No. 56406

IN THE BOARD OF DISCIPLINARY APPEALS

APPELLANT, CHARLES J. SEBESTA, JR.

v.

APPELLEE, THE TEXAS COMMISSION FOR LAWYER DISCIPLINE

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Nature of the Case: Respondent/Appellant Charles Sebesta is appealing a judgment of disbarment entered by an Evidentiary Panel. Complainant Anthony Graves filed two essentially identical complaints against Sebesta, alleging that Sebesta, a former prosecutor, violated the Disciplinary Rules of Professional Conduct in connection with Sebesta's prosecution of a capital murder case against Graves in 1994. Graves filed his first complaint in 2007 and the State Bar dismissed after investigating and determining there was no Just Cause to proceed. Seven years later, in 2014, Graves filed a second complaint based on the same allegations. This time the Bar found Just Cause, pursued the disciplinary action against him, and the proceeding resulted in a Judgment of Disbarment.

Evidentiary Panel: The Evidentiary Panel for State Bar District No. 08-2, State Bar of Texas, was comprised of the following individual members: Brian M. Baker, Presiding Member; Donald Delgado; and Vance Goss.

Course of Proceedings: Sebesta filed a Motion on Res Judicata and Estoppel, seeking dismissal of the 2014 complaint against him as a matter of law based on the Bar's 2007 dismissal. Sebesta and Petitioner/Appellee the Commission for Lawyer Discipline agreed that the Evidentiary Panel could hold a pretrial hearing in order to determine the legal issues presented by Sebesta's Motion. The Panel held a hearing on November 12, 2014 and issued a ruling on December 17, 2014 denying the Motion. The Panel subsequently held a full evidentiary hearing on May 11-14, 2015, and issued a Judgment of Disbarment against Sebesta on June 11, 2015.

STATEMENT OF JURISDICTION

The Board of Disciplinary Appeals has jurisdiction over this appeal from a final judgment of an evidentiary panel pursuant to Texas Government Code section 81.0751. Tex. Gov't Code Ann. § 81.0751 (Vernon 2013).

RECORD

Citations to the Clerk's Record will be by Index Number and Page number as follows: [Index No.] CR [Page No.].

The Reporter's Record is only one volume, which contains the transcript of the Panel's hearing on November 12, 2014. Citations to the Reporters Record will therefore refer only to the page number as follows: RR [page no.]

APPENDIX

The following items are included in the Appendix and cited as "App.__":

App. 1: Chief Disciplinary Counsel's July 18, 2007 notice of determination of no Just Cause, 8CR00161-162.

App. 2: State Bar's August 16, 2007 notice of final dismissal, 8CR00164.

App. 3: Chief Disciplinary Counsel's June 2, 2014 notice of determination of Just Cause, 8CR00513-517.

App. 4: Evidentiary Panel's Order on Respondent's Motion on Res Judicata and Estoppel, 28CR01014.

App. 5: Judgment of Disbarment, 70CR01443-01448.

App. 6: Excerpts of State Bar Rules as amended to December 1971, Tex. State Bar R. art. 12, §§ 11-31, *reprinted in* Tex. Gov't Code Ann., tit. 14 App. (Vernon 1973).

App. 7: Excerpts of Texas Supreme Court Amendments to the Texas Rules of Disciplinary Procedure, Dec. 29, 2013.

ISSUE ON APPEAL

1. Did the Evidentiary Panel err in denying Sebesta's Motion for Res Judicata and Estoppel and failing to dismiss the claims against Sebesta as a matter of law, given the Bar's final dismissal of an identical complaint against Sebesta seven years earlier?

Charles Sebesta files this Brief of Appellant addressing the Evidentiary Panel's order denying his Motion on Res Judicata and Estoppel.

OVERVIEW

This appeal asks the Board of Disciplinary Appeals ("BODA") to determine how far the State Bar may go in order to secure a judgment against an attorney in response to political and media pressure. The Bar's Office of Chief Disciplinary Counsel ("CDC") investigated these same allegations of misconduct against Appellant/Respondent Charles Sebesta ("Sebesta") in 2007. The CDC performed a full investigation of the allegations against Sebesta, it recommended dismissal based on a finding of no Just Cause, and the Bar's Summary Disposition Panel ("SDP") upheld that determination. The Bar fully and finally dismissed the complaint against Sebesta, and told him that it would take no further action.

In 2014, a second grievance was filed by the same party, raising the exact same allegations against Sebesta. This time, the Bar did an about face. The CDC investigated the allegations again (despite its earlier representation that it would take no further action), and it made a finding of Just Cause. The matter proceeded to a hearing before an Evidentiary Panel. Sebesta filed a motion seeking dismissal of the allegations under the doctrines of res judicata and estoppel, pointing out that the complaint against him had already been fully resolved seven years earlier and was thus barred as a matter of law. The Evidentiary Panel denied Sebesta's motion

and ultimately entered a Judgment of Disbarment against Sebesta.

This appeal asks BODA to determine whether the Bar exceeded its legal authority by reviving and pursuing the complaint against him for a second time. The factual allegations in this matter received intense media coverage in the intervening years between 2007 and 2014, and the Bar was criticized by the press for failing to discipline Sebesta in 2007. The Bar understandably may have felt some pressure to reopen the grievance given this barrage of media coverage. But regardless of the prevailing political and media climate, the State Bar still must follow its own rules and respect the law. All lawyers in Texas are entitled to fair treatment, consistency, and finality in the disciplinary system.

STATEMENT OF FACTS

A. The Anthony Graves Case

The genesis of this disciplinary proceeding is a tragic multiple homicide that took place in Burleson County, Texas, in August 1992. Sebesta was the District Attorney for Burleson County at the time, and he prosecuted two individuals for that crime. The first, Robert Carter ("Carter"), confessed to the homicide and also implicated a second individual, Anthony Graves ("Graves").

Sebesta prosecuted Graves and, in 1994, Graves was convicted of capital murder. Carter's testimony was part, but not all, of the evidence that Sebesta presented against Graves at the capital murder trial. The judge who presided over

that trial has since testified that, in his opinion, Graves had a fair trial and Sebesta's conduct in prosecuting Graves was ethical and his recollection of the evidence presented during the Graves trial differs significantly from that reported by the media. 8CR00281-283.

Graves pursued a writ of habeas corpus, alleging that Sebesta had withheld exculpatory evidence, including an alleged exonerating statement by Carter, and otherwise impaired his ability to receive a fair trial. Two federal judges, a magistrate and district court judge, concluded that Graves had received a fair trial, and that any errors or omissions by Sebesta had not been material. *See Graves v. Dretke*, 442 F.3d 334, 338-39 (5th Cir. 2006). Ultimately, however, in March 2006, the Fifth Circuit Court of Appeals disagreed, concluded that Graves had not received a fair trial, and directed that he be retried or released. *Id.* at 345.

B. The 2007 Complaint against Sebesta

On January 31, 2007, Robert S. Bennett filed a grievance against Sebesta ("2007 Complaint"). 8CR00078-00121. Bennett was Graves' attorney, and he stated that he was filing the grievance "on behalf of Anthony Graves."[1] 8CR00084. Bennett relied on the Fifth Circuit Court of Appeals opinion related to Graves' criminal case as the basis for his factual allegations against Sebesta. 8CR00085. Bennett alleged that Sebesta violated the following Texas Disciplinary

[1] Bennett has since been disbarred himself, and is appealing the order of disbarment against him.

Rules of Professional Conduct: 3.09, 3.09(d), 3.04(b), 3.03(a)(5), 3.09(a), and 3.04(c)(2). 8CR00086-87.

The 2007 Complaint included the following factual allegations: 1) Sebesta failed to inform Graves' counsel of allegedly exculpatory statements made by Carter; 2) Sebesta elicited evidence he knew to be false from two trial witnesses; and 3) Sebesta threatened Graves' alibi witness, Yolanda Mathis, who chose not to testify as a result. *Id.*

On February 22, 2007, the State Bar of Texas notified Sebesta that a grievance had been filed against him by Bennett on behalf of Graves. 8CR00123-124. The letter stated that the statute of limitations had run, and he was not required to respond or take any further action. *Id.* The letter concluded: "The Complainant may appeal this determination to the Board of Disciplinary Appeals. You will be notified in writing if this occurs. No action on your part is necessary at this time." *Id.*

On February 28, 2007, Sebesta received a second letter from the State Bar advising him that Bennett had appealed the decision to BODA and he would be notified of BODA's decision. 8CR00126.

On March 19, 2007, Sebesta received a copy of a letter sent to Bennett advising him that BODA had granted his appeal and that the CDC would investigate the matter further. 8CR00128. In other words, BODA determined that

the statute of limitations ***did not*** bar the State Bar from moving forward with its investigation of the merits of the alleged disciplinary violations.

The following day, March 20, 2007, Sebesta received a letter from the State Bar of Texas advising him that the appeal had been granted and that the case was now classified as a Complaint. 8CR00130-131. The State Bar informed Sebesta that he had 30 days to specifically respond to each and every allegation contained in the 43-page Complaint. *Id.*

On March 29, 2007, Sebesta filed his written response, which answered each and every allegation in the 2007 Grievance. 8CR00133-159. Sebesta's response included polygraph results indicating that he had disclosed the alleged exculpatory evidence to Graves' lawyer. 8CR00148-150. Sebesta's response did not discuss the statute of limitations, as BODA had already reversed the CDC's limitations finding. 8CR00133-147.

On July 18, 2007, Sebesta received written notification that the CDC had determined that Just Cause did <u>not</u> exist to proceed on the Complaint and it would be placed on the Summary Disposition Panel docket to determine whether the Complaint should be dismissed or should proceed. App. Tab 1. The letter specifically stated as follows:

> You are hereby notified that, in accordance with Rule 2.13 of the Texas Rules of Disciplinary Procedure, <u>the Chief Disciplinary Counsel has determined that ***Just Cause does not exist*** to proceed with the above-referenced Complaint</u>. The Complaint has therefore

> been placed on the Summary Disposition Panel docket. . . . The Panel shall determine whether the Complaint should be dismissed or should proceed.

Id. (emphasis added).

On August 16, 2007, Sebesta received a letter from the State Bar of Texas with the following statement:

> The Summary Disposition Panel for the District Grievance Committee has determined that the above referenced Complaint should be dismissed. The Complainant cannot appeal this determination of the Summary Disposition Panel. Accordingly, our file on this matter has been closed and ***this office will take no further action***.

App. Tab 2 (emphasis added).

Based on the letters cited above, Sebesta concluded that the State Bar investigated the allegations against him and dismissed the allegations on the merits due to a lack of Just Cause. 8CR00073. Sebesta wrote a letter to the State Bar on August 9, 2007 to confirm his interpretation of the decision. 8CR00074; 8CR00166-170 ("Bob Bennett has already filed a grievance against me that the Chief Disciplinary Counsel has determined to be without 'Just Cause'. . ."). The State Bar never responded to correct Sebesta's statements, nor did the Bar inform him that he misinterpreted the reason for its dismissal of the 2007 Complaint. 8CR00073.

Sebesta proceeded under the assumption that the disciplinary proceedings against him related to his prosecution of Anthony Graves had been fully

concluded, and that the Bar would take no further action against him. On September 24, 2007, Sebesta sent a letter to the CDC indicating that he waived confidentiality regarding the 2007 Complaint. 8CR00172. He posted on his website that the Bar had dismissed the proceedings against him based on a finding of no Just Cause.[2] He did not ask for a copy of the Bar's file relating to the 2007 Complaint, and the Bar destroyed that file. 8CR00174. Sebesta did not attempt to preserve the testimony of several witnesses who had overheard incriminating communications between Carter and Graves, and a key investigator with knowledge of the Graves criminal investigation/prosecution. Those witnesses have since died. 8CR00075-76.

C. Changes in the political climate between 2007 and 2014

On September 6, 2006, Graves left death row and was transported back to the Burleson County jail in Caldwell, Texas, to face his retrial. In early 2007, former Navarro County district attorney Pat Batchelor was appointed special prosecutor to try the case. In February 2010, Batchelor was replaced as special prosecutor by former Harris County assistant district attorney Kelly Siegler. At that point, fourteen years had passed since the initial prosecution. Siegler was well-known prosecutor who had reputedly never lost a case. Siegler elected not to

[2] Graves and the Bar later criticized Sebesta for posting that the Complaint had been dismissed on a finding of no Just Cause, and Linda Acevedo told a reporter at Texas Monthly that the Bar's dismissal letter should not be taken "too literally." 20CR00922.

proceed with the Graves prosecution, and she announced at that time that she did not believe there was any credible evidence to support a case against Graves.[3] Then Burleson County district attorney Bill Parham held a press conference to officially drop the charges against Graves. On October 27, 2010, Graves was released, and a media firestorm erupted against Sebesta.[4]

In December 2013, Texas Monthly ran an article about the Sebesta case. 20CR00920-922. This article criticized the State Bar for not aggressively pursuing disciplinary actions against prosecutors and, in particular, criticized the Bar for not punishing Sebesta. *Id.* 00921 ("And yet the State Bar of Texas, which is supposed to discipline attorneys who commit ethical violations, did not take any action against Sebesta . . .the bar's track record for disciplining prosecutors is abysmal."). The article quoted Linda Acevedo, the Chief Disciplinary Counsel, who stated that the Bar's 2007 dismissal of the complaint against Sebesta "was based on the fact that the complaint was brought forth well beyond the four-year statute of limitations our office is bound by . . ." *Id.* 00922. Ms. Acevedo also told the

[3] Notably, the CDC appointed Siegler as its expert witness at the Evidentiary Panel hearing against Sebesta. Since that time, she herself has come under fire for allegedly engaging in the same tactics she accused Sebesta of employing in this matter. Earlier this year, Judge Larry Gist found that Seigler withheld evidence in a murder case against David Mark Temple and recommended that Temple be granted a new trial.

[4] This information regarding the Graves prosecution and the media coverage is provided only for context. However, should BODA wish to get a sense of the media coverage of the Graves/Sebesta matter, a simple Google search of either name will provide ample results.

Texas Monthly reporter that the wording of the Bar's 2007 dismissal notice should not be taken "too literally" because it was just a form letter.[5] *Id.*

In 2013, the Legislature enacted an amendment to the Government Code which provided that the statute of limitations for disciplinary actions against prosecutors alleging a violation of a disclosure rule should not begin to run until a "wrongfully imprisoned person is released from a penal institution." Acts 2013, 83rd Leg., ch. 450 (SB 825). Since that time, the State Bar has engaged in a number of high profile disciplinary proceedings against prosecutors, including this proceeding against Sebesta.

D. The 2014 Complaint against Sebesta

On January 29, 2014, almost seven years to the day after the 2007 Complaint, Anthony Graves filed a second grievance against Sebesta (the "2014 Complaint"). 8CR00177-00260. The factual allegations in the 2014 Complaint were virtually identical to those alleged in 2007, including the following: 1) Sebesta failed to disclose allegedly exculpatory statements by Carter; 2) Sebesta

[5] Ms. Acevedo's disclosure of the alleged basis for the State Bar's decision to dismiss the 2007 Complaint may have been a violation of the Texas Rules of Disciplinary Procedure. *See* Tex. R. Disciplinary P. 2.16. If it was not a violation, then the Bar had no legitimate basis to instruct the members of the summary disposition panel to refuse to speak with Sebesta's counsel regarding their decision to dismiss the 2007 Complaint. *See infra,* Argument and Authorities section B(1).

elicited false testimony from trial witnesses; and 3) Sebesta allegedly used threats to scare Graves' alibi witness, Yolanda Mathis.[6] 8CR00191-193.

On April 2, 2014, Sebesta submitted his Response, which included a detailed review of the facts of the underlying murder investigation and trial, as well as responses to the specific allegations against him. 8CR00262-432. The Response also included an affidavit from Judge Harold Robert Towslee, who presided over Graves' capital trial in 1994, opining that Graves received a fair trial. 8CR00281-283.

On April 14, 2014, Sebesta's counsel met with Laura Popps and Beth Stevens of the CDC to discuss the Complaint. 8CR00174. At that meeting, Laura Popps informed Sebesta's counsel that the 2007 Complaint was dismissed based on the statute of limitations, not on "the merits". *Id.* The CDC had never communicated this position to Sebesta prior to that date. 8CR00074-75.

In April 2014, Sebesta's counsel reached out to members of the Summary Disposition Panel who dismissed the 2007 Complaint against Sebesta. 8CR00527-28. Sebesta's counsel attempted to contact these individuals to determine the accuracy of the CDC's statements at the April 14, 2014 meeting, in light of the

[6] The 2014 Complaint also included a new allegation that Sebesta made false statements on his webpage and in statements to the media regarding the Bar's no Just Cause finding. 8CR00194-195. However, this allegation—in addition to being unsubstantiated, given that the CDC told Sebesta in 2007 that it had found no Just Cause—is not relevant to this appeal. The Bar eventually dropped the allegation from its petition and it was not part of the Judgment of Disbarment entered by the Evidentiary Panel. App. 5.

contradictory statements in its 2007 letters to Sebesta. *Id.* Shortly thereafter, on April 30, 2014, Sebesta's counsel received an email from the CDC, which stated in part:

> We've been getting calls from a former grievance committee member and his lawyer asking whether they can divulge the information/investigation of the prior grievance against your client. This former member sat on the SDP panel that dismissed the prior grievance. We plan to point them to TRDP 2.16, which is our confidentiality rule. It states that if a Respondent has waived confidentiality, "the pendency, subject matter, status of an investigation, and final disposition, if any" may be disclosed "by the Office of Chief Disciplinary Counsel or Board of Disciplinary Appeals…" I don't believe the rules allow for grievance committee members to release confidential information, even when the Respondent attorney has waived confidentiality.

8CR00500-501.

Sebesta's counsel responded to the CDC the same day and stated:

> Based on Mr. Sebesta's waiver of confidentiality (attached), we are disappointed to hear that the CDC plans to stand in the way of full disclosure regarding his 2007 grievance. We are just trying to learn the facts, without wasting time and money on formal discovery. We think it is in everyone's best interest to have a full understanding of what happened with the 2007 grievance, and how that impacts the current grievance.

Id.

On May 1, 2014, the CDC responded with the following email:

> [T]he confidentiality rules are written the way they are to prevent this very situation—litigants or other persons putting volunteer grievance committee members in the position of trying to determine when and if confidential information can be disclosed, and to what extent. The wording of the rule is pretty clear that only certain types of information can be released, and only from certain entities (CDC and

> BODA in this instance).[7] As you know, we don't have the discretion to override the confidentiality rules.
>
> At our last meeting, you asked why the prior grievance against your client was dismissed and I told you directly that the prior grievance was dismissed on the basis of the statute of limitations. This appears to be the same info you are seeking from former grievance committee members, so I don't understand the reference to standing in the way of full disclosure. If you have any more questions about that, I will be happy to answer them to the extent I can under the rules.

Id. (emphasis added).

On June 2, 2014, Sebesta received a letter from the State Bar informing him that the CDC had investigated the 2014 Complaint and determined this time that there was Just Cause to believe he committed professional misconduct. App. 3. The letter included lengthy factual allegations that mirrored those in both the 2007 and 2014 Complaints. *Id.*

On August 25, 2014, Sebesta was served with the Commission for Lawyer Discipline's ("Commission's") Evidentiary Petition and Request for Disclosure in this action. 5CR00026-32. Once again, the factual allegations in the Evidentiary Petition were identical to those asserted against Sebesta in the 2007 Complaint, 2014 Complaint, and June 2, 2014 letter from the State Bar. The Commission amended its Petition on October 20, 2014 and again on April 8, 2015. In each of

[7] In fact, Rule 2.16 also applies to "[a]ll members and staff of [Bar] . . . Committees," and the "Summary Disposition Panel" is defined as "a panel of the Committee that determines whether a Complaint should proceed or should be dismissed . . ." Tex. R. Disciplinary P. 2.16, 1.06(BB). Thus, if Ms. Acevedo had the legal authority to disclose this information to Texas Monthly and to support the Commission's claims in this case, then the members of the Summary Disposition Panel should have also been free to disclose the basis for their decision.

the amended petitions, the substance of the allegations against Sebesta was identical to those that had been dismissed in 2007. 14CR545-551; 45CR01133-38.

