Scurlock,* 724 S.W.2d at 6 (collateral estoppel prevents conflicting results).

Because the Commission established the elements of offensive collateral estoppel to support a violation of Rule 3.04(a), and because application of collateral

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[14] At the evidentiary hearing, counsel for the Commission observed, on opening argument, that the Panel had already found a violation of Rule 3.04(a) on collateral estoppel for Scarbrough's failure to disclose the existence of the recordings, but that the Panel still had to decide whether Scarbrough had failed to preserve the recorder itself in (another) violation of 3.04(a). (RR1 7). The Panel ultimately did not make that finding; the only violation of 3.04(a) it found was on the basis of collateral estoppel—failure to disclose the recordings. (CR1 2014-15).

estoppel was not unfair to Scarbrough, the Panel's judgment as to that violation must be affirmed.

2. <u>Rule 3.04(d)</u>: The record does not support application of collateral estoppel regarding Scarbrough's violation of trial court's confidentiality order

The Commission concedes that the record does not support the Panel's application of collateral estoppel as to the issue of whether Scarbrough violated a court order by disclosing confidential medical information. The Commission cited, as the basis of its motion for collateral estoppel, the bankruptcy court's judgment and opinion from the adversary proceeding that followed the state-court action. (CR1 397).

The bankruptcy opinion observed that Scarbrough had twice violated the confidentiality order by disclosing Purser's medical records: first to law enforcement when accusing the Pursers of murdering Gary Purser, and again to Bolling after falsely claiming that he represented her deceased uncle. (RX1 176-77, 192-94). Although the present issue is identical to that finding, that finding does not appear to have been "essential to the judgment" that Scarbrough had committed willful and malicious fraud. *See Johnson*, 962 S.W.2d at 521. Although the opinion cited Scarbrough's "violating court orders" in describing his "parade of horribles" throughout the proceeding, it was but one fact among many that supported the court's judgment. (RX1 192). Indeed, the court noted that his violation of the

confidentiality order was "simply part and parcel of [Scarbrough]'s overall scheme to harm and harass Helen Purser" while leveraging a baseless claim through a "campaign of coercion." (RX1 193).[15] It is thus likely that the bankruptcy court would have found that Scarbrough committed willful and malicious fraud even had it not found that he twice violated a confidentiality order.

Because the record does not sufficiently demonstrate that Scarbrough's violation of the confidentiality order was essential to the judgment, the Commission concedes error regarding the Panel's finding that Scarbrough violated Rule 3.04(d) based on the bankruptcy court's order and opinion.

C. BODA must follow binding precedent that collateral estoppel is not barred by appeal of the precluding judgment

Scarbrough next argues that BODA should decline to follow Supreme Court precedent that holds that a final judgment retains its preclusive effect pending decision on appeal, citing hardships attorneys suffer under current law. (AB at 41). *See Scurlock*, 724 S.W.2d at 6. Neither law nor policy supports his argument.

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[15] The Court detailed Scarbrough's "scorched earth litigation strategy," which included, for example, filing frivolous motions and pleadings without client consent "because he had no reason not to;" fraudulent failure to produce evidence and conspiracy to commit fraud; other discovery abuses evincing a "spirit of gamesmanship over discovery matters," such as propounding invasive discovery for the sole purpose of upsetting the Pursers after Gary Purser's death; initiating meritless criminal investigations; and generally "wield[ing] the judicial process like a sword." (RX1 192-95).

First, Scarbrough cites no authority that would permit BODA to disregard Supreme Court precedent. *See Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008) ("It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts."); *In re K.M.S.*, 91 S.W.3d 331 (Tex. 2002) (intermediate appellate courts "are not free to disregard pronouncements from this Court").

Second, contrary to Scarbrough's contention, the rule is rooted in sound policy considerations well beyond uniformity of law:[16] it preserves the finality of judgments; prevents conflicting results; discourages procrastination on appeal; and minimizes burdens associated with retrying common issues borne by the judiciary and litigants. *Scurlock*, 724 S.W.2d at 6 (a rule of nonpreclusiveness "has a greater potential for harm" and threatens "[a]ll of the values served by res judicata").

Third, an exception to this long-standing rule that would favor attorneys in disciplinary proceedings and exclude all other litigants would only incite public skepticism regarding the legitimacy of the State Bar of Texas as a self-regulating body. Scarbrough's complaint thus does not compel reversal.

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[16] The Supreme Court has observed that "most courts" adhere to the rule of preclusiveness. *Scurlock*, 724 S.W.2d at 6.

D. Scarborough waived any argument that the application of collateral estoppel was unconstitutional; alternatively, the Panel's application of collateral estoppel was not unconstitutional

Scarbrough last argues that application of collateral estoppel was unconstitutional because it denied him the opportunity to confront witnesses against him in the disciplinary action in violation of due process. (AB 43-44).

