CAUSE NO. 50185

IN THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY THE SUPREME COURT OF TEXAS
AT AUSTIN, TEXAS

MAX L. TEPPER

Appellant

v.

COMMISSION FOR LAWYER DISCIPLINE

Appellee

On Appeal from the District 6 Grievance Committee, Evidentiary Panel 6A-2
In grievance/disciplinary proceeding No. D0020936831

BRIEF OF APPELLANT, MAX L. TEPPER

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ORAL ARGUMENT REQUESTED

March 26, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

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TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

COMES NOW, Appellant MAX LEON TEPPER, Texas Bar Number 24033377, (and hereafter "Tepper" or "Appellant,") and files this Brief of Appellant, and respectfully submits that the Final Judgment of Partially Probated Suspension entered by the Evidentiary Panel is in error and should be reversed and with judgment rendered in favor of Appellant dismissing the grievance, or alternatively, this case should be remanded before a statewide grievance panel for a new final hearing, and Appellant be granted such other relief to which he may be justly entitled.

STATEMENT OF THE CASE

This appeal emanates from an attorney disciplinary proceeding seeking a finding of professional misconduct and the imposition of sanctions. The evidentiary (6A-2) panel, (hereafter "Panel,") returned a decision finding professional misconduct and imposed the sanction of a partially probated suspension. [C.R. 1738] [1] Following the final hearing, Appellant timely filed a motion to modify judgment which sought the reversal of the Judgment and the entry of a new judgment in favor of Appellant. [C.R. 1761] Appellant's motion to modify was denied by the panel. [C.R. 2176]

Appellant timely filed his request for findings of fact and notified the Panel the findings were overdue. [Sup. C.R. 508; 537] [2] Appellant also timely filed a motion for new final hearing. Both Appellant's request for findings of fact and for new final hearing were overruled by operation of law. [Sup. C.R. 453] Appellant timely filed an appeal of the final Judgment of partially probated suspension, (hereafter "Judgment,") entered by the Panel and this appeal ensued.

STATEMENT OF ISSUES PRESENTED

Pursuant to Tex. R. App. Pro. 38.1(e), this case presents the following issues for consideration by the Board:

1. Whether the CDC exceeded its authority during the investigation of the complaint by untimely determining just cause existed to proceed under Rule 2.14D;

2. Whether the CDC's notice of disposition upon the complaint and to proceed under Rule 2.14D after determination of just cause was an untimely and invalid conferral of jurisdiction;

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[1] Citation to the Clerk's record shall be [C.R. {pg no.}]

[2] Citation to the Supplemental Clerk's record shall be [Sup. C.R. {pg no.}]

3. Whether the CDC's notice of disposition upon the complaint and to proceed under Rule 2.14D after finding just cause was an arbitrary and capricious deprivation of substantial rights of Appellant;

4. Whether the Panel erred in entering Judgment because there was legally insufficient evidence Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation;

5. Whether the Panel erred in entering Judgment because there was factually insufficient evidence Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation;

6. Whether the cumulative error consisting of the CDC's professional misconduct, discovery abuse, and unlawful procedure committed during the prosecution of the McNeill complaint deprived the substantial rights of Appellant by probably causing the rendition of improper Judgment;

7. Whether the Panel erred by failing to grant Appellant's motion to dismiss and for discovery sanctions, to which alternatively requested a new final hearing due to Appellee's spoliation of evidence; AND

8. Whether the Panel erred in entering Judgment because the Panel Chair was disqualified from further service as Chair of the evidentiary proceeding and over the valid objection of Appellant which was overruled.

STATEMENT OF FACTS

The competent evidence before the Panel adduced the following facts:

Appellant is the owner of a 2004 Chevrolet Silverado ranch truck (hereafter referred to as the "vehicle.") The vehicle has never been the primary or only means of transportation for Appellant. [R.R. 2:200] [3] Appellant was raised in Florida and has maintained a resident of the State ever since. [R.R. 2:199] As such, the vehicle was registered in Okaloosa County, Florida. [R.R. 2:192] The vehicle is often kept for use at the family ranch located near San Angelo, Texas. [R.R. 2:200]

On or about March 22, 2008, Appellant could not locate the vehicle, and reported to the vehicle missing to the Sheriff's Department in Bay County, Florida--the appropriate law

[3] Citation to the Reporter's record shall be [R.R. {vol no.}:{pg no.}, {line nos.}]

enforcement agency for its last known whereabouts. [R.R. 2:192] The Sheriff's Department advised Appellant to also notify his insurance carrier if the vehicle could not be located, and Appellant later notified Geico of the missing vehicle.

On May 12, 2008, Appellant executed a Geico Vehicle Theft Questionnaire and on June 16, 2008, a Sworn Statement in Proof of Loss. [C.R. 185] In June of 2008, Geico issued Appellant a check in the amount of $17,306.50 as settlement of the claim and title to the vehicle was transferred to Geico by Appellant. [C.R. 185] Appellant remained the lawful registered owner of the subject vehicle, as Geico declined to register a transfer of title. [Ex. 28] [4]

Occurring on or about September 23, 2008, Appellant discovered the vehicle and in the days which followed, returned to Texas with the vehicle. [R.R. 2:193] Appellant believed the procedure could be handled just as the insurance claim for the vehicle had been, over the phone and through the mails. [R.R. 2:202] Appellant contacted officials at the Okaloosa County, Florida Tax Collectors office to notify of the vehicle's recovery and inquire as to the proper procedure for resolving the issues of title. [R.R. 2:161, 9-11; 2:164, 9-13] This inquiry occurred over the telephone as both Appellant and the vehicle had already returned to the State of Texas several days prior and in September, 2008. [R.R. 2:167, 22-3]

During the above inquiry, Appellant was informed by the Tax Collectors Office that physical possession of the vehicle in Okaloosa County, Florida would be necessary to resolve any further title issues with the vehicle. [R.R. 2:167, 22-3] Appellant was unable to return the vehicle to Florida at the time of the inquiry. [R.R. 2:203-4] As the insurance claim with the vehicle required several months for Geico to process prior to payment, Appellant openly asserted

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[4] Citation to the evidentiary hearing exhibits shall be [Ex.]. The Petitioner's exhibits were marked for identification alphabetically, whereas Respondent's exhibits were marked numerically. E.g. [Ex. 28] refers to Respondent's Exhibit No. "28."

a good faith belief that no valid obligation existed which required Appellant to directly return the vehicle to Okaloosa County, Florida, to remedy any issues with the vehicle, or directly advise Geico. [R.R. 2:205]

Appellant did not intend to make a special appearance to return the vehicle to Florida as Appellant knew he would be returning to Florida in the near future and intended to return with the vehicle at that time and opportunity. [R.R. 2:204] Before Appellant had a reasonable opportunity to return with the vehicle to Okaloosa County Florida, Appellant was stopped by a Tarrant County Sheriff's deputy while driving the vehicle in November, of 2008. [C.R. 185] During the above stop, Appellant was cooperative, explained that his vehicle had been missing but was recovered and provided the officer with his local home, business, and other personal contact information. [R.R. 2:154, 10-3]

As the officer at the traffic stop was able to confirm Appellant was the registered owner of the vehicle, Appellant was released without incident or arrest. [R.R. 2:154, 3-5] Appellant was released with the officer's apologies and informed that his insurance company would be notified. [Ex. E] Geico acquired actual knowledge Appellant had recovered the vehicle later that day. [R.R. 2:28, 24][Ex. 28]

After Geico received actual notification that the Appellant had recovered the vehicle, they made no attempts to make contact with Appellant at any of the addresses, telephone numbers, or email addresses which they had for Appellant. [R.R. 2:54, 8-11, 23-4] The Special Investigations Unit, (hereafter "SIU,") conducted its own investigation beginning on or about December 12, 2008.[R.R. 2:41] The SIU investigation also made no attempt to to contact Appellant. [R.R. 2:54, 8-11, 23-4] The SIU did not contact the Tarrant Co. Sherriff's Dept. or review the police report record of the traffic stop. [R.R. 2:26] The SIU contacted Detective Ton

Reilly, (hereafter "Reilly,") a deputy sheriff, since retired, assigned to the North Texas Auto Theft Task Force. The SIU conducted surveillance on the vehicle which had been kept at Appellant's local residence.

On or about February 6, 2009, the SIU completed its investigation upon the fact of Appellant having possession of both the vehicle and the settlement proceeds for several months, and determined a fraudulent act was committed. [RR 2:76, 15-9] Geico could not authorize a claim for restitution of its investigative expenses, unless the investigation determined that a fraudulent act was committed. Geico had not lawfully recorded the transfer of title to the vehicle, and thus, it could not conclude it was the victim of a fraud required to authorize a claim for restitution. [Ex. 28]

The business records Petitioner received from Geico omit from the activity log of the vehicle claim file any reference of the investigation and all entries for the period of time the investigation was conducted. [Ex. 28] Upon conclusion of the investigation on the 9th day of February, 2009, Geico had lawfully transferred title to the vehicle in its name after registration with Florida department of motor vehicles, re-listed the vehicle as stolen on the NCIS, and forwarded the new certificate of title and keys to Geico's S.I.U. in Dallas. [Ex. 28]

On the 12th of February, 2009, several Geico S.I.U. employees with Det. Reilly present, repossessed the vehicle from Appellant's local residence where it had been parked since November of 2008. [R.R. 2:194-5, 24-1] Immediately upon learning that Geico chose to repossess the vehicle instead of contacting him, Appellant contacted Geico and tendered the full amount of the claim in certified funds, however said tender was refused in order to allow former Detective Tom Reilly more time to extort Appellant. [R.R. 2:215-7] [Ex. 4]

A few days following the first tender, Appellant again tendered certified funds to Geico this time in the amount of $17,306.50 plus the additional amount claimed Geico as restitution for its investigative fees incurred. [R.R. 2:228-9] Once again, this tender from Appellant was also refused to allow former Detective Tom Reilly more time to threaten the Appellant within criminal charges unless Appellant "donated" the vehicle to the task force. [R.R. 2:229]

After Appellant refused to be extorted for another month, on or about the 20th of March, 2009, Geico finally accepted Appellant's third tender of certified funds in exchange for the immediate return of the vehicle and all lawful rights of possession and ownership thereto. [C.R. 185] Nevertheless, it took Geico approximately six more months to actually complete the transfer of all lawful rights to possession and ownership of the vehicle back to Appellant. Once again Geico delayed the lawful transfer in order to help former Detective Tom Reilly extort the Appellant.

