NO. 56406

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

CHARLES J. SEBESTA, JR.,

APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,

APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 08-2
No. 201400539

BRIEF OF APPELLEE
COMMISSION FOR LAWYER DISCIPLINE
(ORAL ARGUMENT REQUESTED)

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BRIEF OF APPELLEE
COMMISSION FOR LAWYER DISCIPLINE

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

Appellee, the Commission for Lawyer Discipline, submits this brief in response to the brief filed by Appellant, Charles J. Sebesta, Jr. For clarity, this brief refers to Appellant as "Sebesta" and Appellee as "the Commission." References to the record are labeled CR (clerk's record), RR (reporter's record),

and App. (appendix to brief). References to rules refer to the Texas Rules of Disciplinary Procedure[1] unless otherwise indicated.

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

STATEMENT OF THE CASE

Type of Proceeding:	Attorney Discipline
Petitioner/Appellee:	The Commission for Lawyer Discipline
Respondent/Appellant:	Charles J. Sebesta, Jr.
Evidentiary Panel:	08-2
Judgment:	Judgment of Disbarment (The appeal is limited to the denial of Appellant's pretrial motion to dismiss based on *res judicata* and quasi-estoppel.)
Violations found (Texas Disciplinary Rules of Professional Conduct):	**Rule 3.03(a)(1):** (a) A lawyer shall not knowingly make a false statement of material fact or law to a tribunal. **Rule 3.03(a)(5):** A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false. **Rule 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. **Rule 8.04(a)(1):** A lawyer shall not violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship. **Rule 8.04(a)(3):** A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

STATEMENT OF THE ISSUES

Did the evidentiary panel correctly determine that if a Wrongfully Imprisoned Person files a complaint based on prosecutorial misconduct within four years after his release from prison under Rule 15.06(C), the doctrines of *res judicata* and quasi-estoppel are not implicated by the prior dismissal, under Rule 15.06(A), of a complaint filed by another person that never made it past the preliminary screening phase of the disciplinary process?

STATEMENT OF FACTS

In 1994, Burleson County District Attorney Charles Sebesta prosecuted Anthony Graves for capital murder (CR 77-121 (Ex. A-1)). The prosecution resulted in a death sentence (CR 77-121 (Ex. A-1)).

Graves appealed his conviction (CR 77-121 (Ex. A-1)). His appeals continued until March 2006 when the U.S. Court of Appeals for the Fifth Circuit granted his writ of habeas corpus based on Sebesta's suppression of exculpatory evidence and his deliberate presentation of false and misleading testimony at Graves' murder trial (CR 77-121 (Ex. A-1)). Despite the grant of habeas relief, Graves remained incarcerated until 2010 because Burleson County resolved to try him again (CR 176-260 (Ex. B-1)).

<u>The 2007 Complaint.</u>

In February 2007, while Graves was still incarcerated, attorney Robert Bennett filed a grievance against Sebesta alleging that he violated the disciplinary rules by failing to disclose evidence that tended to negate Graves' guilt, deliberately eliciting false testimony from prosecution witnesses, and threatening Graves' alibi witness with prosecution when no arguable basis for her prosecution existed (CR 77-121 (Ex. A-1)).

CDC examined the grievance and determined on February 22, 2007, that it constituted an "inquiry" (CR 123-24 (Ex. A-2)).[2] The basis for CDC's determination was that limitations barred disciplinary action against Sebesta (CR 917-19 Ex. A; App. 2).[3] Bennett appealed CDC's dismissal of the grievance to the Board, which sustained the appeal and reclassified the grievance as a "complaint" rather than an "inquiry"[4] (CR 128 (Ex. A-4)). CDC notified Sebesta of the reclassification and requested that he provide a response to the complaint (CR 130-31 (Ex. A-5)).

Sebesta responded on March 29, 2007 (CR 133-59 (Ex. A-6)). CDC subsequently determined that the complaint should be dismissed because, due to limitations, there was no just cause to believe that the case should proceed into litigation (CR 917-19 (Ex. A); App. 2). As mandated by the disciplinary rules, CDC sought approval for its dismissal recommendation from a summary disposition panel of a district grievance committee from the county where the alleged misconduct occurred (CR 161-64 (Ex. A-7, A-8)). CDC presented its

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[2] An "inquiry" is a grievance that alleges conduct which, even if true, does not constitute professional misconduct under the disciplinary rules. TEX. RULES DISCIPLINARY P. R. 1.06(S).

[3] The Fifth Circuit's opinion stated that Graves' attorneys appeared to have learned of exculpatory statements by the state's star witness when they deposed him in 1998 (CR Ex. A-1). Thus, CDC concluded that the 2007 grievance was filed well beyond the four-year limitations deadline (CR Ex. A-1).

[4] A "complaint" alleges conduct which does constitute professional misconduct under the disciplinary rules. TEX. RULES DISCIPLINARY P. R. 1.06(G).

recommendation to the summary disposition panel in proceedings that were confidential pursuant to statute and that neither Bennett nor Sebesta was allowed to attend.

The summary disposition panel approved CDC's dismissal recommendation (CR 164 (Ex. A-8)). Thus, the complaint did not proceed into litigation (CR 164 (Ex. A-8)). CDC notified Sebesta of the no-action decision on August 16, 2007 (CR 164 (Ex. A-8)).

The 2014 Complaint.

In 2014, Graves submitted a new grievance against Sebesta (CR 176-260 (Ex. B-1)). At that point, Graves had been released from prison based on the conclusion of Special Prosecutor Kelly Siegler that no inculpatory evidence supported the state's case against Graves (CR 176-260 (Ex. B-1)). His grievance followed the enactment of the Michael Morton Act and the amendment of Rule 15.06, which changed the limitations provision for disciplinary actions involving prosecutorial misconduct so that exonerated defendants would have the ability to file grievances after their release from incarceration. TEX. R. DISCIPLINARY P. R. 15.06 (App. 3, 4). CDC upgraded the 2014 grievance to "complaint" status (CR 513-17 (B-6)).

Sebesta responded to the 2014 complaint on April 21, 2014 (CR 262-432 (B-2)). On June 2, 2014, CDC notified Sebesta that it had found just cause to proceed to litigation (CR 513-17 (B-6)).

Sebesta elected to have the complaint heard by an evidentiary panel (CR 9). A grievance committee chair assigned an evidentiary panel in the county of proper venue (Sebesta's principal place of practice), and the Commission filed an evidentiary petition with the assigned panel on August 22, 2014 (CR 26-32). The evidentiary petition alleged that Sebesta's actions in connection with the Graves prosecution violated eight separate provisions of the disciplinary rules (CR 26-32).

On September17, 2014, Sebesta filed a motion with the evidentiary panel arguing that the Commission's claims should be dismissed as a matter of law based on the doctrines of *res judicata*, quasi-estoppel, and equitable estoppel (CR 51-528). Sebesta's motion included 20 exhibits (CR 51-528). In the motion, he argued that despite CDC's representations that it dismissed the 2007 complaint based on limitations, evidence supported Sebesta's conclusion that CDC actually dismissed the complaint because it examined the merits of the allegations of misconduct and determined that they were unsupportable (CR 51-69). He also argued that the Commission should be estopped from asserting a position "contrary to the one it took in 2007" (CR 51-69).

The Commission responded to Sebesta's motion on November 5, 2014, and provided two additional exhibits (CR 905-25). The exhibits included an affidavit from Chief Disciplinary Counsel Linda Acevedo, who had assisted with the analysis of the 2007 complaint against Sebesta (CR 917-19; App. 2). Her affidavit unequivocally confirmed that limitations was the basis for the dismissal of the complaint (CR 917-19; App. 2).

The evidentiary panel heard Sebesta's motion on November 12, 2014, and denied it on December 17, 2014 (CR 1014). The case then proceeded to a full evidentiary hearing on the merits that began on May 11, 2015, and ended on May 14, 2015 (CR 1421). On June 11, 2015, the Panel Chair entered a judgment of disbarment finding that:

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

- 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.

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

- 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.

- 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).

- 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).

- 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).

- 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).

- 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' attorney was in violation of Rule 3.09(d).

- 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).

- 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.

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

(CR 1444-46).

Sebesta filed the instant appeal on July 9, 2015 (CR 1452-53; App. 1).

Summary of the Argument

In 2013, the Texas legislature decided that every person who has been wrongfully imprisoned due to prosecutorial misconduct should have an opportunity to file a grievance within four years of the person's release. The corresponding change to the disciplinary rules allowed Graves, who was released in 2010, to file a grievance against Sebesta in 2014. The grievance that Graves filed ultimately resulted in Sebesta's disbarment after a vigorously contested four-day hearing.