First, he failed to raise this argument below and thus waived it. *See* TEX. R. APP. P. 33.1.; *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 875 (Tex. App.—Corpus Christi 2006, pet. denied) ("A party waives the right to raise a constitutional claim such as due process on appeal if that claim is not presented to the trial court.").

Second, he was afforded that right in the prior suit, and he cites no authority that would permit him to collaterally attack the constitutionality of a judgment from one proceeding in a different proceeding. And, again, preventing relitigation of resolved issues is the very purpose of collateral estoppel. *Goldstein*, 109 S.W.3d at 812; *Parklane*, 439 U.S. at 332. Thus, he was not entitled to reexamine those witnesses in the hope of obtaining a different result in the disciplinary action.[17]

[17] Although he contends that he sought to reexamine witnesses to mitigate sanctions for the misconduct that had been established by collateral estoppel, it is apparent from his argument and the record that he actually sought to challenge the sufficiency of evidence supporting the underlying judgment, namely, by demonstrating that witnesses "had lied to the trial court" in the prior action. (AB 44).

For the foregoing reasons, BODA should affirm the Panel's application of collateral estoppel with respect to Rule 3.04(a) and remand as to Rule 3.04(d) for further proceedings. *See Eagle Properties, Ltd. v. Scharbauer,* 807 S.W.2d 714, 725-26 (Tex. 1990) (remanding case after reversing application of collateral estoppel as to certain claims for further litigation of those claims); *State v. Stevens*, 261 S.W.3d 787, 789 (Tex. App.—Houston [14th Dist.] 2008) (same).

IV. Issue 4: Substantial evidence supports the Panel's finding that Scarbrough violated Rule 3.03(a)(1) by making false statements to the trial court

In his fourth issue, Scarbrough argues that the evidence is insufficient to support the Panel's finding that he violated Rule 3.03(a) by falsely representing to the court that he did not know of additional recordings beyond those he had disclosed. (AB 45-51). Specifically, he argues that the evidence is insufficient to show that he was aware of the additional recordings, thus his statement to the court was not false. As discussed, however, Scarbrough is precluded from relitigating the issue of whether he was aware of the recordings because it was fully litigated and resolved in the prior suit. The only issue left for the Panel to decide regarding that rule violation was whether Scarbrough represented to the trial court that he was not aware of any additional recordings. The record plainly establishes that he did.

The Commission introduced the transcript from a May 2011 sanctions hearing at which Scarbrough repeatedly denied having knowledge of the recordings. (RR1

36-38; RRX1 109-27). But the record shows that the recordings were made a year earlier and that Scarbrough possessed them well before the hearing but declined to disclose them. (RR1 10-11, 36-38, 73,74, 189, 193; RX1 120, 126, 172-74; RX2 2). The record thus conclusively demonstrates that he made a misrepresentation of fact to the court at the 2011 sanctions hearing.

He further asserts that a finding that he violated 3.04(a) did not prove a violation of 3.03(a)(1) because the 3.03(a)(1) requires proof of knowledge, and the knowledge was not a finding in the prior suit. (AB 47). The record does not support that contention. The jury charge indicates that the jury found that Scarbrough knowingly failed to disclose the existence of the recordings. (CR1 429).

V. Issue 5: Scarbrough is collaterally estopped from challenging the sufficiency of the evidence to support the Panel's finding that he violated Rule 3.04(a) by concealing the existence of evidence

His fifth issue challenges the Rule 3.04(a) violation based on his failure to disclose the recordings. (AB 51). He again challenges the evidence introduced in the prior action. (AB 51-54). As previously detailed, that violation was the subject of collateral estoppel, thus Scarbrough may not relitigate that issue on appeal. His fifth issue must be overruled.

VI. Issue 6: Scarbrough waived his issue regarding alleged exclusion of evidence and fails to demonstrate error

Scarbrough raises numerous complaints regarding various alleged evidentiary rulings. (AB 55-59). They are without merit.

A. Applicable law

In reviewing an appellate complaint regarding the exclusion of evidence, an appellate court must first determine whether the appellant properly preserved the issue by demonstrating, on the record, what the evidence was. TEX. R. APP. P. 44.1(a)(1); *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000). To adequately demonstrate the substance of the excluded testimony, the proponent must describe the substance of the testimony to the trial court once the opponent's objection is sustained. *In re N.R.C.*, 94 S.W.3d 799, 805-06 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). The proponent may not simply state the reasons for the testimony or explain why it is admissible; he must actually describe the content of the testimony in sufficient detail to allow the trial court to make an intelligent ruling and allow the appellate court to determine whether the ruling was erroneous and its effect on the judgment. *Id.*

If error has been properly preserved, an appellate court must then determine (1) that the evidence was erroneously excluded, (2) that it was controlling on a material issue and was not cumulative of other evidence, and (3) that the erroneous exclusion of the evidence probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a); *Able*, 35 S.W.3d 608, 617 (Tex. 2000).