It is undisputed the complainant in this proceeding, Craig McNeil, (hereafter "complainant" or "McNeill,") was an assistant criminal district attorney for Dallas County, under the employ as a special prosecutor with the Texas Dept. of Insurance at the time the grievance was filed. [Sup. C.R. 11] At no time was the complainant ever a client of Appellant. In fact, the complainant and Appellant had no prior contact with Appellant prior to filing this grievance against him on February 12, 2009 on the same day and shortly after Geico's repossession of the vehicle from Appellant's Dallas address--even though McNeill had no personal knowledge of the allegations of misconduct against Appellant filed with the Office of the Chief Disciplinary Counsel, (hereafter "CDC.") [C.R. 618]

Appellant received notice of the complaint from the CDC on March 3, 2009. [Supp. C.R.: 11] Appellant timely responded on or about March 23, 2009. The CDC investigated the

complaint and determined just cause existed. [C.R. 19] The CDC notified Appellant of the disposition of the complaint on June 17, 2009 and with the alleged determination of Just Cause to have occurred on May 27, 2009. [C.R. 19] Appellant elected to proceed before an evidentiary panel, and the following proceedings were instituted.

After final hearing, the Evidentiary Panel 6A-2, (hereafter "Panel,") determined Appellant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and without further hearing imposed sanctions. [C.R. 1738] Appellant timely filed a motion to modify judgment challenging the sufficiency of the evidence to support finding of misconduct. [C.R. 1761] The motion was denied by the panel. [C.R. 2176] Appellant timely requested findings of fact and conclusions of law, and gave timely notice to the Panel after the Panel's findings of fact were overdue. [Sup. C.R. 508; 537] Appellant filed a motion for dismissal, discovery sanctions, and for new final hearing due to the discovery abuse and other misconduct committed by the CDC. [Sup. C.R. 453] The motion was overruled by operation of law. Appellant timely perfected this appeal.

SUMMARY OF THE ARGUMENT

No more than sixty days after the date by which the respondent must file a written response to the Complaint, the Chief Disciplinary Counsel shall investigate the Complaint and determine whether there is Just Cause. Rule 2.12 Tex. Dis. R. Pro. In the case at hand, the deadline for the CDC to conclude its investigation of the McNeill complaint was June 3, 2009. The CDC alleges it found just cause existed on May 27, 2009, however the record fails to reflect such finding occurred until June 17, 2009. [C.R. 19] As such, the CDC exceeded its authority to proceed upon the McNeill because no jurisdiction existed after the expiration of the investigatory period provided by Rule 2.12, to which had already expired June 3, 2009. [Sup. C.R. 11]

Accordingly, the CDC's notice under Rule 2.14D to Appellant was untimely and invalid to confer jurisdiction to proceed upon the McNeill complaint. *Commission for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 134-5 (Tex.App. Houston [1st Dist.] 2011) citing Tex. R. Dis. Pro. 2.13. Furthermore, the CDC's notice of disposition upon the complaint to proceed under Rule 2.14D after finding just cause was an arbitrary and capricious deprivation of substantial rights of Appellant. *City of El Paso v. P. U.C. of Tex.*, 883 S.W.2d 179, 184 (Tex. 1994).

Nevertheless, the CDC elected to proceed upon the McNeill complaint, alleging one count of professional misconduct, namely that Appellant violated Rule 8.04(a)(3) Tex. Dis. R. Prof. Conduct. Upon final hearing on the complaint, the Panel determined Appellant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, concluding Appellant had violated the alleged Rule 8.04(a)(3). [C.R. 1738] Violation of Rule 8.04(a)(3) however, requires proof the respondent attorney committed an intentional falsehood. *Walter v. Commission for Lawyer Discipline*, 2005 WL 1039970, (Tex.App. Dallas 2005) at *5.

The undisputed evidence adduced before the Panel at final hearing was unequivocal that Appellant did not commit an intentional falsehood necessary to find a violation of Rule 8.04(a)(3). A legal sufficiency or "no-evidence" challenge should be sustained if the record shows an absence of evidence of a vital fact, the evidence offered to prove a vital fact is no more than a scintilla, or the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

In the case at hand, there was no competent or sufficient evidence Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation for the simple fact Appellant did not commit an intentional falsehood. Furthermore, as a matter of law, no special relationship existed between Appellant and Geico to impose a duty of disclosure such that any silence on the

part of Appellant could be sufficient to reasonably infer the requisite intentional falsehood necessary to find a violation of Rule 8.04(a)(3). *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). The evidence adduced at the final hearing was legally and factually insufficient for which the Panel could reasonably infer Appellant violated the alleged rule. As such, the Panel's finding and Judgment of professional misconduct was not reasonably supported by substantial evidence, should be reversed by the Board and the grievance dismissed.

Furthermore, the CDC committed discovery abuse and spoliated evidence during the disciplinary proceeding upon the complaint. The cumulative errors of misconduct by the CDC's prosecution of the McNeill complaint in all likelihood caused the rendition of the Judgment against Appellant. However the Panel erred by refusing to afford Appellant a spoliation presumption by finding Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. In addition, the Panel erred by refusing to grant Appellant's motion to dismiss and for discovery sanctions, and to which alternatively requested a new final hearing due to Appellee's spoliation of evidence and the presumption to which Appellant was entitled. Lastly, the presiding Chair for the evidentiary proceeding was disqualified from presiding over the final hearing, over the valid objection of Appellant. As such, the final hearing which resulted in the Judgment of professional misconduct was voidable, if not void.

ARGUMENT & AUTHORITIES

I. SCOPE OF JUDICIAL REVIEW.

The Appellant may appeal the Judgment to the Board of Disciplinary Appeals, and such appeals must be on the record, determined under the standard of substantial evidence. Rule 2.24 Tex. R. Dis. Pro. A person who has exhausted all administrative remedies available within a

state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. Tex. Gov't Code Sec. 2001.171.

This Board shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions of the Evidentiary Panel are:

(A) in violation of a constitutional or statutory provision;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Tex. Gov't. Code Sec. 2001.174(2)(A)-(F)

II. THE CDC EXCEEDED ITS AUTHORITY DURING THE INVESTIGATION OF THE COMPLAINT.

Appellant's issues presented:

1. Whether the CDC exceeded its authority during the investigation of the complaint by untimely determining just cause existed to proceed under Rule 2.14D;

2. Whether the CDC's notice of disposition upon the complaint and to proceed under Rule 2.14D after determination of just cause was an untimely and invalid conferral of jurisdiction;

3. Whether the CDC's notice of disposition upon the complaint and to proceed under Rule 2.14D after finding just cause was an arbitrary and capricious deprivation of substantial rights of Appellant;

A. Standard of review.

The question whether the record demonstrates that the evidentiary panel acquired jurisdiction over the respondent is a legal issue, and as such, the standard of review is de novo. *Sims v. Comm'n for Lawyer Discipline*, No. 34229, (2006) at *5.

B. Applicable law

The supreme court shall promulgate rules regarding the classification and disposition of grievances, including rules specifying time limits for each stage of the grievance resolution process. Tex. Govt. Code Sec. 81.0753. The CDC shall within thirty days examine each Grievance received to determine whether it constitutes an Inquiry or a Complaint. Rule 2.10 Tex. Dis. R. Pro. No more than sixty days after the date by which the respondent must file a written response to the Complaint as set forth in Rule 2.10, the CDC shall investigate the Complaint and determine whether there is Just Cause. Rule 2.12 Tex. Dis. R. Pro. If either the CDC or the summary disposition panel decides that just cause exists, the CDC notifies the attorney of the attorney's acts or omissions that it contends violate the disciplinary rules, and the substance of those rules. *Stern*, 355 S.W.3d at 134-5 citing Tex. R. Dis. Pro. 2.13.

We apply statutory construction principles to discern the meaning of the TRDP. *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008). If a statute is silent as to the consequences for noncompliance, we look to the statute's purpose to determine the proper consequences. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001). All parts of a statute must be read together and given effect, if possible. *Id.* at 493. One provision should not be interpreted inconsistently with other provisions. *Caballero* at 600 (citing *Helena Chemical*, 47 S.W.3d at 493 ("We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone").

C. No jurisdiction existed to proceed upon the complaint.

For Appellant's jurisdictional argument to succeed, he must first establish the notice under Rule 2.14D is a jurisdictional prerequisite to the evidentiary panel's authority to proceed upon and hear the complaint. *See e.g., Meachum v. Comm'n for Lawyer Discipline*, 36 S.W.3d 612, 614 (Tex.App. Dallas 2000). (concluding district court's authority under prior disciplinary rules was not derived from or dependent upon grievance committee's just cause finding.)

A just cause determination is not a decision on the merits and does not involve an adversarial testing of evidence; it is simply a predicate for instituting a disciplinary action against an attorney. *Stern* at 135 relying on *Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 316-17 (Tex.App.-Houston [1st Dist.] 2010, pet. denied) For each Complaint not dismissed by a Summary Disposition Panel, the CDC shall give respondent written notice of the alleged violation. Tex. R. Dis. Pro. 2.14D. The attorney may timely elect to proceed upon the complaint in a district court, otherwise the administrative proceeding continues before a specially appointed evidentiary panel. Tex. R. Dis. Pro. 2.15, 2.17.

Though the finding of just cause is a predicate to proceeding upon the complaint, the just cause determination is neither a predicate to the jurisdiction of the trial court, nor a jurisdictional predicate to the authority of the evidentiary panel grievance. If the attorney elects district court, the evidentiary panel is not appointed, and the opposite holds true: if the attorney affirmatively elects to proceed before the grievance committee, then jurisdiction of the judiciary is not invoked.

District Grievance Committees appoint evidentiary panels for attorney disciplinary actions, and quorums of the evidentiary panels hear and decide the actions. *Comm'n for Lawyer Discipline v. Schaefer*, 55 Tex. Sup. Ct. J. 620 (Tex.2012) State Bar of Texas grievance

"committees only have authority to act through duly appointed panels." *Schaefer v. Comm'n for Lawyer Discipline of the State Bar of Tex.*, BODA Case No. 44292 (Jan. 28, 2011) at *9. The predicate determination of just cause institutes further proceedings upon the complaint, however, the jurisdictional prerequisite for those proceedings, including that of the evidentiary panel's authority to proceed upon and hear complaint, is the notice provided by Rule 2.14D.

The opinion of the First District Court of Appeals in *Stern* has spoken to this issue and is persuasive authority on point,

> [t]he timing of a just cause decision does not appear to be the trigger for trial court jurisdiction. That trigger is instead the notice of the alleged violation, and the attorney's choice to elect a district court or an evidentiary panel is the jurisdictional driver. *Stern* at 136, citing Tex. R. Dis. Pro. 2.13, 2.14D, 2.15.

Consequently, as an evidentiary panel proceeding is also an affirmative election by the attorney upon receipt of the notice of alleged violation from the CDC, after a determination of just cause, the notice is a jurisdictional prerequisite to the authority of an evidentiary panel to proceed upon and hear the complaint.

D. The CDC's notice of disposition upon the complaint and to proceed under Rule 2.14D after determination of just cause was an untimely and invalid conferral of jurisdiction.

