

VACATED AND REMANDED, Opinion Signed May 10, 2007.



**BEFORE THE BOARD OF DISCIPLINARY APPEALS  
APPOINTED BY  
THE SUPREME COURT OF TEXAS**

**No. 37811**

**CHRISTOPHER JOHN CAFIERO (State Bar Card No. 24031784)**

**v.**

**COMMISSION FOR LAWYER DISCIPLINE  
OF THE STATE BAR OF TEXAS**

**On Appeal from the Evidentiary Panel  
of the State Bar of Texas District 06A Grievance Committee  
SBOT Cause Nos. D0010525697; D0110425311; and D0030526191**

**OPINION AND ORDER**

**Submitted March 23, 2007**

**COUNSEL:**

For Appellant Christopher John Cafiero, Dell James, Dallas

For Appellee, Commission for Lawyer Discipline of the State Bar of Texas, Linda A. Acevedo, First Assistant Disciplinary Counsel (on brief), and Cynthia W. Hamilton, Assistant Disciplinary Counsel (brief and argument), Austin

**OPINION:**

Appellant attorney Christopher John Cafiero appeals from a disciplinary judgment<sup>1</sup> asking that the judgment be vacated because the grievance committee panel that heard the case lacked a proper quorum and, therefore, was powerless to render judgment. The parties do not dispute the facts, but rather the legal effect of a change in the composition of the panel during the lengthy hearing. The panel heard the Bar's evidence against Cafiero in connection with three separate grievances and found that he had violated certain Texas Disciplinary Rules of Professional Conduct ("Professional Conduct Rules")<sup>2</sup> in each matter. The panel suspended him from the practice of law for 60 months, with the first 18 months to be an active suspension, and the remaining 42 months to be probated on certain terms and conditions.

Alternatively, Cafiero asks that the judgment be reversed because the manner in which the panel conducted the hearing denied him a meaningful opportunity to be heard, denying him procedural due process. Cafiero also challenges the sufficiency of the evidence to support the findings of professional misconduct and argues that the panel's repeated denials of his requests for a continuance were abuses of its discretion.

Finally, Cafiero argues that the restitution the panel awarded was improper as a matter of law because it incorporated a remedy from civil breach of fiduciary duty cases not available to the

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<sup>1</sup> Judgment of Partially-Probated Suspension signed April 25, 2006 by an evidentiary panel of the State Bar of Texas District 06A (Dallas) grievance committee in SBOT Cause Nos. D0010525697, D0110425311; and D0030526191.

<sup>2</sup> TEX. DISCIPLINARY R. OF PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (2005) (TEX. STATE BAR R. Art. X, § 9).

Bar and, therefore, constituted the imposition of an impermissible fine or sanction. Cafiero asks that the case be remanded to a statewide grievance committee.<sup>3</sup>

Because it is apparent from the face of the record that the evidentiary panel lost its statutory quorum during the misconduct phase of the hearing, we hold that the Judgment of Partially Probated Suspension signed April 26, 2006 is void. Accordingly, we reverse the judgment in its entirety and remand the case to a state-wide grievance committee panel for a full rehearing on the merits, i.e., for a misconduct phase and, if necessary, a sanction phase.

### **Underlying Grievances**

In this disciplinary proceeding the Bar presented its cases against Cafiero in three separate grievances that were consolidated for the hearing. Each complainant – Mr. Pesina, Mr. Tran and Mr. Emerson – appeared and testified at the hearing. Cafiero testified, as well, disputing certain facts to which the complainants had testified.

#### **Pesina Complaint (SBOT Case D0010525697)**

Complainant Pesina was injured in a motorcycle accident in October 2002 when he was 18. Pesina's father signed an employment contract with Mr. Lafuente, a cousin of Pesina's and law partner of Cafiero, while Pesina was in the hospital. At Mr. Lafuente's request, Cafiero negotiated with the insurer and settled Pesina's claim against it for policy limits (\$25,000). Half of this sum was paid directly to the hospital; the remainder, \$12,500, was to be used to pay the remaining outstanding medical bills. It was deposited into the firm's operating account until those bills were

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<sup>3</sup> TEX. GOV'T CODE § 81.0751(b)(4)(B) provides, in part: "In an appeal of a finding of a panel of a district grievance committee made to the Board of Disciplinary Appeals, the board may . . . reverse the panel's finding and remand the complaint for a rehearing to be conducted by

received. Pesina did not dispute the amount of the attorney fee due to Cafiero pursuant to the contract Pessina's father had signed with Lafuente. During approximately eight months after Pesina signed the authorization to disclose medical information, Pesina and his mother attempted to contact Cafiero for information concerning the status of the case. Although they talked to Cafiero more than once, he did not return all their calls.