A trial court has broad discretion to make evidentiary rulings, and an evidentiary ruling must be upheld if there is any legitimate basis for it. *Owens-*

Corning Fiberglass Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998). Even if a trial court abused its broad discretion in admitting or excluding evidence, reversible error does not occur unless the appellant demonstrates that the whole case turned on the particular evidence excluded or admitted. *Estate of Finney*, 424 S.W.3d 608, 612-13 (Tex. App.—Dallas 2013, no pet.). Thus, to determine harm, the appellate court must review the entire record. *Able*, 35 S.W.3d at 617. Erroneous "exclusion is likely harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference." *Davis v. Tex. Dep't of Family and Protective Services*, 2012 WL 512674 (Tex. App.—Austin 2012, no pet.)

B. The basis of many of Scarbrough's complaints is not clear and are thus waived

Scarbrough cites over a dozen instances in which he claims the trial court improperly limited his questioning of a witness. (AB 57-58). However, many of his contentions do not specifically identify the evidence he claims was wrongly excluded or plainly articulate an argument in support of the claim. Instead, they contain only citations to page ranges within the record and abbreviated supporting phrases, the meaning of which is often unclear. (AB at 57-58). Because he failed to properly brief his issue thereby precluding proper response and analysis, he waived it. *See* TEX. R. APP. P. 38.1(i); *Deutsch v. Hoover, Bax & Slovacek, L.L.P*, 97 S.W.3d 179, 198-99 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Smith v. Comm'n for*

Lawyer Discipline, 42 S.W.3d 362, 363 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

C. Much of the evidence Scarbrough claims was excluded was not excluded, and any other alleged errors were not preserved and were harmless

Although the precise bases of Scarbrough's complaints are not clear, it appears that in most of his cited instances, the evidence he claims was excluded was not in fact excluded. Rather, he was permitted to examine the witness extensively on those subjects, often over the Commission's objections. For example, the record does not show evidence was excluded or questioning limited during his examination of Elizabeth Tipton regarding (1) her statements about a photograph (RR1 110); (2) whether they had previously met in courtroom (RR1 115-25); a judicial opinion in an unrelated case (opinion admitted) (RR1 125, RX5 10); the details of an unrelated incident in a backyard (video of incident admitted) (RR1 125-36; RX5 17); (4) responses to discovery requests in underlying proceeding (RR1 189-95); or his examination of Jeff Ray, counsel for the Pursers, regarding (1) the nature of Purser's marriage (RR2 65-70); (2) Ray's fees for representing the Pursers (RR2 95-101); and (3) Scarbrough's statements regarding the recordings (responses admitted) (RR2 113-14). The Panel gave Scarbrough considerable leeway to develop testimony that was not plainly relevant or probative of any issue. Therefore, the record does not support the factual bases of his issue.

Moreover, Scarbrough does not attempt to demonstrate, for any of his claims, (1) that he preserved a claim by making the substance of the excluded testimony clear; (2) how the Panel chair abused her broad discretion in limiting what was plainly cumulative or irrelevant questioning; or (3) that exclusion of any evidence probably caused the rendition of an improper judgment in light of the entire record. In order to obtain relief, he must meet each of these requirements. Because he has not, his sixth issue must be overruled.

VII. Issue 7: The finding that Scarbrough violated Rule 3.04(d) by violating a confidentiality order must be remanded for further proceedings

In his seventh issue, Scarbrough contends that a determination that the Panel erred in applying collateral estoppel to the issue of whether he violated Rule 3.04(d) by violating the confidentiality order would prevent retrial of that issue. (AB 59). He cites no authority in support of that proposition. Rather, remand in that circumstance would permit further litigation of the alleged violation. *See Eagle*, 807 S.W.2d at 725-26 (Tex. 1990); *Stevens*, 261 S.W.3d at 789. His seventh issue must be overruled.

VIII. Issue 8: Scarbrough waived his variance complaints and has failed to demonstrate harmful error, and substantial evidence supports the Panel's fact findings

A. Scarbrough waived his variance complaints by failing to preserve and properly brief them, and he has failed to demonstrate error or harm

Scarbrough's eighth issue first complains that the proof does not match the pleadings. (AB 60-62). However, an objection to a variance between the pleadings and proof is waived if not timely raised. *Iroh v. Igwe*, 461 S.W.3d 253, 262 (Tex. App.—Dallas 2015, pet. denied); *Borden v. Guerra*, 860 S.W.2d 515, 525 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.). Because Scarbrough failed to raise his complaints at any time in the proceedings below, they are waived.

Furthermore, Scarbrough's complaints are set forth in a chart containing abbreviated words and phrases, many of which are difficult to comprehend. (AB 60-62). An appellate brief must "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." *See* TEX. R. APP. P. 38.1(i). Failure to offer argument or citations to record or relevant authority waives complaint on appeal. *Deutsch*, 97 S.W.3d at 198-99; *Smith*, 42 S.W.3d at 364. Scarbrough was required to state his claims in a clear concise manner, and his failure to do so waives them.