Appellant would respectfully submit to the Board the jurisdiction of the evidentiary panel failed to attach to the proceeding upon the complaint due to the CDC's untimely notice under Rule 2.14D. As such the jurisdictional prerequisite notice under Rule 2.14D was invalid, the disciplinary proceedings before the panel were null and void. [5]

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[5] For clarity, it is Appellant's belief the finding of Just Cause in this proceeding was untimely, and exceeded the period authorized by Rule 2.12 with which to investigate, of no more than 60 days after the response, which expired June 3, 2009. Thus, the any reference to genuine date of just cause would reveal the illegitimacy of the CDC action in this regard and the facial invalidity of the proceeding. Thus, notice under 2.14D could not have been made on or near the alleged just cause determination date of May 27, 2009, for reason no such determination had been made at that time.

Disciplinary Rule 15.05 identifies, by rule, the specific time periods to which are mandatory under the TDRP, including: Rules, 2.10, 2.12, and 2.15. Rule 15.05 Tex. R. Dis. Pro. The rule further states, "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." *Id.*

Thus, upon proper application of the principles of statutory construction, it is clear from the intent of Disciplinary Rules promulgated, the rules intend for strict compliance with regard to the mandatory time periods delineated. Furthermore, it is clear the Supreme Court intended for the noncompliance with any of the specially identified time periods to invalidate the action of the offending party.

Relevant to the issue before this Board, is Rule 2.12, providing the CDC shall determine whether there is just cause to proceed within sixty days after the date by which the attorney must file a written response to the complaint. Tex. R. Dis. Pro. 2.12. Thus, it is clear from the intent of the disciplinary rules, the investigatory period of time from which the CDC must determine whether just cause exists is mandatory, and furthermore, any noncompliance or failure by the CDC to make such a determination after the expiration of the investigatory period, (of not more than 60 days after the date the respondent must file a response to the grievance) would invalidate any such finding of the CDC.

In the case at hand, the June 17, 2009 transmittal letter, (hereafter the "Rule 2.14D notice,") from the CDC would purport to notify Tepper of the determination of just cause by the CDC, to which alleged its preliminary investigation had concluded and determined on May 27, 2009, that just cause exists. If the alleged just cause were in fact determined on May 27, 2009,

such would have occurred within the mandatory time period to investigate the complaint. *See* Rule 2.12.

In this case, the CDC notified Tepper of the McNeill complaint Tepper on March 3, 2009. [Sup. C.R. 11] Tepper timely delivered a response within the 30 day period, or by April, 3, 2009. Tex. R. Dis. Pro. 2.10 The CDC must determine whether there is just cause to proceed within sixty days after the date by which the attorney must file a written response to the complaint, or in any event, the 60 day period for which to investigate this case, under Rule 2.12, expired June 3, 2009.

The CDC has no discretion or authority to investigate a complaint in excess of 60 days as the CDC must either determine Just Cause or recommend the dismissal of complaint by placement on the summary disposition panel docket. Once placed with the summary disposition panel, only the summary disposition panel is authorized to continue disciplinary proceedings on the complaint. However, such was not the case here, as the disposition of the complaint is clear in that it was the CDC's determination of Just Cause, alleged to have occurred on May 27, 2009, and from which said allegation authorized further disciplinary proceedings upon the complaint.

However, the determination is problematic for multiple reasons. First, Rule 5.02 mandates the CDC shall also, notify respondent promptly of the disposition of each Complaint. Tex. Dis R. Pro. Rule 5.02K. The CDC's Rule 2.14D notice to Appellant, occurred June 17, 2009, in excess of three (3) weeks following the CDC's alleged determination date of Just Cause, May 27, 2009. Moreover, the mandatory period to investigate and determine just cause expired June 3, 2009--two weeks prior to the CDC's Rule 2.14D notice of June 17, 2009, and to which instituted this proceeding against Appellant. The mandatory "must have" means that there is no flexibility built into the requirement. *In re Allison*, 288 S.W.3d 413, 417 (Tex. 2009)

There is no legitimate interest served by the CDC's noncompliance with the mandate given by the Supreme Court. Further, if not held accountable on this issue, the practical effect will allow the CDC to exercise an unwarranted discretion in excess of their authority.

The CDC would purport by its conduct, the disposition of the complaint was its determination of just cause. However, as the *Stern* Court wisely interpreted, the just cause determination, "is simply a ***predicate for*** instituting a disciplinary action against an attorney." [emphasis added] *Stern* at 135. Thus, the proper context and intent of Rule 2.12, must be read together and given effect, if possible, and interpreted in the context for which it was intended.

Upon determining just cause exists to proceed upon the complaint, pursuant to Rule 2.12 [the predicate for instituting a disciplinary proceeding, (to which disciplinary proceeding is the subject)] the CDC shall:

- pursuant to Rule 2.14D, notify the attorney of the attorney's acts or omissions that it contends violate the disciplinary rules, and the substance of those rules; AND
- promptly notify the respondent of the disposition of the compliant, to which in this case, was determined just cause exists to proceed thereon said complaint AND the notice provided by Rule 2.14D, the prerequisite to jurisdiction over the complaint and the respondent. See *Stern* at 135-6

Regardless of the timing, the disciplinary rules allow a summary disposition panel to make a just cause determination on some unspecified later date even if the CDC initially determines that just cause does not exist. *Id.* However, as the record before the Board is conclusive, the CDC made the opposite determination and is bound thereby. As such, the CDC investigated and allegedly concluded on May 27, 2009, that just cause exists to proceed upon the McNeill complaint.

The CDC was mandated to promptly notify Tepper of its determination of just cause exists and satisfy the notice requirements of Rule 2.14D. The CDC failed to notify Tepper until

June 17, 2009, fourteen (14) days after the CDC's discretion and authority to proceed upon the determination had expired. Moreover there is no evidence within the record the CDC did in fact determine just cause existed on the date alleged of May 27, 2009, nor is there any evidence the CDC did make such a determination within the period of time mandated by the disciplinary rules, to which expired June 3, 2009. *See* Rules 2.12, 15.05 Tex. Dis. R. Pro. The only evidence of the CDC's alleged determination date of May 27, 2009, of just cause, is the Rule 2.14D notice to Appellant, dated and filed on June 17, 2009. [6]

As such, the CDC lacked any standing to proceed upon the McNeill complaint and from which to deliver the Rule 2.14D Notice to Appellant on June 17, 2009, as the public interest favors the expedient and efficient resolution of unmeritorious and frivolous complaints. More importantly, the Rule 2.14D Notice fails for reason of the complete want of capacity of the CDC to take any action or proceed on the McNeill complaint after June 3, 2009.

Appellant has demonstrated, the just cause finding is a predicate to the CDC's institution of disciplinary proceedings, and there is no evidence the CDC made such a determination by June 3, 2009, mandated by the disciplinary rules. Moreover, as the notification under Rule 2.14D is a jurisdictional prerequisite for the CDC to have instituted disciplinary proceedings against Appellant, the Rule 2.14D Notice to Appellant was untimely, both delivered and filed by the CDC in this case, on June 17, 2009. Accordingly, the resulting disciplinary proceedings upon the McNeill complaint to have followed were wholly null and void, as the CDC lacked any jurisdiction to proceed upon the complaint, nor institute disciplinary proceedings against Appellant.

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[6] In comparison, the attorney in *Stern*, cited previously, received two separate notices pursuant to rule 2.14D upon the CDC's determination of just cause. In each instance, (one of which contained three separate matters,) the CDC's notice to proceed upon the complaint was in fact delivered to Stern on the very date the CDC had made such a determination of just cause. *See Stern* at 136.

Furthermore, the CDC's failure in this instance to satisfy the predicate finding of just cause within the period of time mandated by the disciplinary rules deprived the jurisdiction of the evidentiary panel from having any authority to proceed upon and hear the complaint to which resulted in the adverse Judgment of Partially Probated Suspension against Appellant. A judgment is void only when it is shown that the court had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *Austin Independent School District v. Sierra Club*, 495 S.W.2d 878, 881 (Tex.1973). In such instances, the error is fundamental, and may be raised for the first time on appeal. *Schaefer,* at *8. The Texas Supreme Court also recognizes fundamental error where "the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *Pirtle v. Gregory*, 629 S. W.2d 919, 920 (Tex. 1982).

As this Board has stated previously, "[t] the Office of the Chief Disciplinary Counsel serves in a dual capacity in evidentiary proceedings. How the CDC performs its responsibilities is critical to accomplishing the disciplinary system's goal of protecting the public." *Schaefer* at *9. Accordingly, for the above reasons, it is respectfully requested this Board sustain Appellant's issues presented, declare the resulting Judgment void, and dismiss the grievance.

E. The CDC's notice of disposition upon the complaint and to proceed under Rule 2.14D after finding just cause was an arbitrary and capricious deprivation of substantial rights of Appellant.

"Arbitrary action of an administrative agency cannot stand." *Lewis v. Metropolitan Savings and Loan Association*, 550 S.W.2d 11, 16 (Tex.1977). The supreme court has made clear that an agency's final order may be supported by substantial evidence and yet be invalid for arbitrariness. *Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 454 (Tex.1984)

In pre APA cases, the Texas Supreme Court considered the arbitrary and capricious test to be simply an aspect of the substantial evidence test, i.e. two sides of the same coin. *Id.* In modern times, the test encompasses judicial review of whether the agency: (1) failed to consider a factor the legislature directs it to consider, (2) considers an irrelevant factor, and (3) weighs only relevant factors that the legislature directed it to consider but still reaches a completely unreasonable result. *City of El Paso v. P. U.C. of Tex.*, 883 S.W.2d 179, 184 (Tex. 1994).

In fact, the long held approach has been that an agency's failure to comply with its own rules is arbitrary and capricious. *Id.* In deciding whether the CDC acted arbitrarily and capriciously, we must determine whether the final order was based on a consideration of all relevant factors and whether there is a rational connection between the facts and the decision of the CDC. *State v. Mid-south Pavers, Inc.*, 246 S.W.3d 711, 723 (Tex.App. Austin 2007). In this instance, the final order was the CDC's determination of just cause exists to proceed upon the complaint provided in the June 17, 2009 Rule 2.14D Notice to Appellant. *See* Rules 2.12-2.14 Tex. R. Dis. Pro.

In the case at hand, it is clear the CDC failed to consider the mandatory time period with which to investigate the McNeill complaint provided under Rules 2.12 and 15.05 Tex. R. Dis. Pro. The CDC's duty to investigate the McNeill complaint required the CDC determine whether just cause exists by June 3, 2009. Tex. R. Dis. Pro. 2.12. Thus, if the CDC was unable to determine just cause existed to proceed upon the complaint by the mandatory deadline of June 3, 2009, the CDC was obligated to place the McNeill complaint on the dismissal docket and to recommend dismissal of the complaint before the summary disposition panel. *See* Rules 2.12-2.13, and 5.02C-D Tex. R. Dis. Pro. Yet, the CDC failed to consider its obligations under the disciplinary rules, including its duty to promptly notify Appellant of the disposition of the

McNeill complaint. *See* Tex. R. Dis. Pro. 5.02. The CDC failed to notify Appellant the CDC had allegedly determined just cause exists until June 17, 2009, upon providing the Rule 2.14D Notice.