E. The Evidentiary Panel denies Sebesta's Motion for Res Judicata and Estoppel and enters a Judgment of Disbarment against Sebesta.

In order to avoid additional litigation costs and expedite the process, Sebesta elected to proceed before an Evidentiary Panel. Before the final Evidentiary Hearing, Sebesta filed a Motion for Res Judicata and Estoppel. 8CR00051-528. The Commission filed its own Motion, arguing that the Fifth Circuit's findings in the Graves case were binding under the doctrine of collateral estoppel. 16CR00562-893. Sebesta and the Commission agreed that these matters could properly be determined by the Evidentiary Panel in a pretrial hearing. RR6-9.

The Evidentiary Panel held a hearing on Sebesta's Motion on November 12, 2014. Following that hearing, both sides submitted supplemental briefing on the legal issues related to the potential application of res judicata and estoppel. 26CR00964-973; 27CR00977-1013. On December 17, 2014, the Evidentiary Panel entered an Order denying Sebesta's Motion. App. 4. A full Evidentiary Hearing was held in College Station, Texas, on May 11-14, 2015. On June 11, 2015, the Evidentiary Panel entered a final Judgment of Disbarment. App. 5.

ARGUMENT AND AUTHORITIES

A. Standard of Review

The standard of review for appeals from a decision of an Evidentiary Panel depends on whether the decision was a legally or factually-based determination. Legal conclusions are reviewed under a *de novo* standard. *Comm'n for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 835 (Tex. 2012) *Weir v. Comm'n for Lawyer Discipline*, No. 32082, 2005 WL 6283558, at *2 (Tex. Bd. Disp. App., June 30, 2005). Factual determinations are reviewed under the substantial evidence standard. *Comm'n for Lawyer Discipline v. A Texas Attorney*, No. 55619, 2015 WL 5130876, at *2 (Tex. Bd. Disp. App., July 24, 2015).

Because the facts relevant to this appeal are undisputed as set forth herein, BODA should review the Evidentiary Panel's legal determinations under a *de novo* standard. *See Weir*, 2005 WL 6283558, at *2.

B. The doctrine of res judicata precludes the Bar from relitigating a grievance that it finally dismissed in 2007.

The Bar[8] reviewed these exact complaints against Sebesta in 2007. It dismissed those complaints for a lack of Just Cause, and that determination was final. The Bar has now unilaterally granted itself a complete do-over, and forced Sebesta to defend himself for a second time against these same allegations. Texas

[8] As used herein, reference to the "State Bar" or "Bar" means and includes all relevant arms of the State Bar of Texas, including the CDC, the Commission, and the Summary Disposition Panel.

law, however, does not permit the Bar to arbitrarily reopen grievances in order to reach the result it wishes to have in a particular political climate.

1. The doctrine of res judicata bars the relitigation of matters that an agency has finally adjudicated—and it also bars the agency itself from changing its mind.

The doctrine of res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in a prior action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). "The policies behind the doctrine reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery." *Montgomery v. Blue Cross Blue Shield of Texas, Inc.*, 923 S.W.2d 147, 150 (Tex. App.—Austin 1996, writ denied).

Texas law recognizes that finality is important, even in the context of administrative agency determinations. The Texas Supreme Court explained:

> [W]henever possible the courts should support the finality of administrative orders in keeping with the public policy favoring an end to litigation, whether it be in the administrative or judicial process. Continued litigation or piecemeal litigation should be discouraged.

Westheimer Ind. School Dist. v. Brockette, 567 S.W.2d 780, 787 (Tex. 1978). Numerous Texas courts have thus applied the doctrine of res judicata to bar relitigation of the administrative decisions of a variety of agencies. *See, e.g.,*

Coalition of Cities for Affordable Utility Rates v. Public Utilities Comm'n of Texas, 798 S.W.2d 560, 563 (Tex. 1990) (applying res judicata to a decision of the Public Utilities Commission and noting that permitting repeated litigation "would allow a public utility to secure victory not by the strength of its case but by simply outlasting its opponents"); *Montgomery*, 923 S.W.2d at 150 ("The doctrine [of res judicata] is also applicable to the relitigation of claims previously determined by an administrative agency."); and *Railroad Comm'n v. Humble Oil & Refining Co.*, 119 S.W.2d 728, 729 (Tex.Civ.App.—Austin 1938, writ ref'd) (considering res judicata effect of a judgment of the Railroad Commission).

Based on these policies of finality, as well as the inherent legal limitations on the power of state administrative agencies, courts have also held that once an agency enters an order and the order becomes administratively final, the agency does not have the inherent authority to reopen the proceeding. *See Railroad Comm'n v. Vidaurri Trucking, Inc.*, 661 S.W.2d 94, 96 (Tex. 1983) (agency does not have authority to set aside its own orders after they become final); *Young Trucking, Inc. v. Railroad Comm'n of Texas*, 781 S.W.2d 719, 721 (Tex. App.—Austin 1989, no writ) (holding that, absent a statute authorizing the agency to reopen its order, or a showing of changed circumstances, the agency had no authority to alter its prior order); and *Al-Jazrawi v. Texas Board of Land Surveying*, 719 S.W.2d 670, 672 (Tex. App.—Austin 1986, writ ref'd n.r.e.)

(holding that Board's denial of license could not be reconsidered when the denial order had long been final, and there was no statutory authority permitting the Board to reconsider its prior order).[9]

In other words, unless the governing statute authorizes the agency to reopen or reconsider its prior determination, the agency lacks the power to do so. *See Sexton v. Mount Olivet Cemetary Assoc'n*, 720 S.W.2d 129, 141-42 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *see also Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n of Texas*, 798 S.W.2d 560, 564 (Tex. 1990) (citing to and relying on *Sexton* in concluding that the PUC was barred from reopening an earlier determination when the statute did not grant such authority). And in determining this issue, "[n]othing hinges on whether a reopening is the commencement of a new proceeding or a continuation of the old one; whichever it is, the problem is to determine when a reopening should be permitted and when not." *Sexton*, 720 S.W.2d at 142 (quoting Davis, *Res Judicata in Administrative Law*, 25 Tex. L. Rev. 199, 236 (1947)). So if the governing statute does not

[9] As a limited exception to the rule, "[a]n agency can reconsider a final order only if provided for by statute or on a showing of changed circumstances." *Young*, 781 S.W.2d at 721; *see also Al-Jazrawi*, 719 S.W.2d at 672 (citing Davis, *Res Judicata in Administrative Law*, 25 Tex. L. Rev. 199 (1947)). But this exception applies only when the statute empowers the agency to reconsider its prior orders in light of changed circumstances. *Sexton v. Mount Olivet Cemetary Assoc'n*, 720 S.W.2d 129, 145 (Tex. App.—Austin 1986, writ ref'd n.r.e.). And "*no administrative agency has the power to reconsider its earlier adjudicative orders, based upon a showing of changed circumstances, as a matter of inherent power. . .*" *Id.* (emphasis in original). Here, the governing statute and Rules do not empower the Bar to reopen or reconsider its prior final determinations that a Complaint should be dismissed for no Just Cause.

authorize the agency (here, the CDC) to reopen a matter, it will also preclude the agency from revisiting its old determination in a new proceeding.

Because this proceeding involves an effort by the Bar to relitigate a matter it has already dismissed, the doctrine of res judicata plays out in two ways. First, the CDC lacked the authority to reopen the 2007 Complaint because the governing statute and Rules of Disciplinary Procedure do not permit it to do so. Second, the doctrine of res judicata, as more commonly applied, precludes the Commission, as the Petitioner/Appellee, from relitigating matters that were already finally dismissed with prejudice in 2007.

2. Because the Bar's dismissal of the Complaint against Sebesta in 2007 was administratively final, the CDC did not have the legal authority to reopen the Complaint seven years later. The Government Code and Rules of Disciplinary Procedure do not grant the Bar an arbitrary do-over.

The concept of finality of an administrative decision is grounded in the governing statute. *See Coalition of Cities*, 798 S.W.2d at 564 (considering the finality of the PUC's order based on its governing statute); *see also Texas-New Mexico Power Co. v. Texas Indus. Energy Consumers*, 806 S.W.2d 230, 232 (Tex. 1991) ("Although there is no single rule dispositive of all questions of finality [in the administrative context], courts should consider the statutory and constitutional context in which the agency operates, and should treat as final a decision 'which is definitive, promulgated in a formal manner, and one with which the agency

expects compliance.'"). In the res judicata context, an administrative order "must be considered final unless the [agency] has the statutory power to defer and reconsider" the matter. *Coalition of Cities*, 798 S.W.2d at 564. And in determining whether the statute impliedly grants an agency the power to reconsider its prior order, the court must consider the practical effect of the order in the context of the governing statutory procedure:

> Where the culmination of the administrative proceeding is the creation of a substantial right of property (such as a franchise), where the proceedings entail great financial expense to the parties, or where a party reasonably would be expected to change his position in important matters in reliance on the resulting order, the Legislature's omission to delegate expressly and specifically the power to reopen suggests an unmistakable inference *contrary* to any implied grant of that power. In such cases, the Legislature's silence as to that power implies that the Legislature did *not* intend the agency should have it.

Sexton, 720 S.W.2d at 141 (emphasis added; italics in original). Under this test, there is no doubt that the CDC's 2007 dismissal was a final adjudication.

The State Bar of Texas is an administrative agency of the judicial department of government. Tex. Gov't Code § 81.011 (Vernon 2013). The Bar's Office of Chief Disciplinary Counsel (CDC) is the agency arm that administers the attorney disciplinary system at the investigatory and trial levels. *Schaefer*, 364 S.W.3d at 833. The CDC's authority and the procedures applicable to the disciplinary system are reflected in Chapter 81 of the Government Code and the Texas Rules of Disciplinary Procedure. Tex. Gov't Code §§ 81.011 (Vernon

2013), *et. seq.*; Tex. R. Disciplinary P., *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (Vernon 2013). The Texas Rules of Disciplinary Procedure have the force and effect of statutes, and must be construed under ordinary statutory construction principles. *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988); *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008). Construction of the Texas Rules of Disciplinary Procedure and the Government Code is a question of law that is reviewed *de novo*. *Caballero*, 272 S.W.3d at 599.

Government Code section 81.075 governs the CDC's disposition of complaints. It states as follows:

> (a) The chief disciplinary counsel shall review and investigate each grievance classified as a complaint to determine whether there is just cause, as defined by the Texas Rules of Disciplinary Procedure.
>
> (b) After the chief disciplinary counsel reviews and investigates a complaint: (1) if the counsel finds there is no just cause, the counsel shall place the complaint on a dismissal docket . . .
>
> (c) A panel of a district grievance committee shall consider each complaint placed on the dismissal docket at a closed hearing without the complainant or the respondent attorney present. The panel may: (1) approve the dismissal of the complaint [or] (2) deny the dismissal of the complaint and place the complaint on a hearing docket.

Tex. Gov't Code § 81.075 (a)-(c) (Vernon 2013) (emphasis added). The statute contains no provisions permitting the CDC to reopen a complaint once the summary disposition panel has taken the final step of approving its dismissal.

The Texas Rules of Disciplinary Procedure flesh out this mandatory procedure in more detail. After a grievance is received, the CDC must examine the Grievance to determine whether it should be dismissed as an Inquiry or a Complaint. Tex. R. Disciplinary P. 2.10. If the CDC classifies the Grievance as an Inquiry, the Rule permits the Complainant to appeal that determination to BODA. *Id.* This is what happened with Graves' 2007 Grievance; the CDC initially classified the Grievance as an Inquiry based on the statute of limitations, Graves appealed that determination to BODA, and BODA reversed the CDC's limitations finding. 8CR00123-128.

After a Grievance has been classified as a Complaint, and both parties have been permitted to submit written argument and evidence to the CDC, Rule 2.12 directs the CDC to "investigate the Complaint and determine whether there is Just Cause." Tex. R. Disciplinary P. 2.12. The CDC performed this investigation in 2007, and determined that there was no Just Cause. App. 1.

The final step of this process is a review of the CDC's determination by the Summary Disposition Panel:

> 2.13. Summary Disposition Setting: Upon investigation, if the Chief Disciplinary Counsel determines that Just Cause does not exist to proceed on the Complaint, the Chief Disciplinary Counsel shall place the Complaint on a Summary Disposition Panel docket. At the Summary Disposition Panel docket, the Chief Disciplinary Counsel will present the Complaint together with any information, documents, evidence, and argument deemed necessary and appropriate by the Chief Disciplinary Counsel, without the presence of the Complainant

> or Respondent. The Summary Disposition Panel shall determine whether the Complaint should be dismissed or should proceed. If the Summary Disposition Panel dismisses the Complaint, both the Complainant and Respondent will be so notified. There is no appeal from a determination by the Summary Disposition Panel that the Complaint should be dismissed or should proceed.

Tex. R. Disciplinary P. 2.13 (emphasis added). Under the plain language of Rule 2.13, once the CDC has determined that a Complaint should be dismissed for lack of Just Cause, and once the Summary Disposition Panel has approved that determination, the Complaint is dismissed, and there are no further procedural steps or remedies available. This is what happened in 2007—the CDC determined that there was no Just Cause to proceed on the Complaint, the Summary Disposition Panel approved that determination, and the matter was finally dismissed. App. 1, 2. The CDC's August 16, 2007 letter to Sebesta stated the following:

> The Summary Disposition Panel for the District Grievance Committee has determined that the above referenced Complaint should be dismissed. The Complainant cannot appeal this determination of the Summary Disposition Panel. Accordingly, our file on this matter has been closed and this office will take no further action.

App. 2 (emphasis added).

Like the Government Code, the Rules of Disciplinary Procedure contain no provisions that permit either the Complainant or the CDC to reopen a Complaint that has been dismissed after a finding of no Just Cause. To the contrary, Rule 2.13 explains that there is no appeal from the dismissal, and that "[f]iles of

dismissed Disciplinary Proceedings will be retained for one hundred eighty days, after which time the files may be destroyed [and n]o permanent record will be kept . . ." Tex. R. Disciplinary P. 2.13.

Finally, Section 81.072(o) of the Government Code confirms that this dismissal is final, and that the Respondent may rely on that finality:

> Whenever a grievance is either dismissed as an inquiry or dismissed as a complaint in accordance with the Texas Rules of Disciplinary Procedure and that dismissal has become final, the respondent attorney may thereafter deny that a grievance was pursued and may file a motion with the tribunal seeking expunction of all records on the matter, other than statistical or identifying information . . .

Tex. Gov't Code § 81.075 (a)-(c) (emphasis added).

In sum, under the governing law, two things are clear. First, the dismissal of a Complaint after a finding of no Just Cause is administratively final and may not be revisited later. Second, respondent attorneys such as Sebesta are entitled to rely on the finality of such a dismissal. The CDC thus does not have the legal authority to relitigate the same Grievance seven years later, and it exceeded that authority here. For this reason alone, BODA should reverse the Judgment of the Evidentiary Panel and render a judgment dismissing the Complaint.

3. The undisputed evidence also conclusively establishes the three elements of traditional res judicata.

The doctrine of res judicata, as traditionally applied, bars a party from relitigating claims that have been finally adjudicated in a prior matter. *Igal v.*

Brightstar Information Technology Group, Inc., 250 S.W.3d 78, 87 (Tex. 2007). "When an administrative agency is acting in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *Id.* (quoting *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966)).

The three elements of the res judicata litigation bar are: (1) a prior final adjudication on the merits; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first. *Igal*, 250 S.W.3d at 87. Typically, determination of these issues is a mixed question of law and fact. *Ex parte Myers*, 68 S.W.3d 229, 231 (Tex. App.—Texarkana 2002, no pet.). Here, however, the dispositive facts are undisputed[10] and BODA may thus determine applicability of res judicata as a matter of law. *Id.* at 232.

a. <u>The 2007 dismissal was a final adjudication on the merits.</u>

In deciding to dismiss the 2007 Complaint, the Bar acted in an adjudicative capacity. The CDC's mandated role was to review the allegations, response, and evidence in order to <u>determine</u> whether there was Just Cause. Tex. Gov't Code §

[10] At the Evidentiary Panel hearing, the primary factual dispute was whether the CDC's 2007 dismissal was based on a finding of no Just Cause or based on the statute of limitations. As set forth herein, this factual dispute is not relevant to the question of whether res judicata bars this proceeding.

81.075 (a)-(c); Tex. R. Disciplinary P. 2.12. The Rules define "Just Cause" as follows:

> 'Just Cause' means such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney . . . has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed . . .

Tex. R. Disciplinary P. 1.06(U).

Upon completing its review, the CDC determined that there was no Just Cause, and it placed the 2007 Complaint on the Dismissal Docket. App. 1. At that point, the CDC's determination was subject to review by the Summary Disposition Panel. The Rules describe the role of the Summary Disposition Panel as follows:

> 'Summary Disposition Panel' means a panel of the Committee that determines whether a Complaint should proceed or should be dismissed based upon the absence of evidence to support a finding of Just Cause after a reasonable investigation by the Chief Disciplinary Counsel of the allegations in the Grievance.

Tex. R. Disciplinary P. 1.06(BB) (emphasis added).

Here, the Summary Disposition Panel reviewed the Complaint and "any information, documents, evidence and argument deemed necessary and appropriate by the CDC." *See* Tex. R. Disciplinary P. 2.13. It considered the merits of the allegations against Sebesta and approved the CDC's determination that no Just Cause existed to proceed with the case. App. 2. As set forth above, the resulting

dismissal of the 2007 Complaint was administratively final and not subject to appeal.[11]

i. Dismissals based on the statute of limitations are determinations on the merits for res judicata.

In response to Sebesta's Motion on Res Judicata, the Bar argued that res judicata did not apply because its 2007 dismissal was based on the statute of limitations, rather than the "merits." 20CR00906, 910-911. But for purposes of res judicata, this is a distinction without a difference.

Texas law is clear that a dismissal based on limitations is given preclusive effect. *Ingal*, 250 S.W.3d at 90. In other words, the law treats a dismissal based on limitations as a decision on the merits for purposes of res judicata. *Id.* And the fact that a statute was subsequently enacted that extended the statute of limitations does not alter the preclusive effect of the earlier dismissal. "Texas law considers a change in a statute of limitations to be procedural, not substantive, and it does not grant the parties a new right of action [following dismissal]." *Total Minatome Corp. v. Patterson Servs., Inc.*, 762 So.2d 175, 177 (La. Ct. App. 2000) (applying Texas law and relying on *Besing v. Vander Eykel*, 878 S.W.2d 182 (Tex. App.—Dallas 1994, writ denied)).

[11] Therefore, even if the CDC now alleges that its 2007 dismissal was based on the statute of limitations, and even if this were relevant to res judicata (which it is not), res judicata still bars the 2014 grievance based on the SDP's "independent determination" that no Just Cause existed in 2007.

In *Besing*, a court granted summary judgment dismissing a legal malpractice case based on the statute of limitations and that judgment became final. *Besing*, 878 S.W.2d at 183. Subsequently, the supreme court altered the tolling rule for the accrual of malpractice claims and the plaintiff filed a second suit, asserting that his claim was no longer barred by limitations. The trial court dismissed the case based on res judicata and the Dallas Court of Appeals affirmed, explaining that a subsequent change in the limitations period does not change the finality of the first judgment. *Id.* at 185. Thus, regardless of whether the Bar dismissed the 2007 Complaint based on limitations or a finding of no Just Cause, that dismissal was still a binding final determination on the merits.

ii. The *Sewell* decision does not apply to the current disciplinary system.