Cafiero testified that Lafuente, not Cafiero, was the lead attorney for Pesina. Lafuente and Cafiero's other partner, Lenahan, served as the firm's managing partner and handled accounting for the firm. Cafiero testified that he had had a discussion with Pesina in which Cafiero informed Pesina that the disbursement of the remaining settlement funds could not be finalized until all of the medical bills were submitted and resolved. Cafiero further testified that Pesina had not submitted all of the outstanding medical bills.

The grievance committee panel hearing the case found that Cafiero had violated Professional Conduct Rules 1.03(a) (failure to keep a client reasonably informed and promptly comply with reasonable requests for information); 1.03(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions); 1.14(b) (failure to notify promptly a client or third person with an interest that funds or other property have been received); 1.14(c) (failure to segregate funds belonging in whole or in part to a client or third person until there is an accounting and disbursement); and 8.04(a)(8) (failure to respond timely to a request for information from the Chief Disciplinary Counsel).

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... a statewide grievance committee panel composed of members selected from the state bar districts other than the district from which the appeal was taken."



Tran Complaint (SBOT Case No. D0110425311)

Complainant Tran hired Cafiero to pursue a claim against Tran's former employer, a Toyota dealer, for conversion of Tran's mechanic's tools after Tran's employment with the dealership terminated. Cafiero settled the matter for \$7,500 and deposited the settlement check into the firm trust account in December 2003. Tran knew of and approved the settlement and signed a settlement agreement with the dealership in December of 2003. Tran testified, however, that he did not learn of the payment of the settlement money until eight months later. Cafiero testified that he and Tran argued over the amount due to Cafiero under their contract for legal services and, therefore, the amount payable to Tran out of the settlement proceeds.<sup>4</sup> Tran testified that Cafiero had agreed to take only \$2,500 in attorney's fees, while Cafiero testified that he had always maintained that he was due the 40 percent provided for in the parties' contract.

Tran eventually went to Cafiero's office in August of 2004 and demanded payment of \$5,000. Cafiero was not in the office when Tran appeared, but the receptionist wrote two checks to Tran in the amounts of \$750 and \$4,250. When Tran attempted to negotiate the larger check, he was informed that the account on which it was drawn held insufficient funds to cover the check. When Tran again contacted Cafiero, Cafiero offered to pay Tran the \$3,550 balance that Cafiero calculated was due to Tran under the contract, but Tran maintained that he was entitled to \$5,000 total and demanded \$4,300 (\$4,250 plus \$50 for the returned check charge).<sup>5</sup>

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<sup>4</sup> The contract provided for a 40 percent contingency fee to the firm plus expenses. Cafiero calculated that the firm was entitled to 40 percent of \$7,500 (or \$3,000) plus \$200 in expenses. Tran was, therefore, to recover the balance of \$4,300. Tran testified that he was entitled to \$5,000.

<sup>5</sup> At the hearing, Tran agreed to accept Cafiero's \$3,550 offer.

The evidentiary panel found that Cafiero had violated Professional Conduct Rules 1.14(a) (failure to hold funds belonging in whole or in part to a client or third person separate from the lawyer's own property); 8.01(b) (failure to respond to a lawful demand for information from a disciplinary authority); and 8.04(a)(3) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

#### Emerson Complaint (SBOT Case No. D0030526191)

Emerson hired Cafiero in November 2004 to defend him against DIRECTV, Inc.'s threat to sue Emerson over his possession of signal theft equipment. Cafiero had defended a number of similar demands; Emerson hired him and paid him \$1,000, with the understanding that Cafiero would first dispute the claim in writing. Over the next several months, Cafiero responded to requests from Emerson for information about the status of the matter only by replying to an email with a promise that he, Cafiero, would "look into it."

Cafiero testified that he wrote a letter to DIRECTV disputing the claim and spoke with their representative by telephone. In June 2004 a federal appeals court held that the Wiretap Act created no private cause of action for an entity such as DIRECTV to assert against mere possessors of signal theft equipment.<sup>6</sup> DIRECTV never sued Emerson, and Emerson concluded that this was because DIRECTV had decided to stop pursuing piracy cases following the federal court decision and not due to any efforts on his behalf by Cafiero. As a result, Emerson decided that Cafiero did not earn the \$1,000 fee and demanded a full refund.