As this Board held previously in *Schaefer*, "[o]nly strict adherence to the requirements which...are mandatory will protect public confidence in the decisions of the evidentiary panels." *Schaefer* at *9. In this case, the CDC failed to comply with its own rules and reached a completely unreasonable result. "Meeting this requirement is not burdensome to the Commission or the Office of the Chief Disciplinary Counsel." *Id.*

Thus, it was arbitrary and capricious for the CDC to fail to promptly notify Appellant upon the disposition of the McNeill complaint and to proceed thereon under Rule 2.14D--well after the June 3, 2009 investigatory period had expired from which the CDC could have determined just cause existed. Accordingly, for the above reasons, it is respectfully requested this Board sustain Appellant's issues presented and dismiss the grievance.

III. THE JUDGMENT OF THE EVIDENTIARY PANEL WAS ERRONEOUS AND NOT REASONABLY SUPPORTED BY SUBSTANTIAL EVIDENCE.

Following the close of evidence, the Panel in this case made the factual determination:

- Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. [C.R. 1739]

From the factual determination above, the Panel concluded that the following Texas Disciplinary Rule of Professional Conduct has been violated: 8.04(a)(3). [C.R. 1739]

Tepper filed a motion to modify judgment, a motion for new trial, and requested finding of fact and conclusions of law, all three of which challenged the sufficiency of the evidence to support the findings and determination Tepper engaged in professional misconduct. The motions

were overruled and the request for findings of fact and conclusions of law were ignored. The Panel then entered the following additional findings of fact:

- Respondent never notified GEICO that he had recovered the vehicle. [C.R. 2337]
- The Panel found that Respondent has committed professional misconduct as defined by Rule 1.06V of the Texas Rules of Disciplinary Procedure and in violation of Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct, Article X, Section 9, of the State Bar Rules. [C.R. 2337]

In this appeal, Tepper is challenging the Panel's determinations as they relate to the imposition of judgment under the disciplinary rules. Specifically, Tepper does not believe that there is legally or factually sufficient evidence to support the Panel's findings that: (1) Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, or (2) Respondent never notified GEICO that he had recovered the vehicle, or (3) Respondent has committed professional misconduct as defined by Rule 1.06V of the Texas Rules of Disciplinary Procedure and in violation of Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct, Article X, Section 9, of the State Bar Rules. Furthermore, Tepper is challenging the Panel's conclusion of law that Tepper violated Texas Disciplinary Rule of Professional Conduct 8.04(a)(3).

As such, the Panel's Judgment which concluded Appellant committed professional misconduct was erroneous, as the Panel's findings are not reasonably supported by substantial evidence. Accordingly, the Panel erred when deciding to impose the sanction in this proceeding as such was an unwarranted exercise of discretion.

Appellant's issues presented:

4. Whether the Panel erred in entering Judgment because there was legally insufficient evidence Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; AND

5. Whether the Panel erred in entering Judgment because there was factually insufficient evidence Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation;

A. Standard of review

Appellant respectfully submits that there is legally and factually insufficient evidence to support the Evidentiary Panel's finding of dishonesty, fraud, deceit, or misrepresentation essential to the imposition of Judgment of professional misconduct.

When both legal and factual sufficiency challenges are raised on appeal, an appellate court must first examine the legal sufficiency of the evidence. *Glover v. Tex. Gen. Indem. Co.*, 619 S.w.2d 400, 401 (Tex. 1981). A legal sufficiency or "no-evidence" challenge will be sustained if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). Although a court must consider the evidence in the light most favorable to the verdict, if the evidence allows only one inference, neither jurors nor the reviewing court may disregard it. *Id.* at 822.

The Texas Supreme Court has recently clarified the standard of review applicable to a legal sufficiency or no evidence challenge to a jury verdict. *City of Keller v. Wilson*, 168 S.W3d 802 (Tex. 2005). "The traditional rule in Texas has never been that appellate courts must reject contrary evidence in every no-evidence review. Instead, the traditional scope of review does not disregard contrary evidence if there is no favorable evidence (cite omitted), or if contrary evidence renders supporting evidence incompetent (cite omitted) or conclusively establishes the opposite." *Id.* at 811. More generally, evidence cannot be taken out of context in a way that

makes it seem to support a verdict when in fact it never did. *Id.* at 812; citing *Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W3d 681, 684-5 (Tex. 2004).

The Supreme Court also clarified the consideration of circumstantial evidence in reviewing a no evidence challenge in City of Keller. The Court stated that in claims "supported only by meager circumstantial evidence, the evidence does not rise above a scintilla (and thus is legally insufficient) if jurors would have to guess whether a vital fact exists." *City of Keller*, 168 S.W3d at 813. "When the circumstances are equally consistent with either of two facts, neither fact may be inferred." *Id.*

In such cases, the courts must "view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances." *Id.* at 814. "Thus, when the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well." *Id.*

In *City of Keller*, the Court also stated, "an appellate court conducting a legal sufficiency review cannot 'disregard undisputed evidence that allows of only one logical inference.'" *Id.* "By definition, such evidence can be viewed in only one light, and reasonable jurors can reach only one conclusion from it." *Id.* "Most often, undisputed contrary evidence becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied." *Id.* at 815.

"Proper legal-sufficiency review prevents reviewing courts from substituting their opinions on credibility for those of the jurors, but proper review also prevents jurors from substituting their opinions for undisputed truth. When evidence contrary to a verdict is conclusive, it cannot be disregarded." *Id.* at 817. "Of course, the jury's decisions regarding

credibility must be reasonable." *Id.* at 820. "And ... they are not free to believe testimony that is conclusively negated by undisputed facts." *Id.* at 820.

Conversely, in reviewing a factually insufficient evidence issue, the courts examine and consider all of the evidence, not just the evidence that supports the verdict, to see whether it supports or undermines the finding. *Maritime Overseas Corp. v. Ellis*, 971 SW.2d 402, 406-07 (Tex. 1998). The appellate courts consider and weigh all of the evidence and will set aside the verdict if it is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.* at 407. Stated differently, an assertion that the evidence is factually insufficient to support a fact finding means that the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

B. The disciplinary rules of professional conduct specially define Fraud.

The allegations against Appellant were but a single charge of professional misconduct, namely a violation of Rule 8.04(a)(3), providing "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Rule 8.04(a)(3) Tex. Dis. R. Prof. Conduct. From the basic facts adduced during the final hearing underlying the grievance, the Panel found Appellant committed the violation charged, namely, Appellant engaged in conduct constituting dishonesty, fraud, deceit or misrepresentation.

The Disciplinary Rules of Professional Conduct define fraud with respect to disciplinary proceedings as "an intent to deceive and either: a knowing misrepresentation of a material fact; or a knowing concealment of a material fact if there is a duty to disclose the material fact." Rule 1.00(j) Tex. Dis. R. Pro. Conduct. Fraud, as defined under the disciplinary rules, is conduct having a "purpose to deceive and not merely negligent misrepresentation or failure to apprise

another of relevant information." *Eureste v. Commission for Lawyer Discipline*, 76 S.W.3d 184, 198 (Tex.App. Houston [14th Dist] 2002, no writ) citing Tex. Dis. R. Prof'l Conduct terminology.

The disciplinary rules do not define the remaining three terms prohibited under the rule: dishonesty, deceit, or misrepresentation. In such case, we give that word its "plain meaning unless the statute clearly shows that [it was] used in some other sense," *Coggin v. State*, 123 S.W.3d 82, 88 (Tex.App.-Austin 2003, pet. ref'd), and look to the dictionary or other such sources to determine the word's definition. *See Oler v. State*, 998 S.W.2d 363, 368 (Tex.App.-Dallas 1999, pet. ref'd, untimely filed) (noting that fraud and deception are not statutorily defined and referring to dictionary definition for ordinary usage of terms).

As to the rule's prohibition of dishonesty, the term is defined as including "lack of honesty, probity, or integrity in principle" and "lack of ... straightforwardness." *Brown v. Commission for Lawyer Discipline*, 980 S.W.2d 675, 680 Tex.App. San Antonio 1998, no writ) citing Webster's Third New International Dictionary 650 (1981). [7]

Webster's defines "deceit," as part of the primary definition, as "the act or practice of deceiving (as by falsification, concealment, or cheating)." *Oler v. State*, 998 S.W.2d 363, 368-9 (Tex.App. Dallas 1999) citing Webster's Third New International Dictionary 584 (1981) The Oxford English Dictionary defines "deceit," as its primary definition, as "[t]he action or practice of deceiving; concealment of the truth in order to mislead; deception, fraud, cheating, false dealing." *Id.* citing Oxford English Dictionary 324 (2d ed.1989)

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[7] In the Merriam Webster Collegiate Dictionary, Tenth Edition, being "dishonest" implies a wilful perversion of the truth in order to deceive, cheat or defraud. In Webster's Third New International Dictionary, being "dishonest" is characterized by lack of trust, honesty or truthfulness or by an inclination to mislead, lie, cheat or defraud. Interestingly, in Black's Law Dictionary, Ninth Edition, when reviewing the words "dishonest act", the reader is advised to "see fraudulent act." The words "fraudulent act" are defined as conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.

As with dishonesty and deceit, the disciplinary rules do not define misrepresentation with regard to Rule 8.04(a)(3), however the commentary to the disciplinary rules provides guidance with respect to the terminology, "as the terms "fraud" and "fraudulent" do not incorporate all of the elements of common-law fraud...the terms do not include negligent misrepresentation or negligent failure to apprise another of relevant information." *See* Rule 1.00(j) Dis. R. Prof. Conduct, cmt. 4. [8]

As such, the disciplinary rules distinguish between mere negligent conduct, to which is specifically excluded from definition of fraud, and conduct prohibited under Rule 8.04(a)(3). Moreover, when considering the context of the disciplinary rules and as to how fraud is specially defined, it stands to good reason the prohibition intended under the rule is limited to those instances whereby the misrepresentation made is both "knowing" and "material." *See* Rule 1.00(j) Tex. Dis. R. Pro. Conduct. Otherwise, it would serve no purpose for the Texas Supreme Court of have specially defined fraud as a knowing misrepresentation of a material fact, to which would also violate the rule. Had the supreme court intended for such a misrepresentation to violate the subject rule without either of the knowledge or materiality required to engage in fraud as prohibited by the disciplinary rules, then the Supreme Court would not have included either of such terms under the definition of fraud specially provided.