Almost 40 years ago, the Texas Supreme Court determined that prior decisions by a grievance committee to take disciplinary action or forego such action were inquisitorial in nature, not binding decisions on the merits. *See State v. Sewell*, 487 S.W.2d 716, 718 (Tex. 1972). The court concluded, under then-existing procedures, that the "Committee's prior decisions did not ever rise to the level of a final determination of the merits of the complaints before them, and they are not res judicata." *Id.* However, the Texas Supreme Court's reasoning in *Sewell* no longer makes sense because the current disciplinary regime has been

dramatically altered and makes clear that the Bar's dismissal of a complaint now: (1) involves a final determination of no Just Cause; and (2) is a dismissal with prejudice.[12]

At the time *Sewell* was decided, an investigatory committee performed the Bar's grievance investigation and classification function. *See* Tex. State Bar R. art. 12, §§ 11, 12, 16, *reprinted in* Tex. Gov't Code Ann., tit. 14 App. (Vernon 1973) (reflecting the Rules as amended to December 20, 1971), attached at App. 6. The classification and investigatory procedures took place ***without response or rebuttal from the attorney*** charged with the misconduct, who may not even know of the charges against him. *Id.* § 12. At the conclusion of its investigation, the committee could elect to dismiss the complaint and notify the complainant, "and the accused attorney also, *if he shall have had notice of the complaint*." *Id.* §16 (emphasis added). The investigatory committee could also elect, among other options, to proceed by initiating a formal complaint against the lawyer in state district court. *Id.* §§ 16(d), 19-31. At that point, the Texas Rules of Civil Procedure applied and the lawyer was entitled to present a defense. *Id.*

[12] Some appellate court cases have since reflexively relied on *Sewell* to hold that the Bar's investigatory proceedings do not result in binding determinations. *See, e.g., Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 618 (Tex. App.—Fort Worth 2004, pet. denied); *Gonzalez v. State Bar of Texas*, 904 S.W.2d 823, 829 (Tex. App.—San Antonio 1995, writ denied). But none of these cases have considered whether *Sewell*'s reasoning still applies in light of the modernized statutory procedures, and in particular none have considered whether *Sewell* remains good law in light of the 2004 legislative overhaul.

The *Sewell* decision made sense under the old Texas attorney disciplinary system, in which attorneys did not have a chance to participate in the initial grievance committee investigatory hearing and the procedural rules did not speak to finality. The old system was indeed much more like a grand jury proceeding, in which the accused was not present. However, the Texas Supreme Court's reasoning in *Sewell* no longer makes sense because the current disciplinary regime is not akin to a grand jury proceeding. Instead, the current system includes a thorough investigation, witness interviews, consideration of the attorney's written response and evidence, and an independent and final determination with prejudice by the SDP.[13]

The Texas attorney discipline system has been overhauled several times since *Sewell*. A 2003 sunset review resulted in the most recent procedural rules, which became effective January 1, 2004. One of the goals of the revised legislation and resulting procedural rules was to streamline the State Bar's complex

[13] In support of its Response to Sebesta's Motion, the Bar submitted the Affidavit of the Chief Disciplinary Counsel, Linda Acevedo. 20CR00917-919. In this Affidavit, Ms. Acevedo testified that, "although the disciplinary procedural rules have been amended several times in the last twenty years, the rules have consistently provided a respondent attorney the opportunity to respond to the complaint and to provide other information during the investigation of the complaint." *Id.* ¶1. Ms. Acevedo omits to mention that, in 1972, when *Sewell* was decided, respondent attorneys were <u>not</u> afforded this right. Tex. State Bar R. art. 12, §§ 12, 16. Ms. Acevedo then testified that "prior to 2004, when an investigatory hearing was held before a grievance committee, the respondent attorney was either invited or required to attend the hearing." 20CR00917-918, ¶1. Again, this testimony is incorrect as relates to the procedures that governed when *Sewell* was decided. Nevertheless, before the Evidentiary Panel below, the Bar accused Sebesta's counsel of being "***wholly incorrect***" on the law. 20CR00907; 27CR00977-980; RR75-77.

committee structure, and "to establish a framework for the State Bar's grievance system that simplifies the process to promote consistency and reduce resolution time." Sunset Advisory Comm'n, Summary of Legislation – 78th Legislature, at p. 1 (July 2003), *available at* http://webcache.googleusercontent.com/search?q=cache:QlE7wZHK_9wJ:https://www.sunset.texas.gov/public/uploads/files/reports/State%2520Bar%2520of%2520Texas%2520SOL%25202003%252078%2520Leg.pdf+&cd=1&hl=en&ct=clnk&gl=us.

As a result, the Texas attorney disciplinary process changed dramatically on January 1, 2004. As of that date, there was no longer a local investigatory hearing for attorney disciplinary actions. Instead, the investigations are conducted by the CDC, which employs a team of investigators who investigate the allegations, review the response, gather documents, and interview witnesses to determine if professional misconduct has occurred. Tex. R. Disciplinary P. 2.10, 2.12, 2.13. *See also* Sunset Advisory Comm'n Summary of Legislation at p. 23 (". . . unlike the current process, more thorough investigation will occur before a hearing takes place.") If the CDC believes that the respondent attorney engaged in professional misconduct, the CDC makes an official finding of Just Cause, and the case proceeds to either an evidentiary panel or district court. Tex. R. Disciplinary P. 2.13-2.15 . If the CDC determines that there is no support for the allegations of

professional misconduct, the CDC cannot dismiss the grievance by itself. Tex. R. Disciplinary P. 2.13. Instead, the CDC dockets the case for the Summary Disposition Panel, which makes an independent determination of just cause and either dismisses the Complaint or sends it back to the CDC. Tex. R. Disciplinary P. 1.06(BB), 2.13; *see also Comm'n for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 134 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) ("If the CDC determines that just cause does not exist, then it forwards the complaint to a summary disposition panel, which then makes an independent determination on the existence of just cause.").

The post-2004 Rules make clear that the Bar's dismissal of a Complaint post-SDP review is a final determination that is not subject to appeal. Most critically, the revised Rules made several significant changes to the prior procedure reflecting a desire for finality. First, they struck the prior language stating that "[s]uch a dismissal is without prejudice to the Complainant, who may, within thirty days from receipt of notice of dismissal, refile his or her Complaint with additional evidence not previously presented."[14] In the Supreme Court of Texas, Misc.

[14] Note that in the intervening years between 1972 and 2004 the Rules had been amended to permit the lawyer to respond to the complaint at the investigatory stage. However, the Rules also made clear that the committee's decision to dismiss a complaint after investigation was without prejudice to the complainant's right to refile within thirty days. The 2004 Amendments changed this procedure to remove this right to refile, thus furthering the Legislature's directive to promote consistency and increase resolution time.

Docket No. 03-9209, *Amendments to the Texas Rules of Disciplinary Procedure* (Dec. 29, 2003), Tex. R. Disciplinary P. 2.13 pp. 9-10, attached at App. 7.[15]

In addition to striking the "without prejudice" language and removing the Complainant's right to refile, the Amendments also added the language clarifying that "[t]here is no appeal from a determination from the Summary Disposition Panel that the Complaint should be dismissed . . ." *Id.* As a result, under these new procedures the Bar's dismissal of a Complaint for a lack of Just Cause is a final dismissal with prejudice to the Complainant's right to appeal or refile. And under Texas law, "it is well established that a dismissal with prejudice functions as a final determination on the merits." *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991).

b. The 2007 and 2014 Complaints have an identity of parties or privies.

The second element of res judicata requires an identity of parties or those in privity with them. *Amstadt*, 919 S.W.2d at 652. In other words, the parties to the first action must be identical to those in the second action, or related in such a way to satisfy the requirements of privity. People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their

[15] This document is also available at: http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/03/03920900.pdf.

interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action. *Id.* (citing *Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 800 (Tex. 1992)).

In this case, there is no doubt that the second element of res judicata is satisfied. The 2007 Complaint was written and filed by Bennett, but he expressly stated: "I am writing on behalf of Graves to file a grievance. . ." 8CR00084. All of the allegations in the 2007 Complaint related to Sebesta's alleged actions or omissions in Graves' 1994 criminal trial. Additionally, the final sentence of the 2007 Complaint states: "***Mr. Graves requests*** that a full investigation of Sebesta's conduct be undertaken by this body and an appropriate punishment be ordered." 8CR00088 (emphasis added).

Graves personally filed the 2014 Complaint against Sebesta, with Bennett's assistance. 8CR00177-200. Thus, both the 2007 and 2014 Complaints were filed by Bennett on behalf of Graves, and both alleged misconduct by Sebesta. Once the matter proceeded to litigation before the Evidentiary Panel, the Commission for Lawyer Discipline legally stepped into Graves' shoes. Tex. R. Disciplinary P. 4.06(A). The evidence thus conclusively demonstrates the required privity of parties or privies to satisfy the second element of res judicata.

c. The 2014 Complaint is based on the same claims as the 2007 Complaint.

The final element of res judicata requires the second action to be based on the same claims that were raised "or could have been raised" in the first action. *Amstadt*, 919 S.W.2d at 652. As detailed above, the allegations in both the 2007 and 2014 Complaints were based on Graves' 1994 criminal case and the Fifth Circuit Court of Appeals' subsequent decision. The factual allegations in each of the Complaints are virtually identical. 8CR00085-87; 8CR00191-193. Further, the Evidentiary Panel's Final Judgment of Disbarment was also based on the same issues as were raised in Graves' 2007 Complaint. App. 5. Therefore, the claims at issue in this proceeding were all raised or could have been raised in the first action, satisfying the third requisite element of res judicata.

In sum, the Bar is precluded from relitigating this matter. The CDC had the opportunity to investigate these exact allegations in 2007. It found that the Complaint should be dismissed because there was no Just Cause to proceed; the SDP upheld that determination and the dismissal became final under Texas law. When the Bar dismissed the 2007 Complaint it told Sebesta that "our file on this matter has been closed and this office will take no further action." App. 2 (emphasis added). The Bar now has tried to take further action by relitigating the same allegations seven years later, in deference to a biased media firestorm and political pressure. But the Bar does not have the authority to arbitrarily resurrect

old cases any time it wishes to do so. This is for good reason. Lawyers should be able to rely on a dismissal of a grievance as a meaningful legal determination. The doctrine of res judicata legally precludes the Bar from reopening this matter, and prohibits relitigation of the allegations that were finally dismissed in 2007.

C. The claims against Sebesta are barred by quasi-estoppel.

The Bar's prosecution of these claims against Sebesta, despite its final dismissal seven years prior, is also barred under the doctrine of quasi-estoppel. Quasi-estoppel is a long-standing doctrine that precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 334 (Tex. App.—Dallas 2011, no pet.) (citing *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000)). Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he obtained a benefit. *Lopez*, 22 S.W.3d at 864*; see also Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd.*, 349 S.W.3d 258, 268 (Tex. App.—Dallas 2011, pet. denied) ("'Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct to the prejudice of another.'") (quoting *Schauer v. Von Schauer*, 138 S.W. 145, 149-50 (Tex.Civ.App.—Austin 1911, writ ref'd)).

Unlike equitable estoppel, quasi-estoppel does not require a showing of false representation or detrimental reliance. *Forney*, 349 S.W.3d at 268. Rather, it focuses on the conduct of the party potentially subject to estoppel, to prevent that party from behaving in an unconscionable manner. For example, quasi-estoppel "forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid corresponding obligations or effects." *Brooks v. Brooks*, 257 S.W.3d 418, 423 (Tex. App.—Fort Worth 2008, pet. denied).

Quasi-estoppel is an affirmative defense, on which Sebesta bears the burden of proof. *Forney*, 349 S.W.3d at 268. As set forth herein, however, the *undisputed* facts conclusively establish the unconscionability of the Bar's conduct as a matter of law.[16] Where the facts conclusively establish the elements of quasi-estoppel, as they do here, a court should render judgment on the defense as a matter of law. *See, e.g., Forney,* 349 S.W.3d at 269-70 (holding quasi-estoppel established as a matter of law based on evidence of a party's prior representation that it would not seek to avoid a contract on a particular basis; permitting the party to reverse position and avoid the contract would be unconscionable and would result in prejudice to the other party); *Brooks*, 257 S.W.3d at 424 (finding quasi-estoppel as

[16] Certainly the Bar has disputed certain of Sebesta's evidence—such as whether the Bar dismissed the 2007 Grievance based on limitations or a finding of no Just Cause—but BODA can and should find estoppel as a matter of law based just on the facts in the record that are undisputed.

a matter of law based on a litigant's choice to take one position at trial (that an agreement was unenforceable) and his subsequent reversal in a post-judgment motion (asserting that the agreement should be enforced), when enforcing the agreement would be to the opposing party's disadvantage).

1. There is no question that the Bar has taken inconsistent positions regarding whether the disciplinary allegations about Sebesta's prosecution of Graves can be pursued.

The undisputed evidence conclusively establishes that the Bar took a position in 2007 that Graves' allegations of professional misconduct against Sebesta were dismissed, and that the dismissal was final. The CDC's July 18, 2007 letter to Sebesta notified him that the CDC determined that "Just Cause does not exist to proceed on the above-referenced Complaint. The Complaint has therefore been placed on the Summary Disposition docket. . . The Panel shall determine whether the Complaint should be dismissed or should proceed." App. 1 (emphasis added). The Bar's follow-up letter to Sebesta, dated August 16, 2007, stated: "The Summary Disposition Panel for the District Grievance Committee has determined that the above referenced Complaint should be dismissed. The Complainant cannot appeal this determination of the Summary Disposition Panel. Accordingly, our file on this matter has been closed and *this office will take no further action*." App. 2 (emphasis added).

In a complete reversal, the CDC's June 2, 2014 letter to Sebesta informed him:

> The Office of Chief Disciplinary Counsel has completed its investigation of the above Complaint and determined on June 2, 2014, that *there is Just Cause* to believe that [Mr. Sebesta] has committed one or more acts of Professional Misconduct . . .

App. 3 (emphasis added). The letter informed Sebesta that the disciplinary proceedings against him would proceed either before an Evidentiary Panel or in district court. *Id.* In sum, between 2007 and 2014, the Bar completely reversed its position on the grievance against Sebesta.

At the Evidentiary Panel hearing on Sebesta's Motion, the Bar took the position that it had not really reversed its position because its 2007 dismissal was actually based on the statute of limitations, not "the merits."[17] There are a number of significant problems with this argument. First, the Bar's internal reasoning is irrelevant. Regardless of why the Bar internally decided to dismiss the 2007 Complaint, the position it took publicly in its dismissal notice was that it had fully

[17] The Bar submitted the affidavit of Linda Acevedo, who opined that the CDC's dismissal in 2007 had actually been based on the statute of limitations. 20CR00917-918. But the CDC simultaneously instructed those individuals actually involved in the decision-making process not to communicate with Sebesta's counsel about the reasons why they dismissed the Complaint. 8CR00173-74; 00500-501; 00526-528. The CDC's stated reason for this instruction was confidentiality, despite that Sebesta had expressly waived confidentiality and that Ms. Acevedo had voluntarily disclosed the Bar's alleged reasoning for its decision to dismiss the 2007 Complaint to the press for the 2013 Texas Monthly article. 8CR500-501; 20CR00922. This conduct, in and of itself, is an unconscionable reversal of position that constitutes an estoppel, and it certainly raises a question as to why the CDC was afraid to permit Sebesta's counsel to talk with the relevant decision-makers. It also renders the Bar's evidence regarding its internal reason for its dismissal in 2007 inadmissible under the offensive use doctrine. *See Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985).

and finally dismissed the Complaint based on a finding of no Just Cause. The Bar has now reversed this position completely, and whether or not the statute of limitations played into its internal deliberations in 2007 is beside the point.

Second, if the Bar really did dismiss the 2007 Complaint based solely on the statute of limitations, it intentionally ignored this Board's ruling that the 2007 Complaint was not barred by limitations. After the Grievance was first filed, the CDC classified it as an Inquiry based on the then-four year statute of limitations. 8CR00123-124. The Complainant appealed the CDC's determination to BODA, and BODA reversed, holding:

> After reviewing the original complaint, the Board grants the appeal, finding that the complaint alleges a possible violation(s) of the following Disciplinary Rules of Professional Conduct . . . The State Bar Chief Disciplinary Counsel's office will now investigate this complaint further. . .

8CR00128. Therefore, if the CDC then investigated the Complaint and still recommended dismissal based on the statute of limitations, the CDC was knowingly ignoring BODA's direct order reversing its classification decision.

In sum, the dispositive evidence conclusively establishes that the Bar reversed its position. In 2007, the Bar told Sebesta that it was dismissing the Complaint against him regarding his prosecution of Graves because there was no Just Cause to proceed. The Bar told Sebesta that the dismissal was final, that he could deny that he was ever the subject of a grievance, that its files would be

destroyed, and that it would take no further action. In 2014, the CDC reconsidered the same exact allegations, investigated again despite its earlier representation that it would "take no further action," and told Sebesta that it had concluded this time that there was Just Cause to proceed. The Bar's reversal of position could not be more plain, and it gives rise to estoppel here.

2. There is no question that the Bar's prosecution of the 2014 Complaint prejudices Sebesta.

The prejudice to Sebesta in this case is as obvious as the Bar's reversal. By reversing its position, the Bar has forced Sebesta to hire counsel and defend himself against the same allegations of misconduct a second time. 8CR00075-76. This time, the proceedings culminated in a Final Judgment of Disbarment. App. 5. The prejudice to Sebesta wrought by the Bar's reversal of position is undeniable. These undisputed facts—that Sebesta has had to defend himself a second time and has now been disbarred—are, in and of themselves, sufficient to conclusively establish prejudice for purposes of quasi-estoppel.

In addition, Sebesta presented substantial evidence to the Evidentiary Panel as to how the CDC's reversal of position, seven years after a final order purportedly dismissed the complaint against him, was prejudicial to his ability to defend himself in 2014. First, at their April 14, 2014 meeting, the CDC's Laura Popps informed Sebesta's counsel that the CDC no longer had its file for the 2007 Complaint against him. 8CR00174. The CDC destroyed Sebesta's 2007 file

pursuant to Texas Rule of Disciplinary Procedure 2.13 ("Files of dismissed Disciplinary Proceedings will be retained for one hundred eighty days, after which time the files may be destroyed. No permanent record will be kept of Complaints dismissed except to the extent necessary for statistical reporting purposes."). Therefore, Sebesta was deprived of the ability to compel production of the witness interviews, documents, and other information collected by the CDC in 2007.

Sebesta was also disadvantaged by his inability to call several potential witnesses who may have provided key testimony at his hearing. Dispatchers Wayne Meads and Sherry Stifflemeyer both died in the years following the 2007 Complaint. 8CR00075-76. Meads and Stifflemeyer would have been able to testify about the incriminating jailhouse conversations they overhead between Graves and Carter. *Id.* Former Deputy Sheriff Ted Galloway died in 2014 as well. *Id.* Galloway played an active role in the 1994 murder investigation and trials. *Id.* He was available to testify at the time of the 2007 Complaint, but he is now deceased.

In the Evidentiary Panel proceeding, the Bar did not actually dispute the veracity of any of the above evidence. Rather, it primarily contended that Sebesta could not have been prejudiced because Sebesta did not "rely" on any misrepresentations by the Bar that the case had been dismissed on the merits rather

than on limitations grounds.[18] 20CR00913-914. But detrimental reliance is not an element of quasi-estoppel. *Forney*, 349 S.W.3d at 268. In addition, the relevant reversal of position here is not the limitations issue—it is the Bar's final order of dismissal in 2007, its representation to Sebesta that it would take "no further action," and its subsequent decision in 2014 to reinvestigate a dismissed Complaint and pursue Sebesta's disbarment. Again, the CDC's alleged internal reason for its decision is irrelevant. In sum, there is no doubt that Sebesta has been disadvantaged by the Bar's reversal of position.

3. Permitting the Bar to arbitrarily relitigate complaints that it has finally dismissed would be unconscionable and detrimental to the proper functioning of the disciplinary system.