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<sup>6</sup> *DIRECTV, Inc. v. Treworgy*, 373 F.3d 1124 (11<sup>th</sup> Cir. 2004).

The evidentiary panel found that Cafiero had violated Professional Conduct Rules 1.01(b)(1) (neglecting a legal matter entrusted to the lawyer); 1.03(a) (failing to keep a client reasonably informed and promptly comply with reasonable requests for information); and 8.04(a)(8) (failing to respond timely to a request for information from the Chief Disciplinary Counsel).

#### Evidentiary Proceedings

The grievance committee panel convened the hearing at approximately 1:30 p.m. on Thursday, April 13, 2006 with all six of its members present: there were four attorney members and two public members. An assistant disciplinary counsel (CDC) appeared on behalf of the State Bar Commission for Lawyer Discipline, and Cafiero represented himself.

The CDC called each complainant to testify, and Cafiero cross-examined each of them. At approximately 5:30 p.m., the CDC called Cafiero to testify. Before proceeding, Cafiero informed the panel that he was a single parent and had sole responsibility to pick up his two children (ages eight and three) from daycare by 6:30 p.m. and, after that, to care for them. He explained that the disciplinary counsel had only told him just before the hearing started that it would be “lengthy” and stated that he had had no opportunity to make other arrangements for his children. He expressed concern that he would not have adequate time to put on his case and still meet the deadline for picking up his children. Based on these circumstances, Cafiero asked the panel to recess at 6 p.m. and to continue the matter to another date, thus allowing him to pick up his children and have a fair opportunity, given the time allowed to the prosecutor, to present his evidence.

The CDC opposed Cafiero’s request, arguing that a continuance would disadvantage the CDC by allowing Cafiero more time to prepare his defense. The CDC proposed that, rather than continuing the hearing, Cafiero should bring his children to the hearing and allow her “other staff”



to care for them until the hearing concluded. Cafiero declined this “offer.” The panel announced that it would recess at 6:15 p.m. and reconvene at 8 p.m. to conclude the hearing. After reconvening, the panel heard testimony until just before 11 p.m.

At some point during the misconduct hearing, one of the public members left.<sup>7</sup> The hearing continued, with four attorney members and the remaining public member all present. The panel then deliberated for approximately 37 minutes before announcing its findings of misconduct. The Chair stated:

*Back on the record. The Panel has met, and only three of the attorneys participated in the voting, since there is one public member here. [Public member #2] had to leave early. So there is one public member voting and two attorneys.*

This statement indicates that, while four attorneys continued to hear evidence, only three actually voted.<sup>8</sup> The chair of the panel read the findings and then announced that the sanctions phase of the hearing would begin immediately. The time was approximately 11:34 p.m.

Cafiero again asked that the sanctions hearing be continued to another day, arguing that requiring him to proceed with the sanctions phase of the hearing at almost midnight effectively denied him a meaningful opportunity to put on his case because he could not call witnesses at that late hour. The CDC again opposed Cafiero’s request for a continuance, arguing that Cafiero had been told at the beginning of the hearing that the sanctions phase would, if necessary, immediately follow the misconduct hearing. The CDC also asserted that Cafiero should have had any witnesses

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<sup>7</sup> While the record does not reflect exactly when the public member left, his last statement on the record occurred at approximately 4:46 p.m., prior to the dinner recess.

<sup>8</sup> The record does not reflect whether all four lawyers or only three retired for the panel’s deliberation. Presumably, the chair would not have felt it necessary to announce that only three lawyers voted if only three lawyers had retired to deliberate.



he wished to call present when the misconduct hearing began at 1:30 p.m. The CDC urged the panel to continue, “so that the testimony of the witnesses is fresh in the Panel’s mind, and so that we can continue it and complete it tonight.”

During a five-minute break, while the panel considered Cafiero’s second motion for continuance, Cafiero called an attorney. After the panel announced that they were denying his second motion for a continuance, Cafiero asked that the commencement of the sanctions phase of the hearing be delayed for approximately 15 minutes, so that his attorney could represent him. The time was now 11:45 p.m. The CDC again strenuously opposed the request, asserting that it would be “absurd” to wait for Cafiero’s attorney because “[w]e will be through in 15 minutes.” The panel denied Cafiero’s request for a delay, finding it to be unreasonable. Within 10 minutes of the beginning of the sanctions hearing, Cafiero’s attorney arrived. The panel did allow Cafiero’s attorney seven minutes to make a closing statement, which he began immediately on his arrival.