Even had Scarbrough preserved his complaints and properly briefed them on appeal, the record demonstrates no variance between the proof and pleadings. The record contains testimony that there were multiple requests for the recordings and

that the recording device contained several additional recordings, which Scarbrough admitted in his opening argument. (RR1 10, 51-53; RR2 15, 20, 28). Some of his complaints seem to merely challenge the Commission's (and ultimately the Panel's) interpretation of the evidence, including his responses to discovery requests and representations to Bolling, which do not constitute variance. He has thus failed to demonstrate error.

Finally, "courts have rarely found a variance between pleadings and proof to be harmful error." *Iroh v. Igwe*, 461 S.W.3d at 262 (citing *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980). To warrant reversal, the variance must be "substantial, misleading, constitute surprise, and be a prejudicial departure from the pleadings." *Id*. So even if Scarbrough had not waived the issue and identified error, he has failed to satisfy that high standard of harmfulness in light of the entire record.

B. Substantial evidence supports the Panel's fact findings

Scarbrough next effectively challenges the sufficiency of the evidence to support various findings of fact. (AB 62). Even assuming that every fact finding is subject to substantial-evidence review—a proposition for which he cites no authority—the record does not support his contention. Again, it contains evidence that there had been multiple requests of Scarbrough for any recordings. (RR1 51-52;

RR2 15, 20-21). Scarbrough admitted that he had given the device to Richeson and that it contained additional recordings. (RR1 10-11).

Further, contrary to his contention, the record does contain the bankruptcy court's fact findings as set forth in the court's opinion. (RX1 162-200). *See* FED. R. CIV. P. 52 (stating that findings of fact may be stated in an opinion or memorandum filed by the court); FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52 into adversary bankruptcy proceedings).

The complaint regarding the violation of the confidentiality order is moot, and the record plainly shows that he did not disclose his representation of Deaton to Bolling, which includes the transcript of that entire conversation. (RX2 4-70).

His eighth issue must be overruled.

IX. Issue 9: Substantial evidence supports the Panel's finding that Scarbrough violated Rule 8.04(a)(1)

Scarbrough's ninth issue challenges the Panel's finding that he violated 8.04(a)(1) because, he contends, there is no evidence that he violated the rules or knowingly induced another to do so. (AB 63). He advances the same arguments he raises in his second issue challenging the Panel's denial of his special exceptions and in his various sufficiency challenges. (AB 64-66). The Commission thus relies on its briefing on those issues in response to this issue.

Scarbrough alternatively contends that a civil litigant may not be "convicted of two different wrongs based on exactly the same facts." (AB 66). In support, he

cites generally *Fed. Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706 (Tex. 1990). However, that case is wholly unrelated and does not support that contention. *See id*. (addressing whether a creditor owes a guarantor a duty of good faith in deciding whether and when to foreclose a lien on real property). Rather, "[a]ll that is necessary to establish a violation of Rule 8.04(a)(1) is a violation of another rule." *Eureste v. Comm'n For Lawyer Discipline*, 76 S.W.3d 184, 201 (Tex. App.—Houston [14th Dist.] 2002). Accordingly, courts have routinely upheld findings of violations of Rule 8.04(a)(1) based solely on violations of other rules. *See*, *e.g*., *id*. (concluding that because the evidence was sufficient to find violations of other disciplinary rules, it was sufficient to find a violation of Rule 8.04(a)(1)); *Comm'n for Lawyer Discipline v. C.R.*, 54 S.W.3d 506, 518 (Tex. App.—Fort Worth 2001) (observing that the evidence demonstrating a violation of other disciplinary rules also established a violation of Rule 8.04(a)(1)). His ninth issue must be overruled.

X. Issue 10: Substantial evidence supports the Panel's finding that Scarbrough violated Rule 8.04(a)(3)

Scarbrough's tenth issue challenges the sufficiency of the evidence supporting the Panel's finding that he violated Rule 8.04(a)(3) by falsely indicating to Gary Purser's niece that he represented Purser. (AB 66). He again describes the evidence and challenges the Panel's assessment of it. But the Panel, as factfinder, is the sole judge of the credibility of testimony and weight to be given that testimony and is free to draw reasonable inferences from the evidence presented. *Curtis*, 20 S.W.3d

at 231; *Fredericksburg Indus., Inc. v. Franklin Intern., Inc.*, 911 S.W.2d 518, 523 (Tex. App.—San Antonio 1995), writ denied (May 16, 1996).