This Board has previously cautioned that the "CDC's adherence to the disciplinary rules is essential because it occupies a dual role and must avoid even the appearance of impropriety." *Schaefer v. Comm'n for Lawyer Discipline*, BODA No. 44292, at *9 (Jan. 30, 2011) (en banc), available at https://casetext.com/case/schaefer-v-commission-for-lawyer-discipline, *rev'd on other grounds*, 364 S.W.3d 831 (Tex. 2012). "The Office of the Chief Disciplinary Counsel serves in a dual capacity in evidentiary proceedings. How the CDC

[18] The Bar also contended that the evidence regarding these unavailable witnesses was irrelevant. But witness testimony that would corroborate Sebesta's version of events, including Graves' incriminating statements, is obviously relevant to a disciplinary proceeding in which Sebesta is accused of causing an innocent man to go to prison. Again, however, even without this evidence, the prejudice to Sebesta is established as a matter of law based on the fact that he had to defend himself twice and his resulting disbarment, both of which are undisputed facts.

performs its responsibilities is critical to accomplishing the disciplinary system's goal of protecting the public." *Id.* Here, the CDC has placed its desire to respond to political and media pressure above the mandatory requirements of the Texas Rules of Disciplinary Procedure. This conduct is unconscionable, and it must not be permitted.

Rule of Disciplinary Procedure 2.12 directs that "[n]o more than sixty days after the date by which the Respondent must file a written response to the Complaint as set forth in Texas Rule Disciplinary Procedure 2.10, the Chief Disciplinary Counsel shall investigate the Complaint and determine whether there is Just Cause." Tex. R. Disciplinary P. 2.12. Rule 15.05 states that the time limits in Rule 2.12 are mandatory. Tex. R. Disciplinary P. 15.05 ("The time periods provided in Rules 2.10, 2.12 . . . are mandatory. All other time periods herein provided are directory only and the failure to comply with them does not result in the invalidation of an act or event by reason of the noncompliance with those time limits."). The CDC first initiated its Rule 2.12 investigation of the allegations against Sebesta in 2007. It reopened that investigation in 2014, and ultimately made the Just Cause determination that led to this proceeding on June 6, 2014, approximately seven years after it should have concluded its investigation. The CDC has violated the mandatory time limitations of Rule 2.12.

In addition, the Government Code and the Texas Rules of Disciplinary Procedure make clear that the Bar's dismissal of a Complaint after review by a Summary Disposition Panel is a final adjudication that cannot be revisited. Rule 2.13 provides:

> 2.13. . . . If the Summary Disposition Panel dismisses the Complaint, both the Complainant and Respondent will be so notified. There is no appeal from a determination by the Summary Disposition Panel that the Complaint should be dismissed or should proceed.

Tex. R. Disciplinary P. 2.13 (emphasis added). The Government Code confirms that such a dismissal is final, and that the Respondent lawyer may rely on that finality:

> Whenever a grievance is either dismissed as an inquiry or dismissed as a complaint in accordance with the Texas Rules of Disciplinary Procedure and that dismissal has become final, the respondent attorney may thereafter deny that a grievance was pursued and may file a motion with the tribunal seeking expunction of all records on the matter, other than statistical or identifying information . . .

Tex. Gov't Code § 81.075 (a)-(c) (emphasis added). There are no provisions in the Texas Rules of Disciplinary Procedure or the Government Code that permit the Complainant or the CDC to reopen a matter that has been finally dismissed. But that is exactly what the CDC has done here.

If the Bar is permitted to proceed in this matter, BODA will be sending a message to the Bar, Texas lawyers, and the general public that the Bar's dismissal of a Complaint is a meaningless act, that the Bar can change its mind at will and at

any time, and that lawyers cannot achieve any real finality in grievance proceedings. That is certainly what happened in Sebesta's case. The Bar decided in 2007 to dismiss the Complaint against Sebesta, that decision should have been final, but Sebesta was forced to defend himself against identical allegations seven years later, and after much of the evidence he would have used in his defense had disappeared. Permitting the Bar to reverse its position in this matter would be unconscionable, and the doctrine of quasi-estoppel bars this proceeding as a matter of law.

CONCLUSION AND PRAYER

The State Bar's attorney disciplinary system performs an extraordinarily important function in our State. But in order for this system to work, lawyers must have confidence that the Bar will follow its own rules when it investigates and prosecutes grievances. In this case, the Bar has contradicted itself and ignored its mandatory obligations under the Government Code and the Texas Rules of Disciplinary Procedure. The Bar should not be permitted to put the ends before the means, and this Board should hold the Bar accountable to its legal obligations.

This matter never should have proceeded to an Evidentiary Panel hearing. The doctrines of res judicata and quasi-estoppel bar the claims against Sebesta as a matter of law, and Sebesta respectfully requests that BODA reverse the Judgment

of Disbarment, and that it render a judgment dismissing the claims against him and reinstating his license to practice law.

Respectfully submitted,

SCOTT, DOUGLASS
& McCONNICO LLP
303 Colorado St., Suite 2400
Austin, Texas 78701-2589
(512) 495-6300
(512) 495-6399 Fax

By /s/ *Steve McConnico*
Steve McConnico
State Bar No. 13450300
smcconnico@scottdoug.com
Robyn B. Hargrove
State Bar No. 24031859
rhargrove@scottdoug.com
Kim Gustafson Bueno
State Bar No. 24065345
kbueno@scottdoug.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2015, a true and correct copy of the foregoing was served via email and hand delivery to Appellee's counsel of record as indicated below.

Linda Acevedo—***Via email and hand delivery***
Chief Disciplinary Counsel
linda.acevedo@texasbar.com

Laura Bayouth Popps—***Via email and hand delivery***
Deputy Counsel for Administration
laura.popps@texasbar.com

Rebecca (Beth) Stevens—***Via email and hand delivery***
Assistant Disciplinary Counsel
beth.stevens@texasbar.com

Shelly Hogue—***Via email and hand delivery***
Evidentiary Panel Clerk
shelly.hogue@texasbar.com

Cynthia Canfield Hamilton –***Via email and hand delivery***
Senior Appellate Counsel
cynthia.hamilton@texasbar.com

Office of the Chief Disciplinary Counsel
STATE BAR OF TEXAS
1414 Colorado Street
Austin, Texas 78701

/s/ Robyn B. Hargrove
Robyn B. Hargrove

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Appellant was prepared using Microsoft Word 2010, and that, according to its word-count function, the sections of the foregoing brief covered by BODA Rule 4.05(d) contain 11,604 words in a 14-point font size and footnotes in a 12-point font size.

/s/ *Robyn B. Hargrove*
Robyn B. Hargrove

APPENDIX

App. 1: Chief Disciplinary Counsel's July 18, 2007 notice of determination of no Just Cause, 8CR00161-162.

App. 2: State Bar's August 16, 2007 notice of final dismissal, 8CR00164.

App. 3: Chief Disciplinary Counsel's June 2, 2014 notice of determination of Just Cause, 8CR00513-517.

App. 4: Evidentiary Panel's Order on Respondent's Motion on Res Judicata and Estoppel, 28CR01014.

App. 5: Judgment of Disbarment, 70CR01443-01448.

App. 6: Excerpts of State Bar Rules as amended to December 1971, Tex. State Bar R. art. 12, §§ 11-31, *reprinted in* Tex. Gov't Code Ann., tit. 14 App. (Vernon 1973).

App. 7: Excerpts of Texas Supreme Court Amendments to the Texas Rules of Disciplinary Procedure, Dec. 29, 2013.

APPENDIX 1

STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

July 18, 2007

Charles J. Sebesta, Jr.
P. O. Box 580
Caldwell, Texas 77836

CMRRR 7006 3450 0003 6297 2323

Re: A0020710876 Robert Bennett – Charles J. Sebesta, Jr.

Dear Mr. Sebesta:

You are hereby notified that, in accordance with Rule 2.13 of the Texas Rules of Disciplinary Procedure, the Chief Disciplinary Counsel has determined that Just Cause does not exist to proceed on the above referenced Complaint. The Complaint has therefore been placed on a Summary Disposition Panel docket. A list of the members assigned to the Panel is attached to this notice.

At the Summary Disposition Docket, the Chief Disciplinary Counsel will present the Complaint without the presence of the Complainant or the Respondent. The Panel shall determine whether the Complaint should be dismissed or should proceed.

In the event that the Panel determines that the Complaint should proceed, please be advised that the fact that a Complaint was placed on a Summary Disposition Panel docket and not dismissed is wholly inadmissible for any purpose in any subsequent Disciplinary Action or Disciplinary Proceeding.

Sincerely,

Sylvia Delgado
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas

Attachment – List of Panel Members Assigned

00161

District 08A
GRIEVANCE COMMITTEE
MEMBERS

Panel 1

↘ Larry Holt
1707 Broadmoor, Suite 103
Bryan, Texas 77802

↘ Michael Gentry
1515 Emerald Plaza
College Station, Texas 77845

↘ Bill Armstrong*
405 Chimney Hill
College Station, Texas 77840

Panel 2

___ W. Jeff Paradowski
P. O. Box 3335
Bryan, Texas 77802

___ John C. Webb
1515 Emerald Plaza
College Station, Texas 77845-1515

___ Doug Moore*
1311 Angelina
College Station, Texas 77840-4854

Panel 3

___ Jay B. Goss
4343 Carter Creek Parkway, #100
Bryan, Texas 77802

___ Steven Haley
P. O. Box 1808
Brenham, Texas 77833

___ Donald Ahrens*
351 Pleasant Hill School Road
Brenham, Texas 77833

Alternate Public Member

___ Norman Koch*
P. O. Box 7
Bremond, Texas 76629

*** Denotes Public Member**

07/2007

APPENDIX 2

STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

August 16, 2007

Charles J Sebesta, Jr
PO Box 580
Caldwell, Texas 77836-0580

Re: A0020710876 Robert S Bennett - Charles J Sebesta, Jr

Dear Mr. Sebesta:

The Summary Disposition Panel for the District Grievance Committee has determined that the above-referenced Complaint should be dismissed. The Complainant cannot appeal this determination of the Summary Disposition Panel. Accordingly, our file on this matter has been closed and this office will take no further action.

Disciplinary Proceedings, including the investigation and processing of a Complaint, are strictly confidential and not subject to discovery. The pendency, subject matter and status of a Disciplinary Proceeding may be disclosed by a Complainant, Respondent, or the Chief Disciplinary Counsel if the Respondent has waived confidentiality or the Disciplinary Proceeding is based upon a conviction for a Serious Crime.

Pursuant to Texas Government Code § 81.072(o), if a Grievance is dismissed as an Inquiry and that dismissal has become final, an attorney may deny that the dismissed Grievance was pursued.

The State Bar Act requires that all dismissed grievances (other than where the person complained about is deceased or disbarred, or not a lawyer) be referred to the State Bar's voluntary dispute resolution program, the Client-Attorney Assistance Program (CAAP). The Complainant has been so notified. For additional information, you may contact CAAP at 1-800-932-1900.

Sincerely,

Sylvia Delgado
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas

00164

APPENDIX 3

STATE BAR OF TEXAS

Office of the Chief Disciplinary Counsel

June 2, 2014

Sent Via CMRRR#: 7012 3460 0001 0081 5736

Steve McConnico
One American Center
600 Congress Avenue
15th Floor
Austin, Texas 78701-3236

Re: 201400539 Anthony Graves - Charles J. Sebesta, Jr.

Dear Mr. McConnico:

The Office of Chief Disciplinary Counsel has completed its investigation of the above Complaint and determined on June 2, 2014, that there is Just Cause to believe that your client has committed one or more acts of Professional Misconduct as defined by the Texas Rules of Disciplinary Procedure (TRDP).

In accordance with TRDP 2.14D, enclosed is a written notice of the acts and/or omissions engaged in by your client and of the Texas Disciplinary Rules of Professional Conduct that the Chief Disciplinary Counsel contends have been violated by such conduct:

> Respondent, Charles Sebesta ("Sebesta"), was the district attorney for Burleson and Washington counties in 1992. On August 18, 1992, six members of the Davis family, including four children, were murdered in Somerville, Texas. The victims were stabbed, bludgeoned and/or shot to death and their bodies were burned in an attempt to cover up the murders. On August 23, 1992, law enforcement officers questioned Robert Carter ("Carter"), father of one of the child victims, who was seen wrapped in bandages at the victims' funeral. After hours of questioning, Carter admitted being at the scene of the murders but implicated Anthony Graves ("Graves") as the killer. Sebesta presented the case to grand jury and obtained indictments against Carter and Graves for capital murder. In an attempt to pressure Carter to cooperate, Sebesta also sought and obtained an indictment against Theresa "Cookie" Carter, Robert Carter's wife. Sebesta did not have probable cause to support the indictment against Theresa Carter.

P. O. Box 12487, Austin, TX 78711, (512) 427-1350, (877) 953-5535, fax: (512) 427-4167

Carter was tried, convicted and sentenced to death in February of 1994. While his case was on appeal, Sebesta entered into negotiations with Carter (through counsel) for Carter's testimony in Graves' upcoming trial. Because there was no physical evidence linking Graves to the murders, Carter's testimony implicating Graves was a critical part of the prosecution's case against Graves. During an interview the night before he was to testify, Carter told Sebesta that he had committed the murders alone. Sebesta never disclosed this information to the defense.

Defense counsel made written pretrial requests for all exculpatory evidence and for any evidence of a third person's involvement in the murders. Although Sebesta told defense counsel during a pretrial hearing that Carter had implicated an individual nicknamed "Red" in the murders, he never disclosed that law enforcement had identified this individual as Kevin Dwayne Vincent ("Vincent") and had been able to rule him out as a suspect. Instead, Sebesta presented false testimony at trial that the individual Carter identified as "Red" did not exist and that Carter was likely using the nickname "Red" as a cover for his wife. Information that Carter had implicated an innocent individual in the murders would have been consistent with the defense theory that Carter had wrongfully implicated Graves. Sebesta also failed to disclose that John Robertson, an important prosecution witness who allegedly overheard admissions by Graves, was under indictment in Burleson County on felony charges of Criminal Mischief at the time of his testimony.

During Graves' trial, Sebesta presented testimony that, except for Carter's testimony before the grand jury where he completely recanted any involvement in the murders, all of Carter's statements regarding the murders implicated Graves. That testimony was false, as Carter had stated the night before his testimony in Graves' trial that he committed the murders alone. Sebesta took no steps to correct this testimony.

Graves presented an alibi defense at trial which centered around witnesses that put him in Brenham, Texas on the night of the murders. The most important defense witness, Yolanda Mathis ("Mathis"), was Graves' girlfriend at the time and was with Graves the entire timeframe in question on the night of the murders. Just before the defense called her to the stand at trial, Sebesta stated in open court that Mathis was a suspect in the murders, would possibly be indicted, and should be read her rights before testifying. Mathis was not, in fact, a suspect in the murders and there was no evidence to support that she participated in the murders. This was a false statement meant to intimidate Mathis into not testifying. When defense counsel informed Mathis of Sebesta's comments, she refused to testify and left the courthouse, leaving the defense without their most critical witness. Thereafter, at closing argument, Sebesta commented on the fact that Mathis had not testified, leaving the negative impression with the jury that the defense was unable or unwilling to produce her as a witness.

Graves was convicted and sentenced to death. After eighteen years in prison, twelve of them on death row, Graves' conviction was reversed and remanded for a new trial in 2006 by the Fifth Circuit due to prosecutorial misconduct by Sebesta. In 2010, Graves was released from prison when the special prosecutor appointed to pursue the case against him determined that there was no evidence linking Graves to the murders.

These alleged acts violate 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.
3.03(a)(5)	A lawyer shall not knowingly: offer or use evidence that the lawyer knows to be false.
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.
3.09(a)	The prosecutor in a criminal case shall: refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause.
3.09(d)	The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

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.
8.04(a)(3)	A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
8.04(a)(4)	A lawyer shall not engage in conduct constituting obstruction of justice.

Pursuant to TRDP 2.15, you must notify this office whether your client elects to have the Complaint heard by an Evidentiary Panel of the District Grievance Committee or in a district court of proper venue, with or without a jury. **The election must be in writing and served upon the Chief Disciplinary Counsel's office no later than twenty (20) days after your receipt of this notice.** Failure to file a timely election shall conclusively be deemed an affirmative election to proceed before an Evidentiary Panel in accordance with TRDP 2.17 and 2.18.

Enclosed is a form in which to indicate your client's election and principal place of practice. It should be mailed to the undersigned at the address shown at the bottom of this letter. In making the election, your client should be aware that an Evidentiary Panel proceeding is confidential unless a public sanction is entered and that a **private reprimand is only available before an Evidentiary Panel.** District court proceedings are public and a private reprimand is not an available sanction.

Sincerely,

Laura B. Popps with permission Rebecca Stevens

Laura Bayouth Popps
Deputy Counsel for Administration
State Bar of Texas

Enclosure: Respondent's Election and Principal Place of Practice Certification

LBP/smh

P. O. Box 12487, Austin, TX 78711, (512) 427-1350, (877) 953-5535, fax: (512) 427-4167

COMPLAINT AGAINST	§	
	§	
Charles J. Sebesta, Jr.	§	**201400539 [Graves]**
	§	
Caldwell, TX	§	

RESPONDENT'S ELECTION &
PRINCIPAL PLACE OF PRACTICE CERTIFICATION

I, Charles J. Sebesta, Jr., hereby elect: (Choose one of the following)

_____ District Court

_____ Evidentiary Hearing - District Grievance Committee

I, Charles J. Sebesta, Jr., hereby certify that:

_____(City), _____(County),

Texas, is my principal place of practice and my physical address (no P.O. Box) is

_____.

Signed this _____ day of _____, 20____.

_____
Charles J. Sebesta, Jr.

****RETURN THIS FORM WITHIN 20 DAYS OF RECEIPT OF ELECTION NOTICE****

APPENDIX 4

FILED

DEC 18 2014

Austin Office
Chief Disciplinary Counsel
State Bar of Texas

BEFORE THE EVIDENTIARY PANEL FOR
STATE BAR DISTRICT NO. 08-2 STATE BAR OF TEXAS

COMMISSION FOR LAWYER DISCIPLINE, Petitioner	§	
	§	201400539
v.	§	
CHARLES J. SEBESTA, JR., Respondent	§	

ORDER ON RESPONDENT'S MOTION ON RES JUDICATA AND ESTOPPEL

On November 12, 2014, the Evidentiary Panel for State Bar District No. 08-2 heard Respondent Charles J. Sebesta, Jr.'s Motion on Res Judicata and Estoppel. Further, this Panel met and deliberated on the above motion on December 16, 2014 after reviewing motions, responses, and the supplemental briefing from both parties. Having considered the law and arguments of counsel, this Panel is of the opinion that the Motion should be DENIED.

IT IS THEREFORE ORDERED that Respondent's motion is DENIED.

Signed this 17th day of Dec., 2014

PANEL CHAIR

APPENDIX 5

BEFORE THE EVIDENTIARY PANEL FOR STATE BAR DISTRICT NO. 08-2 STATE BAR OF TEXAS

COMMISSION FOR LAWYER DISCIPLINE,	*	
Petitioner	*	
	*	**201400539**
V.	*	
	*	
CHARLES J. SEBESTA, JR.,	*	
Respondent	*	

JUDGMENT OF DISBARMENT

Parties and Appearance

On May 11th, 12th, 13th, and 14th, 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, Charles J. Sebesta, Jr., Texas Bar Number 17970000, appeared in person and through attorney of record and announced ready.