Also on point is that stated from the Restatement of Restitution § 8(1957), by the Supreme Court in *Custom Leasing, Inc. v. Texas Bank & T. Co. of Dallas*, 516 S.W.2d 138 (Tex.1974), which speaks of tortious misrepresentations and materiality, as "[a]

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[8] To recover upon an action for negligent misrepresentation, the plaintiff must prove that: (1) the defendant made the representation in the course of its business or in a transaction in which it has a pecuniary interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *First Interstate Bank v. S.B.F.I., Inc.*, 830 S.W.2d 239, 245 (Tex. App.—Dallas 1992, no writ).

misrepresentation is a representation which, under the circumstances, amounts to an assertion not in accordance with the facts." *Id.* at 142 A misrepresentation is material if it would by likely to affect the conduct of a reasonable man with reference to the transaction in question. *Id.* [9] [10]

C. Violation of Rule 8.04(a)(3) requires an intentional falsehood.

In order to find an attorney engaged in any of the prohibited conduct of dishonesty, fraud, deceit, or misrepresentation required to violate the rule, it is inherent upon any such finding to require the requisite intent of the attorney to have engaged in conduct constituting dishonesty, fraud, deceit, or misrepresentation. *State Bar v. Lerner*, 859 S.W.2d 496, 498-9 (Tex.App. Houston [1st Dist] 1993). In *Lerner*, the Houston Appellate Court held, "[T]he trial judge was not required to find that Lerner engaged in dishonesty, fraud, deceit, or misrepresentation...[r]ather, he could have reasonably concluded that Lerner's conduct was not done with intentional dishonesty in order to defraud or deceive anyone." *Id.* [11]

The *Lerner* court noted the trial judge obviously believed that Lerner's conduct was wrong, but not that Lerner acted dishonestly, fraudulently, or deceitfully, holding, "For that conduct, intent is essential." *Id.* at 499. Furthermore, the Dallas Court of Appeals has also

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[9] "A representation consists of words or other conduct manifesting to another the existence of a fact, including a state of mind. It may be made directly to the other or by a manifestation to third persons intended to reach the other." *Custom Leasing* at 142 citing Restatement of Restitution § 8(2)(b) (1957)

[10] "A misrepresentation is fraudulent if it is made to another with knowledge that it is untrue and with the intention that the other shall act thereon. Likewise, it is fraudulent for a person with a like intention to make an untrue statement if he realizes that he does not know whether or not it is true. Concealment implies a purpose of preventing another from ascertaining pertinent facts and is fraudulent if done with the intention that another shall act thereon. Non-disclosure, when unprivileged, is also fraudulent when the facts are intentionally not revealed for the purpose of inducing action by another." *Custom Leasing* at 142 citing Restatement of Restitution § 8(2)(c) (1957)

[11] Lerner did not contest the trial judge's findings that she 1) failed to comply with the terms of the June 24, 1987 settlement letter, 2) failed to return the money to Williams, 3) forced Williams to attend additional hearings, 4) misled Williams into believing that the Cartwright lawsuit had been settled, and 5) failed to inform Williams she was not settling the lawsuit until he inquired on two separate occasions about the release...Such findings would obviously require intentional misconduct, but...[t]he trial judge could have concluded that this disclosure by Lerner was inconsistent with the State Bar's allegations of intentional dishonesty done to defraud, deceive, or mislead. *Lerner* at 499

spoken on the very Rule at issue before the Board, holding, "Rule 8.04(a)(3) prohibits ***intentionally*** engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation." [emphasis added] *Walter*, 2005 WL 1039970, at *5, citing Tex. Dis. R. Pro. Conduct 8.04(a)(3)

In addition, the Supreme Court of Iowa upon interpreting the Texas Rule at issue, came to the same conclusion as both courts in the *Walter* and *Lerner*. *See Attorney Disciplinary Bd. v. Kress*, 747 N.W.2d 530, 530 (Iowa.2008). The Iowa Court in *Kress*, held, "[w]hen considering alleged violations of DR 1-102(A)(4), ["A lawyer shall not: (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation,"] unlike DR 1-102(A)(6), intent is a requirement for violation of DR 1-102(A)(4). *Id.* 1993). [12]

However, the record before the Panel is devoid of any evidence of Appellant's intent to violate the rule for the simple fact Tepper did not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Moreover, there is no competent or sufficient evidence of the requisite intent to commit dishonesty, fraud, deceit, or misrepresentation to be reasonably inferred from Appellant's conduct. *See Lerner* at 498. Lastly, in addition to the requisite intent to sufficient violate the rule, to engage in the prohibited conduct of Rule 8.04(a)(3), it is necessary such "violation of the rule requires an intentional falsehood." *Walter* at p.5.

As Appellant will demonstrate, the record before the Panel is further devoid of any competent or sufficient evidence Tepper committed a falsehood required to violate the rule, for the single fact Tepper did not make a falsehood to Geico or any other. As such, it was unreasonable for the Panel to infer the basic facts constitute dishonesty, fraud, deceit or

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[12] DR 1-102. Misconduct: (A) A lawyer shall not: (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Supreme Court of Texas, Code of Professional Responsibility, DR 1-102(A)(4) repealed by Order of the Supreme Court of Texas dated October 17, 1989, effective January 1, 1990. Supreme Court of Texas, Code of Professional Responsibility, DR 1-102(A)(4) repealed by Order of the Supreme Court of Texas dated October 17, 1989, effective January 1, 1990.

misrepresentation were competent or sufficient evidence to violate Rule 8.04(a)(3) Tex. Dis. R. Prof. Conduct.

D. There was legally and factually insufficient evidence Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

When considering only the evidence and the reasonable inferences therefrom in the most favorable light to Appellee, the evidence does not support a finding Tepper engaged in dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.04(a)(3), as there is no evidence of an "intentional falsehood" by Appellant. Appellant would concede he did not personally advise Geico the vehicle had been located prior to the pertinent two month period had elapsed, however, Appellant would have been well within his right to leave the vehicle exactly where it was discovered. Additionally, the fact Appellant had possession of both the vehicle and the settlement funds for several months, is no evidence of a violation of Rule 8.04(a)(3). Vital facts may not, however, be proved by unreasonable inferences or by piling inference upon inference. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex.1968). Appellant tendered the entire amount of the settlement proceeds just as soon as Geico made contact with Appellant. Appellant believed Geico would be contacting him, as Geico had Appellant's contact information on file.

1. There was no competent or sufficient evidence Appellant made a knowing misrepresentation of a material fact.

During the disciplinary proceeding, the CDC never assumed the position that Tepper committed a fraud in violation of Rule 8.04(a)(3). Instead, the CDC argued the conduct of Tepper was dishonest, to which itself was a violation of the rule, and later at the final hearing, included amongst its argument that Tepper's conduct was also tantamount to a misrepresentation, either of which would violate the rule. In fact, the only party to ever

specifically allege Tepper had committed a fraud, was the purported victim GEICO, to which was made by the SIU.

It was never the contention of the CDC that Tepper provided any false information to either Geico or Bay County, nor that any of Tepper's representations made during the processing of the insurance claim were untrue, nor that the missing vehicle any subterfuge on the part of Tepper. [C.R. 360] Nor were any such contentions made of Geico.

During the cross examination of Candace Donnell, who supervised the investigation made by Geico's SIU into this matter to which concluded by alleging a fraudulent act had been committed, Donnell was examined into the underlying facts, information, and circumstances considered during Geico's investigation to which had formed the basis of the SIU's conclusion that a fraudulent act had been committed. Donnell testified as follows,

> The fact that Mr. Tepper had reported the vehicle stolen to us, he was paid for the vehicle the fair market value for the vehicle, he subsequently continued to possess the vehicle when we had paid him for it, and actually, GEICO owned the vehicle at that point, and he was still in possession of the vehicle and the money that we paid him for it. [RR 2:36-7; 22-5, 1-3] [13]

Geico had knowledge of the above information provided Donnell, however, prior to the investigation was even conducted by the SIU.

When examined further regarding the traffic stop, Donnell further testified, "[t]he fraud was committed at the moment that Mr. Tepper had possession of GEICO's money and the vehicle. So the traffic stop was merely the impetus to notifying GEICO that we have been the victim of fraud." [RR 2:76, 15-9] Again, when asked to clarify the fraud alleged Geico, Donnell provided the following testimony,

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[13] Apparently, the investigation did not consider the recorded statement previously given Tepper during the processing of the insurance claim, nor the written transcription thereof contained within the Geico's business records. Nowhere amongst the statement provided did Tepper ever state the vehicle had been stolen. *See* Respondent's Ex. No. 28, the business records affidavit of Candace Donnell admitted into evidence.

> the fraud was committed at the point that Mr. Tepper recovered the vehicle and had possession of the vehicle and our funds at the same time; therefore, the fraud was committed, apparently, in September...and continued until we took possession of our vehicle... [RR 2:91, 7-12]

The above testimony provided by Geico's supervising investigator is clear as to the fact that Geico had already determined a fraud had been committed before the investigation into the matter ever began. Of greater importance, however, is that Geico had based its allegations of fraud, on the same facts to which the CDC based its allegations of professional misconduct against, namely, "Tepper recovered the vehicle and had possession of the vehicle and our funds at the same time; therefore, the fraud was committed."

The competent evidence adduced at the final hearing is no evidence of a knowing misrepresentation of a material fact made by Tepper, as fraud is defined under the disciplinary rules. Moreover, the evidence adduced at the final hearing is not competent evidence of any intent to deceive on the part of Tepper, nor from which the Panel could reasonably infer such an intent required to find Tepper engaged in fraud as prohibited under the disciplinary rules. The evidence adduced before the Panel is no evidence of intentional falsehood by Tepper and insufficient for the Panel to find Tepper engaged in dishonesty, fraud, deceit or misrepresentation. Moreover, the opinions of either Donnell or Geico as to a fraudulent act was committed are conclusory, and no evidence of the vital fact alleged. *Coastal Trans., Inc. v. Crown Cent. Petro.*, 136 S.W.3d 227, 232 (Tex.2004)

Proof of the aforesaid facts at issue in this case does not support any inference there was any "purpose to deceive" on behalf of Appellant. Conduct having a "purpose to deceive" necessarily requires proof of "intent" as held by the Walker and Lerner Courts, respectively, for reason absent intent, there can be no purpose to deceive.

2. There was no competent or sufficient evidence Appellant knowingly concealed a material fact.

Furthermore, as disciplinary rules also specially define fraud as a knowing concealment of a material fact if there is a duty to disclose, the evidence before the Panel is not competent of any concealment on the part of Tepper. Black's Law Dictionary defines "conceal" as follows:

> To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery." *Duncan v. Board of Disciplinary Appeals*, 898 S.W.2d 759, 761 (Tex.1995) [14]

In fact the evidence before the Panel established the nonexistence of any concealment on the part of Tepper. Neither the CDC nor Geico ever alleged any concealment on the part of Appellant.

The Chief Operations Officer for the Okaloosa County Tax Collector's Office, John Holguin testimony was unequivocal and undisputed that Tepper did in fact notify the Okaloosa County, Florida, authorities the shortly after recovering the vehicle, in September, 2008. [Ex.64; R.R. 2:161, 9-11; 2:164, 9-13] [15]

Furthermore, Howard Johnson, the deputy sheriff of Tarrant County who had initiated the traffic stop, also testified that during the November 2008 stop that Tepper notified the deputy the vehicle had been recovered. [Ex. E] Deputy Johnson provided additional testimony as follows:

- Tepper was cooperative and answered all of the deputy's questions during the stop; [R.R. 2:154, 10-3]
- There was neither probable cause, nor any reasonable suspicion that a crime had been committed to detain Tepper for further investigation, and accordingly, no criminal charges were filed resulting from the incident. [R.R. 2:140-1, 19-06]

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[14] *See* also, *Duncan* at 764 (Cornyn, J, concurring in part and dissenting in part), [t]he word "conceal" has been interpreted to mean "something more than mere failure to disclose—some affirmative act of concealment, such as suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime had been committed." citing *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934).