It is undisputed that when Bolling asked Scarbrough whether he represented Purser, Scarbrough responded that he represented Purser "probably more than anyone else in the world," when he in fact had never represented Purser. (RR1 141). Bolling testified that Scarbrough's response gave her "the impression that he was maybe somebody from the court that was representing or looking into Uncle Gary on his behalf," which she confirmed was the only reason she continued the phone conversation. (RR1 144). In his closing argument, Scarbrough stated that he wanted to speak with Bolling about whether she had ulterior motives in visiting Deaton at Deaton's salon. (RR2 227). He explained that, in order to get people answer your questions, "You have to . . . let them know that you're on their side. . . ." (RR2 227-28). The Panel was free to conclude that his response thus constituted conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.04(a)(3). Scarbrough's tenth issue must be overruled.

XI. Issue 11: Because the Rule 3.04(d) violation must be remanded for further proceedings, the sanction must also be remanded

Despite that overwhelming evidence supports of the sanction—even absent the confidentiality-order violation—the Commission believes that because that violation must be remanded for further proceedings, the sanction must also be remanded to the Panel.

CONCLUSION AND PRAYER

The Commission prays that BODA (1) affirm the Evidentiary Panel's determination that Scarbrough violated Rules 3.03(a)(1), 3.04(d), 8.04(a)(1), and 8.04(a)(3); (2) reverse the Evidentiary Panel's determination that Scarbrough violated Rule 3.04(d); (3) reverse the sanctions imposed by the Evidentiary Panel; and (4) remand this cause to the Evidentiary Panel for further proceedings limited to the allegation that Scarbrough violated Rule 3.04(d) and sanctions.

RESPECTFULLY SUBMITTED,

LINDA A. ACEVEDO
CHIEF DISCIPLINARY COUNSEL

LAURA BAYOUTH POPPS
DEPUTY COUNSEL FOR ADMINISTRATION

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/s/ Julie Liddell
JULIE LIDDELL
STATE BAR CARD NO. 24070781
ATTORNEY FOR APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to the Board of Disciplinary Appeals Internal Procedural Rules, the foregoing brief on the merits contains approximately 10,198 words (total for all sections of brief that are required to be counted), which is less than the total words permitted by the Board's Internal Procedural Rules. Counsel relies on the word count of the computer program used to prepare this petition.

/s/ Julie Liddell
JULIE LIDDELL

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing brief of Appellee, the Commission for Lawyer Discipline has been served on Appellant, Jerry W. Scarbrough, by and through his attorney of record, Michele Barber Chimene, 2827 Linkwood Drive, Houston, Texas 77025, by email to michelec@airmail.net on the 6th day of July 2016.

/s/ Julie Liddell
JULIE LIDDELL
APPELLATE DISCIPLINARY COUNSEL
STATE BAR OF TEXAS

NO. 56375

Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas

JERRY W. SCARBROUGH,
APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,
APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 08-5
No. A0111214896 and A0111214897

APPENDIX TO BRIEF OF APPELLEE COMMISSION FOR LAWYER DISCIPLINE

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V.

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On Appeal from the Evidentiary Panel
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No. A0111214896 and A0111214897

APPENDIX TO BRIEF OF APPELLEE COMMISSION FOR LAWYER DISCIPLINE

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

The Commission for Lawyer Discipline attaches the following documents in support of the foregoing brief:

APPENDIX 1: First Amended Evidentiary Petition (CR1 63-67)

APPENDIX 2: Judgment of Partially Probated Suspension (CR1 2013-21)

Appendix 1

BEFORE THE EVIDENTIARY PANEL FOR
STATE BAR DISTRICT NO. 08-5 STATE BAR OF TEXAS

COMMISSION FOR LAWYER DISCIPLINE,	*	
Petitioner	*	
	*	**A0111214896**
V.	*	**A0111214897**
	*	
JERRY W. SCARBROUGH,	*	
Respondent	*	

FIRST AMENDED EVIDENTIARY PETITION

COMES NOW, the Commission for Lawyer Discipline, Petitioner, and would respectfully show the following:

I.

Parties

Petitioner is the Commission for Lawyer Discipline, a committee of the State Bar of Texas. Respondent, Jerry W. Scarbrough State Bar No. 17717500, is an attorney licensed to practice law in the State of Texas. Respondent may be served with process at:

Jerry Scarbrough
P.O. Box 690866
Killeen, Texas 76549

II.

Jurisdiction & Venue

This Disciplinary Proceeding is brought pursuant to the State Bar Act, Tex. Gov't. Code Ann. Sec. 81.001, et seq., the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. The complaints which form the basis of this Disciplinary Proceeding were filed by Elizabeth Tipton and Alice Oliver-Parrott on or after January 1, 2004.

Venue is proper in Bell County, Texas, pursuant to Rule 2.11(B) of the Texas Disciplinary Rules of Procedure, because Bell is the county of Respondent's principal place of practice.

III.

Professional Misconduct

The acts and omissions of Respondent, as hereinafter alleged, constitute professional misconduct.