Sebesta now urges the Board to reverse his disbarment based on two affirmative defenses that he raised in a pretrial motion – *res judicata* and quasi-estoppel. Neither doctrine applies.

Sebesta first argues that the evidentiary panel should have dismissed this disciplinary action because *res judicata* barred the Commission from relitigating a prior complaint that was filed by another person and resulted in dismissal. However, CDC never litigated the prior complaint, so there cannot have been any *re*litigation. CDC dismissed the prior complaint based on limitations before it reached the point in the disciplinary process that allows for litigation to take place. Thus, there was no final judgment on the merits. For *res judicata* to apply, there must be (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or their privies, and (3) a second action based on the same claims that were raised or could have been raised in the first action.

In an attempt to show that the prior complaint resulted in a final judgment, Sebesta presented the evidentiary panel with a form letter from a CDC staff attorney announcing CDC's decision that no action would be taken on the prior complaint because no just cause supported it. Sebesta argued that the no-just-cause decision constituted a "final judgment on the merits" because a summary disposition panel approved CDC's dismissal recommendation. Sebesta's argument overlooks the utter lack of authority for a summary disposition panel to adjudicate a complaint. It also overlooks the prohibition against the attendance of the complainant or respondent at summary disposition proceedings, which forecloses any argument that the proceedings are adversarial in nature.

Sebesta's arguments regarding quasi-estoppel also have no merit. Quasi-estoppel prohibits a party from accepting the benefits of a transaction and subsequently taking an inconsistent position to avoid corresponding obligations or effects. Nothing in the record supports Sebesta's contention that the doctrine is applicable here.

Because neither *res judicata* nor quasi-estoppel applies under the circumstances of this case, the evidentiary panel correctly denied Sebesta's pretrial motion to dismiss. Thus, his appeal presents no basis for reversal, and the Board should affirm the judgment of disbarment.

ARGUMENT AND AUTHORITIES

I. Standard of review.

The Board determines appeals under the standard of substantial evidence. TEX. RULES DISCIPLINARY P. R. 2.24. Thus, the Board reviews questions of law *de novo* but reviews questions of fact under a deferential standard that focuses on whether any reasonable basis supports the evidentiary panel's factual determinations. In this case, some facts are disputed, including the factual basis for the dismissal of the 2007 complaint.

This appeal focuses on the evidentiary panel's denial of a pretrial motion to dismiss based on affirmative defenses. A trial court may grant a motion to dismiss based on an affirmative defense only if the moving party conclusively proves all elements of the defense as a matter of law. *See, e.g., KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999) (discussing the standard of review for a summary judgment based on an affirmative defense). A reviewing court must take the nonmovant's evidence as true and indulge all reasonable inferences in the nonmovant's favor. *Id.*

II. Cases of attorney discipline involve two distinct phases – (1) an administrative screening phase at the agency level and (2) a litigation phase before a tribunal.

Before a complaint alleging attorney misconduct may proceed to litigation, it must first go through an administrative screening process to determine if there is

sufficient cause to believe that litigation could result in a sanction. This case focuses on actions taken during the pre-litigation stage of the disciplinary process.

The Texas Rules of Disciplinary Procedure govern the administrative screening phase. *See generally* TEX. RULES DISCIPLINARY P. R. 2.10-2.15 (setting forth the process for screening grievances). The disciplinary rules have the same force and effect as statutes. *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988).

A. During the administrative screening phase, the Office of the Chief Disciplinary Counsel (CDC) determines whether there is sufficient cause to proceed with litigation.

The disciplinary process begins with the filing of a grievance against an attorney.[5] TEX. RULES DISCIPLINARY P. R. 2.10. Within thirty days after a grievance is filed, CDC makes a threshold screening decision known as "classification" and categorizes the grievance as either an "inquiry" or a "complaint." TEX. RULES DISCIPLINARY P. R. 2.10, 1.06(G), 1.06(S).

If CDC classifies a grievance as an inquiry, the complainant may appeal the classification to the Board. TEX. RULES DISCIPLINARY P. R. 2.10. As in this case, the Board may determine that the grievance be reclassified as a complaint. *Id.* Once a grievance is classified or reclassified as a complaint, CDC sends a copy to

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[5] "'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 Chief Disciplinary Counsel." TEX. RULES DISCIPLINARY P. R. 1.06(R).

the respondent attorney with notice for the attorney to provide a written response to the complainant's allegations within thirty days. *Id.*

Within 60 days after the deadline for the attorney's response, CDC must investigate the complaint and determine whether there is "just cause" to proceed. TEX. RULES DISCIPLINARY P. R. 2.12. "Just cause" is defined as:

> 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.

TEX. RULES DISCIPLINARY P. R. 1.06 (emphasis added).

The disciplinary rules do not provide for the subpoena of documents or other methods of discovery during the just-cause phase. TEX. RULES DISCIPLINARY P. R. 2.12. The just-cause phase simply allows for a preliminary determination that is intended to weed out complaints which appear to provide no basis for disciplinary action. Discovery does not take place until the litigation phase after just cause is found and the Commission files a disciplinary petition with a tribunal. TEX. RULES DISCIPLINARY P. R. 2.17E, 3.05.

If CDC determines that there is no just cause, it places the complaint on a dismissal docket for presentation to a summary disposition panel of a grievance committee from the county where the alleged misconduct occurred. TEX. RULES DISCIPLINARY P. R. 2.11, 2.13. The proceedings are not adversarial in nature, and

neither the respondent attorney nor the complainant may attend. TEX. RULES DISCIPLINARY P. R. 2.13; TEX. GOV'T CODE ANN. § 81.075 (West 2015).

A summary disposition panel may vote to proceed despite CDC's determination that just cause does not exist, or the panel may approve CDC's dismissal recommendation. *Id.* In either case, the panel's decision cannot be appealed. *Id.* And as in this case, the summary disposition panel does not issue an order or judgment of any kind. CDC notifies the respondent and complainant of the decision by letter.

B. No adjudication takes place until after just cause is found and the complaint moves to the litigation phase.

When CDC determines that just cause exists or a summary disposition panel declines to approve CDC's dismissal recommendation, CDC must provide the respondent attorney with written notice of the allegations of misconduct. TEX. RULES DISCIPLINARY P. R. 2.14(D). The attorney then has the option to elect to have the matter heard by a district court or by an evidentiary panel of a grievance committee. TEX. RULES DISCIPLINARY P. R. 2.15.

If the attorney chooses the administrative process, or fails to elect, litigation of the case begins when the Commission files an evidentiary petition with an evidentiary panel, which then adjudicates the complaint and renders judgment.

TEX. RULES DISCIPLINARY P. R. 2.17(A).[6] Venue usually lies in the county of the attorney's principal place of practice. TEX. RULES DISCIPLINARY P. R. 2.11(B). Either party may appeal the evidentiary panel's judgment to the Board. TEX. RULES DISCIPLINARY P. R. 2.24. And the Board's decision may be appealed to the Texas Supreme Court. TEX. RULES DISCIPLINARY P. R. 7.11.

If a respondent attorney chooses to proceed in district court, CDC files a disciplinary petition with the Texas Supreme Court, which appoints an active district judge to preside over the case and then forwards the matter to a district court of proper venue, where the case generally proceeds as in any other civil case. TEX. RULES DISCIPLINARY P. R. 3.02, 3.03, 3.08(B). The district court's judgment may be appealed "as in civil cases generally." TEX. RULES DISCIPLINARY P. R. 3.16.

In short, before the Commission actually initiates litigation by filing a petition with either a district court or an evidentiary panel, no adjudication takes place. The pre-litigation phase includes only the administrative screening of the allegations of misconduct and a preliminary investigation to determine whether any allegation appears to provide a potential basis for a sanction.[7] Although CDC must get the approval of a summary disposition panel before dismissing a

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[6] The Commission officially becomes a party to a disciplinary proceeding when just cause is found. TEX. RULES DISCIPLINARY P. R. 2.14(A), 2.17(A), 4.06(A).

[7] CDC has no subpoena power or other means of compelling the complainant, the respondent, or any witness to provide information during the pre-litigation phase.

complaint prior to the litigation phase, the summary disposition panel only has authority to approve or reject CDC's dismissal recommendation. TEX. GOV'T CODE ANN. § 81.075 (West 2015). It cannot adjudicate allegations of misconduct. *Id.* Adjudication does not begin unless and until just cause is found and the complaint proceeds to the litigation phase, at which point both parties, for the first time, are given the opportunity to conduct discovery, issue subpoenas for evidence, and obtain a determination on the merits.

