BEFORE THE BOARD OF DISCIPLINARY APPEALS
OF THE SUPREME COURT OF TEXAS

IN THE MATTER OF	§	
SCOTT DOUGLAS FLETCHER	§	CAUSE NO. 60490
STATE BAR NO. 24029191	§	

RESPONDENT'S BRIEF IN SUPPORT OF RESPONDENT'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

COMES NOW Scott Douglas Fletcher, Respondent in the above styled and numbered cause, and files this, his Brief in Support of Respondent's No Evidence Motion for Summary Judgment and Traditional Motion for Summary Judgment and would show this honorable tribunal that Respondent is entitled to judgment, as a matter of law, as follows:

I.

ARGUMENT AND AUTHORITIES

A. Statement of the Argument

This case is a is a Reciprocal Discipline suit as is provided for by Part VII of the Texas Rules of Disciplinary Procedure (hereinafter TRDP). In addition to the rules contained in Part VII, there are three other Rules of Disciplinary Procedure that are directly applicable:

1. Rule 1.06.W.2, TRDP, which unambiguously states that one form of actionable "professional misconduct" in Texas is, "[A]ttorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct."

2. Rule 15.06, TRDP, which unambiguously states, "No attorney may be disciplined for Professional Misconduct that occurred more than four years before the date on which a Grievance alleging the Professional Misconduct is received by the Chief Disciplinary Counsel."

3. Rule 1.06.R, TRDP, which unambiguously defines he term "grievance" as follows: "'Grievance' means a written statement, from whatever source, apparently intended to allege Professional Misconduct by a lawyer, or lawyer Disability, or both, received by the Office of the Chief Disciplinary Counsel."

Accordingly, an essential element of any suit seeking Reciprocal Discipline that is challenged as being brought after the expiration of the Statute of Limitations is proof that the period of limitations was suspended by the filing of a "grievance" within four years of the date of the "conduct that occurs in another state" made the basis of the suit. This is due to the fact that Rule 1.06.W.2., giving the statute a plain-meaning reading, unambiguously requires *both* the conduct made the subject of the sister state disciplinary action *and* the sister state's disciplinary action occur before the expiration of limitations. The use of the word "and" between the phrase "conduct that occurs in another state" and the phrase "and results in the disciplining of an attorney in that other jurisdiction" makes the two phrases conjunctive. Once the two elements are conjoined it means, as a matter of law, both elements must occur within the period of limitations. However, in the instant case the requirement that both elements of the cause of action occur within the period of limitations is not dispositive as, under the facts of the instant case, neither element occurred within the period of limitations.

B. Statutory Construction—Preliminary Considerations

Respondent/Movant asserts that the applicable Texas Rules of Disciplinary Procedure that are dispositive of this claim are clear and unambiguous. Accordingly, giving effect to the plain meaning of TRDP Rules 15.06, 1.06.W.2, and 1.06.R., it is clear that this case is barred by limitations absent proof that a writing meeting the definition of "Grievance" [1.06.R] was received by the State Bar of Texas Office of the Chief Disciplinary Counsel on or before November 3, 2006, within four (4) years of the latest date stated for an act of professional misconduct in the Order of the Arkansas Supreme Court Committee on Professional Conduct

that found facts and imposed a sanction of Scott Fletcher.

Further, if Petitioner/Non-Movant asserts there is ambiguity in any of the controlling Texas Rules of Disciplinary Procedure, this honorable tribunal is directed by long-standing case authority to apply the canons of statutory construction to the task of ascertaining the meaning of any such allegedly ambiguous statute. See, e.g., the following State Bar of Texas authorities:

1. *Love v. State Bar of Texas*, 982 S.W.2d 939, 942 (Tex. App. – Houston [1st Dist.] 1998, no writ):