Jurisdiction and Venue

The Evidentiary Panel 8-2, 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 and conclusions of law:

1. Respondent, Charles Sebesta, Jr. ("Sebesta"), is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.

2. Sebesta resides in and maintains his principal place of practice in Burleson County, Texas.

3. Sebesta was the district attorney for Burleson and Washington counties from 1975-2000.

4. On August 18, 1992, six members of the Davis family, including four children, were murdered in Somerville, Texas. On August 23, 1992, law enforcement officers questioned Robert Carter ("Carter"), father of one of the child victims. Carter eventually admitted being at the scene of the murders but implicated Anthony Graves ("Graves") as the killer. Carter testified before the grand jury, and contrary to his previous admissions he denied that he or Graves had any involvement in the murders.

5. Carter was tried, convicted and sentenced to death in February of 1994. Sebesta was the lead prosecutor for that case.

6. Graves' trial began on September 19, 1994 with jury selection. Sebesta was the lead prosecutor for the case. Prior to trial, Sebesta began negotiations with Carter through his appellate attorney for testimony against Graves. On October 20, 1994, the night before Carter was called to testify at Graves' trial, Sebesta met with Carter, in order to finalize the agreement. At that meeting, Carter informed Sebesta that he had committed the murders alone, a statement that necessarily excluded Graves as a participant in the murders.

7. On the morning of October 21, 1994, shortly before Carter took the stand, Sebesta provided the court with the details of the final agreement reached for Carter's testimony. Sebesta stated on the record that he was agreeing not to ask Carter any questions about his wife Theresa Carter. However, the exculpatory statement made by Carter the night before – that he acted alone in committing the murders – was not placed on the record at that time or at any other time. The evidence shows that Sebesta never disclosed this exculpatory information to Graves' attorneys. Sebesta's failure to disclose this information was in violation of Rule 3.09(d).

8. Sebesta conducted the examination of Carter at Graves' trial on October 21, 1994. Sebesta elicited testimony from Carter that, aside from his statement to the grand jury, Carter had always maintained that Graves participated in the murders. This testimony was false based on Carter's statements to Sebesta the night before when he recanted Graves' involvement and admitted to committing the murders alone. No steps were taken by Sebesta to correct Carter's false testimony or to bring the perjured statement to the courts attention. Because Sebesta knew that Carter's testimony was false and yet used and presented Carter's testimony at trial, Sebesta violated Rule 3.03(a)(5).

9. Sebesta conducted the examination of the lead investigator Ranger Ray Coffman on October 24, 1994. Sebesta elicited testimony from Ranger Coffman that, aside from Carter's statement to the grand jury, Carter had always implicated Graves in the murders. Again, this testimony was false based on Carter's statements to Sebesta the night of October 20, 1994 when he recanted Graves' involvement and admitted to committing the murders alone. Sebesta took no steps to correct the false impression left by Ranger Coffman's testimony. Because Sebesta knew that Ranger Coffman's testimony was false, Sebesta violated Rule 3.03(a)(5).

10. Graves presented an alibi defense at trial. The defense centered around witnesses that put him in Brenham, Texas on the night of the murders. Yolanda Mathis ("Mathis") was Graves' girlfriend and had previously testified at grand jury that she had been with Graves during the critical time period on the night of the murders. After being sworn in and placed under the Rule, but before the defense called her to the stand at trial, and while Mathis was not in the courtroom, Sebesta stated in open court that:

> **Mr. Sebesta:** Judge, when they call Yolanda Mathis we would ask, outside the presence of the jury that the Court warn her of her rights. She is a suspect in these murders and it's quite possible, at some point in the future, she might be indicted. I don't know. And I feel outside the presence of the jury that it would be proper to warn her of her rights.

Sebesta had no evidence or information tending to show Yolanda Mathis was a suspect or had any involvement in the murders. Whether the result was intended or not, Yolanda Mathis refused to appear as a witness for the defense after this false statement was uttered to the court. Sebesta's statement to the court was false and in violation of Rule 3.03(a)(1).

11. In conjunction with providing an alibi for Graves, the defense was simultaneously attempting to show Carter had falsely implicated Graves. Defense counsel made both written and oral pretrial requests for all exculpatory evidence and for any evidence of a third person's involvement in the murders. Sebesta told defense counsel and the court during a pretrial hearing that Carter had implicated an individual nicknamed "Red" in the murders, and had given law enforcement specific information to locate that individual. However, Sebesta never disclosed to Graves' attorneys that law enforcement eventually identified this individual as Kevin Dwayne Vincent ("Vincent") and had been able to rule him out as a suspect; nor did Sebesta disclose to Graves' attorneys that Carter confirmed for law enforcement that Vincent was not involved. Sebesta's failure to disclose this information to Graves' attorneys was in violation of Rule 3.09(d).

12. Sebesta admits that he failed to disclose that John Robertson, one of the State's witnesses who allegedly overheard admissions by Graves, was under indictment in Burleson County on felony charges of Criminal Mischief at the time of his testimony. Sebesta's failure to disclose this information was in violation of Rule 3.09(d).

13. Graves was convicted and sentenced to death. In 2006, Graves' conviction was reversed and remanded for a new trial by the United States Court of Appeals for the Fifth Circuit due to prosecutorial misconduct by Sebesta. In 2010, after sixteen years in prison, twelve of them on death row, Graves was released from prison when the special prosecutor appointed to pursue the case against him determined that there was no credible evidence that Graves had any involvement in the murders.

14. Due to the rule violations enumerated above, the Panel finds that Sebesta violated Rule 8.01(a)(1) and 8.04(a)(3).

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), 3.03(a)(5), 3.09(d), 8.04(a)(1), and 8.04(a)(3).

Sanction

The Evidentiary Panel, having found 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 Rule of Disciplinary Procedure, the Evidentiary Panel finds that proper discipline of the Respondent for his acts of Professional Misconduct is DISBARMENT.

Disbarment

It is therefore ORDERED, ADJUDGED and DECREED that effective June 11, 2015, Respondent, Charles J. Sebesta, Jr., State Bar Number 17970000, is hereby DISBARRED from the practice of law in the State of Texas.

It is further ORDERED Respondent is 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 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."

Notification

It is further ORDERED Respondent shall immediately notify each of his current clients in writing of this disbarment. In addition to such notification, Respondent is ORDERED to return any files, papers, unearned monies and other property belonging to clients and former clients in the Respondent's possession to the respective clients or former clients or to another attorney at the client's or former client's request. Respondent is further ORDERED to 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) within thirty (30) days of the signing of this judgment by the Panel Chair, an affidavit stating that all current clients have been notified of Respondent's disbarment and that all files, papers, monies and other property belonging to all clients and former clients have been returned as ordered herein.

It is further ORDERED Respondent shall, on or before thirty (30) days from the signing of this judgment by the Panel Chair, 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. Respondent is further ORDERED to 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), within thirty (30) days of the signing of this judgment by the Panel Chair, an affidavit stating that each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice has received written notice of the terms of this judgment.

Surrender of License

It is further ORDERED Respondent shall, within thirty (30) days of the signing of this judgment by the Panel Chair, 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 the State of Texas.

Publication

It is further ORDERED this disbarment 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 11TH day of JUNE, 2015.

EVIDENTIARY PANEL
DISTRICT NO. 8-2
STATE BAR OF TEXAS

Brian M. Baker
District 8-2 Presiding Member

01448

APPENDIX 6

VERNON'S ANNOTATED

REVISED CIVIL STATUTES

OF THE

STATE OF TEXAS

Volume 1A

Articles 201 to 578

Apprentices to Bees

ST. PAUL, MINN.
WEST PUBLISHING CO.

TITLE 14—APPENDIX

RULES GOVERNING THE STATE BAR OF TEXAS

Adopted by

MEMBERS OF THE STATE BAR OF TEXAS

and

Promulgated by

THE SUPREME COURT OF TEXAS

As Amended to December 20, 1971.

These Rules were originally prepared by the Lawyers' Advisory Committee and approved by the Supreme Court on February 22, 1940.

The Order of the Supreme Court approving the Rules read:

"These Rules providing for the conduct of the State Bar of Texas, and the discipline, suspension and disbarment of attorneys at law and prescribing a code of ethics governing the professional conduct of the members of the Bar, as prepared and recommended by the Lawyers' Advisory Committee authorized and created under order of this Court, are hereby approved by the Supreme Court and ordered submitted to the registered members of the State Bar for a vote thereon."

ARTICLE I—DEFINITIONS

ARTICLE II—STATE BAR OF TEXAS

Sec.

Section 9. Compulsory Disbarment

Disbarment shall be compulsory on proof of conviction of any felony, or of any misdemeanor involving the theft, embezzlement, or fraudulent appropriation of money or other property.

Law Review Commentaries

Proposed amendment of state bar act. Davis Grant, 31 Texas Bar J. 1009 (1968).

Notes of Decisions

1. In general

Attorney should not be held liable in disbarment proceeding for an error in judgment if he acts in good faith. Hicks v. State (Civ.App.1967) 422 S.W.2d 539, ref. n. r. e.

Regardless of whether indictment might be pending against attorney, suit for his disbarment on same ground and for same offense may be brought and prosecuted to judgment. Fulmer v. State (Civ.App.1969) 445 S.W.2d 546, ref. n. r. e.

In disbarment suit brought under § 28 of this article giving court power to determine whether attorney who is found guilty shall be reprimanded, suspended from practice or disbarred rather than under former § 9 of this article stating that disbarment is compulsory on proof of conviction of felony, it is not an abuse of discretion for court, which finds accused attorney has committed acts constituting crime of embezzlement, to order a suspension rather than disbarment. State v. Pevehouse (Civ.App. 1972) 483 S.W.2d 565, ref. n. r. e.

The preliminary investigation of an attorney for alleged misconduct is comparable to an inquisition by a grand jury. State v. Sewell (Sup.1972) 487 S.W.2d 716.

Attorney who had no possessory lien and had been instructed to turn client's file over to her new attorney had no right to retain file pending court order requiring release thereof. Smith v. State (Civ.App. 1973) 490 S.W.2d 902.

Where prospective client consulted attorney to establish cost and feasibility of divorce in case he decided such action was required and the conference lasted only approximately 15 minutes, attorney was guilty of professional misconduct when, without sending prospective client a bill, attorney filed suit and continued prosecuting same despite fact that prospective client offered to pay fee in installments. Id.

2. Probate matters

Under all circumstances and viewed in light of finding that interlineation providing that land devised to executor and his brother should be subject to indebtedness against it at testator's death was made before execution of will, conduct of attorney who drew will and filed it for probate was not such as to justify his dismissal from case wherein he represented residuary legatee who opposed striking the interlineation. Schoenhals v. Schoenhals (Civ.App. 1963) 366 S.W.2d 594, ref. n. r. e.

To insert in a will without the testator's knowledge or consent, that upon his death the firm of which the attorney preparing the will was a member should represent the estate was fraudulent and dishonorable within the meaning of former Section 8 of this Article XII. Bar Committee Opinion 152 (June 1957).

3. Trial

Argument of state's counsel in disbarment proceeding as to whether duty to get facts for client included "wire tapping and all that kind of stuff" was subject to objection, but failure to object constituted waiver of error. Fulmer v. State (Civ. App.1969) 445 S.W.2d 546, ref. n. r. e.

Fact that of 15 separate instances wherein defendant was alleged to have been guilty of improper solicitation of employment as attorney there were only 5 in which finding of jury was in accord, and 10 instances in which jury refused to find against defendant was strong indication that minds of jury were not inflamed by conduct of trial, testimony of witnesses and conduct and argument of counsel. Id.

It was relevant, to charge of professional misconduct in advising client to falsely swear at deposition that client had not been previously convicted of felony, that client had completely broken down and cried during trial when asked if he had ever committed felony. Smith v. State (Civ.App.1973) 490 S.W.2d 902.

4. Evidence

Evidence in disbarment proceeding supported jury findings that defendant's conduct constituted dishonorable conduct,

fraudulent conduct and malpractice. Hicks v. State (Civ.App.1967) 422 S.W.2d 539, ref. n. r. e.

Error in cross-examination of attorney for defendant in disbarment proceeding whether he was aware of opinion holding that attorney should not represent client in court knowing that he would appear as a witness in the case in advance of it was harmless. Fulmer v. State (Civ.App.1969) 445 S.W.2d 546, ref. n. r. e.

Whether jurors in disbarment proceeding had heard statement in jury room that use of concealed tape recorders was unfair, illegal, and unethical, was issue of fact, and it was to be presumed that trial court concluded that no such discussion occurred. Id.

5. Special issues

Since issues submitted by court to jury in disbarment case relating to fraudulent conduct and dishonorable conduct, when considered along with definitions given, constituted submission of issue as to good faith of defendant and placed burden on plaintiff to prove absence of good faith, good faith did not constitute an affirmative defense of such character that defendant was entitled to have special issues thereon submitted to jury. Hicks v. State (Civ. App.1967) 422 S.W.2d 539, ref. n. r. e.

Court properly refused to submit requested special issues in disbarment proceeding to jury on good faith where defendant did not plead any such defense, if issue of defendant's good faith was to be considered an affirmative defense. Id.

Section 10. Four-year Limitation Rule and Exceptions

Except in cases where disbarment is compulsory under Section 9, no member shall be reprimanded, suspended, or disbarred for misconduct occurring more than four years prior to the time of filing of a complaint with the Grievance Committee; but limitation will not run where fraud or concealment is involved until such misconduct is discovered or should have been discovered by reasonable diligence. The complaint shall be considered as filed when made in writing to the Committee or any member thereof.

In cases where the accused attorney has been found guilty of professional misconduct, evidence may be introduced after the close of the trial, relating to misconduct otherwise barred by limitation, for consideration in determining the punishment to be decreed.

Library References

Attorney and Client ⇐46. C.J.S. Attorney and Client § 25.

Section 11. Complaints, Filing of

It shall be the duty of each District Grievance Committee and its members to receive complaints of professional misconduct, alleged to have been committed by an attorney within the district, or by an attorney having his office or residence therein; and each Committee member shall report to his committee any case of professional misconduct which shall come or be brought to his attention. The Committee may, in any case, require a sworn statement setting forth the matter complained of as a condition to taking further action.

Library References

Attorney and Client ⇐48. C.J.S. Attorney and Client § 27.

Notes of Decisions

Construction and application 1
Privileged nature of complaint 2

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1. Construction and application

Individual attorney, acting independently of state bar and of any district grievance committee of state bar, has no authority to institute civil proceedings in state district court seeking disbarment or suspension of license of another attorney. State ex rel. Chandler v. Dancer (Civ.App.1964) 391 S.W.2d 504, ref. n. r. e.

2. Privileged nature of complaint

Members of the general public have the right to make complaints against attorneys to bar association grievance committees authorized to conduct investigations and making findings, and such complaints so made cannot constitute the basis of a civil action for libel or slander; falsity of statement or malice of utterer is immaterial, even though statement was not relevant, pertinent and material to issue involved. McAfee v. Feller (Civ.App.1970) 452 S.W.2d 56.

Allegedly libelous matter in letter, which concerned attorney and which was forwarded to grievance committee of state bar, was absolutely privileged where sender followed substantially the legally designated procedures through the proper authorities and there was no repetition or republication of charges shown. Id.

Section 12. Complaints, Investigation of

The Committee shall make such investigation of each complaint as it may deem appropriate under the circumstances of the case, preliminary to taking action as set forth under Section 16. In conducting a hearing as a part of any investigation, the Committee may require testimony to be given under oath or affirmation. The name of the accused member and the proceedings shall be kept private, so far as is consistent with development of the facts. Where the complaint appears to be of such nature as will not call for disciplinary action and can probably be dismissed without the necessity of hearing the accused attorney, the Committee need not notify him of the filing of the complaint.

Notes of Decisions

1. Construction and application

After filing of formal complaint, portions of bar grievance committee hearings which may otherwise be required to be disclosed under rules of procedure and evidence are not protected from discovery by provision for "private" hearings in this section, and must be disclosed to defendant upon proper proceeding by him for that purpose. McGregor v. State (Civ.App.1972) 483 S.W.2d 559, order set aside 487 S.W.2d 693.

Upon filing of suit for disbarment, parties' procedural rights were governed by rules of civil procedure, and bar grievance committee did not thereafter have authority to compel person to appear before it and testify or produce other evidence regarding any complaints of alleged professional misconduct by defendant. Id.

Power of bar grievance committee to serve as investigatory agency ends with filing of law suit. Id.

Section 13. Notices Issued to Witnesses

In any investigation or hearing before the Grievance Committee, it may require the attendance of witnesses and the production of documentary or other evidence by issuing notices to witnesses, ordering them to appear and testify or to produce said documentary or other

evidence. Such notices shall be issued at the request of the Committee, or the accused attorney, but in the latter case without expense to the State Bar. Such notice must be in writing and signed by the presiding member of the Committee, and shall notify the witness of the time and place he is to appear. If the witness is commanded to produce documentary or other evidence, the notice shall contain a brief description of such evidence.

Cross References

Unauthorized practice of law, grievance committee investigations, applicability of this section, see Article XIII A.

Section 14. Service of Notices to Witnesses

Notice to a witness shall be served on the witness personally or by mailing the same to him by registered mail, return receipt requested. Proof of service may be made by certificate of the person making the same, with return receipt attached when made by registered mail.

Cross References

Unauthorized practice of law, grievance committee investigations, applicability of this section, see Article XIII A.

Section 15. Examination of Witness before District Judge; Procedure

If any witness, other than the accused attorney, after such notice has been given, fails or refuses to appear before the Committee, or to produce books, papers, documents, letters, or other evidence described in the notice, or refuses to be sworn, or testify, or if a witness is not a resident of, or is not to be found in, the county in which the hearing is being held, such witness shall be compelled by a Judge of any district court to appear and testify at a hearing before such judge in the same manner as witnesses may be compelled to appear and testify in a civil suit in the district court. Application for such hearing may be filed by any party to such proceeding in any district court of the county in which such witness resides or may be found. The judge shall fix by order a time and place for such hearing and shall provide for such notice to the Grievance Committee and the accused attorney as he deems proper. If such witness fails to appear, or testify, or produce such documentary or other evidence as may be requested, he shall be punished as in cases of contempt.

Cross References

Unauthorized practice of law, grievance committee investigations, applicability of this section, see Article XIII A.

Section 16. Complaints, Action on, after Investigation

At the conclusion of its investigation, the Committee shall take action on the complaint in one of the following ways:

(a) If the Committee shall be of the opinion that no disciplinary action is warranted, it shall dismiss the complaint and notify the complainant, and the accused attorney also, if he shall have had notice of the complaint.

(b) If, in a case where the accused has had notice of the complaint and opportunity to be heard, the Committee shall decide that he should be reprimanded, the reprimand shall be reduced to writing. At its discretion, the Committee may require the accused to appear before it for delivery of the reprimand, or it may send a copy thereof to him by registered mail; and it shall determine what publicity, if any, shall be given the reprimand.

If the accused shall deem the reprimand unwarranted, he may, within ten days after delivery or mailing thereof, file suit in the district court of the county of his residence to set the same aside, failing which, the reprimand shall become final, and a copy thereof, together with a copy of the complaint, shall be mailed to the Clerk of the Supreme Court, also to the Secretary of the State Bar, and a memorandum of the reprimand shall be made on the membership rolls kept by said Clerk. At the discretion of the Committee, a third copy of the reprimand may be delivered to the Clerk of the District Court of the residence or office address of the attorney for entry upon the minutes of the court.

(c) If the Committee shall be of the opinion that the license of the accused should be revoked, or suspended for a period not to exceed three years, and shall have reason to believe the accused will accept its action as final, it shall prepare a form of judgment and submit the same to him; and upon his agreement to its entry, evidenced by memorandum in writing signed and acknowledged by him, the Committee shall enter judgment accordingly, and the same shall have the force and effect of a judgment of the District Court of the county of the residence of the accused. Copies of the judgment, together with copies of the complaint, shall be mailed to the Secretary of the State Bar, the Clerk of the Supreme Court, and the Clerk of the District Court of the county of residence of the accused, in the last case for entry upon the minutes of court. If the attorney's license has been revoked, the Clerk of the Supreme Court shall strike his name from the rolls; if suspended, the said Clerk shall strike the name from the rolls for the time suspended.