III. Because there is no adjudication in the administrative screening phase, *res judicata* cannot bar a subsequent disciplinary action for allegations that never made it past screening.

The doctrine of *res judicata* is not nearly as broad as Sebesta argues. It provides that a final judgment in an action bars the parties and their privies from bringing a second action on the matters actually litigated, as well as causes that arise out of the same subject matter and could have been litigated, in the first suit. *State and County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696 (Tex. 2001) (per curiam). A party seeking to assert *res judicata* as a bar to subsequent litigation must show a final judgment on the merits resulting from a prior adjudication or opportunity for adjudication by the parties or their privies. *Id.*; *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 799-800 (Tex. 1992).

A. *Res judicata* has limited applicability in the administrative context.

Res judicata may apply to an administrative decision but only to the extent that prior administrative proceedings actually adjudicated or provided an opportunity to adjudicate the claims at issue. "Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 504 U.S. 104 (1991). If administrative proceedings did not include a final adjudication, *res judicata* cannot apply. *See Tex. State Bd. Of Dental Exam'rs v. Brown*, 281 S.W.3d 692, 708 (Tex.App.—Corpus Christi 2009, pet. denied) (holding that *res judicata* did not apply because a prior agreed settlement order resulted from proceedings in the nature of mediation rather than adjudication, the merits of the claims were not reached, and the second action did not involve a claim that was or could have been finally litigated in the first action).

The Texas Supreme Court has explicitly recognized that *res judicata* has limited applicability in the administrative context and cannot be applied to every action and inaction by an administrative agency. *Coalition of Cities for Affordable Util. Rates v. Public Util. Comm'n of Tex.*, 798 S.W.2d 560 n. 5 (Tex. 1990). The agency must have acted in an adjudicative capacity and resolved disputed issues of fact properly before it that the parties had an opportunity to litigate:

> [In this case,] every fact involved is historical; the amount and wisdom of these construction expenditures will remain constant no matter how many times the PUC permits relitigation addressing them. All of the same parties participated vigorously in the initial contest with each presenting its own evidence and cross-examining its opponent's witnesses. Were this not true, imposition of *res judicata* principles would be inappropriate."

Id. at 563.

B. Courts have repeatedly held that determinations made during the preliminary phase of the disciplinary process are not final decisions on the merits.

Courts have repeatedly held that proceedings before grievance panels in the preliminary phase of the disciplinary process are not adversarial in nature; do not constitute a trial on the merits; do not invoke the application of *res judicata* or collateral estoppel; and in the case of a dismissal, do not preclude the filing of a subsequent complaint based on the same conduct. *State v. Sewell*, 487 S.W.2d 716, 718 (Tex. 1972) (orig. proceeding) (finding that a grievance committee's investigation and decision to take or forego disciplinary action is inquisitorial in nature rather than a decision on the merits); *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 618 (Tex.App.—Fort Worth 2004, pet. denied) (finding that a grievance committee's decision to dismiss a grievance has no res judicata or collateral estoppel effect); *Gonzalez v. State Bar of Tex.*, 904 S.W.2d 823, 830-31 (Tex.App.—San Antonio 1995, writ denied) (finding that a grievance committee's decision to dismiss a complaint does not constitute the litigation or

determination of an issue before a court of competent jurisdiction); *Smith v. Grievance Committee*, 475 S.W.2d 396, 399 (Tex.Civ.App.—Corpus Christi 1972, orig. proceeding) (finding that grievance committee proceedings were not adversarial because committee was not designed or equipped by the disciplinary rules to conduct a trial).

In the current disciplinary system, which has been in place since 2004, the members of grievance committees have extremely limited authority during the preliminary phase of the disciplinary process. They may only act through summary disposition panels, and the only action a summary disposition panel may take is to approve or disapprove a recommendation from CDC that a complaint should be dismissed for lack of just cause. TEX. RULES DISCIPLINARY P. R. 2.01-2.15. They have no authority to adjudicate allegations of misconduct or otherwise preside over adversarial hearings. *Id.* Their proceedings are clearly inquisitorial rather than adjudicative. *See Genzer v. Fillip*, 134 S.W.2d 730, 732 (Tex.Civ.App.—Austin 1939, writ dism'd judgm't cor.) (holding that a decision based solely on the findings and report of a commission is insufficient to qualify as an "adjudication" because "adjudication" implies a judicial ascertainment of issues through "a hearing by the court, after notice, of legal evidence on the factual issue involved").

Because of its limited authority, a summary disposition panel cannot issue a final judgment on the merits that could serve as a basis for the application of *res judicata* to prevent subsequent disciplinary action by a duly appointed evidentiary panel. *Sewell,* 487 S.W.2d at 718; *Rodgers,* 151 S.W.3d at 618; *Gonzalez*, 904 S.W.2d at 830-31. Adjudication of a complaint cannot begin until just cause is found and the complaint is transferred to an evidentiary panel of proper venue or, upon the respondent attorney's election, proceedings are instituted in district court.

C. Recent amendments to the disciplinary rules have not changed the nature of determinations made during the preliminary phase of the disciplinary process.

Sebesta acknowledges prior decisions which have consistently held that *res judicata* does not apply to determinations by grievance panels during the preliminary phase of the disciplinary process. But he urges the Board to find that under the current disciplinary rules, *res judicata* may apply to a summary disposition panel's approval of CDC's dismissal recommendation because of differences between the old rules and the current rules. Sebesta's position relies on a flawed analysis of the old rules.

Most notably, Sebesta incorrectly contends that under the old rules, "[t]he 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" (Appellant's Br. 31) (emphasis in original). In fact, however,

the old rules provided that a grievance committee need not notify a respondent attorney of a complaint *only if* it appeared to be wholly without merit. The old rules specifically provided:

> 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.

TEX. STATE BAR R. art. 12, § 12, *reprinted in* TEX. GOV'T CODE ANN., tit. 14 App. (Vernon 1973).

In other words, the old rules did not require notice to the respondent attorney under circumstances similar to those that, under the current rules, would result in a grievance's being classified as an "inquiry." TEX. RULES DISCIPLINARY P. R. 1.06(S). Therefore, the old rules and the current rules are actually very similar in this respect because the current rules also provide no opportunity for a respondent attorney to respond to a grievance or otherwise participate in the disciplinary process if a grievance appears to be without merit. *See* TEX. RULES DISCIPLINARY P. R. 2.10 (requiring that CDC notify a respondent attorney of its receipt of a grievance that is classified as an "inquiry" only after the dismissal of the grievance).

Moreover, contrary to Sebesta's suggestion, the preliminary phase of the disciplinary process was far more adversarial in nature under the old rules than under the current rules. *McGregor v. State*, 483 S.W.2d 559, 561 (Tex.Civ.App.—

Waco 1972, set aside without reference to the merits). A grievance committee could take testimony under oath. *Id.* It could also compel witnesses to appear and could require the production of documents or other evidence. *Id.* The respondent attorney could likewise request that the committee compel witnesses to appear and produce documents or other evidence on his behalf. *Id.* And the failure to comply with a grievance committee's order to appear or provide evidence was punishable by contempt. *Id.*

In contrast, the proceedings before a summary disposition panel under the current disciplinary rules are vastly more limited. A summary disposition panel considers only the information "deemed necessary and appropriate" by CDC, and it has no authority to compel the testimony of witnesses or the production of evidence. TEX. RULES DISCIPLINARY P. R. 2.13. Also, neither the respondent nor the complainant may be present during summary disposition proceedings. *Id.*

Clearly, then, proceedings during the preliminary phase of the disciplinary process were more adversarial under the old rules, and grievance committees functioned in more of a judicial capacity than summary disposition panels do. Nonetheless, under the old rules, courts consistently held that determinations made during the preliminary phase were not final decisions. The analysis of these courts applies with even greater force in the current system. Because the 2007 no-just-cause determination is not a final judgment on the merits, the evidentiary panel

correctly determined that *res judicata* could not bar a subsequent disciplinary action for allegations that never made it past screening.[8]

D. No authority supports Sebesta's contention that the letter he received from CDC staff constitutes a prior final judgment on the merits.