> Promulgated rules have the same force and effect as statutes. *Missouri Pac. R.R. Co. v. Cross,* 501 S.W.2d 868, 872 (Tex.1973). Consequently, rules should be interpreted in accordance with the rules of statutory construction. *Knight v. Intern. Harvester Credit Corp.,* 627 S.W.2d 382, 384 (Tex.1982). The primary goal of interpretation is to determine what the enacting body intended. *Id.* Here, our goal is to determine what the Texas Supreme Court intended by enacting Texas Rule of Disciplinary Procedure 1.04 and the resulting effect on disciplinary investigations commenced before May 1, 1992. We must interpret rule 1.04, and, in the process, harmonize and give effect to the entire set of disciplinary rules. *See Martin v. Sheppard,* 129 Tex. 110, 102 S.W.2d 1036, 1039 (Tex.1937).
>
> A cardinal rule of statutory construction is that every word used must be presumed to have been used for a purpose. *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535, 540 (Tex.1981). It is also presumed that words excluded were left out for a purpose. *Id.* The language of rule 1.04 is absolutely silent regarding the existence of any additional pleading requirements on the State Bar to prosecute claims under the old State Bar Rules. Therefore, we must presume that the absence of such language was intentional. *See Martin,* 102 S.W.2d at 1039.

2. *State Bar of Texas v. Wolfe*, 801 S.W. 2d 202, 203-204 (Tex. App. – Houston [1st Dist.] 1990, no writ):

> The State Bar rules have the same effect as statutes. ***204** *State Bar of Texas v. Edwards,* 646 S.W.2d 543, 544 (Tex.App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). The power of the trial court to impose a punishment in bar discipline cases derives from the rules, and these same rules limit the punishment to what is set out in the rules. *Id.* The rules provide that one of the sanctions for professional misconduct is "reprimand by a district court, *which reprimand will be publicized."* SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 8(4) (1986) (emphasis added).
>
> When considering the State Bar rules, we look to the entire rule rather than

to one phrase, clause, or sentence. One provision or part will not be given meaning or construction out of harmony or inconsistent with the other provisions. *State v. Malone,* 692 S.W.2d 888, 896 (Tex.App.—Beaumont 1985, writ ref'd n.r.e.). The trial court is restricted to assessing one of the punishments prescribed by the existing rules. *State v. Edwards,* 691 S.W.2d 747, 748 (Tex.App.—Texarkana 1985, no writ); *Edwards,* 646 S.W.2d at 544.

3. *State v. Malone*, 692 S.W.2d 888, 896 (Tex. Civ. App. – Beaumont 1985, writ ref'd n.r.e.):

> We acknowledge that the State Bar Rules are to be given the same force and effect as statutes. *State Bar of Texas v. Edwards,* 646 S.W.2d 543 (Tex.App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). The Code of Professional Responsibility is an integral part of the State Bar Rules. The disciplinary rules are likewise a [sic] integral part of the State Bar Rules. These disciplinary rules may be considered as statutes. In construing statutes, as well as disciplinary rules, we must look to the entire statute rather than any one isolated phrase, clause or sentence. Additionally, one provision or part will not be given a meaning or construction out of harmony or inconsistent with the other provisions. *See and compare Barr v. Bernhard,* 562 S.W.2d 844 (Tex.1978).

There can be no doubt that a suit seeking to impose Reciprocal Discipline is a suit seeking to prove a Texas lawyer engaged in "professional misconduct" as described in Rule 1.06.W.2, "Attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct."

There can be no doubt that Rule 15.06 first states a general rule of limitations in all suits alleging professional misconduct by a Texas lawyer in subsection A and thereafter provides three exceptions to the general rule of limitations. The entirety of Rule 15.06 states as follows:

> 15.06. Limitations, General Rule and Exceptions:
>
> A. General Rule: No attorney may be disciplined for Professional Misconduct that occurred more than four years before the date on which a Grievance alleging the Professional Misconduct is received by the Chief Disciplinary Counsel.
>
> B. Exception: Compulsory Discipline: The general rule does not apply to a Disciplinary Action seeking compulsory discipline under Part VIII.
>
> C. Exception: Alleged Violation of the Disclosure Rule: A prosecutor may be disciplined for a violation of Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct, that occurred in a prosecution that resulted in the wrongful