After the panel announced the sanction it had decided to impose, Cafiero asked that he be given 90 days to pay a portion of the attorney’s fees awarded as part of the sanction. The panel chair asked the CDC whether it was possible to delay the payment of all or a portion of fees, and she (incorrectly) advised the panel that “You have to make your decision tonight and put it on the record. There is no provision in the Disciplinary Rules to continue a portion of your sanction.” Just before adjourning, the chair asked the CDC whether, in completing the Evidentiary Hearing Report, he had to mark through the names of the panel members that “had to drop out.” The Report shows lines drawn through the names of two members who were originally marked as being “Present.”

### Statutory Grievance Committee Panel Composition

Cafiero asks that the judgment be vacated because the evidentiary panel lost its quorum sometime before the completion of the misconduct phase of the hearing. In the absence of a proper quorum required by law to hold court, any judgment rendered by the remaining judges is a nullity, because the court is without authority to render judgment. *Long v. State*, 59 Tex. Crim. 103, 127 S.W. 551, 558 (1910). The number of judges required to be present to authorize a court to transact business is determined by the constitutional and statutory provisions creating the court. *Id.*

This case involves the effect of a judgment rendered by a purportedly improperly-constituted panel as distinguished from a properly-constituted panel proceeding in an irregular manner. *See Greater Fort Worth & Tarrant Co. Cmty. Action Agency v. Mims*, 627 S.W.2d 149 (Tex. 1982); *Swain v. Wiley College*, 74 S.W.3d 143 (Tex. App.—Texarkana 2002, no pet.). It does not raise an issue of how many members of a quorum are required to render a decision, as all the panel members voted unanimously on all findings and sanction.

The State Bar Act, TEX. GOV'T CODE § 81.001 *et seq.* and the Texas Rules of Disciplinary Procedure, *reprinted* in TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (2005) (“TRDP” or “Disciplinary Procedural Rules”),<sup>9</sup> mandate the required composition of a grievance committee, a panel of the committee, and a quorum of a panel. The State Bar President appoints members to district grievance committees based on recommendations by the Directors of the State Bar. TRDP 2.02. Each Committee must consist of two-thirds attorneys and one-third public members. *Id.* Grievance committee members are assigned to panels, TRDP 2.06, which are typically composed of

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<sup>9</sup> The disciplinary rules have the force and effect of statutes. *O’Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988).

either six members or three members. A numerical majority of the panel constitutes a quorum for conducting business. TRDP 2.07. A majority vote of those present permits the conduct of business, if a proper quorum is present. *Id.* Once a panel is assigned, the complainant and respondent must consent to any changes made to the panel to obtain a quorum or to effect a substitution on the day of the hearing. TEX. GOV'T CODE § 81.072(m) and (n).

Like the Committee as a whole, each panel must be comprised of two-thirds attorney members and one-third public members. TRDP 2.02; TRDP 2.07; and TRDP 2.17. In addition, a quorum of a panel must include at least one public member for every two attorney members *present*. TEX. GOV'T CODE § 81.072(j); TRDP 2.07. The Texas legislature amended the State Bar Act in 2001<sup>10</sup> to ensure a certain ratio of public members to attorney members at hearings. Before the addition of this legislative requirement, a quorum of a three-person panel (two attorneys and one public member) could hear a case, with the two attorney members being that quorum. The legislature, presumably, wanted to ensure that hearings proceeded with a certain level of participation by non-lawyer members.

In this case, a full panel of six members with the proper ratio of four attorneys and two public members convened to hear the case. Before determining whether misconduct occurred, however, one public member departed, leaving four attorneys and only one public member to proceed with the hearing. The chair's statement that "The Panel has met, and only three of the attorneys participated in the voting, since there is one public member here" indicates that four

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<sup>10</sup> H.B. 792, 77<sup>th</sup> Leg., R.S., 2001 Tex. Gen. Laws 1436.



attorneys continued to participate in the hearing with only one public member present.<sup>11</sup> In presenting argument to this Board, counsel for the Commission conceded that “It does appear that there probably were four lawyers present at some point and only one public member.” The Commission also conceded that a panel comprised of four lawyers and one public member violates the statutory quorum requirements for grievance committee panels. Although there were enough members present to constitute a quorum numerically, the remaining members violated the statutory requirement by proceeding without at least one public member being present for every two attorneys. Having one member abstain from voting after all four lawyers had heard the balance of the evidence – and possibly participated in the misconduct deliberations – could not cure the defect.