Sebesta provides no authority for the proposition that a letter from a staff attorney announcing that an agency "will take no further action" constitutes a final judgment on the merits such that *res judicata* applies to it. He cites 14 Texas cases which purportedly support his argument, but an analysis of the cases easily reveals that they are more supportive of the Commission's position than Sebesta's position:

Cases Cited by Sebesta	Relevant Holdings
Amstadt v. U.S. Brass Corp., 919 S.W.2d 644 (Tex. 1996)	The court held that *res judicata* barred the plaintiffs' claims based on faulty plumbing systems installed in their homes. The basis of the holding was that the prior property owners who sold the homes to the plaintiffs had successfully brought a lawsuit against

[8] Sebesta's reliance on statements from the Sunset Advisory Commission's report is misplaced (Appellant's Br. 33). The statement that "more thorough investigation will occur before a hearing takes place" reflects the prior practice of convening an investigatory hearing on every grievance that was upgraded to "complaint" status. The old rules required that both the complainant and respondent be invited to attend the investigatory hearing. Under the current rules, an actual hearing cannot take place until after just cause is found and litigation begins.

	the defendants and recovered damages because of the faulty plumbing systems. **The decision is inapposite because it involves the application of *res judicata* to a final judgment resulting from a lawsuit rather than an agency's non-adjudicative preliminary determination.
Montgomery v. Blue Cross Blue Shield of Tex., 923 S.W.2d 147 (Tex.App.—Austin 1996, writ denied)	The court reversed a district court's summary judgment based on *res judicata*. The basis of the holding was that the claims brought in district court could not have been litigated in the prior administrative proceedings because the administrative tribunal had no authority to determine the claims. **The decision supports the Commission's position because the summary disposition panel had no authority to determine the allegations of misconduct that the evidentiary panel adjudicated in the proceedings below.
Westheimer Ind. Sch. Dist. v. Brockette, 567 S.W.2d 780 (Tex. 1978)	The court affirmed a district court's decision that a lower administrative officer (the Commissioner of Education) had no authority to rescind a prior final order of a superior agency (the State Board of Education). The State Board of Education had entered the prior order after multiple adjudicative hearings, and the order became final when neither party perfected a timely appeal to district court. **The decision is inapposite because

	there was no opportunity for an adjudicative hearing before the summary disposition panel in 2007 nor any opportunity to appeal the panel's determination.
Coalition of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex., 798 S.W.2d 560 (Tex. 1990)	The Texas Supreme Court held that *res judicata* barred the reconsideration of a final order that the Public Utility Commission entered after 132 days of heavily contested hearings which, according to the Court, constituted a "trial." The final order included detailed findings of fact and conclusions of law. **The decision is inapposite because it involves the application of *res judicata* to a final order that included findings of fact and conclusions of law resulting from 132 days of heavily contest hearings rather than an agency's non-adjudicative preliminary determination.
R.R. Comm'n v. Humble Oil & Ref. Co., 119 S.W.2d 728 (Tex.Civ.App.—Austin 1938, writ ref'd)	The court held that *res judicata* applied where the Railroad Commission entered an order after a full hearing, the losing party sought judicial review in district court, final judgment was rendered by the district court, and neither party appealed the judgment. ** The decision is inapposite because it involves the application of *res judicata* to an agency's order resulting from a full hearing, followed by judicial review of the order, rather than an agency's non-adjudicative preliminary

	determination. In addition, the court recognized that even where *res judicata* applies, changed conditions may support the reconsideration of a final order.
R.R. Comm'n v. Vidaurri Trucking, Inc., 661 S.W.2d 94 (Tex. 1983)	The Texas Supreme Court held that the Railroad Commission had no authority to reconsider its own final order that was entered after a hearing where the respondent had an opportunity to appear and present evidence. The governing statute explicitly made the order "final for all purposes." **The decision is inapposite because it involves an order that was entered after a hearing where the respondent was allowed to participate rather than an agency's non-adjudicative preliminary determination. In addition, explicit statutory language dictated that the order was "final."
Young Trucking v. R.R. Comm'n of Tex., 781 S.W.2d 719 (Tex.App.—Austin 1989, no writ)	The court held that the Railroad Commission's order, which was entered after proper notice and hearing, was final because the governing statute provided that an order of the Commission was effective on the date entered unless the order stated otherwise. **The decision is inapposite because it involves an order that was entered after proper notice and hearing rather than an agency's preliminary determination without any opportunity for the respondent to appear.

Al-Jazrawi v. Tex. Bd. Land Surveying, 719 S.W.2d 670 (Tex.App—Austin 1986, writ ref'd n.r.e.)	The court held that an agency order denying the respondent's application for a license became final when he did not perfect an administrative appeal of the order. The agency had no obligation to reconsider its order where none of the relevant facts had changed. **The decision is inapposite because it involves an agency order that became final after an opportunity for the respondent to file an administrative appeal rather than an agency's preliminary determination without any opportunity for hearing or appeal.
Sexton v. Mount Olivet Cemetery Assoc,, 720 S.W.2d 129 (Tex.App.—Austin 1986, writ ref'd n.r.e.)	The court held that an agency could not reopen administrative proceedings that had resulted in a final order after an adjudicative hearing where both sides appeared, were represented by legal counsel, and had an opportunity to offer evidence. The order became final after neither party sought judicial review. **The decision is inapposite because there was no opportunity for an adjudicative hearing before the summary disposition panel in 2007 nor any opportunity to seek judicial review of the panel's determination.
Texas-New Mexico Power Co. v. Tex. Indus. Energy Consumers, 806 S.W.2d 230 (Tex. 1991)	The Texas Supreme Court held that an order issued by the Public Utility Commission after a hearing on the merits was final and appealable despite the conditional nature of the order.

	Thus, the applicant could seek judicial review of the order prior to beginning construction of its power plant. **The decision is inapposite because there was no opportunity for a hearing on the merits before the summary disposition panel in 2007 nor any opportunity to appeal the panel's determination.
Igal v. Brightstar Info. Tech. Group, 250 S.W.3d 78 (Tex. 2007)	The Texas Supreme Court held that *res judicata* applied to an administrative agency's order because the agency had statutory authority to act in a judicial capacity and, in fact, acted in a judicial capacity to resolve disputed issues of fact that the parties had an adequate opportunity to litigate. The proceedings underlying the agency's order included a preliminary determination by a hearings officer followed by multiple days of proceedings before an appeals tribunal that included appearances of counsel and witness testimony on both sides. **The decision is inapposite because the summary disposition panel had no authority to act in a judicial capacity. Thus, there was no opportunity to litigate disputed issues of fact before the summary disposition panel in 2007.
Besing v. Vander Eykel, 878 S.W.2d 182 (Tex.App.—Dallas 1994, writ denied)	The court applied *res judicata* to a prior final judgment that had been entered by a district court and affirmed by the court of appeals.

	**The decision is inapposite because it involves the application of *res judicata* to a final judgment entered by a district court rather than an agency's non-adjudicative preliminary determination.
Comm'n for Lawyer Discipline v. Stern, 355 S.W.3d 129 (Tex.App.—Houston [1st Dist.] 2011, pet. denied)	The court held that a just-cause determination is "not a decision on the merits and does not involve an adversarial testing of evidence" but is "simply a predicate for instituting a disciplinary action against an attorney." **The decision supports the Commission's argument that a summary disposition panel's approval of CDC's no-just-cause finding is not a final judgment on the merits.
Mossler v. Shields, 818 S.W.2d 752 (Tex. 1991)	The Texas Supreme Court held that a county court's order dismissing a petitioner's claim with prejudice barred the petitioner from subsequently asserting the same claim in a different county court. The Court noted that the petitioner had a fair opportunity to assert her claims in the prior suit. **The decision is inapposite because it involves the application of *res judicata* to a final judgment entered by a district court rather than an agency's non-adjudicative preliminary determination.

In short, Sebesta's argument that he satisfied the first element of *res judicata* has no support because there is no prior final judgment on the merits. The 2007 no-just-cause determination was an administrative determination that did not result from adversarial proceedings. CDC's letter to Sebesta is not an adjudicative order that may support the application of *res judicata*. Nor did the summary disposition panel's approval of CDC's dismissal recommendation make the preliminary phase of the disciplinary process an adjudicative proceeding. A summary disposition panel clearly has no adjudicative authority. The absence of a final judgment on the merits was fatal to Sebesta's motion, and the evidentiary panel correctly denied it.

E. Sebesta's arguments regarding privity are flawed.

In addition to presenting a prior final judgment on the merits, a party asserting *res judicata* must show that the parties in the subsequent action were parties or privies in the prior action. *Amstadt*, 919 S.W.2d at 652. There is no such privity in this case. Only CDC participated in the 2007 summary disposition proceedings, so only CDC could be considered a party to those proceedings. And CDC's interests were not aligned with the complainant's interests in 2007.

Privity is not established by the mere fact that parties happen to be interested in the same question or in proving the same facts. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). "[T]he determination of who are privies

requires a careful examination into the circumstances of each case." *Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 774 (Tex. 1983).