[15] Holguin's testimony was also undisputed that Tepper was notified "he was going to have to come back to Okaloosa County," Florida with the vehicle to clear the title issues. [R.R. 2:167, 22-3]

- Tepper was present while the deputy Johnson contacted the Bay County Sheriff's Department to notify the vehicle had been recovered. [R.R. 2:150, 1-8]

- Deputy Johnson's conversation with Bay County occurred over the deputy's cell phone. [R.R. 2:149, 19-25]

- Deputy Johnson did not specifically identify to Tepper with whom the deputy's communications regarding the recovery of the vehicle were made, and that it was possible Tepper misunderstood the deputy only spoke directly with officials from Bay County, and not a representative of Geico. [R.R. 2:154, 7-9; 2:130-1]

Also material as to the nonexistence of any concealment on the part of Tepper, was the testimony of Donnell at the final hearing as follows:

- During the investigation, Geico had within its possession the at least the following contact information for Tepper: his cell number, email address, Florida P.O. Box, Tepper's local residential address on Milton Street, in University Park, Texas, and business address in Dallas. [R.R. 2:53-4, 11-07]

- GEICO had notice on the 29th day of November, 2008, that the truck had been recovered. [R.R. 2:28, 20-4]

- The vehicle was parked at Tepper's Milton address, with Tepper's business card located on the console, and the license plate was visible and not covered. [R.R. 1:77, 15-24; 2:30, 4-5]

- Donnell admitted "there was no shortage of available contact information" had Geico wanted to contact Tepper, however Geico made no attempt to contact him. [R.R. 2:54, 8-11, 23-4]

- Geico did not contact Tepper until after it had recovered the vehicle on February 12, 2009, and in response to Tepper who had contacted Geico. [R.R. 2:29, 5-8]

Evidence cannot be taken out of context in a way that makes it seem to support a verdict when in fact it never did. *City of Keller* at 812. In such cases, the courts must "view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances." *Id.* When viewing all of the circumstantial evidence, not in isolation, but in light of all the known circumstance, there is simply no evidence from which the Panel could have reasonably inferred Appellant knowingly concealed a material fact. As such, the evidence before the Panel was

legally insufficient to support Appellant knowingly concealed a material fact. Furthermore, when considering and weighing all the evidence, the evidence before the Panel is factually insufficient to support such a finding that Appellant knowingly concealed a material fact for reason the evidence in support is so weak or contrary to the overwhelming great weight and preponderance of the evidence.

3. There was no competent or sufficient evidence from which the Panel could reasonably infer an intent or purpose to deceive on the part of Appellant.

It is within the jury's province to draw reasonable inferences from the evidence. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex.1997). The 14th District Court of Appeals of Houston, in *Eureste v. Commission for Lawyer Discipline*, 76 S.W.3d 184 (Tex.App. Houston [14th Dist.] 2002, no writ), has interpreted Rule 8.04(a)(3) in the same fashion as the *Lerner* and *Walter* Courts, as "[f]raud is defined under the rules as conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." *Id.* at 198, citing Tex. Disciplinary R. Prof'l Conduct terminology.

Proof of the basis facts at issue in this case does not support the rational inference there was any "purpose to deceive" on behalf of Appellant, as no rational trier of fact could reasonably infer Appellant possessed an intent to deceive. Jurors cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted. *City of Keller* at 817. Conduct having a "purpose to deceive" necessarily requires proof of "intent" as held by the *Walker* and *Lerner* Courts, respectively, for reason absent intent, there can be no purpose to deceive. Furthermore, when the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well. *City of Keller* at 814.

The above facts, when viewed in the light most favorable to Appellee allows but one logical inference, namely, Appellant did not possess the requisite intent to deceive required to violate Rule 8.04(a)(3). "By definition, such evidence can be viewed in only one light, and reasonable jurors can reach only one conclusion from it." *City of Keller* at 814. As such, it was unreasonable for the Panel to infer Appellant intended to deceive Geico for the simple fact Appellant never possessed any such intent as conclusively shown by the evidence before the Panel. Even assuming *arguendo* the Panel could have reasonably inferred such an intent from the evidence, when considering the great weight and preponderance of the evidence before the Panel, any such implied finding by the Panel of an intent to deceive on the part of Appellant is clearly is so weak or the evidence to the contrary is so overwhelming that such an implied finding is clearly wrong and unjust.

4. As a matter of law, there was no special relationship which existed between Appellant and GEICO to which the law would impose a duty of disclosure.

As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information. *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001) Silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent. *Id.* Whether such a duty exists is a question of law. *Id.* citing *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 633 (Tex.App.--San Antonio 1993, writ denied).

A duty to speak may arise from a fiduciary relationship. *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 692 (Tex.App. Amarillo 1998) Formal fiduciary relationships typically arise from legal relationships such as attorney-client, guardian-ward, and trustee-cestui que trust. *See Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex.1980). Whether a formal fiduciary relationship exists is a question of law when the underlying facts are undisputed. *Fuqua v.*

Taylor, 683 S.W.2d 735, 737 (Tex.App. Dallas 1984, writ ref'd n.r.e.). However, there was no formal fiduciary relationship between Appellant and Geico.

The Texas Supreme Court has also categorized certain relationships as "special relationships," giving rise to a tort duty of good faith and fair dealing. See, e.g., *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex.1988); (holding there is a duty on the part of workers' compensation carriers to deal fairly and in good faith with injured employees in the processing of compensation claims); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex.1987). (holding the duty of an insurer to deal fairly and in good faith with its insured in the processing and payment of claims.) Moreover, there was no special relationship between Appellant and Geico.

The supreme court has also recognized that certain informal relationships may give rise to a fiduciary duty. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex.1992). Such informal fiduciary relationships have also been termed "confidential relationships" and may arise "where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one." *Id.* Because not every relationship involving a high degree of trust and confidence rises to the stature of a formal fiduciary relationship, the law recognizes the existence of confidential relationships in those cases "in which influence has been acquired and abused, in which confidence has been reposed and betrayed." *Moore*, 595 S.W.2d at 507. Although the existence of a confidential relationship is ordinarily a question of fact, when the issue is one of no evidence, it becomes a question of law. *Crim Truck & Tractor*, 823 S.W.2d at 594. However, in the case at hand, the facts are clear that no confidential relationship existed between Appellant and Geico.

The existence of a confidential relationship is but one of the bases for imposing a duty to disclose information. *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 212 (Tex.App. Houston [14th Dist] 2001). A duty to speak may arise in at least three other situations. *Id.* First, when one voluntarily discloses information, he has a duty to disclose the whole truth. *Id.* citing *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W.2d 661, 681 (Tex.App.-El Paso 1984, writ dism'd by agr.) In the case at hand, however, it was never the contention of the CDC that Appellant failed to disclose the whole truth to Geico during the processing of the insurance claim for the vehicle.

Second, when one makes a representation, he has a duty to disclose new information when he is aware the new information makes the earlier representation misleading or untrue. *Susanoil, Inc. v. Continental Oil Co.,* 519 S.W.2d 230, 236 n. 6 (Tex.Civ.App.-San Antonio 1975, writ ref'd n.r.e.). However, "even in arms-length transactions, a duty to disclose arises if a party knows, or should have known, its prior statement was false." *Martin*, 44 S.W.3d at 213-4, citing *Susanoil, Inc.,* 519 S.W.2d at 236 n. 6. Finally, when one makes a partial disclosure and conveys a false impression, he has a duty to speak. *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 636 (Tex.App.-San Antonio 1993, writ denied)

As Appellant will demonstrate, neither of the remaining two situations were present in the case at hand which could otherwise be sufficient to impose an informal relationship between Appellant and Geico obligating a duty of disclosure. First, with regard to the duty of disclosure regarding new information when the party is aware the new information makes the earlier representation misleading or untrue, applied by both courts in *Susanoil* and *Marin*; the duty of disclosure to which the courts relied expressly dealt with the factual omission of a party to an arm's length transaction which was committed during the transaction, but not afterward and not

subsequent to the closure of the arm's length transaction. As such, the facts present in either *Susanoil* or *Matin* were simply not present in the case at hand. Appellant was never accused of recovering the vehicle during the processing of the insurance claim for the vehicle. Thus, when the insurance claim for the vehicle was finally processed by GEICO, and concluded upon the payment in June of 2008, such also concluded the transaction between Appellant and Geico. At that point, there was nothing more for Appellant to disclose or further, to which Appellant could have disclosed.

The final circumstance discussed regarding partial disclosures to which convey a false impression, such a circumstance is also applicable only during the context of an arm's length transaction. Our supreme court noted this in *Bradford v. Vento*, 48 S.W.3d 749, 755-6 (Tex. 2001). Furthermore while recognizing the Restatement (Second) of Torts section 551 also provides a general duty to disclose facts in a commercial setting, the supreme court held, the supreme court held, "[in such cases, a party does not make an affirmative misrepresentation, but what is said is misleading because other facts are not disclosed. **We have never adopted section 551.**" [emphasis added] *Id.*

There was no evidence before the Panel that Appellant either made a partial disclosure to Geico during the processing of the insurance claim for the vehicle, nor that Appellant discovered the vehicle prior to the conclusion of the insurance claim to which could make the prior statements made by Appellant misleading. Once the insurance claim was paid, the parties to the transaction, Appellant and Geico were once again at arm's length as the transaction had concluded. Afterward, and after the fact Appellant had subsequently located the vehicle, Appellant was free to pursue his own interests. *See Crim Truck & Tractor* at 594-5 (holding a party to a contract is free to pursue its own interests, even if it results in a breach of that contract,

without incurring tort liability. The fact that one businessman trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship.)

However, in the case at hand, there was no evidence of a promise to perform made by Appellant, that namely that Appellant would notify Geico if the vehicle was subsequently located. Failure to perform, standing alone, is no evidence of the promissor's intent not to perform when the promise was made. *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex.1986)

There was no competent of sufficient evidence adduced for the Panel to reasonably infer Appellant engaged in acts constituting dishonesty, fraud, deceit or misrepresentation and it was unreasonable for the Panel to find otherwise, as the Panel's finding is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole. As such, the decision to impose sanctions upon Tepper was a clearly unwarranted exercise of discretion of the Panel.

For these reasons expressed herein, Appellant respectfully requests this Board sustain Appellant's issues of error, reverse the Judgment of the evidentiary panel of professional misconduct, render judgment dismissing the grievance, or alternatively, remand for further proceedings before a statewide grievance panel, and Appellant have such other and further relief to which he may be justly entitled.