(d) In other cases, the Committee shall direct procedure by Formal Complaint as hereinafter set forth.

Section 17. Grievance Committee Forms, Style of

Grievance Committee papers may be commenced as follows:

BEFORE THE GRIEVANCE COMMITTEE OF THE STATE BAR OF TEXAS FOR DISTRICT NO. .....

COMPLAINT AGAINST

..... REPRIMAND

....., TEXAS.

Section 18. Reprimand, Form of

A reprimand should set forth the pertinent findings of fact and the conclusions of the Committee. It may state the reasons why no more severe action is taken and contain the warning that no leniency may be expected in event of future misconduct. It should show where copies thereof are to be filed, and what publicity, if any, shall be given thereto. It shall be signed as follows:

GRIEVANCE COMMITTEE OF THE STATE BAR OF TEXAS FOR DISTRICT NO. .....

BY .....

The Chairman or any other member may sign for the Committee.

Section 19. Grievance Committee Judgment, Form of

A judgment of the Grievance Committee entered under Section 9(c) should in general follow the ordinary form of a court judgment. It may recite filing of the complaint and hearing thereon by the Committee, submission of the form of judgment to the accused and his consent to its entry, pertinent findings of fact and the conclusion that by reason thereof the Committee finds the accused guilty of professional misconduct calling for his disbarment or suspension for the period stated, as the case may be. The order should be to the effect that license of the party to practice law in the State of Texas is thereby revoked, or suspended for the period stated, as the case may be, and that copies of the judgment be transmitted pursuant to Section 16(c). The judgment should be signed by the Chairman of the Committee.

Section 20. Consent to Grievance Committee Judgment, Form of

Consent to entry of judgment by the Grievance Committee under Section 16(c) should be addressed to the Committee and may be in form in substance as follows:

"In connection with charges of professional misconduct filed against me and heard by your Committee, I hereby consent to entry of judgment in the form submitted to me pursuant to Article XII, Section 16(c) of the State Bar Rules, revoking my license to practice law in the State of Texas (or suspending my license to practice law in the State of Texas for a period of .....)."

The consent shall be signed and acknowledged by the accused.

C. PROCEDURE BY FORMAL COMPLAINT

Section 21. Rules of Civil Procedure to Govern, Except When in Conflict

The Texas Rules of Civil Procedure shall govern the procedure in all proceedings under Formal Complaint except where in conflict with specific provisions hereof.

Library References

Attorney and Client ⚖49. C.J.S. Attorney and Client § 28.

Section 22. When Regular Judge Is Disqualified

When the regular judge of the District is disqualified or recuses himself, the Presiding Judge of the Administrative Judicial District of the county of residence of the accused attorney shall appoint for trial of the case another District Judge of the Administrative Judicial District in accordance with the statutes relative to Administrative Judicial Districts.

Library References

Judges ⚖51. C.J.S. Judges §§ 92 to 94.

Section 23. Counsel for Prosecution of Disciplinary Actions

The Committee may appoint counsel for the prosecution of disciplinary actions. Such counsel may be compensated from State Bar funds upon action by the Board of Directors, who may authorize payment of a retainer when the matter is first presented to them, and

the remainder of the fee when counsel's services have been fully performed. Also, upon request made by the Committee to the District Attorney of the county in which the action is to be tried, it shall be his duty to represent it in such actions, either alone or in association with counsel for the Committee, at the option of the Committee.

Cross References

Unauthorized practice proceedings, applicability of this section, see Article XIII A.

Library References

Attorney and Client ⇐48. C.J.S. Attorney and Client § 27.

Section 24. Requisites of Formal Complaint

The Formal Complaint shall be the pleading by which the proceeding is instituted. The Formal Complaint shall be filed in the name of the STATE OF TEXAS as Plaintiff against the accused attorney as defendant and shall set forth the professional misconduct with which the defendant is charged. The prayer may be that the defendant be "disbarred, suspended, or reprimanded as the facts shall warrant."

Cross References

Unauthorized practice proceedings, formal complaint, see Article XIII A.

Library References

Attorney and Client ⇐52. C.J.S. Attorney and Client § 31.

Section 25. Answer of Defendant

The answer of the defendant to the Formal Complaint shall either admit or deny each allegation of the complaint, except where the defendant is unable to admit or deny the allegation, in which case defendant shall set forth the reasons why he cannot admit or deny.

Library References

Attorney and Client ⇐52. C.J.S. Attorney and Client § 32.

Section 26. Amendment in Order to Include Additional Misconduct

To avoid multiplicity of actions, the Formal Complaint may be amended, by leave of the trial judge, at any time prior to the conclusion of the trial, to include additional misconduct coming to the attention of the Committee.

Library References

Attorney and Client ⇐52. C.J.S. Attorney and Client § 32.

Section 27. Preferred Setting

Proceedings under Formal Complaint shall be entitled to preferred setting at the request of either party.

Library References

Attorney and Client ⇐54. C.J.S. Attorney and Client § 34.

Section 28. Judgment

If the court shall find from the evidence in a case tried without a jury, or from the verdict of the jury, if there be one, that the defendant is guilty of no professional misconduct, he shall enter judgment so declaring and dismiss the complaint; but if he shall find the defendant guilty, he shall determine whether the party shall be (a) reprimanded, or (b) suspended from practice (in which case he shall fix the term of suspension), or (c) disbarred; and he shall enter judgment accordingly.

If the judgment be one finding the defendant guilty as aforesaid, it shall direct transmittal of certified copies of the judgment and complaint to the Secretary of the State Bar and the Clerk of the Supreme Court; and the latter shall make proper notation on the membership rolls.

Library References

Attorney and Client ⇐56. C.J.S. Attorney and Client § 36.

Notes of Decisions

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1. Validity

Section 32 of this article, when construed in light of this section allowing trial court three alternatives, reprimand, suspension, or disbarment, if a defendant is found guilty of misconduct, and giving discretion to trial court as to term of suspension, does not deny due process, and judgment of disbarment prohibiting practice of law subject to right to apply for reinstatement after expiration of five years was not unconstitutional. Steere v. State Bar of Tex. (Civ. App.1971) 464 S.W.2d 732.

2. In general

Attorney should not be held liable in disbarment proceeding for an error in judgment if he acts in good faith. Hicks v. State (Civ.App.1967) 422 S.W.2d 539, ref. n.r.e.

Under this section, providing that in case tried without jury if defendant attorney is guilty then court shall determine whether the party shall be reprimanded, suspended from practice of law or disbarred and enter judgment accordingly, it is in trial court's discretion to fix punishment of one found guilty of professional misconduct. State v. Pevehouse (Civ.App.1972) 483 S.W.2d 565, ref. n. r. e.

In disbarment suit brought under this section giving court power to determine whether attorney who is found guilty shall be reprimanded, suspended from practice or disbarred rather than under former § 9 of this article stating that disbarment is compulsory on proof of conviction of felony, it is not an abuse of discretion for court, which finds accused attorney has committed acts constituting crime of embezzlement, to order a suspension rather than disbarment. Id.

Where order dismissing the formal complaint to disbar attorney was without prejudice to the Grievance Committee's right to refile suit, order was not a bar to institution of same suit. State v. Sewell (Sup. 1972) 487 S.W.2d 716.

The Supreme Court is charged with the duty of making the regulations for disciplining, suspending and disbarring attorneys after appropriate investigation and trial. Id.

Grievance Committee's prior decisions not to institute disciplinary proceedings were not final determinations of the merits of the two complaints before the Committee and were not res judicata to subsequent hearing by Committee on the complaints. Id.

Where Grievance Committee's decisions at prior hearings upon two complaints were not final determinations of merits of complaints, injunction preventing Grievance Committee from conducting a hearing on matters which were considered by Committee at two earlier hearings was an interference with grievance procedures authorized by Article XII of the State Bar Act and granting thereof constituted a clear abuse of discretion. Id.

3. Evidence

Evidence in disbarment proceeding supported jury findings that defendant's conduct constituted dishonorable conduct, fraudulent conduct and malpractice. Hicks v. State (Civ.App.1967) 422 S.W.2d 539, ref. n. r. e.

4. Special issues

Since issues submitted by court to jury in disbarment case relating to fraudulent conduct and dishonorable conduct, when considered along with definitions given, constituted submission of issue as to good faith of defendant and placed burden on plaintiff to prove absence of good faith, good faith did not constitute an affirmative defense of such character that defendant was entitled to have special issues thereon submitted to jury. Hicks v. State (Civ. App.1967) 422 S.W.2d 539, ref. n. r. e.

Court properly refused to submit requested special issues in disbarment proceeding to jury on good faith where defendant did not plead any such defense, if issue of defendant's good faith was to be considered an affirmative defense. Id.

Section 29. Costs Adjudged against Plaintiff

Any costs adjudged against the plaintiff shall be paid by the State Bar.

Library References

Attorney and Client ⚖59. C.J.S. Attorney and Client § 39.

Section 30. Appeal. No Supersedeas

Either party to such proceeding shall have the right of appeal to the Court of Civil Appeals, but if the judgment appealed from be one suspending or disbarring the defendant, he shall not be entitled to practice law in any form while the appeal is pending, and he shall have no right to supersede the judgment by bond or otherwise.

Library References

Attorney and Client ⚖57. C.J.S. Attorney and Client § 37.

Section 31. Plaintiff Exempt from Cost Bond

No cost bond shall be required of the plaintiff in any court in a proceeding under Formal Complaint. In lieu thereof, when cost bond would otherwise be required, memorandum shall be filed setting forth the exemption under this Rule.

APPENDIX 7

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 03- 9209

AMENDMENTS TO
THE TEXAS RULES OF DISCIPLINARY PROCEDURE

ORDERED that:

1. During the last legislative session, H.B. 599 (the State Bar Sunset Act) was passed. The bill mandated revisions to the attorney disciplinary system and required this Court "to adopt rules and procedures required by" the bill not later than January 1, 2004.

2. Accordingly, the Texas Rules of Disciplinary Procedure are amended as attached. The effective date of these changes is Janaury 1, 2004.

3. These changes apply to a grievance filed on or after January 1, 2004, regardless of whether the conduct that is the subject of the grievance occured before, on, or after that date. A grievance filed before January 1, 2004, is governed by the Texas Rules of Disciplinary Procedure in effect immediately before the effective date of these amended rules, and the former rules are continued in effect for that purpose.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

c. send a copy of this Order to each elected member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register*.

SIGNED AND ENTERED this 29th day of December, 2003.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

Priscilla R. Owen, Justice

Harriet O'Neill, Justice

Wallace B. Jefferson, Justice

Michael H. Schneider, Justice

Steven Wayne Smith, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

Misc. 03- 9209

TEXAS RULES OF DISCIPLINARY PROCEDURE

The Supreme Court of Texas has the constitutional and statutory responsibility within the State for the lawyer discipline and disability system, and has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability in a manner that does not discriminate by race, creed, color, sex, or national origin. To carry out this responsibility, the Court promulgates the following rules for lawyer discipline and disability proceedings. Subject to the inherent power of the Supreme Court of Texas, the responsibility for administering and supervising lawyer discipline and disability is delegated to the Board of Directors of the State Bar of Texas. Authority to adopt rules of procedure and administration not inconsistent with these rules is vested in the Board. This delegation is specifically limited to the rights, powers, and authority herein expressly delegated.

PART I

General Rules

1.01 Citation: These rules are to be called the Texas Rules of Disciplinary Procedure and shall be cited as such.

1.02 Objective of the Rules: These rules establish the procedures to be used in the professional disciplinary and disability system for attorneys in the State of Texas.

1.03 Construction of the Rules: These rules are to be broadly construed to ensure the operation, effectiveness, integrity, and continuation of the professional disciplinary and disability system. The following rules apply in the construction of these rules:

A. If any portion of these rules is held unconstitutional by any court, that determination does not affect the validity of the remaining rules.

B. The use of the singular includes the plural, and vice versa.

C. In computing any period of time prescribed or allowed by these rules, the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

1.04 Integration and Concurrent Application of the Rules: These rules apply prospectively to all attorney professional disciplinary and disability proceedings commenced on and after the effective date as set forth in the Supreme Court's Order of promulgation. ~~Upon adoption and promulgation of these rules, existing Article X, Sections 1 through 8, and Article X, Sections 10 through 38, of the State Bar Rules (Title 2, Subtitle G - Appendix, V.T.C.A., Government Code) are repealed except to the extent that they apply to then pending disciplinary matters by Order of the Supreme Court of Texas.~~ All disciplinary and disability proceedings commenced prior to the effective date of these rules as amended are governed by the Texas Rules of Disciplinary Procedure in effect as of the date of commencement of said disciplinary and disability proceedings.

1.05 Texas Disciplinary Rules of Professional Conduct: Nothing in these rules is to be construed, explicitly or implicitly, to amend or repeal in any way the Texas Disciplinary Rules of Professional Conduct.

1.06 Definitions:

A. "Address" means the address provided by the attorney the subject of a Grievance as shown on the membership rolls maintained by the Clerk of the Supreme Court at the time of receipt of the Grievance by the Chief Disciplinary Counsel.

BA. "Board" means the Board of Directors of the State Bar of Texas.

CB. "Chief Disciplinary Counsel" means the person serving as Chief Disciplinary Counsel and any and all of his or her assistants.

DC. "Commission" means the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.

ED. "Committee" means any of the grievance committees within a single District ~~the District grievance committee~~.

FE. "Complainant" means the person, firm, corporation, or other entity, including the Chief Disciplinary Counsel, initiating a Complaint or Inquiry.

GF. "Complaint" means those written matters received by the Office of the Chief Disciplinary Counsel that, either on the face thereof or upon screening or preliminary investigation, allege Professional Misconduct or attorney Disability, or both, cognizable under these rules or the Texas Disciplinary Rules of Professional Conduct.

HG. "Director" means a member of the Board of Directors of the State Bar of Texas.

IH. "Disability" means any physical, mental, or emotional condition that, with or without a substantive rule violation, results in the attorney's inability to practice law, provide client services, complete contracts of employment, or otherwise carry out his or her professional responsibilities to clients, courts, the profession, or the public.

JI. "Disciplinary Action" means a proceeding brought by or against an attorney in a district court~~before an evidentiary panel of a Committee~~ or any judicial proceeding covered by these rules other than an Evidentiary Hearing ~~covered by these rules~~.

KJ. "Disciplinary Petition" means a pleading that satisfies the requirements of ~~Section~~ Rule 3.01.

LK. "Disciplinary Proceedings" ~~means~~ includes the processing of a Grievance, the investigation and processing of an Inquiry or Complaint, presentation of a Complaint before a Summary Disposition Panel, and the proceeding before an Evidentiary Panel ~~before a~~

Disciplinary Action.

ML. "District" means disciplinary district.

N. "Evidentiary Hearing" means an adjudicatory proceeding before a panel of a grievance committee.

O. "Evidentiary Panel" means a panel of the District Grievance Committee performing an adjudicatory function other than that of a Summary Disposition withPanel with regard to a Disciplinary Proceeding pending before the District Grievance Committee of which the Evidentiary Panel is a subcommittee.

P. "Evidentiary Petition" means a pleading that satisfies the requirements of Rule 2.17.

Q.M. "General Counsel" means the General Counsel of the State Bar of Texas and any and all of his or her assistants.

R. "Grievance" means a written statement, from whatever source, apparently intended to allege Professional Misconduct by a lawyer, or lawyer Disability, or both, received by the Office of the Chief Disciplinary Counsel.

SN. "Inquiry" means any written matter concerning attorney conduct received by the Office of the Chief Disciplinary Counsel that, even if true, does not allege Professional Misconduct or Disability.

TO. "Intentional Crime" means (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary.

UP. "Just Cause" means such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.

VQ. "Professional Misconduct" includes:

1. Acts or omissions by an attorney, individually or in concert with another person or persons, that violate one or more of the Texas Disciplinary Rules of Professional Conduct.
2. Attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct.

3. Violation of any disciplinary or disability order or judgment.

4. Failure of a Respondent to furnish information subpoenaed by a Committee, unless he or she, in good faith, asserts a privilege or other legal grounds for the failure to do so.

45. Engaging in conduct that constitutes barratry as defined by the law of this state.

56. Failure to comply with ~~Section~~ Rule 13.01 of these rules relating to notification of an attorney's cessation of practice.

67. Engaging in the practice of law either during a period of suspension or when on inactive status.

78. Conviction of a Serious Crime, or being placed on probation for a Serious Crime with or without an adjudication of guilt.

89. Conviction of an Intentional Crime, or being placed on probation for an Intentional Crime with or without an adjudication of guilt.

WR. "Reasonable Attorneys' Fees," for purposes of these rules only, means a reasonable fee for a competent private attorney, under the circumstances. Relevant factors that may be considered in determining the reasonableness of a fee include but are not limited to the following:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly~~.~~;

2. The fee customarily charged in the locality for similar legal services~~.~~;

3. The amount involved and the results obtained~~.~~;

4. The time limitations imposed by the circumstances~~.~~; and

5. The experience, reputation, and ability of the lawyer or lawyers performing the services.

XS. "Respondent" means any attorney who is the subject of a Grievance, Complaint, Disciplinary Proceeding, or Disciplinary Action.

YT. "Sanction" means any of the following:

1. Disbarment.

2. Resignation in lieu of ~~disbarment~~discipline.

3. Indefinite Disability suspension.

4. Suspension for a term certain.

5. Probation of suspension, which probation may be concurrent with the period of suspension, upon such reasonable terms as are appropriate under the circumstances.

6. Interim suspension.

7. Public reprimand.

8. Private reprimand.

The term "Sanction" may include the following additional ancillary requirements:

a. Restitution (which may include repayment to the Client Security Fund of the State Bar of any payments made by reason of Respondent's Professional Misconduct); and

b. Payment of Reasonable Attorneys' Fees and all direct expenses associated with the proceedings.

ZU. "Serious Crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

AAV. "State Bar" means the State Bar of Texas.

BB. "Summary Disposition Panel" means a panel of the Committee that determines whether a Complaint should proceed or should be dismissed based upon the absence of evidence to support a finding of Just Cause after a reasonable investigation by the Chief Disciplinary Counsel of the allegations in the Grievance.

PART II

The District Grievance Committees

2.01 Disciplinary Districts and Grievance Committee Subdistricts: The State of Texas is geographically divided into disciplinary districts that are coextensive with the districts of elected Directors of the State Bar. One or more Committee subdistricts shall be delineated by the Board within each such District. From time to time, if the Commission deems it useful for the efficient operation of the disciplinary system, it shall recommend to the Board that a redelineation be made of one or more subdistricts within a District. All Committees within a single disciplinary district have concurrent authority within the District but once a matter has been assigned to a Committee, that Committee has dominant jurisdiction, absent a transfer.

2.02 Composition of Members: Each elected Director of the State Bar shall nominate, and the President of the State Bar shall appoint, the members of the Committees within the District that coincides with the Director's district, according to rules and policies adopted from time to time by the Board. Each Committee must consist of no fewer than nine members, two-thirds of whom must be attorneys licensed to practice law in the State of Texas and in good standing, and one-third of whom must be public members All Committee panels must be composed of two-thirds attorneys and one-third public members. Each member of the Committee shall reside within or maintain his or her principal place of employment or practice within the District for which appointed. Public members may not have, other than as consumers, any financial interest, direct or indirect, in the practice of law. There may be no ex officio

members of any Committee. ~~Deliberations or discussions of the Committee on the merits of any grievance may be conducted only in the presence of the members of the Committee and the Committee's counsel.~~

2.03 Time for Appointment and Terms: All persons serving on a Committee at the time these rules become effective shall continue to serve for their then unexpired terms, subject to resignation or removal as herein provided. Nominations to Committees shall be made annually at the spring meeting of the Board; all appointments shall be made by the President no later than June 1 of each year. If any Director fails or refuses to make nominations in a timely manner, or the President fails or refuses to make appointments in a timely manner, the existing members of the Committees shall continue to hold office until the nominations and appointments are made and the successor member is qualified. One-third of each new Committee will be appointed for initial terms of one year, one-third for an initial term of two years, and one-third for an initial term of three years. Thereafter, all terms will be for a period of three years, except for appointments to fill unexpired terms, which will be for the remaining period of the unexpired term. Any member of a Committee who has served two consecutive terms, whether full or partial terms, is not eligible for reappointment until at least three years have passed since his or her last prior service. No member may serve as chair for more than two consecutive terms of one year each. All members are eligible for election to the position of chair.