Sebesta's arguments regarding privity are intrinsically flawed because CDC was not aligned with the complainant in the preliminary screening phase of the 2007 complaint. At all times until just cause is found, CDC's role is to objectively evaluate the information provided by both the complainant and the respondent in order to determine whether any allegation of misconduct is viable. As such, CDC's position is essentially neutral.

In 2007, CDC determined that the complaint should be dismissed because of limitations, and it successfully recommended dismissal. Thus, contrary to Sebesta's argument, CDC's position never became aligned with the complainant's interests. In fact, the very purpose of the summary disposition proceedings was to obtain approval for dismissal – an action that obviously was against the complainant's interests and favored Sebesta's interests. So *res judicata* would not bar the 2014 disciplinary action because *res judicata* applies only to parties who were adverse in the first action. *Miller*, 52 S.W.3d at 696; *Getty Oil Co.*, 845 S.W.2d at 800. CDC never took a position adverse to Sebesta in 2007. *Id.*

F. The Commission could not have presented its allegations of misconduct to the summary disposition panel for determination.

The final element of *res judicata* is that the second action must be based on claims that were litigated or could have been litigated in the first action. *Amstadt*, 919 S.W.2d at 652. Sebesta's position fails because, as demonstrated above, the Commission could not have litigated its claims before the summary disposition panel in 2007.

The summary disposition panel that approved the dismissal of the 2007 complaint was empowered only to determine whether the complaint should be dismissed for lack of just cause or should proceed to litigation. TEX. GOV'T CODE ANN. § 81.075 (West 2015). It could not adjudicate the allegations of misconduct because only an evidentiary panel or a district court has authority to determine whether a respondent attorney committed professional misconduct such that a sanction is warranted. TEX. RULES DISCIPLINARY P. R. 2.01-2.15. Thus, the summary disposition panel had no authority to determine the issues that the evidentiary panel determined in this case, and the evidentiary panel correctly determined that *res judicata* did not apply. *See Whallon v. City of Houston*, 462 S.W.3d 146, 156-58 (Tex.App.—Houston [1st Dist.] 2015, no pet.) (holding that prior proceedings before the Building and Standards Commission (BSC) did not bar the City's subsequent lawsuit because the BSC had no authority to award the

relief sought in the lawsuit); *Barnes v. United Parcel Service*, 395 S.W.3d 165 (Tex.App.—Houston [1st Dist.] 2012, pet. denied) (holding that an unfavorable decision by the Department of Workers' Compensation (DWC) did not bar the plaintiff's subsequent wrongful death lawsuit because the matters at issue in the lawsuit could not have been litigated in the DWC proceedings due to the hearings officer's limited authority).

IV. Quasi-estoppel does not apply.

Sebesta argues that the disciplinary action against him was barred not only by *res judicata* but also by the doctrine of quasi-estoppel. Sebesta's argument has no merit because it was not unconscionable for the Commission to pursue disciplinary action based on Sebesta's prosecutorial misconduct that resulted in a death sentence and the wrongful imprisonment of Anthony Graves for eighteen years.

Under Texas law, quasi-estoppel serves to prevent a party from asserting, to another party's detriment, a right inconsistent with a position previously taken. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000); *Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 334-35 (Tex.App.—Dallas 2011, no pet.). Quasi-estoppel applies only when it would be unconscionable for a party to take the subsequent inconsistent position. *Id.*

In the proceedings below, Sebesta did not demonstrate that quasi-estoppel barred the disciplinary action that resulted in his disbarment. Most importantly, nothing in the record supports his contention that the Commission took a position inconsistent with its prior position. The Commission has consistently maintained that it found no just cause in 2007 based on limitations (App. 2). Sebesta speculated that the Commission's no-just-cause determination was based on an assessment of the merits of the 2007 complaint, but no evidence supported his erroneous conclusion. It was merely based on surmise. And the Acevedo affidavit unequivocally confirmed that the 2007 dismissal was based on limitations.[9] Because the basis for the 2007 dismissal is a question of fact, the evidentiary panel correctly determined it in favor of the nonmovant (the Commission). And the Board should defer to the Panel's determination. *KPMG*, 988 S.W.2d 746, 748.

In addition, the Commission did not benefit from its 2007 no-just-cause determination, nor did the subsequent disciplinary action against Sebesta allow the Commission to avoid any obligation or effect of the 2007 determination. The gist of quasi-estoppel is that a party may not accept the benefits of a transaction and subsequently take an inconsistent position to avoid corresponding obligations or

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[9] If not for limitations, the only reasonable conclusion that CDC could have reached based on the 2007 complaint and response was that just cause existed. Sebesta's contention that CDC evaluated the factual allegations and concluded *on the merits* that there was no just cause is unconvincing because no reasonable attorney would have drawn that conclusion. The complaint and response undeniably provided just cause but for the bar imposed by the old limitations provision.

effects. *Lindley v. McKnight*, 349 S.W.3d 113, 131-32 (Tex.App.—Fort Worth 2011, no pet.).

Furthermore, for quasi-estoppel to apply, the estopped party must have had knowledge of all material facts at the time of the conduct on which the estoppel claim is based. *Frazier v. Wynn*, 472 S.W.2d 750, 753 (Tex. 1971); *Nash v. Beckett*, 365 S.W.3d 131, 144 (Tex.App.—Texarkana 2012, pet. denied). In this case, the Commission did not delve into all of the relevant facts in 2007 because it was clear that limitations applied. The Commission's lack of knowledge defeats Sebesta's claim that quasi-estoppel prohibited the disciplinary action that resulted in his disbarment. *Id.*

Finally, Sebesta's argument regarding prejudice to him is misplaced. It was his own egregious misconduct, not the dismissal of the 2007 complaint, that resulted in the 2014 complaint and his subsequent disbarment. And in the absence of a full record of the proceedings below, including a transcript of the evidentiary hearing, it is impossible for the Board to determine the significance of any evidence that Sebesta supposedly would have offered but for the 2007 dismissal.

CONCLUSION AND PRAYER

Res judicata serves "to ensure that a defendant is not twice vexed for the same acts, and to achieve judicial economy by precluding those who have had a fair trial from relitigating claims." *Amstadt,* 919 S.W.2d at 653. The evidentiary panel correctly determined that *res judicata* could not serve as a bar to disciplinary action against Sebesta because the Commission never sought to relitigate claims that had already been adjudicated. To the contrary, the 2007 proceedings provided no opportunity to litigate the allegations of misconduct that the evidentiary panel determined in the proceedings below.

The evidentiary panel also correctly determined that quasi-estoppel also did not apply. At all times, CDC and the Commission have consistently maintained that the dismissal of the 2007 complaint was based on limitations. Indeed, if not for the bar imposed by limitations, CDC obviously would have found that the 2007 complaint provided just cause to believe that Sebesta committed misconduct requiring that a sanction be imposed.

The proceedings below were possible because circumstances changed dramatically in 2013 when the Texas legislature decided that limitations would not bar a grievance involving prosecutorial misconduct that resulted in wrongful imprisonment *as long as* the wrongfully imprisoned person filed the grievance within four years of his release. That is precisely what happened here.

For these reasons, the Commission prays that the Board affirm the judgment of the District 08-2 Evidentiary Panel of the State Bar of Texas.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Board of Disciplinary Appeals Internal Procedural Rules, the foregoing brief on the merits contains approximately 10,208 words, which is less than the total words permitted by the Board's Internal Procedural Rules. Counsel relies on the word count of the computer program used to prepare this petition.

/s/ Cynthia Canfield Hamilton
CYNTHIA CANFIELD HAMILTON

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing brief of Appellee, the Commission for Lawyer Discipline, has been served on Mr. Charles J. Sebesta, Jr. by and through his attorneys of record by email to Mr. Stephen E. McConnico (smcconnico@scottdoug.com), Ms. Robyn Hargrove (rhargrove@scottdoug.com), and Ms. Kimberly Gustafson Bueno (kbueno@scottdoug.com), Scott, Douglass & McConnico, L.L.P., 600 Congess Avenue, Suite 1500, Austin, Texas 78701-2589 on the 10th day of December 2015.

/s/ Cynthia Canfield Hamilton
CYNTHIA CANFIELD HAMILTON

NO. 56406

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

CHARLES J. SEBESTA, JR.,

APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,

APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 08-2
No. 201400539

APPENDIX TO BRIEF OF APPELLEE
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APPENDIX TO BRIEF OF APPELLEE COMMISSION FOR LAWYER DISCIPLINE

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

APPENDIX 1: Judgment of Disbarment (CR 1443-48)

APPENDIX 2: Affidavit of Linda Acevedo (CR 917-923)

APPENDIX 3: Legislation that Changed the Limitations Provision Applicable to Complaints Involving Prosecutorial Misconduct (CR 254-59)

APPENDIX 4: Texas Rule of Disciplinary Procedure 15.06

Appendix 1

FILED

JUN 11 2015

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	*	

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).