> imprisonment of a person if the Grievance alleging the violation is received by the Chief Disciplinary Counsel within four years after the date on which the Wrongfully Imprisoned Person was released from a Penal Institution.
>
> D. Effect of Fraud or Concealment: Where fraud or concealment is involved, the time periods stated in this rule do not begin to run until the Complainant discovered, or in the exercise of reasonable diligence should have discovered, the Professional Misconduct

There can be no doubt that neither exception set forth in subsections B and C has any application to the instant case. If the exception stated in subsection D is purported to be applicable to the instant case it will require allegations of fact and proof by Petitioner/Non-Movant to demonstrate its applicability. No such allegations have been pleaded. However, examination of Exhibit 1 to the Petitioner/Non-Movant's Petition shows that Robert Maertens filed a suit against Mr. Fletcher's former client Jewell Rapier in October 2002 and by July of 2003 Ms. Rapier had agreed to institute a third-party action against Mr. Fletcher. Accordingly, by no later than July of 2003, "discovery" had been made of potential misconduct by Mr. Fletcher. Even if, for the purposes of argument, it is conceivable that Rule 15.06.D's exception could be applied to the case, the very latest date for the commencement of limitations that can be asserted is August 1, 2003, making August 1, 2007 the outside deadline for submission of a grievance against Mr. Fletcher with the State Bar of Texas that would be effective to halt the running of limitations.

Finally, to complete the first level of analysis of the applicable Texas Rules of Disciplinary Procedure, we consider the definition of the word "grievance" that is used in Rule 15.06.A. to state action what action must occur within the four-year period of limitations to prevent proper assertion of a Statute of Limitations defense. Rule 1.06.R unambiguously describes the term "grievance" as follows: "'Grievance' means a written statement, from whatever source, apparently intended to allege Professional Misconduct by a lawyer, or lawyer Disability, or both, received by the Office of the Chief Disciplinary Counsel."

To summarize, for this case to go forward in the face of the assertion of the Statute of Limitations, Petitioner/Non-Movant is required to prove that within four years of the conduct that a sister state later found to be misconduct under the sister state's rules, someone must have presented a "written statement intended to allege Professional Misconduct" by Mr. Fletcher to

"the Office of the Chief Disciplinary Counsel." Furthermore, if a "grievance" had been submitted concerning Mr. Fletcher, at any time, pursuant to TRDP Rule 2.10, "Classification of Inquiries and Complaints," the Chief Disciplinary Counsel was under the following requirements:

> The Chief Disciplinary Counsel shall within thirty days examine each Grievance received to determine whether it constitutes an Inquiry or a Complaint. If the Grievance is determined to constitute an Inquiry, the Chief Disciplinary Counsel shall notify the Complainant and Respondent of the dismissal. . . . If the Grievance is determined to constitute a Complaint, the Respondent shall be provided a copy of the Complaint with notice to respond, in writing, to the allegations of the Complaint.

On its face, Rule 2.10, TRDP, instructs us that if *any* grievance – even one that was dismissed as an Inquiry – was received by the office of the Chief Disciplinary Counsel, notoce of the grievance was required to be sent to Mr. Fletcher within 30 days of its receipt.

By affidavit (Exhibit A to the Motion for Summary Judgment), Mr. Fletcher has provided Summary Judgment evidence that he has never received any notice of a grievance from the State Bar of Texas. Mr. Fletcher's affidavit testimony is clear and unequivocal that he has never received any notice about any matter that would be defined as a grievance from the State Bar of Texas and it is clear that his sworn statement is not limited to only matters included in the Arkansas disciplinary action.

C. Statutory Construction—Application of the Rules of Disciplinary Procedure to the Facts

Unless the Petitioner/Non-Movant can show that a "grievance" was "received by the Office of the Chief Disciplinary Counsel" [Rule 1.06.R] prior to the expiration of limitations, Respondent/Movant Fletcher is entitled to a Judgment that, as a matter of law, this case is barred by Rule 15.06. Presumably, no such "grievance" was received by the Office of the Chief Disciplinary Counsel as Mr. Fletcher was never provided with notice as required by Rule 2.10.