We note that the panel chair also stated that “there is one public member voting and two attorneys,” which seems inconsistent with his previous statement that three attorneys participated in the voting. We assume that the chair simply misspoke and meant to say “three attorneys.” However, if only two attorneys and one public member (three members total) voted, then the panel had lost the fourth member required for a numerical quorum. Either way, the panel had lost its authority to act by the time it purported to render the judgment here at issue.

#### Waiver

The Commission argues that, while the departure of one public member may have resulted in an improperly constituted panel, Cafiero waived the defect by not objecting to the remaining members continuing the hearing. We disagree. The law is clear that a judgment rendered by a court

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<sup>11</sup> The record reflects that the public member who left early made no statements on the record after 4:45 p.m., but four different attorneys continued to ask questions until at least 10:19 p.m.

without capacity to act is void. *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485 (Tex. 1995) (per curiam); *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding) (per curiam); *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (orig. proceeding) (per curiam). Although a party need not appeal a void judgment to secure the right not to comply with it, the party may appeal, asking the appellate body to declare the judgment void. *State ex rel. Owens v. Latty* at 486. The grievance committee was not free to disregard the legislative mandate concerning panel composition. *See Anderson v. Grossenbacher*, 381 S.W.2d 72, 74 (Tex. Civ. App.–San Antonio 1964, writ ref'd n.r.e.) (“we are not faced with a parliamentary rule made by the Drafting Commission which it could disregard, but we have a statutory rule which the Drafting Commission could not override or ignore. Without the quorum at the fourth called hearing there was no commission, and without a commission there was no hearing.”). When the remaining members of the panel proceeded with a numerical quorum that, nevertheless, had an incorrect ratio of lawyer members to public members, it lost capacity to act as a properly-constituted grievance committee panel quorum, and its decision was, therefore, void.

#### Fee Disgorgement

Because Cafiero challenges the judgment’s requirement that he disgorge all of the fees for which he contracted with the complainants, and because the question might arise on remand,<sup>12</sup> we note that the restitution permitted under the Disciplinary Procedural Rules does not include the equitable remedy of total fee forfeiture. The panel confused the award of a civil remedy for breach

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<sup>12</sup> Our comments concerning the fee disgorgement awarded should not be construed as a suggestion that, on remand, Cafiero should be found to have committed misconduct. We express no opinion of the merits of the Commission’s misconduct cases.

of fiduciary duty<sup>13</sup> with the imposition of a sanction intended to restore to a client funds lost as a result of professional misconduct. The panel's interpretation of allowable restitution in this case effectively reads into every disciplinary case a breach of fiduciary duty; if this were the law, total fee disgorgement would be permissible in any case finding any violations of the Texas Disciplinary Rules of Professional Conduct. Without any basis for doing so, the panel here decided that Cafiero was entitled to no fee for any of the work he had performed on behalf of these three clients. That result is clearly punitive and not within the purpose of the disciplinary sanctions.

Because the panel chose to continue the hearing with a quorum that did not include one public member for every two attorney members present, we hold that the Judgment of Partially Probated Suspension is void. Accordingly, we vacate the judgment in Cause Nos. D0010525697, D0110425311, and D0030526191 and remand the case to a state-wide grievance committee panel for further proceedings consistent with this opinion.

**IT IS SO ORDERED.**



Karen L. Watkins, Chair



Paul D. Clote, Vice Chairman



William D. Greenhill

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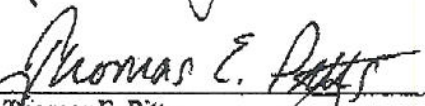
<sup>13</sup> *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

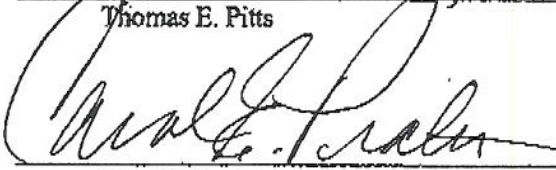


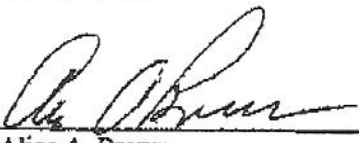
  
Robert Flowers


Yolanda de León  
  
Clement H. Osimeha

  
Jose L. Gonzalez-Falla

  
Thomas E. Pitts

  
Carol E. Prater

  
Alice A. Brown

  
Charles L. Smith

Ben Selman not sitting.