01445

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.

01447

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 2

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	*	

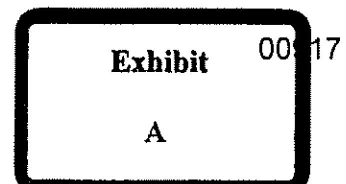
AFFIDAVIT OF LINDA ACEVEDO

STATE OF TEXAS	§
	§
COUNTY OF TRAVIS	§

BEFORE ME, the undersigned Notary Public, on this day personally appeared Linda Acevedo, known to me to be the person whose name is subscribed below, and who after being duly sworn, stated on her oath:

"My name is Linda Acevedo and I am over the age of eighteen years and competent to make this affidavit in all respects, and have personal knowledge of the facts herein stated:

1) I currently serve as the Chief Disciplinary Counsel for the State Bar of Texas. I have served in this position since February 1, 2009 and have worked for the State Bar of Texas in the discipline division since 1985. 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. In addition, 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.

2) In 2007, Assistant Disciplinary Counsel Stephen Moyik consulted me regarding a complaint pending against Charles Sebesta. Our discussion centered on whether the complaint against Sebesta was barred by the four year statute of limitations contained in Tex. R. Disciplinary P. 15.08. We discussed the Fifth Circuit opinion of *Graves v. Dretke*, 442 F. 3d 334 (5th Cir. 2006) and whether the date of issuance could be utilized to argue that the complaint was filed within the statute of limitations. We concluded that it could not because the opinion contained information that the alleged misconduct was known to the parties more than four years before the grievance was filed. Mr. Moyik therefore made a recommendation of no "just cause" to the summary disposition panel based on the statute of limitations, and the panel dismissed the case.

3) Under the disciplinary procedural rules in place in 2007, when the Chief Disciplinary Counsel determined that Just Cause did not exist to proceed on the complaint, the matter was placed on a summary disposition docket and considered without the presence of the complainant or the respondent attorney.

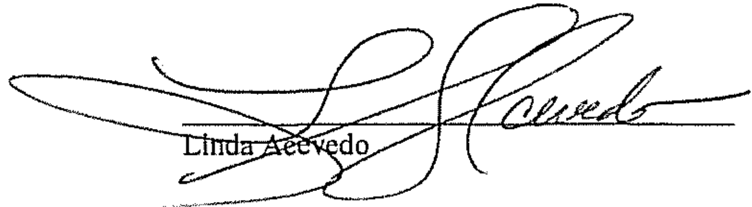
4) I have reviewed Mr. Sebesta's affidavit and its attachments provided with Mr. Sebesta's Motion on Res Judicata and Estoppel. The letters he cites (Exhibits A-7 and A-8), are form letters that were routinely sent by CDC when a case was dismissed by a summary disposition panel. These letters were not specially generated for the 2007 complaint.

5) In late 2013, I was contacted by Pamela Colloff with Texas Monthly requesting information regarding the dismissal of the 2007 complaint. Since Mr. Sebesta had written extensively

about the complaint on his website and made the dismissal letters available, I confirmed that the 2007 complaint was dismissed and that the basis was on the then-applicable statute of limitations.

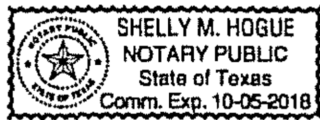
6) Attached as Exhibit A-1 is a true and correct copy of the article written by Pamela Colloff, which ran in Texas Monthly in December of 2013.

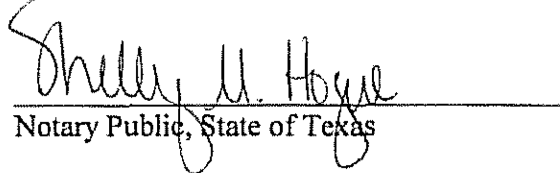
Further Affiant says not."



Linda Acevedo

SWORN TO AND SUBSCRIBED BEFORE ME this 5 day of November 2014.



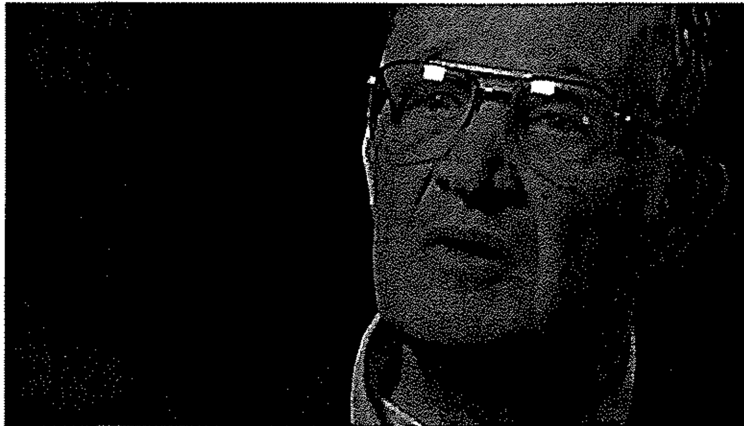


Notary Public, State of Texas

Why Was This Prosecutor Never Punished?

ANTHONY GRAVES WAS WRONGFULLY CONVICTED OF CAPITAL MURDER BASED ON THE OUTCOME OF A TRIAL WHERE THE PROSECUTOR, CHARLES SEBESTA, WITHHELD EVIDENCE THAT COULD HAVE HELPED PROVE GRAVES'S INNOCENCE. SO WHY HASN'T SEBESTA BEEN HELD ACCOUNTABLE FOR HIS EGREGIOUS MISCONDUCT?

by PAMELA COLLOFF WED DECEMBER 18, 2013 6:30 AM



The criminal justice world was shook up last month by the news that former Williamson County district attorney Ken Anderson, the prosecutor in the Michael Morton case, had to forfeit his law license, plead guilty to criminal contempt of court charges, and serve jail time. The fact that Anderson would be punished—no matter how "insultingly short" the ten-day sentence might be—was historic, marking the "first time ever" that someone would be punished for committing one of the worst sins a prosecutor can commit: withholding critical evidence that could help the accused's case. In doing so, Anderson won a conviction against a man who turned out to be innocent.

The facts of the Morton case are by now well known, but to quickly recap: During Morton's 1987 murder trial, Anderson failed to turn over a police transcript that described an eyewitness account given by Morton's young son, who said that a stranger, not his father, had killed his mother,

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2 A Perry-Sharp Rivalry at
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3 The Other Side of the Sto

4 Kolaches for Christmas,
Your Gift Guide to Mail C
From West, Texas

5 The Body of the Missing
Man Was Found and the
Wants Answers

00920
Exhibit
A-1

Christine. The jury never learned of the transcript and found Morton guilty. Morton spent nearly 25 years in prison before he was exonerated by DNA evidence in 2011.

Anderson has now become the face of prosecutorial misconduct, but another prosecutor went much further than Anderson to secure a conviction: Burleson County DA Charles Sebesta, the man who sent Anthony Graves to death row. During Graves's trial in 1994, Sebesta never disclosed that the only eyewitness to the brutal 1992 murder of the Davis family in Somerville—a man named Robert Carter—repeatedly insisted that Graves never took part in the crime. (Carter was himself convicted of the killings, but investigators felt certain he'd had an accomplice. He named Graves after more than twelve hours in police custody.) And according to a withering 2006 ruling from the U.S. Fifth Circuit Court of Appeals, Sebesta not only withheld favorable evidence in the Graves case, he also suborned perjured testimony—or obtained false statements—from two witnesses on the stand. The Fifth Circuit, one of the most conservative in the nation, stated that Sebesta's "deliberate" effort to mislead the jury with information that he "knew was false" was "perhaps even more egregious" than his failure to turn over evidence that was favorable to the defense.

And that was not all. As my 2010 story on the Graves case explained in greater detail, Sebesta also scared off Graves's alibi witness during the trial by suggesting that she, too, might be charged in the Davis murders. Terrified, she refused to testify. (She was never charged.) He also pressured Carter into testifying against Graves after he refused. "Sebesta told Carter that if he didn't testify against Anthony, he would prosecute Carter's wife instead," said Graves's attorney, Nicole Cásarez. (Carter's wife, Cookie, was arrested and charged with capital murder but never tried.) "He twisted Carter's arm to ensure that he got a conviction," Cásarez said. Which he did. Graves was found guilty and spent eighteen years behind bars, twelve of them on death row, before he was released in 2010 and exonerated by an act from the Texas Legislature.