2.04 Organizational Meeting of Grievance Committees: The last duly elected chair of a Committee shall call an organizational meeting of the Committee no later than July 15 of each year; shall administer the oath of office to each new member; and shall preside until the Committee has elected, by a majority vote, its new chair. Members may vote for themselves for the position of chair.

2.05 Oath of Committee Members: As soon as possible after appointment, each newly appointed member of a Committee shall take the following oath to be administered by any person authorized by law to administer oaths:

"I do solemnly swear (or affirm) that I will faithfully execute my duties as a member of the District grievance committee, as required by the Texas Rules of Disciplinary Procedure, and will, to the best of my ability, preserve, protect, and defend the Constitution and laws of the United States and of the State of Texas. I further solemnly swear (or affirm) that I will keep secret all such matters and things as shall come to my knowledge as a member of the grievance committee arising from or in connection with each Disciplinary Action and Disciplinary Proceeding, unless permitted to disclose the same in accordance with the Rules of Disciplinary Procedure, or unless ordered to do so in the course of a judicial proceeding or a proceeding before the Board of Disciplinary Appeals. I further solemnly swear (or affirm) that I have neither directly nor indirectly paid, offered, or promised to pay, contributed any money or valuable thing, or promised any public or private office to secure my appointment. So help me God."

2.06 Assignment ~~Duties of~~ Committee Members: Each member of a Committee shall act through panels assigned by the chair of the Committee for summary disposition ~~investigatory hearings~~ dockets and evidentiary hearings. Promptly after assignment, notice must be provided to the Respondent by United States certified mail, return receipt requested, of the names and addresses of the panel members assigned to each ~~grievance~~ Complaint. A member is disqualified or is subject to recusal ~~to sit~~ as a panel member for ~~either an investigatory hearing or~~

an evidentiary hearing if a district judge would, under similar circumstances, be disqualified or recused. If a member is disqualified or recused, another ~~panel~~ member shall be appointed by the Committee chair. No peremptory challenges of a Committee ~~panel~~ member are allowed. Any alleged grounds for disqualification or recusal of a panel member are conclusively waived if not brought to the attention of the panel within ten days after receipt of notification of the names and addresses of members of the panel; however, grounds for disqualification or recusal not reasonably discoverable within the ten day period may be asserted within ten days after they were discovered or in the exercise of reasonable diligence should have been discovered.

2.07 Duties of Committees: Committees shall act through panels, as assigned by the Committee chairs, to conduct ~~investigatory hearings~~ summary disposition dockets and~~or~~ evidentiary hearings. No panel may consist of more than one-half of all members of the Committee or fewer than three members. If a member of a panel is disqualified, recused or otherwise unable to serve, the chair shall appoint a replacement. Panels must be composed of two attorney members for each public member. A ~~majority constitutes a~~ quorum must include at least one public member for every two attorney members present and consists of a majority of the membership of the panel, and business shall be conducted upon majority vote of those members present, a quorum being had. In matters in which evidence is taken, no member may vote unless that member has heard or reviewed all the evidence. It shall be conclusively presumed, however, not subject to discovery or challenge in any subsequent proceeding, that every member casting a vote has heard or reviewed all the evidence. No member, attorney or public, may be appointed by the chair ~~in the same matter~~ for both the ~~investigatory panel~~ Summary Disposition docket and the Eevidentiary Ppanel pertaining to the same disciplinary matter. ~~All Committee panels must be randomly selected by the chair.~~ Any tie vote is a vote in favor of the position of the Respondent.

2.08 Expenses: Members of Committees serve without compensation but are entitled to reimbursement by the State Bar for their reasonable, actual, and necessary expenses.

2.09 Notice to Parties:

A. Every notice required by this Part to be served upon the Respondent may be served by U. S. certified mail, return receipt requested, or by any other means of service permitted by the Texas Rules of Civil Procedure to the Respondent at the Respondent's Address or to the Respondent's counsel.

B. Every notice required by this Part to be served upon the Commission may be served by U. S. certified mail, return receipt requested, or by any other means of service permitted by the Texas Rules of Civil Procedure, to the address of the Commission's counsel of record or, if none, to the address designated by the Commission.

C. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail or telephonic document transfer, three days shall be added to the prescribed period.

2.1009 Classification of Inquiries and Complaints: ~~Every written statement, from~~

whatever source, apparently intended to allege Professional Misconduct by a lawyer, shall be promptly forwarded to the Office of the Chief Disciplinary Counsel. The Chief Disciplinary Counsel shall within thirty days examine each Grievance such written statement received to determine whether it constitutes an Inquiry or a Complaint. In those instances in which the Complaint alleges a violation that involves no harm to a particular individual or entity, or with respect to which the testimony of the individual or entity is not reasonably anticipated to be necessary, upon request of that individual or entity initiating the Complaint, a restated Complaint shall be made in the name of the Bar without identification of that individual or entity and furnished to the lawyer in accordance with these rules. In such cases, the name of the individual or entity shall remain confidential. If the Grievancestatement is determined to constitute an Inquiry, the Chief Disciplinary Counsel shall notify the Complainant and Respondent of the dismissal;. The Complainant may, within thirty days from notification of the dismissal, appeal the determination to the Board of Disciplinary Appeals. If the Board of Disciplinary Appeals affirms the classification as an Inquiry, the Complainant will be so notified and may within twenty days amend the Grievance one time only by providing new or additional evidence. The Complainant may appeal a decision by the Chief Disciplinary Counsel to dismiss the amended Complaint as an Inquiry to the Board of Disciplinary Appeals. No further amendments or appeals will be accepted. who has the right to amend the statement or, within thirty days after receipt of the notice, appeal the determination to the Board of Disciplinary Appeals. Complainants may amend the statement with additional material for reconsideration one time only following dismissal by the Chief Disciplinary Counsel. In all instances where a Grievance is dismissed as an Inquiry other than where the attorney is deceased or is not licensed to practice law in the State of Texas, the Chief Disciplinary Counsel shall refer the Inquiry to a voluntary mediation and dispute resolution procedure. If the statement Grievance is determined to constitute a Complaint, the Respondent shall be provided a copy of the Complaint with notice to respond, in writing, to the allegations of the Complaint. The notice shall advise the Respondent that the Chief Disciplinary Counsel may provide appropriate information, including the Respondent's response, to law enforcement agencies as permitted by Rule 6.08. The Respondent shall by delivering the response to both the Committee Office of the Chief Disciplinary Counsel and the Complainant within thirty days after receipt of the notice. The notice shall notify the Respondent that the Chief Disciplinary Counsel may provide appropriate information, including the Respondent's response, to law enforcement agencies as permitted by Rule 6.08. The Chief Disciplinary Counsel shall then forward the statement to the Committee. The Respondent may, within thirty days after receipt of a notice to respond, appeal to the Board of Disciplinary Appeals the determination of the Chief Disciplinary Counsel that the statement constitutes a Complaint. If the Respondent perfects an appeal, the pendency of the appeal does not automatically stay the investigation and determination of Just Cause, but no evidentiary panel may be assigned while an appeal is pending on the issue of whether a statement constitutes a Complaint. All proceedings shall immediately be dismissed if the determination of the Chief Disciplinary Counsel is reversed and it is finally held that a statement does not constitute a Complaint.

2.110 VenuePlace of Forum: Venue of District Grievance Committee proceedings shall be in accordance with the following:

A. Investigatory Summary Disposition Panel Proceedings. Proceedings of an investigatory Summary Disposition Ppanel of a Committee shall be conducted by a Committee Panel for the county where the alleged Professional Misconduct occurred, in whole or in part. If

the acts or omissions complained of occurred wholly outside the State of Texas, proceedings shall be conducted by a Panel for the county of Respondent's residence and, if Respondent has no residence in Texas, by a Panel for Travis County, Texas. ~~Any motion by Respondent to transfer, based upon facts existing at the time the Respondent receives the notice to respond to the Complaint, must be filed within twenty days after Respondent's receipt of notice to respond. Otherwise, Respondent's right to seek transfer based upon such facts is waived. Any motion to transfer by Complainant must be made within ten days after receipt of the notice from the Chief Disciplinary Counsel that the statement has been classified as a Complaint, or Complainant's right to seek transfer is waived. Dismissal of a previous complaint by the Chief Disciplinary Counsel or Committee shall not be grounds for requesting transfer to a different region.~~

B. Evidentiary Panel Proceedings. ~~If the investigatory panel finds Just Cause and is unable to negotiate a Sanction acceptable to it and to the Respondent, or if there is no sufficient Sanction available to the investigatory panel, the matter shall be transferred to a Committee for the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, to the county of Respondent's residence; or if the Respondent maintain a residence within the State of Texas, then to the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, disciplinary actions must take place in Travis County, Texas.~~ In an Evidentiary Panel proceeding, venue shall be in the county of Respondent's principal place of practice; or if the Respondent does not maintain a place of practice within the State of Texas, in the county of Respondent's residence; or if the Respondent maintains neither a residence nor a place of practice within the State of Texas, then in the county where the alleged Professional Misconduct occurred, in whole or in part. In all other instances, venue is in Travis County, Texas.

2.12~~1~~ Investigation and Determination of Just Cause: No more than ~~thirty~~ sixty days after ~~receiving~~ the date by which the Respondent's must file a written response to the Complaint as set forth in Rule 2.10, the Chief Disciplinary Counsel ~~chair of the Committee having jurisdiction~~ shall ~~promptly convene an investigatory panel to~~ investigate the Complaint and determine whether there is Just Cause. ~~Respondent and Complainant shall each be invited to appear before the investigatory panel but the inability or failure to so appear does not abate or preclude further proceedings. No motion for continuance, resetting, or agreed pass may be granted unless required by the interest of justice. The investigatory panel may receive such evidence as the panel in its discretion finds appropriate for purposes of determining Just Cause. The hearings, deliberations, voting, and discussions of an investigatory panel are strictly confidential and are not subject to discovery or production. Complainant, Counsel, and Respondent each have the right to cause the testimony to be recorded, at the requesting party's expense, provided that all records and transcripts remain in the custody of the Committee and may be released only for use in disciplinary matters or appeals therefrom.~~

2.13~~2~~ ~~Disposition Upon a Failure to Find Just Cause~~Summary Disposition Setting: ~~If no member of the investigatory panel votes in favor of a finding of Just Cause, the panel shall forthwith dismiss the Complaint and so advise the Complainant, the Respondent, and the Chief Disciplinary Counsel. If any member of the first assigned investigatory panel votes to find that Just Cause exists, the Complainant may submit his or her Complaint to a second investigatory panel of the same Committee, which shall make a de novo determination of whether Just Cause exists. If a majority of the second investigatory panel fails to find that Just Cause exists, it shall forthwith dismiss the Complaint and so advise the Complainant, the~~

~~Respondent, and the Chief Disciplinary Counsel. Such a dismissal is without prejudice to the Complainant, who may, within thirty days from receipt of notice of dismissal, refile his or her Complaint with additional evidence not previously presented.~~ Upon investigation, if the Chief Disciplinary Counsel determines that Just Cause does not exist to proceed on the Complaint, the Chief Disciplinary Counsel shall place the Complaint on a Summary Disposition Panel docket. At the Summary Disposition Panel docket, the Chief Disciplinary Counsel will present the Complaint together with any information, documents, evidence, and argument deemed necessary and appropriate by the Chief Disciplinary Counsel, without the presence of the Complainant or Respondent. The Summary Disposition Panel shall determine whether the Complaint should be dismissed or should proceed. If the Summary Disposition Panel dismisses the Complaint, both the Complainant and Respondent will be so notified. There is no appeal from a determination by the Summary Disposition Panel that the Complaint should be dismissed or should proceed. All Complaints presented to the Summary Disposition Panel and not dismissed shall be placed on the Hearing Docket. The fact that a Complaint was placed on the Summary Disposition Panel Docket and not dismissed is wholly inadmissible for any purpose in the instant or any subsequent Disciplinary Proceeding or Disciplinary Action. Files of dismissed Disciplinary Proceedings will be retained for one hundred eighty days, after which time the files may be destroyed ~~unless the Complainant refiles the Complaint within the permitted time~~. No permanent record will be kept of Complaints dismissed except to the extent necessary for statistical reporting purposes. In all instances where a Complaint is dismissed by a Summary Disposition Panel other than where the attorney is deceased or is not licensed to practice law in the State of Texas, the Chief Disciplinary Counsel shall refer the Inquiry to a voluntary mediation and dispute resolution procedure.

2.14~~3~~ ~~Disposition~~ Proceeding Upon a ~~Finding~~ Determination of Just Cause: ~~Should an investigatory panel find Just Cause, it may, with the consent of Respondent, impose any Sanction available under these rules except disbarment. It may also, with or without Sanctions, impose a referral for rehabilitation with the consent of Respondent. If a negotiated result is reached, or if the investigatory panel wishes to offer an agreed result to the respondent, its terms shall be embodied in a written judgment which shall contain the findings, conclusions, Sanctions, or referral for rehabilitation agreed upon. Such judgment shall promptly be delivered to Respondent and Respondent shall have 20 days from receipt of such judgment to sign and return it to the Chief Disciplinary Counsel. If the Chief Disciplinary Counsel has not received the judgment signed by the Respondent 20 days after the Respondent received it, the matter shall proceed as if no negotiated result had been reached. If the investigatory panel is unable to negotiate a Sanction with the Respondent, it shall so notify the Complainant and the Respondent by U.S. certified mail, return receipt requested, and the matter will proceed. Such notice must include the following statement: "Further proceedings shall be conducted before an evidentiary panel of a District Grievance Committee, in accordance with the Texas Rules of Disciplinary Procedure, unless you timely elect, in accordance with Section 14 thereof, to have the Complaint heard in a district court of proper venue, with or without a jury, instead of by an evidentiary panel of the District Grievance Committee." The procedure for making such an election is as provided in Section 2.14.~~ All rights characteristically reposed in a client by the common law of this State as to every Complaint not dismissed by the Summary Disposition Panel are vested in the Commission.

A. Client of Chief Disciplinary Counsel: The Commission is the client of the Chief Disciplinary Counsel for every Complaint not dismissed by the Summary Disposition Panel.

B. Interim Suspension: In any instance in which the Chief Disciplinary Counsel reasonably believes based upon investigation of the Complaint that the Respondent poses a substantial threat of irreparable harm to clients or prospective clients, the Chief Disciplinary Counsel may seek and obtain authority from the Commission to pursue interim suspension of the Respondent's license in accordance with Part XIV of these rules.

C. Disability: In any instance in which the Chief Disciplinary Counsel reasonably believes based upon investigation of the Complaint that the Respondent is suffering from a Disability to such an extent that either (a) the Respondent's continued practice of law poses a substantial threat of irreparable harm to client or prospective clients; or (b) the Respondent is so impaired as to be unable to meaningfully participate in the preparation of a defense, the Chief Disciplinary Counsel shall seek and obtain client authority to refer the Complaint to the Board of Disciplinary Appeals pursuant to Part XII of these rules.

D. Notification of Complaint: For each Complaint not dismissed by a Summary Disposition Panel, the Chief Disciplinary Counsel shall give the Respondent written notice of the acts and/or omissions engaged in by the Respondent and of the Texas Disciplinary Rules of Professional Conduct that the Chief Disciplinary Counsel contends are violated by the alleged acts and/or omissions. Such notice shall be given by certified mail, return receipt requested, sent to the Respondent at the Address.

2.154 ~~Optional Trial De Novo~~Election: A~~If a~~ Respondent ~~is~~ given written notice of the allegations and rule violations complained of~~notified~~, in accordance with ~~Section~~ Rule 2.143, shall notify the Chief Disciplinary Counsel whether the Respondent seeks ~~of a finding of Just Cause and an inability to negotiate a Sanction, he or she may elect~~ to have the Complaint heard in a district court of proper venue, with or without a jury, ~~instead of~~ or by an Eevidentiary Ppanel of the Committee. The election must be in writing and served upon the Chief Disciplinary Counsel no later than ~~fifteen~~ twenty days after the Respondent's receipt of written notification pursuant to ~~Section~~ Rule 2.143. If the Respondent timely elects to have the Complaint heard in a district court~~files such an election~~, the matter will proceed in accordance with Part III hereof. If the Respondent timely elects to have the Complaint heard by an Evidentiary Panel, the matter will proceed in accordance with Rules 2.17 and 2.18. A Respondent's failure to timely file an election shall conclusively be deemed as an affirmative election to proceed in accordance with ~~Section~~ Rules 2.17 and 2.186.

2.165 Confidentiality: ~~All information, proceedings, hearing transcripts, statements, and any other information coming to the attention of the investigatory panel of the Committee must remain confidential and may not be disclosed to any person or entity (except the Chief Disciplinary Counsel) unless disclosure is ordered by the court. If there is a finding of Just Cause and any Sanction other than a private reprimand (which may include restitution and payment of Attorneys' Fees) imposed by agreement of the Respondent, all of the information, proceedings, hearing transcripts, documents, statements, and other information coming to the attention of the investigatory panel shall be, upon proper request, made public. Notwithstanding anything herein to the contrary, any action taken by a Committee to refer a matter to the Board of Disciplinary Appeals for attorney Disability screening and determination must remain confidential.~~

A. Disciplinary Proceedings are strictly confidential and not subject to disclosure, except by court order or as otherwise provided in this Rule 2.16.

B. The pendency, subject matter and status of a Disciplinary Proceeding may be disclosed by Complainant, Respondent or Chief Disciplinary Counsel if the Respondent has waived confidentiality or the Disciplinary Proceeding is based upon a conviction for a serious crime.

C. While Disciplinary Proceedings are confidential, facts and evidence that are discoverable elsewhere are not made confidential merely because they are discussed or introduced in the course of a disciplinary proceeding.

D. The deliberations and voting of an Evidentiary Panel are strictly confidential and not subject to discovery. No person is competent to testify as to such deliberations and voting.

E. If the Evidentiary Panel finds that professional misconduct has occurred and imposes any sanction other than a private reprimand, all information, documents, statements and other information coming to the attention of the Evidentiary Panel shall be, upon request, made public. However, the Chief Disciplinary Counsel may not disclose work product or privileged attorney-client communications without the consent of the client.

2.176 Evidentiary Hearings: Within fifteen days of the earlier of the date of Chief Disciplinary Counsel's receipt of Respondent's election or the day following the expiration of Respondent's right to elect, ~~If the investigatory panel of the Committee finds Just Cause and if the Respondent fails to elect to have the Complaint tried in the district court, the matter may be transferred, if necessary, in accordance with the venue provisions of these rules. T~~the chair of ~~a~~the Committee having proper venue ~~to which the matter is transferred~~ shall appoint an Eevidentiary Ppanel to hear the Complaint~~conduct an evidentiary hearing, to make findings of fact and conclusions of law, and either to dismiss the Complaint or to impose Sanctions~~. The Eevidentiary Ppanel may not include any person who served on ~~a~~the Summary Disposition Docket~~investigatory~~ panel that heard the Complaint and must have at least three members but must have no more than one-half as many members as on the Committee. Each Eevidentiary Ppanel must have a ratio of two ~~lawyers~~ attorney members for every public member. Proceedings before an Eevidentiary Ppanel of the Committee include:

A. Evidentiary Petition and Service: ~~Service upon the Respondent of a written statement of the specific charge or charges against the Respondent, together with a copy of the Complaint. The charge shall be formulated by the evidentiary panel on the basis of the findings of the investigatory panel~~. Not more than sixty days from the earlier of receipt of Respondent's election or Respondent's deadline to elect to proceed before an Evidentiary Panel, the Chief Disciplinary Counsel shall file with the Evidentiary Panel an Evidentiary Petition in the name of the Commission. The Evidentiary Petition shall be served upon the Respondent in accordance with Rule 2.09 and must contain: ~~The notification shall be given by the Chief Disciplinary Counsel and shall be served by U.S. certified mail, return receipt requested, upon the Respondent or upon his or her attorney, if an attorney has entered an appearance before the Committee on behalf of the Respondent, or by any other means of service permitted by the Texas Rules of Civil Procedure. At the time of service upon the Respondent, the Chief Disciplinary Counsel shall also file with the Committee and serve upon the Respondent a proposed hearing order containing~~

at least the following:

1. A list, including names, addresses, and telephone numbers of all witnesses expected to be called to testify before the panel in person or by deposition.