However, should some writing have been "received by the Office of the Chief Disciplinary Counsel," that writing will still have to be proven to have been received in time to halt the expiration of the Statute of Limitations. Respondent/Non-Movant, out of an abundance

of caution (on the off chance that a grievance was received at some point in history and the Office of the Chief Disciplinary Counsel either failed to comply with Rule 2.10 or Mr. Fletcher was sent notice that did not reach him or he accidentally discarded), provides the following analysis of the proper means of ascertaining the last date by which a grievance received by the Office of Chief Disciplinary Counsel would halt the running of the period of limitations.

Rule 1.06.W.2 states two conditions that must exist: 1. Conduct by a lawyer in another state that would be misconduct in Texas; 2. That is subsequently found to be professional misconduct by the sister state. Rule 1.06.W.2 connects those two conditions with the word "and." Accordingly, under the rules of statutory conjunction, the terms are conjunctive which means that both conditions must occur. And, if both conditions must occur, both conditions must occur within the period of limitations. That means, applying the rules of statutory construction, a grievance that stops the running of limitations must be submitted within four years from the *earlier* of the two conjoined conditions. A grievance that halts the running of limitations must be received by the Office of the Chief Disciplinary Counsel within four years of the attorney's conduct, not within four years of the imposition of discipline by a sister state.

See, Beal, The Art of Statutory Construction: Texas Style, 339 Baylor L. Rev. 64.2 (2012) at page 388:

> *a. "Or" and "And"*
>
> In 1944, the Texas Supreme Court clarified the use and construction of "or" and "and" by adopting the following analysis:
>
> > Ordinarily, the words "and" and "or," are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive, the latter, of a disjunctive, nature. Nevertheless, in order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word "and" is sometimes construed to mean "or." This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake.

It is clear that the burden on the proponent of an argument that "and" and "or" are interchangeable is very heavy, and the likelihood of a court so holding will be rare.

Consistent with Prof. Beal's scholarship, see *Pizzo v. State*, 235 S.W.3d 711, 712-719 (Tex. Crim. App. 2007). In that case a criminal defendant objected to a jury charge that used the conjunctive word "and" when he asserted the disjunctive word "or" was the correct word. The Court overruled the objection and submitted the charge using the conjunctive "and." The Court of Criminal Appeals reversed as the important distinction between the words "and" and "or" was not honored by the trial court, leading to an ambiguous verdict:

> The evidence presented at trial showed that on two separate occasions—one in A.S.'s house and one in Pizzo's trailer— ***713** Pizzo touched both the breasts and genitals of A.S. At the charge conference, asserting his right to a unanimous jury verdict, Pizzo objected to the proposed charge because the application paragraphs as to Counts II and III set out the form of sexual contact in the disjunctive. Pizzo stated:
>
> > the words 'breast' or 'genitals' in each, are charged obviously in the disjunctive. I'm requesting that they be charged in the conjunctive with an 'and' because otherwise, you don't know if six jurors decided 'genitals' and six decided 'breasts,' and the possibility of a non-unanimous verdict because it's charged in the same paragraph.
>
> The trial judge overruled the objection and the charge submitted to the jury on Counts II and III read, in part, as follows:
>
> > if you find from the evidence, beyond a reasonable doubt, that on or about the 21st day of June, 2001 in Grimes County, Texas the defendant, BARRY LOUIS PIZZO, did then and there intentionally or knowingly engage in sexual contact with [A.S.] by touching the genitals or breasts of [A.S.], and [A.S.] was then and there under the age of seventeen years and not the spouse of the defendant, and that said act, if any, was committed with the intent on the part of the defendant to arouse or gratify the sexual desire of himself, then you will find the defendant guilty....
>
> . . . .
>
> Pizzo argues that the definition of sexual contact includes three "separate and discrete" offenses and that "the disjunctive pleading leaves all to speculate as to whether the verdict was truly unanimous—or whether the jurors were divided on that count or paragraph between the breast-touching and the genital-touching."

. . . .