And yet the State Bar of Texas, which is supposed to discipline attorneys who commit ethical violations, did not take any action against Sebesta—even after the Fifth Circuit ordered that Graves be given a new trial, citing the fact that the district attorney had withheld favorable evidence and used false testimony to win.

Houston attorney Robert Bennett filed a grievance with the bar after the Fifth Circuit handed down its ruling in 2006, alleging that Sebesta had committed a host of ethical violations. But the bar summarily dismissed the complaint without even a hearing, stating in a letter to Bennett that "there is no just cause to believe that [Sebesta] committed professional misconduct."

Bennett, who is usually on the other side of such cases—he specializes in defending attorneys in disciplinary proceedings—was taken aback. "The bar gave him a free pass," Bennett told me. "At the very least, they should have investigated further, given the importance of the case."

Then again, the bar's track record for disciplining prosecutors is abysmal. "In ninety-one criminal cases in Texas since 2004, the courts decided that prosecutors committed misconduct, ranging from hiding evidence to making improper arguments to the jury," noted Brandi Grissom of the *Texas Tribune* last year. "None of those prosecutors has ever been disciplined."

Sebesta has always maintained that the bar dismissed the grievance against

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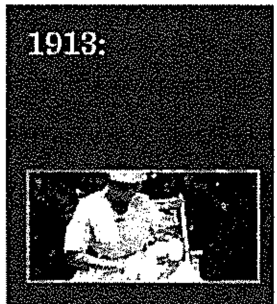

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him for one simple reason: the agency determined that he had done nothing wrong. "For the Record," his website states, "there was never any 'Prosecutorial Misconduct' on my part—not then and not now, and anyone wishing to verify that, can check with the State Bar of Texas."

So I recently decided to do just that. I began by contacting Linda Acevedo, the bar's chief disciplinary counsel, to see if she could comment on why the grievance had been dismissed. She emailed me that she could disclose little, due to confidentiality issues, but explained why the grievance went nowhere. "This dismissal was based on the fact that the complaint was brought forth well beyond the four-year statute of limitations our office is bound by," she wrote.

In other words, the bar never cleared Sebesta of wrongdoing, as he has suggested for years. It never made any determination as to whether or not he had violated the rules of professional conduct. It simply took no action because the statute of limitations on those violations—including withholding favorable evidence and eliciting perjured testimony—had run out.

As for the letter that the bar had sent Bennett stating that there was "no just cause" to believe Sebesta committed professional misconduct, Acevedo cautioned not to take that wording too literally. The letter Bennett received did not exonerate Sebesta; it was only "the standard dismissal letter used by our office," she wrote, and "did not specify the basis for the dismissal."

Given that the bar never absolved Sebesta, I asked Acevedo if Sebesta could face sanctions for claiming that the agency had cleared his name.

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Tags: CHARLES SEBESTA, ANTHONY GRAVES, STATE BAR OF TEXAS, CRIMINAL JUSTICE

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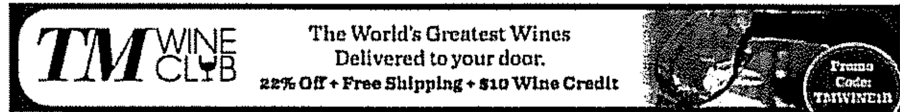

Appendix 3

83R2121 KFF-F

By: Whitmire S.B. No. 825

A BILL TO BE ENTITLED
AN ACT

relating to disciplinary standards and procedures applicable to grievances alleging certain prosecutorial misconduct.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 81.072, Government Code, is amended by amending Subsection (b) and adding Subsections (b-1) and (b-2) to read as follows:

(b) The supreme court shall establish minimum standards and procedures for the attorney disciplinary and disability system. The standards and procedures for processing grievances against attorneys must provide for:

(1) classification of all grievances and investigation of all complaints;

(2) a full explanation to each complainant on dismissal of an inquiry or a complaint;

(3) periodic preparation of abstracts of inquiries and complaints filed that, even if true, do or do not constitute misconduct;

(4) an information file for each grievance filed;

(5) a grievance tracking system to monitor processing of grievances by category, method of resolution, and length of time required for resolution;

(6) notice by the state bar to the parties of a written grievance filed with the state bar that the state bar has the authority to resolve of the status of the grievance, at least quarterly and until final disposition, unless the notice would jeopardize an undercover investigation;

(7) an option for a trial in a district court on a complaint and an administrative system for attorney disciplinary and disability findings in lieu of trials in district court, including an appeal procedure to the Board of Disciplinary Appeals and the supreme court under the substantial evidence rule;

(8) an administrative system for reciprocal and compulsory discipline;

(9) interim suspension of an attorney posing a threat of immediate irreparable harm to a client;

(10) authorizing all parties to an attorney disciplinary hearing, including the complainant, to be present at all hearings at which testimony is taken and requiring notice of those hearings to be given to the complainant not later than the

seventh day before the date of the hearing;

(11) the commission adopting rules that govern the use of private reprimands by grievance committees and that prohibit a committee:

(A) giving an attorney more than one private reprimand within a five-year period for a violation of the same disciplinary rule; or

(B) giving a private reprimand for a violation:

(i) that involves a failure to return an unearned fee, a theft, or a misapplication of fiduciary property; or

(ii) of a disciplinary rule that requires a prosecutor to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, including Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct; and

(12) distribution of a voluntary survey to all complainants urging views on grievance system experiences.

(b-1) In establishing minimum standards and procedures for the attorney disciplinary and disability system under Subsection (b), the supreme court must ensure that the statute of limitations applicable to a grievance filed against a prosecutor that alleges a violation of the disclosure rule does not begin to run until the date on which a wrongfully imprisoned person is released from a penal institution.

(b-2) For purposes of Subsection (b-1):

(1) "Disclosure rule" means the disciplinary rule that requires a prosecutor to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, including Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct.

(2) "Penal institution" has the meaning assigned by Article 62.001, Code of Criminal Procedure.

(3) "Wrongfully imprisoned person" has the meaning assigned by Section 501.101.

SECTION 2. As soon as practicable after the effective date of this Act but not later than December 1, 2013, the Texas Supreme Court shall amend the Texas Rules of Disciplinary Procedure to conform with Section 81.072, Government Code, as amended by this Act.

SECTION 3. This Act takes effect September 1, 2013.

HOUSE RESEARCH ORGANIZATION bill analysis 5/13/2013 SB 825 Whitmire, et al. (S. Thompson)

SUBJECT: State Bar disciplinary process for certain prosecutor disclosure violations

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendments

VOTE: 7 ayes — Lewis, Farrar, Farney, Hernandez Luna, K. King, Raymond, S. Thompson

0 nays

2 absent — Gooden, Hunter

SENATE VOTE: On final passage, (March 26) — 31-0

WITNESSES: For — Thomas Ratliff, representing Michael Morton (*Registered, but did not testify:* Rebecca Bernhardt, Texas Defender Service; Cindy Eigler, Texas Interfaith Center for Public Policy; Kristin Etter, Texas Criminal Defense Lawyers Association; Andrea Marsh, Texas Fair Defense Project; Matt Simpson, ACLU of Texas; Ana Yanez-Correa, Texas Criminal Justice Coalition)

Against — None

On — (*Registered, but did not testify:* Linda Acevedo, State Bar of Texas, Shannon Edmonds, Texas District and County Attorneys Association)

BACKGROUND: Under Government Code sec. 81.071, attorneys practicing in Texas are subject to the disciplinary and disability jurisdiction of the Texas Supreme Court and the Commission for Lawyer Discipline, a committee of the State Bar.

Under sec. 81.072(b) the Supreme Court is required to establish minimum standards and procedures for the attorney disciplinary and disability system. Those standards must include requiring the Commission for Lawyer Discipline to adopt rules governing the use of private reprimands by grievance committees.

Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct requires prosecutors to disclose to criminal defendants all evidence and

information that tends to negate the guilt of the accused or mitigate the offense. This is sometimes called the disclosure rule.

Government Code sec. 501.101 defines "wrongfully imprisoned" as someone who has:

- received a pardon for innocence after having served all or part of a sentence in the Texas Department of Criminal Justice system;
- been granted relief under a writ of habeas corpus based on a court finding or determination that the person was actually innocent; or
- been granted relief under a writ of habeas corpus and: 1) the state district court in which the charge was pending dismissed the charge; 2) the dismissal was based on a motion in which the prosecutor says no credible evidence exists against the defendant; and 3) the prosecutor believes the defendant is actually innocent.