IV.

Factual Allegations

A0111214896 Elizabeth Tipton and A0111214897 Alice Oliver-Parrott

In 2009, Clayton Olvera, a former business associate of Gary Purser, Sr. ("Gary Purser), filed a lawsuit against Gary Purser and the Purser family (Helen Purser, Sue Purser, JoAnn Purser and Bubba Purser). On or about June 18, 2010, the Purser family filed a third-party petition against Melissa Deaton ("Deaton"), and Deaton hired Respondent, Jerry Scarbrough, to represent her. Deaton, through prior counsel, counter-claimed against the Purser family and, through Respondent, filed a third-party petition against Elizabeth Purser Tipton.

Throughout the litigation, Respondent responded to various discovery requests on behalf of Deaton. In two of those responses, sent prior to Deaton's first deposition, Respondent (1) denied the existence of "any discoverable witness statements" as witness statement is defined by Texas Rules of Civil Procedure 192.3(h) and (2) denied the existence of "photographs, video, surveillance and/or other forms of recording/documentation depicting and/or concerning any party to this litigation" and any "written or recorded statement in this lawsuit taken from...any party to this litigation." On January 7, 2011, during Deaton's first deposition, she disclosed the existence of two such recordings: (1) "the Sister recording" and (2) "the Reddington recording."

Thereafter, Respondent retrieved the recording device ("the device") used to make the Sister recording from Deaton and took the device to an IT specialist. After the IT specialist copied the recordings onto a computer, he burned the recordings onto a CD/ROM and gave same to Respondent. The CD/ROM contained the Sister recording disclosed by Deaton in her deposition and several additional recordings. Respondent sent the Sister recording and the Reddington recording to the Purser family but failed to disclose the additional recordings, through discovery or any other means, to the Purser family. Additionally, although the recordings were material and relevant to the claims at issue in the lawsuit, neither Respondent nor Deaton preserved the device, which eventually resulted in a spoliation instruction to the jury. At a hearing on May 27, 2011, Respondent and Deaton, who both testified, continued to deny the existence of the additional recordings.

Respondent contacted Gary Purser's niece, Carolyn Bolling, after Gary Purser's death, and, when asked whom he represented, he said he represented himself and Gary "probably more than anyone else in the world right now." This left Ms. Bolling with the impression that Respondent represented her deceased uncle. At no time did Respondent represent Gary Purser.

A confidentiality order was entered by the Court regarding, *intera alia*, Gary Purser's medical records. Respondent twice violated the confidentiality order. First, he disclosed Gary Purser's medical records to a detective for the Killeen Police Department. He was subsequently sanctioned for his "willful violation" of the order. After being sanctioned the first time, Respondent then disclosed the contents of Gary Purser's medical records to Ms. Bolling in the conversation discussed above. He was again sanctioned for his "willful violation" of the order and was held in criminal contempt for the second violation.

V.

Disciplinary Rules of Professional Conduct

The conduct described above is in violation of the following Texas Disciplinary Rules of Professional Conduct:

3.03(a)(1) A lawyer shall not knowingly make a false statement of material fact or law to a tribunal;

3.04(a) A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act;

3.04(d) A lawyer shall not knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience;

8.04(a)(1) A lawyer shall not violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship; and

8.04(a)(3) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

VI.

Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a judgment of professional misconduct be entered against Respondent and that this Evidentiary Panel impose an appropriate sanction against Respondent as warranted by the facts. Petitioner further prays to recover all reasonable and necessary attorney fees and all direct expenses associated with this

proceeding. Petitioner further prays for such other and additional relief, general or specific, at law or in equity, to which it may show itself entitled.

Respectfully submitted,

Linda A. Acevedo
Chief Disciplinary Counsel

Rebecca (Beth) Stevens
Assistant Disciplinary Counsel

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512.427.1350 Phone
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Rebecca (Beth) Stevens
State Bar Card No. 24065381
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Jerry Scarbrough, P.O. Box 690866, Killeen, Texas 76549, by facsimile (254) 634-0516, in accordance with Rule 21a Tex.R.Civ.P. on this 17th day of March 2014.

Rebecca (Beth) Stevens

Appendix 2

BEFORE THE EVIDENTIARY PANEL FOR
STATE BAR DISTRICT NO. 08-5 STATE BAR OF TEXAS

COMMISSION FOR LAWYER DISCIPLINE, Petitioner	*	
V.	*	A0111214896 A0111214897
JERRY W. SCARBROUGH, Respondent	*	

JUDGMENT OF PARTIALLY PROBATED SUSPENSION

Parties and Appearance

On January 14, 2015, a hearing on Petitioner's First Amended Motion for Application of Collateral Estoppel was heard. On January 16, 2015, an Order Partially Granting Petitioner's First Amended Motion for Application of Collateral Estoppel was entered. On February 19, 2015 and March 9, 2015, came to be heard the above styled and numbered cause. Petitioner, Commission for Lawyer Discipline, appeared by and through its attorney of record and announced ready. Respondent, Jerry W. Scarbrough, Texas Bar Number 17717500, appeared in person and through attorney of record and announced ready.