IV. THE JUDGMENT WAS AFFECTED BY THE UNLAWFUL PROCEDURE AND OTHER ERRORS OF LAW FROM THE DISCOVERY ABUSE AND MISCONDUCT COMMITTED BY THE CDC DURING THE PROCEEDING.

Appellant's Issues Presented:

6. Whether the cumulative error consisting of the CDC's professional misconduct, discovery abuse, and unlawful procedure committed during the prosecution of the McNeill complaint deprived the substantial rights of Appellant by probably causing the rendition of improper Judgment;

7. Whether the Panel erred by failing to grant Appellant's motion to dismiss and for discovery sanctions, to which alternatively requested a new final hearing due to Appellee's spoliation of evidence; AND

8. Whether the Panel erred in entering Judgment because the Panel Chair was disqualified from further service as Chair of the evidentiary proceeding and over the valid objection of Appellant which was overruled.

A. Supplemental statement of facts.

The competent evidence before the Panel adduced the following facts to which occurred during the disciplinary proceeding:

Appellee caused the issuance of a subpoena from the Panel Chair, Caren Lock-Hanson, (hereafter "Chair,") to Donnell, as records custodian for Geico. [C.R. 49] The Donnell subpoena commanded production of the complete Geico investigation claim file regarding Appellant and the subject vehicle. [C.R. 49] Donnell produced business records in response to the subpoena from Appellee's counsel the CDC, in addition to Donnell's sworn affidavit attesting to 53 attached pages of business records kept by Geico in the ordinary course of business. [Ex. 28] The CDC filed the Donnell affidavit within the evidentiary record for the Panel proceedings on September 24, 2009, and failed to provide Appellant with notice of the filing or serve a copy. [C.R. 1142, 1158] However, only 50 pages of Geico business records are attached. [Ex. 28]

On or about the 6th of November, Appellant served Appellee with a Request for Disclosure and for Production. [C.R. 1159] Appellant's discovery specifically requested production of all documents received by you from GEICO Insurance Company, its agents or attorneys under subpoena or otherwise, which relate to the vehicle or Appellant. [C.R. 1159]

On the 9th day of December, 2009, Appellee served a response to Appellant's request for production and which omitted any reference, identification, or disclosure of the existence of the Donnell business records affidavit. [C.R. 1159] [Ex. 10] Appellee disclosed in response to the

Geico request for production as follows, "Additional records will be produced when they are received," and failed to disclose the Donnell affidavit or Geico business records. [C.R. 1159-60]

Also occurring on December 9, 2009, Appellee served its response to disclosure upon Appellant. [C.R. 1290] [Ex. 9] With regard to the disclosure of witness statements obligated by the discovery rules, Appellee again failed to disclose the Donnell business records affidavit. [C.R. 1290] [Ex. 9] Appellee also failed to disclose the existence of the witness statement of Appellant amongst the Geico business records and concealed with the Donnell affidavit. [Ex. 28] Appellee did not amend or supplement either discovery response.

On January 11, 2010, Appellee transmitted a notice of final hearing, which provided February 4, 2010 as the date scheduled. [C.R. 194] The following day, January 12, 2010, Appellee filed another business records affidavit from another Geico custodian, Romano Thomas. [Ex. A] Appellee failed to provide notice to Appellant of the Thomas affidavit was filed with the Evidentiary Panel or disclose the affidavit or business records existed within Appellee's possession. [C.R. 1142]

The parties agreed to continue the final hearing as Appellant had requested his prior counsel to withdraw. Appellee had also requested Appellant's deposition. On February 10, 2010, the undersigned counsel for Appellant filed his notice of appearance and specially excepted to the Appellee's evidentiary complaint and the sufficiency of the pleadings. [C.R. 306, 350] The special exceptions were overruled by the Chair. [C.R. 370] Appellee noticed the deposition of Appellant, and to which Appellant filed a motion to quash. [C.R. 385] The motion to quash was overruled by the Chair. [C.R. 594]

Appellant moved for summary judgment on the sufficiency of the pleadings. [C.R. 521, 702] Appellee responded and objected to the motion. The motion was submitted to the Panel

for consideration, which sustained Appellee's objection. [C.R. 713] Appellant caused the issuance of discovery subpoenas for the previously noticed depositions of McNeil and Reilly. [C.R. 715-7] Following service of the deposition subpoenas, McNeil & Reilly filed a motion to quash and for a protective order with the Panel. [C.R. 725]

The Chair *sua sponte* ordered the depositions quashed. [C.R. 732] Appellant filed a petition in district court to compel the depositions of McNeil & Reilly, which was granted by the court after hearing. [Sup. C.R. 27] During the review of Appellant's case file, his counsel noticed an unissued subpoena to Candace Donnell. [C.R. 1142] An inquiry was made to the CDC regarding the issuance of the subpoena, and any documents produced in response. [C.R. 1142] Counsel for Appellee admitted the business records produced in response had not been served upon Appellant, and would be mailed. [C.R. 1285]

Upon receipt of the Donnell and Thomas business records affidavits, Appellant did not learn of the existence of either Donnell or Thomas business records affidavit until receipt of same from the CDC and bearing a file mark from the clerk of the evidentiary panel. [Sup. C.R. 65] Appellant's counsel eventually noticed the Donnell affidavit contained only fifty (50) pages of attached Geico business records, and not the fifty-three attested by Donnell, and contacted Donnell to schedule her deposition. [Ex. 28]

In December of 2010, Appellant noticed the opal deposition of Donnell for the following month, to be taken in Virginia as she had been transferred to Geico's SIU office in Virginia Beach. [C.R. 1003] Geico filed a motion to quash and for protection in the district court cause, which was still active. [C.R. 1027] Appellant requested hearing on Geico's motion, scheduled for March 2, 2011, before the associate judge Teresa Guerra-Snelson. [C.R. 1041] Appellant was unaware the associate judge was the spouse of Steve Snelson, one of the attorney members

appointed to the evidentiary panel 6-A2 for the disciplinary proceeding. [16] Before Appellant could inquire of assistant disciplinary counsel Van Hamme regarding the Donnell affidavit discrepancy, assistant disciplinary counsel replaced Van Hamme as Appellee's record counsel for the disciplinary proceeding. [C.R. 1044]

As the hearing on Geico's motion, the associate judge requested additional briefing and a proposed orders. [C.R. 1052] Appellant's counsel contacted the court clerk on multiple occasions regarding the status of the hearing over the months which followed. [C.R. 1142] The cause and Geico's discovery objections and motion to quash were dismissed for want of prosecution by the presiding district judge on October 10, 2011. [Sup. C.R. 202] Appellant discovered this fact after receiving a notice of final hearing from Petitioner's counsel, scheduled for January 2012. [C.R. 1077] Upon contact with the CDC, Appellant's counsel was informed of Donnell's availability to testify and tricked Appellant into entering a Rule 11 agreement allowing the witness to testify via telephone. [C.R. 1087] The final hearing was continued. to allow Appellant to secure Donnell's testimony. [C.R. 1080]

Appellant filed a notice of written deposition and intent to subpoena documents on January 23, 2012, and with a subpoena for issuance. [Sup. C.R. 204] The Donnell written deposition was scheduled February 16, 2012. [Sup. C.R. 204] Upon receiving the deposition notice via email, the CDC subsequently mailed notice of final hearing to which Appellant received January 26, 2012. [C.R. 107] Farris did not transmit the requested subpoena to the Chair for issuance. [Sup. C.R. 204]

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[16] Appellant did not learn of this fact until after the final hearing had commenced. Furthermore, Appellant did not learn of the prior acquaintance between the associate judge Guevara-Snelson and the Chair who serve together on the board of directors for the Univ. North Texas law school until after the final hearing concluded.

Appellant again moved for continuance to secure the testimony of Donnell, and the CDC opposed. [C.R. 1142] The final hearing was continued and specially set for April 5, 2012, with Chair informed the parties no additional continuances will be granted. [C.R. 1532] Donnell was served with a subpoena commanding her appearance March 12, 2012, pursuant to the second amended notice. [Sup. C.R. 415] Donnell failed to appear and without excuse. Donnell filed a Motion to Quash Subpoena and/or for a Protective Order on March 9, 2012, asserting privileges and objections. [Sup. C.R. 415]

Appellant requested issuance of a trial subpoena for Tana Van Hamme. [C.R. 1537] The Chair refused issuance and Farris filed a motion to quash the subpoena on behalf of Van Hamme, individually, and with the Panel. [C.R. 1546] The Chair failed to issue the Van Hamme subpoena and ordered the subpoena quashed after hearing. [C.R. 1516] At the final hearing, Petitioner called Donnell as the first witness. [R.R. 1:45] Appellant objected and was overruled by the Chair. [R.R. 1:45] Furthermore, the Chair appointed for the evidentiary proceedings had presided in excess of two terms and to which Appellant objected, but was overruled. [R.R. 2:11] During Appellant's case in chief, Appellant attempted to call Van Hamme at a witness, but Appellant's request was disallowed. [R.R. 2:286]

The Panel determined Appellant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and without further hearing imposed sanctions. Appellant timely requested findings of fact and conclusions of law regarding the spoliation of evidence by Appellee, and gave timely notice to the Panel after the Panel's findings of fact were overdue. [Sup. C.R. 508, 537] Appellant also timely filed a motion for dismissal, discovery sanctions, and for new final hearing due to the discovery abuse and spoliation of evidence by the CDC, however Appellant's motion was overruled by operation of law. [Sup. C.R. 453]

B. Doctrine of cumulative error.

Texas courts recognize the doctrine of cumulative error, whereby a number of instances of erroneous rulings, none of which alone constituted reversible error, have a cumulative effect of probably causing the rendition of an improper judgment. *Strange v. Treasure City*, 608 S.W.2d 604, 609 (Tex. 1980) (cumulative acts of jury misconduct did not amount to reversible error); *University of Texas at Austin v. Hinton*, 822 S.W.2d 197, 205 (Tex. App. Austin 1991) (saying Supreme Court has long recognized the doctrine of cumulative error)

C. The Judgment of the evidentiary panel proceeding was affected by the cumulative errors of law by the CDC's discovery abuse.

Though the record is devoid of any evidence Appellant engaged in conduct in violation of Rule 8.04(a)(3), however there is substantial evidence of the CDC's conduct engaged during the prosecution of the underlying grievance involving dishonesty, fraud, deceit or misrepresentation. As such, the cumulative errors of misconduct of the CDC's prosecution of the McNeill complaint in all likelihood caused the rendition of the Judgment against Appellant.