DIGEST:

SB 825 would require the Texas Supreme Court to adopt rules requiring the Commission for Lawyer Discipline to prohibit a grievance committee from giving a private reprimand concerning a violation of a disciplinary rule that requires a prosecutor to disclose to the defense all evidence and information that tends to negate the guilt of the accused or mitigate the offense. This would include Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct.

The Supreme Court would have to ensure that the statute of limitations that applied to a grievance filed against a prosecutor alleging a violation of the disclosure rule did not begin to run until the date on which a wrongfully imprisoned person was released from prison.

The bill would take effect September 1, 2013. By December 1, 2013, the Supreme Court would have to amend the Texas Rules of Disciplinary Procedure to conform with the bill.

SUPPORTERS SAY:

SB 825 would strengthen the process used by the State Bar to hold prosecutors accountable when it is alleged that they did not disclose required information in cases in which persons were wrongfully convicted. Questions about this came to light with the case of Michael Morton, who was exonerated after spending nearly 25 years in prison for the murder of his wife.

At issue is the statute of limitations for filing grievances with the state bar

in such cases and the appropriateness of keeping reprimands in these cases private. SB 825 would address these issues with a fair, limited response narrowly drawn to apply only to cases in which persons were wrongfully imprisoned and when an allegation of a violation of the disclosure rule was at stake.

Currently, allegations of attorney misconduct must be filed with the State Bar's grievance system within four years of the date the conduct occurred. An exception to this allows the limit in cases involving fraud and concealment to begin four years after the misconduct was discovered or should have been discovered. The interplay of these two sections and the different interpretations of the language in the exception have raised questions about whether the deadline should be changed in cases in which a person was wrongfully convicted.

SB 825 would clear up these questions by establishing a rule for cases in which someone was wrongfully convicted by allowing grievances to be filed for four years after release from prison. The wrongfully convicted should not have to overcome the barrier of proving fraud or concealment to file a grievance under the current exception to the deadline.

This change would strike a fair balance by maintaining the four-year statute of limitations but requiring that it begin to run only after a person had been released from prison. Exonerees should have a full four years to pursue a grievance in free society, where they would have access to resources and assistance.

The bill also would address accountability issues in the current system by requiring reprimands in these cases to be public. Currently, in most cases when a State Bar panel rules on a grievance, the panel decides whether to make any reprimand public or private. In all cases of persons wrongfully convicted and involving a prosecutor's violation of the disclosure rule, a private reprimand would be inappropriate because the case involves public officials acting in their public capacity. Making these reprimands public would enhance open government and public confidence in the criminal justice system.

Requiring public reprimands in these cases would be consistent with current law that prohibits certain private reprimands when it is in the public interest. Current law names two other situations in which private reprimands are prohibited: giving more than one private reprimand within

five years for a violation of the same rule and giving a reprimand for a violation that involves a failure to return a fee, a theft, or a misapplication of fiduciary property. The need for public accountability in the situation described by SB 825 is at least as great — if not much greater — than those in current law.

SB 825 bill would not infringe on the discretion of grievance committees to make decisions in these cases. The bill would apply only to the type of reprimand, not whether one should be given. As in the case of the other prohibitions on private reprimands, these decisions should continue to be based on the facts of an individual case. The seriousness of all violations of the disclosure rule in cases in which persons were wrongfully convicted warrants a consistent policy for these types of reprimands.

OPPONENTS SAY: Requiring reprimands in these cases to be public would decrease the discretion of grievance committees to handle these cases as they saw fit. In some cases, for example, a grievance committee might want to make a private reprimand if it thought the misconduct was of a lower level and that a public reprimand would be inappropriate. This could lead to some cases being dismissed if a private reprimand was unavailable.

OTHER OPPONENTS SAY: The provisions in SB 825 dealing with the statute of limitations could be unnecessary because the current rules allow for the deadline in cases involving fraud and concealment to begin when the conduct was discovered or should have been discovered, and most cases described by the bill could fall under this exception, allowing time to file a grievance.

It is unclear what limitation would apply if a wrongfully convicted person discovered disclosure rule misconduct involving fraud and concealment more than four years after being released from prison.

NOTES: The companion bill, HB 1921 by S. Thompson, was referred to the House Judiciary and Civil Jurisprudence Committee on March 4.

Appendix 4

B. Three or more acts of Professional Misconduct, as defined in subsections (a) (2) (3) (4) (6) (7) (8) or (10) of Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct, whether or not actual harm or threatened harm is demonstrated.

C. Any other conduct by an attorney that, if continued, will probably cause harm to clients or prospective clients.

PART XV. MISCELLANEOUS PROVISIONS

15.01. **Enforcement of Judgments:** The following judgments have the force of a final judgment of a district court: final judgments of an Evidentiary Panel and judgments entered by the Board of Disciplinary Appeals. To enforce a judgment, the Commission may apply to a district court in the county of the residence of the Respondent. In enforcing the judgment, the court has available to it all writs and processes, as well as the power of contempt, to enforce the judgment as if the judgment had been the court's own.

15.02. **Effect of Related Litigation:** The processing of a Grievance, Complaint, Disciplinary Proceeding, or Disciplinary Action is not, except for good cause, to be delayed or abated because of substantial similarity to the material allegations in pending civil or criminal litigation.

15.03. **Effect on Related Litigation:** Neither the Complainant nor the Respondent is affected by the doctrines of res judicata or estoppel by judgment from any Disciplinary Action.

15.04. **Effect of Delay or Settlement by Complainant:** None of the following alone justifies the discontinuance or abatement of a Grievance or Complaint being processed through the disciplinary system: (1) the unwillingness or the neglect of a Complainant to cooperate; (2) the settlement or compromise of matters between the Complainant and the Respondent; (3) the payment of monies by the Respondent to the Complainant.

15.05. **Effect of Time Limitations:** The time periods provided in Rules 2.10, 2.12, 2.15, 2.17C, 2.17E, 2.17P, 2.25, 3.02, 3.04, 7.11, 9.02, 9.03, 10.02, 11.01, 11.08, and 12.06(d) 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.

15.06. **Limitations, General Rule and Exceptions:**

A. *General Rule:* No attorney may be disciplined for Professional Misconduct that occurred more than four years before the date on which a Grievance alleging the Professional Misconduct is received by the Chief Disciplinary Counsel.

B. *Exception: Compulsory Discipline:* The general rule does not apply to a Disciplinary Action seeking compulsory discipline under Part VIII.

C. *Exception: Alleged Violation of the Disclosure Rule:* A prosecutor may be disciplined for a violation of Rule 3.09(d), Texas Disciplinary Rules of Professional

Conduct, that occurred in a prosecution that resulted in the wrongful imprisonment of a person if the Grievance alleging the violation is received by the Chief Disciplinary Counsel within four years after the date on which the Wrongfully Imprisoned Person was released from a Penal Institution.

D. *Effect of Fraud or Concealment*: Where fraud or concealment is involved, the time periods stated in this rule do not begin to run until the Complainant discovered, or in the exercise of reasonable diligence should have discovered, the Professional Misconduct.

15.07. Residence: For purposes of these rules, a person licensed to practice law in Texas is considered a resident of the county in Texas of his or her principal residence. A person licensed to practice law in Texas but not residing in Texas is deemed to be a resident of Travis County, Texas, for all purposes.

15.08. Privilege: All privileges of the attorney-client relationship shall apply to all communications, written and oral, and all other materials and statements between the Chief Disciplinary Counsel and the Commission subject to the provisions of Rule 6.08.

15.09. Immunity: No lawsuit may be instituted against any Complainant or witness predicated upon the filing of a Grievance or participation in the attorney disciplinary and disability system. All members of the Commission, the Chief Disciplinary Counsel (including Special Assistant Disciplinary Counsel appointed by the Commission and attorneys employed on a contract basis by the Chief Disciplinary Counsel), all members of Committees, all members of the Board of Disciplinary Appeals, all members of the District Disability Committees, all officers and Directors of the State Bar, and the staff members of the aforementioned entities are immune from suit for any conduct in the course of their official duties. The immunity is absolute and unqualified and extends to all actions at law or in equity.

15.10. Maintenance of Funds or Other Property Held for Clients and Others: Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or accounts, designated as such, into which funds of clients or other fiduciary funds must be deposited, shall further maintain and preserve for a period of five years after final disposition of the underlying matter, the records of such accounts, including checkbooks, canceled checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries, and disbursements of the funds or other property of a client.

15.11. Restrictions on Imposition of Certain Sanctions:

A. Public reprimands shall not be utilized if:

1. A public reprimand has been imposed upon the Respondent within the preceding five (5) year period for a violation of the same disciplinary rule; or