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

JOHN O. MUKORO ***State Bar of Texas Card No. 24041539***	:	
Appellant,	:	**CAUSE NO. 52049**
v.	:	
COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS	:	
Commission.	:	

Name and Address of Appellant, appearing pro se

Mr. John O. Mukoro
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Name and Address of Commission

The Board of Disciplinary Appeals (Appointed by the Supreme Court of Texas)
P. O. Box 12426, Capitol Station
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Cases

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Rules

I. General Statement

Respondent-Appellant John Mukoro (hereinafter "Appellant") herein appeals a suspension and sanction by Evidentiary Panel 4C of the State Bar District No. 4 Grievance Committee ("Panel") based on the Texas Disciplinary Rules of Professional Conduct ("TDRPC") 5.03 and 5.04, failure to supervise a non-lawyer and prohibited fee splitting. The matters before the Panel were based on fraudulent conduct committed and hidden from Appellant by a legal assistant in Appellant's employ, one Stephen Dele Akinnibosun ("Akinnibosun") during 2005. (10/3/2012 Hear. Trans. 137:19-25, 138:7-24, 163:5 ("I learned about Ms. Foster from the State Bar.")); (12/5/12 Hear. Trans. 25:15-17, 25:20-22.)

The grievances by Teketele were founded on fraudulent representations by Akinnibosun to her and her insurers that resulted in Akinnibosun collecting and failing to disburse settlements in personal injury

matters. (10/3/2012 Hear. Trans. 30:7-14, 33:22-25, 30:7-14, 137:19-25, 138:7-24.) The Foster matter involved Akinnibosun signing Appellant's name to a Petition Akinnibosun filed, he "failed to appear at trial," and the Foster case was dismissed for want of prosecution. (10/3/12 Hear. Trans. 70:3-6, 71:2-9, 72:8-12, 191:20-24, 210:11-18.) While The Commission for Lawyer Discipline of the State Bar of Texas ("Commission") initially charged Appellant with a knowing failure to avoid the consequences or mitigate the actions of Akinnibosun under TRDPC Rule 5.03(b)(2), this charge was dropped, and over four years after Akinnibosun's conduct at the root of the grievances, the charge of fee-splitting was added. (10/3/12 Hear. Trans. 224:9-21.)

During the hearing on the petition the Panel grossly misinterpreted the year 2005 IRS form 1099 from Appellant's firm to Akinnibosun. While the Panel focused on the amount of money remunerated to Akinnibosun, evidence was presented by Appellant to the effect that most of that sum was a reimbursement to Akinnibosun by Appellant for hard assets, such as furniture, that Akinnibosun had purchased in order to initially establish Appellant's office. (*E.g.* 10/3/2012 Hear. Trans. 142:11-14, 12/5/12 Hear. Trans. 58:10-12, 2/26/13 Hear. Trans. 70:16-18.) Moreover, considering the 2005 1099 Form was untimely under Tex. R. Disp. Proc. 15.06.

Despite a recommendation by the Attorney for the Commission that included the point that Appellant not received nor misused funds in his trust account, and that the allegation in the Commission's petition included only the allegation that Appellant had "permitted" Akinnibosun's conduct, and despite evidence presented to the contrary, the decision specified that Appellant had "encouraged and ordered" Akinnibosun's activities. This occurred despite evidence that Appellant had no knowledge of Akinnibosun's actions and that Akinnibosun had actually concealed his actions regarding Teketele and Foster from him. (10/3/2012 Hear. Trans. 137:19-25, 138:7-24, 163:5 ("I learned about Ms. Foster from the State Bar.")); (12/5/12 Hear. Trans. 25:15-17, 25:20-22.) Moreover, the Panel gave Appellant a six-

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month active suspension even though he already served a one-year active and two-year probated suspension for earlier conduct involving Akinnibosun (10/3/12 Hear. Trans. 165:22-25, 166:4-6) and had no opportunity to learn from these suspensions as the conduct in this case occurred before the suspensions began. (10/3/12 Hear. Trans at 156:18-21, 210:11-18, 85:8-11., 102:22-25, 103:1-2, 65:12-20.)

After announcing sanctions at the end of the 12/5/12 hearing, the Panel altered these sanctions without notice to Appellant or his counsel. (*See* 2/26/13 Hear. Trans. 8:11-17.) Moreover, his counsel had to use the word "somehow" to describe how these alterations occurred, and Commission's counsel's description was more detailed. (2/26/13 Hear. Trans. 8:11-17, 27:19-20.) Incredibly, also "somehow lost" in Commission's counsel's office was the written hearing report of the panel chair drafted immediately after the 12/5/12 hearing. (2/26/13 Hear. Trans. 24:22-25.) The result before the Evidentiary Panel 4C in this case involved concluding violations of TDRPC 5.03(a), 5.03(b)(1), and 5.04(a) occurred and involved imposing sanctions, among which are a six-month active suspension, a 3.5 year probated suspension, payment of attorney's fees of $3,750.00 and direct expenses of $811.65 to the Texas State Bar, and additional CLE. (Judgment of Evidentiary Panel 4C at 2, 3, 5.)