2. A written summary of the issues of fact expected to be contested.

3. A list of exhibits expected to be presented to the panel at the hearing.

4. Written summaries of the testimony expected to be elicited from each witness.

5. The estimated length of time for presenting the entire case to the panel.

1. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.

2. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.

3. Allegations necessary to establish proper venue.

4. 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 made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.

5. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.

6. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.

7. Any other matter that is required or may be permitted by law or by these rules.

B. Answer: A responsive pleading either admitting or denying each specific charge allegation of Professional Misconduct must be filed by or on behalf of the Respondent within twenty days no later than 5:00 p.m. on the first Monday following the expiration of twenty days after the date of service of the Evidentiary Petitionnotification of the specific charge or charges against the Respondent. At the time of filing the responsive pleading, Respondent shall also file a proposed hearing order containing any modifications that the Respondent desires to make to the proposed hearing order filed by the Chief Disciplinary Counsel. Any failure to file such a responsive pleading and proposed hearing order within the time permitted constitutes a default, and all facts alleged in the charging document shall be taken as true for the purposes of the Disciplinary Action unless:

(i) within seven days after receipt of notice of such default, Respondent files a verified motion reflecting good cause for failing to timely file a responsive pleading and proposed hearing order and files, subject to leave being granted, a responsive pleading and proposed hearing order; and

(ii) the evidentiary panel finds that good cause exists for Respondent's failure to have timely filed a responsive pleading and proposed hearing order.

C. Default: A failure to file an answer within the time permitted constitutes a default, and all facts alleged in the Evidentiary Petition shall be taken as true for the purposes of the Disciplinary Proceeding. Upon a showing of default, the Evidentiary Panel shall enter an order of default with a finding of Professional Misconduct and shall conduct a hearing to determine the Sanctions to be imposed. The final hearing order may be amended for good cause shown at the discretion of the chair, and shall control the hearing. If the final hearing order differs from the proposed hearing order filed by the Respondent, Respondent may, by filing a written request with the chair and the Chief Disciplinary Counsel within ten days after the date of actual receipt of the final hearing order, remove the case to a court of proper venue for a trial de novo under Part III.

D. Request for Disclosure: The Commission or Respondent may obtain disclosure from the other party of the information or material listed below by serving the other party, no later than thirty days before the first setting of the hearing. The responding party must serve a written response on the requesting party within thirty days after service of the request, except that a Respondent served with a request before the answer is due need not respond until fifty days after service of the request. A party who fails to make, amend, or supplement a disclosure in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the panel finds that there was good cause for the failure to timely make, amend, or supplement the disclosure response; or the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other party. No objection or assertion of work product is permitted to a request under this Rule. A party may request disclosure of any or all of the following:

1. The correct names of the parties to the Disciplinary Proceeding.
2. In general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial).
3. The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the disciplinary matter.
4. For any testifying expert, the expert's name, address, and telephone number; the subject matter on which the expert will testify, and the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them.
5. Any witness statements.

E. Limited Discovery: In addition to the Request for Disclosure, the Commission and the Respondent may conduct further discovery with the following limitations:

1. All discovery must be conducted during the discovery period, which begins when the Evidentiary Petition is filed and continues until thirty days before the date set for hearing.
2. Each party may have no more than six hours in total to examine and cross-

examine all witnesses in oral depositions.

3. Any party may serve on the other party no more than twenty-five written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.
4. Any party may serve on the other party requests for production and inspection of documents and tangible things.
5. Any party may serve on the other party requests for admission.

F. Modification of Discovery Limitations: Upon a showing of reasonable need, the Evidentiary Panel chair may modify the discovery limitations set forth in Rule 2.17E. The parties may by agreement modify the discovery limitations set forth in Rule 2.17E.

G. Discovery Dispute Resolution: Except where modified by these rules, all discovery disputes shall be ruled upon by the Evidentiary Panel chair generally in accord with the Texas Rules of Civil Procedure; provided, however, that no ruling upon a discovery dispute shall be a basis for reversal solely because it fails to strictly comply with the Texas Rules of Civil Procedure.

H~~D~~. ~~Compulsory process to compel the attendance of witnesses, enforceable by an order of a district court of proper jurisdiction, is available to the Respondent and to the Chief Disciplinary Counsel.~~ Subpoena Power: Commission or Respondent may compel the attendance of witnesses, including the Respondent, and the production of books, documents, papers, banking records, and other things by subpoena. The subpoena must notify the witness of the time, date, and place of appearance and must contain a description of the materials to be produced. Subpoenas must be in writing and signed and issued by the Evidentiary Panel chair. The party seeking the subpoena shall submit it in a proper form and is responsible for securing service. Any contest between the Commission and the Respondent about the materiality of the testimony or production sought by a subpoena shall be determined by the Evidentiary Panel chair, and is subject to review. Subpoenas must be served on witnesses personally or in accordance with Rule 21a of the Texas Rules of Civil Procedure. Proof of service shall be by certification of the server or by the return receipt. The subpoena is enforceable by the district court of the county in which the attendance or production is required. Witnesses shall be paid witness fees and mileage the same as for a district court.

I. Enforcement of Subpoenas and Examination Before a District Judge: If any witness, including the Respondent, fails or refuses to appear or to produce the things named in the subpoena, or refuses to be sworn or to affirm or to testify, the witness may be compelled to appear and produce tangible evidence and to testify at a hearing before a district judge of the county in which the subpoena was served. The application for such a hearing is to be styled "In re: Hearing Before The District _____ Grievance Committee." The court shall order a time, date, and place for the hearing and shall notify the Commission, the Respondent, and the witness. Unless the Respondent requests a public hearing, the proceedings before the court shall be closed and all records relating to the hearing shall be sealed and made available only to the Commission, the Respondent, or the witness. If the witness fails or refuses to appear, testify, or produce such tangible evidence, he or she shall be punished for civil contempt.

JE. Right to Counsel: The Respondent and the Complainant may, if they so choose, have counsel present during any evidentiary hearing.

K. Alternative Dispute Resolution: Upon motion made or otherwise, the Evidentiary Panel Chair may order the Commission and the Respondent to participate in mandatory alternative dispute resolution as provided by Chapter 154 of the Civil Practice and Remedies Code or as otherwise provided by law when deemed appropriate.

LF. Evidence: The Respondent, ~~the Complainant,~~ individually or through his or her counsel if represented, and the ~~Chief Disciplinary Counsel~~Commission, through the Chief Disciplinary Counsel, may, if they so choose, offer evidence, examine witnesses and present argument ~~confront witnesses, including the Complainant. Cross~~ Witness examination may be conducted only by the Commission, the Respondent~~, or his or her counsel, and by the Chief Disciplinary Counsel.~~, and the panel members. The inability or failure to exercise this opportunity does not abate or preclude further proceedings. The Evidentiary Panel chair shall admit all such probative and relevant evidence as he or she deems necessary for a fair and complete hearing, generally in accord with the Texas Rules of Evidence; provided, however, that admission or exclusion of evidence shall be in the discretion of the Evidentiary Panel chair and no ruling upon the evidence shall be a basis for reversal solely because it fails to strictly comply with the Texas Rules of Evidence.

~~G. In the discretion of the evidentiary panel, limited discovery is permissible upon a clear showing of good cause and substantial need. The party seeking discovery must file with the evidentiary panel a verified written request for discovery showing good cause and substantial need no later than twenty days after the filing of, or the time for the filing of, the first responsive pleading by the Respondent. If good cause and substantial need are demonstrated, the panel shall by written order permit the discovery, including in the order any limitations or deadlines on the discovery. Such discovery, if any, as may be permitted must be conducted by the methods provided by the Texas Rules of Civil Procedure in effect at the time and may, upon motion, be enforced by a district court of proper jurisdiction. A decision of an evidentiary panel on a discovery matter may be reviewed only on appeal of the entire case. No reversal of a case may be based on the granting or denial of a discovery request without a showing of material unfairness or harm.~~

~~H. The presiding member of the evidentiary panel shall admit all such probative and relevant evidence as he or she deems necessary for a fair and complete hearing, generally in accord with the Texas Rules of Civil Evidence; provided, however, that admission or exclusion of evidence shall be in the discretion of the presiding member of the evidentiary panel and no ruling upon the evidence shall be a basis for reversal solely because it fails to strictly comply with the Texas Rules of Civil Evidence.~~

MI. Burden of Proof: The burden of proof is upon the ~~Complainant and the Chief Disciplinary Counsel~~ Commission for Lawyer Discipline to prove the material allegations of the charge Evidentiary Petition by a preponderance of the evidence.

NJ. Record of the Hearing: A verbatim record of the proceedings will be made by a certified shorthand reporter in a manner prescribed by the Board of Disciplinary Appeals. In the event of an appeal from the Eevidentiary Ppanel to the Board of Disciplinary Appeals, the party

initiating the appeal shall pay the costs of preparation of the transcript. Such costs shall be taxed at the conclusion of the appeal by the Board of Disciplinary Appeals.

~~K. All proceedings before an evidentiary panel, except its deliberations, are open to the public.~~

OL. Setting: ~~A written decision by the evidentiary panel must be issued promptly after the consummation of evidence.~~ Evidentiary Panel proceedings Matters must be set for hearing with a minimum of ~~on a date not sooner than~~ forty-five days' ~~nor later than ninety days after the filing of the responsive pleading of the Respondent.~~ notice to all parties unless waived by all parties. Evidentiary Panel proceedings shall be set for hearing on the merits on a date not later than 180 days after the date the answer is filed, except for good cause shown. If the Respondent fails to answer, a hearing for default may be set at any time not less than ten days after the answer date without further notice to the Respondent ~~from the date which Respondent received his notice of default~~. No continuance may be granted unless required by the interests of justice.

PM. Decision: After conducting the Evidentiary Hearing, the Evidentiary Panel shall issue a judgment within thirty days. In any Evidentiary Panel proceeding where Professional Misconduct is found to have occurred, such judgment shall include findings of fact, conclusions of law and the Sanctions to be imposed. The Evidentiary Panel may:

1. dismiss the Disciplinary Proceeding and refer it to the voluntary mediation and dispute resolution procedure;

2. find that the Respondent suffers from a disability and forward that finding to the Board of Disciplinary Appeals for referral to a district disability committee pursuant to Part XII; or

3. find that Professional Misconduct occurred and impose Sanctions.

~~Written findings of fact, conclusions of law, and any Sanctions shall be issued by the evidentiary panel within thirty days after the conclusion of the evidentiary hearing.~~

2.1~~8~~7 Imposition of Sanctions: ~~If the evidentiary panel finds that a Sanction should be assessed against the Respondent, the written order of the evidentiary panel shall assess the Sanction.~~ The Eevidentiary Ppanel may, in its discretion, conduct a separate ~~evidentiary~~ hearing and receive evidence as to ~~on~~ the appropriate Sanctions to be imposed. ~~Private reprimand is not an available Sanction in a hearing before an evidentiary panel.~~ Indefinite Disability sanction is not an available Sanction in a hearing before an Evidentiary Panel. In determining the appropriate ~~imposing any~~ Sanctions, the Eevidentiary Ppanel shall consider:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned~~.~~;

B. The seriousness of and circumstances surrounding the Professional Misconduct~~.~~;

C. The loss or damage to clients~~.~~;

D. The damage to the profession~~.~~;

E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found.;

F. The profit to the attorney.;

G. The avoidance of repetition.;

H. The deterrent effect on others.;

I. The maintenance of respect for the legal profession.;

J. The conduct of the Respondent during the course of the Disciplinary Proceeding~~Committee action.~~;

In addition, the Respondent's disciplinary record, including any private reprimands, is admissible on the appropriate Sanction to be imposed. Respondent's Disability ~~resulting from the use of alcohol or drugs~~ may not be considered in mitigation, unless Respondent demonstrates that he or she is successfully pursuing in good faith a program of recovery or appropriate course of treatment.

2.19 Terms of Judgment: In any judgment of disbarment or suspension that is not stayed, the Evidentiary Panel shall order the Respondent to surrender his or her law license and permanent State Bar card to Chief Disciplinary Counsel for transmittal to the Clerk of the Supreme Court. In all judgments imposing disbarment or suspension, the Evidentiary Panel shall enjoin the Respondent from practicing law or from holding himself or herself out as an attorney eligible to practice law during the period of disbarment or suspension. In all judgments of disbarment, suspension, or reprimand, the Evidentiary Panel shall make all other orders as it finds appropriate, including probation of all or any portion of suspension.

2.20~~18~~ Restitution: In all cases in which the proof establishes that the Respondent's misconduct involved the misappropriation of funds and the Respondent is disbarred or suspended, the panel's judgment must require the Respondent to make restitution during the period of suspension, or before any consideration of reinstatement from disbarment, and must further provide that its judgment of suspension shall remain in effect until evidence of satisfactory restitution is made by Respondent and verified by Chief Disciplinary Counsel.

2.21~~19~~ Notice of Decision: The Complainant, the Respondent, and ~~Chief Disciplinary Counsel~~ the Commission must be notified in writing of the judgment~~decision~~ of the Eevidentiary Ppanel~~, including any Sanctions imposed~~. The~~Such~~ notice sent to the Respondent and the Commission ~~shall be mailed by U.S. certified mail, return receipt requested, to the Complainant, Respondent, and the Chief Disciplinary Counsel. The notice~~ must clearly state that any appeal of the judgment~~findings, conclusions, or Sanctions~~ must be ~~made in writing~~ filed with the Board of Disciplinary Appeals within thirty days of the date of the notice. If the Evidentiary Ppanel finds that the Respondent committed professional misconduct, a copy of the Evidentiary Petition ~~charge as defined in Section 2.16 of the Texas Rules of Disciplinary Procedure~~, and the ~~final~~ judgment shall be transmitted by the Office of the Chief Disciplinary Counsel to the Clerk of the Supreme Court. The Clerk of the Supreme Court shall make an appropriate notation on

the Respondent's permanent record.

2.22 Post Judgment Motions: Any motion for new hearing or motion to modify the judgment must comport with the provisions of the applicable Texas Rules of Civil Procedure pertaining to motions for new trial or to motions to modify judgments.

2.230 Probated Suspension - Revocation Procedure: If all or any part of a suspension from the practice of law is probated under this Part II, the Board of Disciplinary Appeals is hereby granted jurisdiction for the full term of suspension, including any probationary period, to hear a motion to revoke probation. If the Chief Disciplinary Counsel files a motion to revoke probation, it shall be set for hearing within thirty days of service of the motion upon the Respondent. Service upon the Respondent shall be sufficient if made in accordance with Rule 21a of the Texas Rules of Civil Procedure. Upon proof, by a preponderance of the evidence, of a violation of probation, the same shall be revoked and the attorney suspended from the practice of law for the full term of suspension without credit for any probationary time served. The Board of Disciplinary Appeals' Order revoking a probated suspension cannot be superseded or stayed.

2.241 Appeals by ~~Complainant,~~ Respondent~~,~~ or ~~Chief Disciplinary Counsel~~ Commission: The ~~Complainant,~~ Respondent~~,~~ or ~~Chief Disciplinary Counsel~~ Commission may appeal the judgment to the Board of Disciplinary Appeals ~~any findings, conclusions, or Sanctions imposed by an evidentiary panel~~. Such appeals must be on the record, determined under the standard of substantial evidence. Briefs may be filed as a matter of right. The time deadlines for such briefs shall be promulgated by the Board of Disciplinary Appeals. ~~The Complainant is entitled to the reasonable assistance of the Chief Disciplinary Counsel in any appeal; but the Chief Disciplinary Counsel is not obligated to assist the Complainant in matters considered by Chief Disciplinary Counsel to be without merit.~~

~~A.~~ An appeal, if taken, is perfected when a written notice of appeal is filed ~~must be commenced by the filing~~ with the Board of Disciplinary Appeals ~~of a Notice of Appeal within thirty days from Respondent's receipt of the decision of the evidentiary panel from which the appeal is made~~. The Nnotice of aAppeal must reflect the intention of the Respondent or the Commission to appeal and identify the decision from which appeal is perfected. The notice of appeal must be filed within thirty days after the date of judgment, except that the notice of appeal must be filed within ninety days after the date of judgment if any party timely files a motion for new trial or a motion to modify the judgment.

~~B.~~ 2.25 No Supersedeas: An Eevidentiary Ppanel's order of disbarment cannot be superseded or stayed. The Respondent may within thirty days from entry of judgment petition the Evidentiary Panel to stay a judgment of suspension. The Respondent carries the burden of proof by preponderance of the evidence to establish by competent evidence ~~An order of suspension must be stayed during the pendency of any appeals therefrom if the evidentiary panel finds, upon competent 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. An order of suspension must be stayed during the pendency of any appeals therefrom if the Evidentiary Panel finds that the Respondent has met that burden of proof. An Eevidentiary Ppanel may condition its stay upon reasonable terms, which may include, but are not limited to, the cessation of any practice found to constitute Professional Misconduct, or it may impose a requirement of an affirmative act such as an audit of a Respondent's client trust account.

2.26 Disposition on Appeal: The Board of Disciplinary Appeals may, in any appeal of the judgment of an Evidentiary Panel within its jurisdiction:

A. Affirm the decision of the Evidentiary Panel, in whole or in part;

B. Modify the Evidentiary Panel's judgment and affirm it as modified;

C. Reverse the decision of the Evidentiary Panel, in whole or in part, and render the judgment that the Evidentiary Panel should have rendered;

D. Reverse the Evidentiary Panel's judgment and remand the Disciplinary Proceeding for further proceeding by either the Evidentiary Panel or a statewide grievance committee panel composed of members selected from state bar districts other than the district from which the appeal was taken;

E. Vacate the Evidentiary Panel's judgment and dismiss the case; or

F. Dismiss the appeal.

2.27 Remand to Statewide Grievance Committee Panel: In determining whether a remand is heard by a statewide grievance committee panel, the Board of Disciplinary Appeals must find that good cause was shown in the record on appeal. The Board of Disciplinary Appeals shall randomly select the members of the statewide grievance committee panel from grievance committees other than the district from which the appeal was taken. Six such members shall be selected, four of whom are attorneys and two of whom are public members. The statewide grievance committee panel, once selected, shall have all duties and responsibilities of the Evidentiary Panel for purposes of the remand.

2.28 Appeal to Supreme Court of Texas: An appeal from the decision of the Board of Disciplinary Appeals on an Evidentiary Proceeding is to the Supreme Court of Texas in accordance with Rule 7.11.

PART III

Trial ~~De Novo~~ in the District Court

3.01 Disciplinary Petition: If the Respondent timely elects to have the Complaint heard by a district court, with or without a jury, ~~files an election for trial de novo~~ in accordance with Section Rule 2.154, the Chief Disciplinary Counsel shall file not more than sixty days after receipt of Respondent's election to proceed in district court a Disciplinary Petition in the name of the Commission with the Clerk of the Supreme Court of Texas. The petition must contain:

A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.

B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.