Appellee was under a duty to serve notice upon Appellant of any filing of any papers, pleadings, or documents with the record for the Evidentiary Panel proceedings. *See* Rule 21 Tex. R. Civ. Pro.; Rules 3.05(a)(b)-(2) Tex. Dis. R. Professional Conduct. Appellee was also under a duty to preserve the Donnell affidavit and all business records received responsive to the Donnell subpoena issued in conjunction with the disciplinary proceeding. *See* Rule 3.04(a) Tex. Dis. R. Professional Conduct. [17]

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[17] "While a litigant is under no duty to keep or retain every document in its possession... it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery [or] is the subject of a pending discovery sanction." *Trevino v. Ortega* 969 S.W.2d 950, 958 (Tex. 1998)(J. Baker concurring).

However Appellee filed the Donnell affidavit with the record of the Evidentiary Panel proceedings on the 24th day of September, 2009, and wholly failed to provide Appellant with notice of the filing or service of a copy of the Donnell affidavit. Neither the Donnell affidavit, nor notice of its filing was served upon Appellant for reason three pages of Geico business records produced in conjunction with the subpoena and in Appellee's care, custody, or control were lost, altered, or destroyed from the Donnell affidavit prior to filing as the Donnell affidavit filed of record by Appellee contained only fifty (50) pages of attached Geico business records, and not the fifty-three attested by Donnell. Three (3) pages of business records produced Geico and under the care, custody, and control of Appellee were lost, altered, or destroyed by Appellee.

On November 6, 2009, Appellant served Appellee with a Request for Production, specifically requesting the production of all documents and tangible things its care, custody, or control received from Geico. Upon service the above discovery request, Appellee was under a duty to Appellant to make a complete response, based on all information reasonably available to the Appellee at the time the response is made. Rule 193.1 Tex. R. Civ. Pro. Appellee had a legal duty to accurately identify and disclose the Donnell affidavit in response to Appellant's request for production. As Appellant will demonstrate, Appellee falsified its discovery responses to conceal from Appellant's discovery: both the existence of the Donnell Affidavit and Appellee's spoliation of evidence.

On the 9th day of December, 2009, Appellee served a response to Appellant's request for production of all documents received from Geico which constituted a certification that to the best of counsel for Appellee's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made, has a good faith factual basis, and is not interposed for any improper purpose. *See* Rule 191.3(b)-(c) Tex. R. Civ. Pro.

Also occurring on the 9th day of December, 2009, Appellee served its response to disclosure upon Appellant.

However Appellee's response to production wholly omitted any reference, identification, or disclosure of the Donnell affidavit which had been filed of record a six weeks prior, on the 24th of September. Moreover, Appellee's response to Request for Production No. 6 states, "Additional records will be produced when they are received." Furthermore, the Donnell affidavit within Appellee's care, custody, and control is a qualified witness statement under Rule 192.3(h) for which Appellee was under a duty to disclose in response. *See* Rule 192.3(h) Tex. R. Civ. Pro. Moreover, the Geico business records attached to the Donnell affidavit contained a substantially verbatim transcription of the recorded statement of Appellant, also a qualified witness statement under Rule 192.3(h) for which Appellee was under a duty to disclose.

Appellee's response to Appellant's discovery requests for disclosure and production of all documents received from Geico constituted a certification that to the best of Appellee's knowledge, information, and belief, formed after a reasonable inquiry, the disclosures are complete and correct as of the time it is made, each have a good faith factual basis, and are not interposed for any improper purpose, however Appellee's certifications were false and without substantial justification. *See* Rule 191.3(b)-(c) Tex. R. Civ. Pro. At the time of service of Appellee's response, the Donnell affidavit (and Geico business records,) had not only been in Appellee's care, custody, and control for at least six weeks prior to service of Appellee's response, but the Donnell affidavit had previously been filed with the record without notice to Appellant. Unfortunately, the misconduct of Appellee did not end there.

Approximately one month following both of Appellees false certifications and fraudulent responses to Appellant's valid requests for production and disclosure, on January 12, 2010,

Appellee again caused the filing of the Thomas business records affidavit to be filed of record for the proceeding and willfully failed to serve notice upon Appellant of the filing. [18]

Appellee was under a duty to supplement its discovery responses timely or reasonably promptly upon material change in prior response. *See* Rule 193.5(a) Tex. R. Civ. Pro. However, Appellee violated that duty as well by failing to promptly amend or supplement its materially false discovery responses to production and disclosure. Furthermore, Appellee was also under a duty to amend or supplement the response, made reasonably promptly after discovery that the Appellee's response to production of all documents received from Geico was incomplete or incorrect, or was no longer complete and correct, to the extent that the written discovery sought other information. *See* Rule 193.5(a)(1)-(2) Tex. R. Civ. Pro.

Appellee was under a duty to make a complete response, based on all information reasonably available to the Appellee at the time the response is made, to disclose both witness statements, that from Appellant and Donnell. *See* Rule 191.3(b)-(c) Tex. R. Civ. Pro. However, Appellee's Response to Disclosure pursuant to Rule 2.17(D)(4), Tex. R. Dis. Pro., whereby Appellee disclosed the following in response: "Appellee is in possession of the Complaint filed by Complainant, other communications received from Complainant, and the response of Appellant." Again, any reference, identification or disclosure to either the Donnell affidavit, or the qualified witness statement of Appellant contained within the Donnell affidavit is wholly omitted from Appellee's Response to Disclosure. Appellee's response to disclosure constitutes the certification that to the best of Appellee's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made, has a good

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[18] The affidavit of Romano Thomas attested to fifty-two (52) attached pages of Geico business records, (the identical 50 pages contained within the Donnell affidavit, plus two additional pages consisting of a copy of the Donnell subpoena issued and correspondence from appellee.)

faith factual basis, and is not interposed for any improper purpose, however the certification from Appellee is false and without substantial justification. *See* Rule 191.3(b)-(c) Tex. R. Civ. Pro.

Unfortunately, the misconduct of the Appellee did not end with the deliberate spoliation of evidence Appellee was under a duty to preserve, the willful failure to serve notice upon Appellant of the Donnell affidavit and unlawful ex parte communication with the Panel, Appellee's multiple fraudulent responses to lawful discovery requests of Appellant--both production and disclosure, and Appellee's multiple false certifications without substantial justification in furtherance of Appellee's prior concealment of material evidence and Appellee's unlawful spoliation of evidence.

Appellee was under a duty to supplement its discovery responses timely or reasonably promptly upon material change in prior response. *See* Rule 193.5(a) Tex. R. Civ. Pro. However, Appellee violated that duty as well by failing to promptly amend or supplement its materially false discovery responses to production and disclosure. Appellee's misrepresentations were made to Appellant with actual knowledge of the falsity of its contents. Appellee's response was fraudulent as defined by T.D.R.P.C., with the purpose to deceive Appellant into the reasonable belief as to the non-existence of the three (3) witness statements, as well as the business records of Geico fraudulently concealed from Appellant's lawful discovery requests.

D. Appellant was entitled to a spoliation presumption due to the CDC's improper destruction and spoliation of evidence within its custody.

Spoliation is defined as "the improper destruction of evidence" relevant to a case. *Whiteside v. Watson*, 12 S.W.3d 614 (Tex.App.-Eastland, 2000) Spoliation may also refer to the significant and meaningful alteration of a document or instrument. *Brewer v. Dowling*, 862

S.W.2nd 156, 158 n.2 (Tex.App.-Fort Worth, 1993, writ denied) (quoting Black's Law Dictionary 1257 (5th ed. 1979)

Spoliation is the improper destruction of evidence, proof of which may give rise to a presumption that the missing evidence would be unfavorable to the spoliator. *Brumfield v. Exxon Corp.*, 63 S.W.3d 92, 919 n.3 920 (Tex.App.-Houston[14th Dist.] 2002, pet.denied). The spoliation presumption attaches when physical, tangible evidence has been destroyed. *American Maint. & Rentals, Inc. v. Estrada*, 896 S.W.2d 212, 223 (Tex.App.-Houston[1st Dist.] 1995, vacated by agr.) Appellee was under a duty to preserve the Geico business records produced by Donnell responsive to the CDC subpoena. The intent of the spoliation doctrine is to prevent the subversion of the discovery process and to encourage the fair administration of justice, the antithesis of the intentional destruction of evidence. *Trevino v. Ortega*, 96 S.W.2d 950, 955 (Tex.1998).

This was brought to the attention of the Panel, first with regard to Appellant's motion for continuance, [C.R. 1142] and during the final hearing. [R.R. 1:34] In addition, Appellant requested discovery sanctions and new final hearing based on the CDC's spoliation of evidence. [Sup. C.R. 453] The question of whether a spoliation presumption is given or whether sanctions are justified is a question of law *See Miller v. Stout*, 706 S.W.2d 785 (San Antonio 1986, no writ); *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998)(J. Baker, concurring). By giving this instruction, the nonspoliating party can survive a summary judgment, directed verdict, judgment notwithstanding the verdict and factual and legal sufficiency review on appeal. *See Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 484 S.E.2d 249, 251 (1997). This presumption serves to insure that a litigant's rights are not impaired by another party's improper destruction of relevant evidence. *Trevino v. Ortega*, 969 S.W.3d 950, 953 (Tex.1998) However the Panel

erred by refusing to afford Appellant a spoliation presumption by finding Appellant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. Furthermore, the Panel erred by refusing to grant Appellant's motion to dismiss and for discovery sanctions, and to which alternatively requested a new final hearing due to Appellee's spoliation of evidence and the presumption to which Appellant was entitled.

E. The Chair over the evidentiary proceeding had exceed her term limit and was disqualified from presiding over the final hearing over the objection of Appellant.

On July 8, 2009, the Chair of the District 6 grievance committed assigned panel 6A-2 to proceed upon the McNeill complaint. [C.R. 32] At the time of the appointment, Hanson was duly appointed Chair for the evidentiary panel. [C.R. 32] The disciplinary rules provide that no member may serve as chair for more than two consecutive terms of one year each. Tex. R. Dis. Pro. 2.03. Under the disciplinary rules, Hanson was precluded and disqualified from serving as Chair for the disciplinary proceeding after the expiration of two (2) consecutive terms of one (1) year each, to which occurred on or about July 15, 2011.

Hanson served as Chair for the evidentiary panel for the entire proceeding, which concluded in September of 2012. Under the prior holdings in *Schaefer*, by the Board and by the Supreme Court, the authority is clear such a defect would render the disciplinary proceeding, voidable, if not wholly void. This defect was brought to the attention of the Panel at the final hearing and for which Appellant objected. [R.R. 2:11] However, Appellant's objection was overruled, and to which the final hearing proceeded upon the McNeill complaint. As such, the Panel erred by overruling Appellant's objection which resulted in the Judgment of professional misconduct against Appellant.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant MAX LEON TEPPER, requests the Board of Disciplinary Appeals consider the Brief of Appellant, sustain Appellant's issues presented herein, reverse the Judgment of the Panel finding professional misconduct, dismiss the grievance, or alternatively, remand the cause for further proceedings before a statewide evidentiary panel, and grant Appellant such other and further relief to which he may be justly entitled.

Respectfully submitted,

MATTHEW SHARP, ATTORNEY AT LAW

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record, via certified mail and electronic mail, on the 26th day of March, 2013.

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