> "Sexual contact," as defined in Section 22.01(B), criminalizes three separate types of conduct—touching the anus, touching the breast, and touching the genitals with the requisite mental state. Therefore, each act constitutes a different criminal offense and juror unanimity is required as to the commission of any one of these acts. Because the indictment charged Pizzo with touching the breasts and genitals of A.S. in the conjunctive, Pizzo's right to a unanimous verdict was possibly violated by the trial judge's jury instruction charging breasts and genitals in the disjunctive. Like the charge in *Francis,* the instruction here allowed the jury to convict Pizzo without reaching a unanimous verdict on the same act. It is possible that six jurors convicted Pizzo for touching the breasts of A.S. while six others convicted Pizzo for touching the genitals of A.S.

If Rule1.06.W.2 is read to permit the latter of the two conditions to control the commencement of the running of limitations – the date of the imposition of Arkansas discipline – that reading would disregard the proper meaning of "and." "And" used in Rule 1.06.W.2 means both acts have to occur with the period of limitations. Had the drafters intended otherwise – intended the statute of limitation to commence running on the date of the imposition of out-of-state discipline – that intention could easily have been expressed. For example, the description of the out-of-state professional misconduct could be described thusly: "Imposition of attorney discipline in another state or in the District of Columbia." Similarly, if the intention of the drafters was to assure that conduct that could not result in a misconduct finding in Texas was to be exempted from the scope of Part VII, the Rule 10.0.W.2 definition could state as follows: "Imposition of attorney discipline in another state or in the District of Columbia if the conduct made the subject of attorney discipline would constitute Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct."

Additionally, another rule of statutory construction mandates that the specific provision to control over a general provision. See *Unigard Security Ins. Co. v. Schaeffer*, 572 S.W.2d 303, 307 (Tex. 1978) (When specific exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply. *State v. Richards*, 157 Tex. 166, 301 S.W.2d 597 (1957)). This rule of statutory construction points us to TRDP Rule 15.06. The inclusion of an exemption from limitations for Compulsory Discipline actions demonstrates that Reciprocal Discipline actions were intentionally *not* exempted from the general rule of

limitations. Had the drafters intended that a special rule of limitations apply to Reciprocal Discipline cases, a subsection to Rule 15.06 could have been drafted in this manner: "Exception: Reciprocal Discipline: For the purposes of a Disciplinary Action seeking reciprocal discipline under Part VII, the statute of limitations commences to run on the date a disciplinary sanction is imposed by another state or the District of Columbia." Similarly, if the drafters had intended no limitations to apply to a Reciprocal Discipline actions, a subsection substantially identical to subsection A could have been included in Rule 15.06 such as: "Exception: Reciprocal Discipline: The general rule does not apply to a Disciplinary Action seeking reciprocal discipline under Part VII."

II.
CONCLUSION

There is no way to read Rule 1.06.W.2 – either plain meaning or by resort to the canons of statutory construction – that exempts a Reciprocal Discipline action from the general Statute of Limitations stated in Rule 15.06. There is no way to read Rule 1.06.W.2 – either plain meaning or by resort to the canons of statutory construction – that permits the calculation of the period of limitations to begin other than the date of the conduct that constituted professional misconduct in a sister state or the first date by which such conduct should have been discovered by the exercise of reasonable diligence. Accordingly, absent proof of an attorney grievance having been received by the Office of the Chief Disciplinary Counsel on or before November 3, 2006 or, at the very latest, August 1, 2007, the case against Movant is barred by the Statute of Limitations and Movant is entitled to Summary Judgment on his affirmative defense.

In the alternative, should this honorable tribunal determine that the date of the imposition of the Arkansas sanction, September 29, 2011, is the date that commences the running of limitations, absent proof of an attorney grievance having been received by the Office of the Chief Disciplinary Counsel on or before September 29, 2015, the case against Movant is barred by the Statute of Limitations and Movant is entitled to Summary Judgment on his affirmative defense.

Respondent-Movant respectfully prays for a Summary Judgment dismissing the case against him as being barred by Rule 15.06, the Statute of Limitations that controls this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Respondent's Brief in Support was by sent email, this 28th day of June 2018, to:

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