Jurisdiction and Venue

The Evidentiary Panel 8-5 having been duly appointed to hear this complaint by the chair of the Grievance Committee for State Bar of Texas District 8, finds that it has jurisdiction over the parties and the subject matter of this action and that venue is proper.

Professional Misconduct

The Evidentiary Panel, having considered all of the pleadings, evidence, stipulations, and argument, finds Respondent has committed Professional Misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.

Findings of Fact

The Evidentiary Panel, having considered the pleadings, evidence and argument of counsel, makes the following findings of fact:

1. Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.

2. Respondent resides in and maintains his principal place of practice in Bell County, Texas.

3. In 2009, Clayton Olvera, a former business associate of Gary Purser, Sr. ("Gary Purser"), filed a lawsuit against Gary Purser and the Purser family (Helen Purser, Sue Purser, JoAnn Purser and Bubba Purser). On or about June 18, 2010, the Purser family filed a third-party petition against Melissa Deaton ("Deaton"), and Deaton hired Respondent, Jerry Scarbrough, to represent her. Deaton, through prior counsel, counter-claimed against the Purser family and, through Respondent, filed a third-party petition against Elizabeth Purser Tipton.

4. Respondent knowingly made a false statement of material fact to the 146th District Court. Throughout the litigation, Respondent responded to various discovery requests on behalf of Deaton. Opposing counsel made repeated requests to Respondent for production of any recordings involving Gary Purser. At a discovery sanctions hearing on May 27, 2011, in sworn testimony before the 146th District Court, Respondent denied having knowledge of any recordings of Gary Purser other than (1) a recording involving Gary Purser, Melissa Deaton, and Kathy Purdue, and (2) a recording involving Gary Purser, Melissa Deaton, and John Redington. However, there existed at least one additional recording, referred to as the "two good bitches" recording, involving Gary Purser, Melissa Deaton, and Denise Steele, which Respondent had previously given to an information technology professional named Shawn Richardson together with the two other recordings.

5. In prior litigation, the 146th District Court and the U.S. Bankruptcy Court for the Western District of Texas, Waco Division, made fact findings that Respondent unlawfully obstructed another party's access to evidence, specifically audio recordings of Gary Purser; altered, destroyed, or concealed audio recordings of Gary Purser; or counseled or assisted Melissa Deaton in doing so.

6. In prior litigation, the 146th District Court and the U.S. Bankruptcy Court for the Western District of Texas, Waco Division, made fact findings that Respondent knowingly disobeyed an order of the 146th District Court not to disclose medical records pertaining to Gary Purser.

7. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation during a telephone conversation with Gary Purser's niece, Carolyn Bolling, after Gary Purser's death. When Ms. Bolling asked Respondent whom he represented, Respondent said that he represented himself and Gary "probably more than anyone else in the world right now." Respondent did not disclose his representation of Melissa Deaton. This left Ms. Bolling with the impression that Respondent represented her deceased uncle. At no time did Respondent represent Gary Purser.

8. The Chief Disciplinary Counsel of the State Bar of Texas has incurred reasonable attorneys' fees and direct expenses associated with this Disciplinary Proceeding in the amount of $12,000.00.

Conclusions of Law

The Evidentiary Panel concludes that, based on foregoing findings of fact, the following Texas Disciplinary Rules of Professional Conduct have been violated: 3.03(a)(1), 3.04(a), 3.04(d), 8.04(a)(1) and 8.04(a)(3).

Sanction

The Evidentiary Panel, having found that Respondent has committed Professional Misconduct, heard and considered additional evidence regarding the appropriate sanction to be imposed against Respondent. After hearing all evidence and argument and after having considered the factors in Rule 2.18 of the Texas Rules of Disciplinary Procedure, the Evidentiary Panel finds that the proper discipline of the

Respondent for each act of Professional Misconduct is a Partially Probated Suspension.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Respondent be suspended from the practice of law for a period of ten (10) years, beginning May 1, 2015 and ending April 30, 2025, provided Respondent complies with the following terms and conditions. Respondent shall be actively suspended from the practice of law for a period of two (2) years beginning May 1, 2015 and ending April 30, 2017. If Respondent complies with all of the following terms and conditions timely, the eight (8) year period of probated suspension shall begin on May 1, 2017, and shall end on April 30, 2025:

1. Respondent shall pay all reasonable and necessary attorney's fees and direct expenses to the State Bar of Texas in the amount of $12,000.00. The payment shall be due and payable on or before April 30, 2017, and shall be made by certified or cashier's check or money order. Respondent shall forward the funds, made payable to the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

2. Respondent shall make contact with the Chief Disciplinary Counsel's Offices' Compliance Monitor at 877-953-5535, ext. 1334 and Special Programs Coordinator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

Should Respondent fail to comply with all of the above terms and conditions timely, Respondent shall remain actively suspended until the date of compliance or until April 30, 2025, whichever occurs first.

Terms of Active Suspension

It is further ORDERED that during the term of active suspension ordered herein, or that may be imposed upon Respondent by the Board of Disciplinary Appeals as a

result of a probation revocation proceeding, Respondent shall be prohibited from practicing law in Texas; holding himself out as an attorney at law; performing any legal services for others; accepting any fee directly or indirectly for legal services; appearing as counsel or in any representative capacity in any proceeding in any Texas or Federal court or before any administrative body; or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "attorney," "counselor at law," or "lawyer."

It is further ORDERED that, on or before April 30, 2015, Respondent shall notify each of Respondent's current clients and opposing counsel in writing of this suspension.

In addition to such notification, it is further ORDERED Respondent shall return any files, papers, unearned monies and other property belonging to current clients in Respondent's possession to the respective clients or to another attorney at the client's request.

It is further ORDERED Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) on or before May 15, 2015, an affidavit stating all current clients and opposing counsel have been notified of Respondent's suspension and that all files, papers, monies and other property belonging to all current clients have been returned as ordered herein.

It is further ORDERED Respondent shall, on or before April 30, 2015, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice of each and every court or tribunal in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the

pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing.

It is further ORDERED Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) on or before May 15, 2015 an affidavit stating Respondent has notified in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing in Court.

It is further ORDERED that, on or before May 1, 2015, Respondent shall surrender his law license and permanent State Bar Card to the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701), to be forwarded to the Supreme Court of Texas.

Terms of Probation

It is further ORDERED that during all periods of suspension, Respondent shall be under the following terms and conditions:

3. Respondent shall not violate any term of this judgment.
4. Respondent shall not engage in professional misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.
5. Respondent shall not violate any state or federal criminal statutes.
6. Respondent shall keep State Bar of Texas membership department notified of current mailing, residence and business addresses and telephone numbers.
7. Respondent shall comply with Minimum Continuing Legal Education requirements.
8. Respondent shall comply with Interest on Lawyers Trust Account (IOLTA) requirements.
9. Respondent shall promptly respond to any request for information from the

Chief Disciplinary Counsel in connection with any investigation of any allegations of professional misconduct.

10. Respondent shall make contact with the Chief Disciplinary Counsel's Offices' Compliance Monitor at 877-953-5535, ext. 1334 and Special Programs Coordinator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

Probation Revocation

Upon information that Respondent has violated a term of this judgment, the Chief Disciplinary Counsel may, in addition to all other remedies available, file a motion to revoke probation pursuant to Rule 2.23 of the Texas Rules of Disciplinary Procedure with the Board of Disciplinary Appeals ("BODA") and serve a copy of the motion on Respondent pursuant to Tex.R.Civ.P. 21a.

BODA shall conduct an evidentiary hearing. At the hearing, BODA shall determine by a preponderance of the evidence whether Respondent has violated any term of this Judgment. If BODA finds grounds for revocation, BODA shall enter an order revoking probation and placing Respondent on active suspension from the date of such revocation order. Respondent shall not be given credit for any term of probation served prior to revocation.

It is further ORDERED that any conduct on the part of Respondent which serves as the basis for a motion to revoke probation may also be brought as independent grounds for discipline as allowed under the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure.

Attorney's Fees and Expenses

It is further ORDERED Respondent shall pay all reasonable and necessary attorney's fees and direct expenses to the State Bar of Texas in the amount of

$12,000.00. The payment shall be due and payable on or before April 30, 2017, and shall be made by certified or cashier's check or money order. Respondent shall forward the funds, made payable to the State Bar of Texas, to the Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

It is further ORDERED that all amounts ordered herein are due to the misconduct of Respondent, are assessed as a part of the sanction in accordance with Rule 1.06(Z) of the Texas Rules of Disciplinary Procedure. Any amount not paid shall accrue interest at the maximum legal rate per annum until paid and the State Bar of Texas shall have all writs and other post-judgment remedies against Respondent in order to collect all unpaid amounts.

It is further ORDERED that Respondent shall remain actively suspended from the practice of law as set out above until such time as Respondent has completely paid attorney fees and direct expenses in the amount of $12,000.00 to the State Bar of Texas.

Publication

This suspension shall be made a matter of record and appropriately published in accordance with the Texas Rules of Disciplinary Procedure.

Other Relief

All requested relief not expressly granted herein is expressly DENIED.

SIGNED this 7 day of April, 2015.

EVIDENTIARY PANEL
DISTRICT NO. 8-5
STATE BAR OF TEXAS

Lisa Richardson
District 8-5 Presiding Member

CF6-16