II. Issues Presented

1. **The Panel's consideration of and Commission's counsel's treatment of the 2005 1099 Appellant gave Akinnibosun infringed Tex. R. Disp. Proc. 15.06.**

2. **The 2005 1099 Appellant gave Akinnibosun also included money Appellant gave Akinnibosun to reimburse him for buying furniture and other assets for the firm.**

3. **The fee splitting count infringed Tex. R. Disp. Proc. 15.06.**

4. **Appellant did not violate TDRPC 5.03(b)(1) because he did not know of Akinnibosun's conduct in the Foster and Teketele matters.**

5. **It was error for the judgment to include the words "ordered" and "encouraged."**

6. **If the BODA rejects Appellant's arguments about fee splitting *supra*, the evidence regarded one fee splitting claim, not one claim for Teketele and another for Foster.**

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7. A due process violation occurred because Appellant and his counsel had no notice of the telephonic hearing and had to guess why trust account monitoring was dropped and replaced by attorney's fees as a sanction.

8. The Tex. R. Disp. Proc. 3.10 factors do not support actively suspending Appellant.

9. BODA May Modify Its Written Orders To Avoid the Manifest Injustice Created by Contravening Prior Inconsistent Oral Directives by the Texas State Bar.

10. It was error for the Panel to require the completion of additional CLE as a sanction.

III. Legal Argument

Standard of Review

The violation of a disciplinary rule and "knowingly engag[ing] in ... conduct contrary to a disciplinary rule" are questions of law for a court, not matters of fact. *Gamez v. State Bar of Texas*, 765 S.W.2d 827, 834 (Tex. App.-San Antonio 1988) (ellipsis in original). An appellate court faced with argument that a six-month suspension was an abuse of discretion and a counterargument that the suspension was not an abuse of discretion has a question of law. *Daves v. State Bar of Texas*, 691 S.W.2d 784, 791 (Tex. App.-Amarillo 1985). "A contention that there has been an abuse of judicial discretion presents a question of law." *Smith v. State*, 490 S.W.2d 902, 912 (Tex. App.-Corpus Christi 1972) (quoting *State v. O'Dowd*, 158 Tex. 348, 312 S.W.2d 217 (1958)). Questions of law receive de novo review. *Caballero*, 272 S.W.3d 595, 599 (Tex. 2008).

If the BODA disagrees and concludes substantial evidence applies, showing abuse of discretion is sufficient to show substantial evidence supports a reversal. *Caballero*, 272 S.W.3d at 601, f.n. 8. Also if the BODA disagrees, "[t]he judgment of a trial court in a disciplinary proceeding may be so light or heavy as to amount to an abuse of discretion." *Rosas v. Comm. of Lawyers Discipline*, 335 S.W.3d 311, 320 (Tex. App.-San Antonio 2010.) "In resolving the meaning of these rules, [the Texas Supreme Court] appl[ies] statutory construction principles....Statutory construction is a legal question, which [the Texas

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Supreme Court] review[s] de novo." *Caballero*, 272 S.W.3d at 599 (internal citation omitted). The standard of review for the applicability of a statute of limitations is de novo. *See e.g. Delhomme v. Comm. for Lawyer Discipline*, 113 S.W.3d 616, 619 (Tex. App.-Dallas 2003).

A. <u>The Panel's consideration of and Commission's counsel's treatment of the 2005 1099 Appellant gave Akinnibosun infringed Tex. R. Disp. Proc. 15.06.</u>

As part of his cross-examination of Appellant, Commission's counsel asked about the 2005 1099 Appellant gave Akinnibosun. (*See e.g.* 2/26/13 Hear. Trans. 70:13-19.) However, "[n]o attorney licensed to practice law in Texas may be disciplined for Professional Misconduct occurring more than four years before the time when the allegation of Professional Misconduct is brought to the attention of the Office of Chief Disciplinary Counsel." Tex. R. Disp. Proc. 15.06 "Petitioner, Petitioner's counsel, myself, became aware of [Appellant's] activity regard[ing] fee splitting during the deposition that was taken on November 14, 2011." (10/3/12 Hear. Trans. 122:6-9.) Applying Rule 15.06 to this sentence allows Commission to look back only to November, 14, 2007, which is years before the 2005 1099. Moreover, *Delhomme* indicates the standard of review for the applicability of a statute of limitations is de novo. 113 S.W.3d at 619. Thus, it is improper to utilize this document to support disciplining Appellant.

B. <u>The 2005 1099 Appellant gave Akinnibosun also included money Appellant gave Akinnibosun to reimburse him for buying furniture and other assets for the firm.</u>

Included in that 1099 were amounts Appellant reimbursed Akinnibosun for paying for firm assets. (*See* e.g. 10/3/12 Hear. Trans. 142:11-14 ("As a matter of fact, the first year we started, he paid a lot of money for the furniture in the office; so the 1099 you see, it's not only what he gets paid but what I owe him.") (*See also* 10/3/12 Hear. Trans. 142:15-17.) As part of his testimony during the 12/5/12 hearing Appellant said he "also testified [Akinnibosun] brought forth a lot of money, some money for furniture and all that stuff." (12/5/12/ Hear. Trans. 58:10-12.) Appellant testified similarly under cross-examination in the 2/26/13 hearing. He said "I don't know. I don't think it was an earning. I made myself as clear as

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possible. There was some things he did for the law office." (2/26/13 Hear Trans. 70:16-18)." He also said "[t]hat includes the loans, things he bought for the office that would be refunded to me." (2/26/13 Hear. Trans. 72:5-6.)

To counter this, Commission's counsel said during the 12/5/12 hearing "I went through the various boxes of them at the time." (2/26/13 Trans. 72:9-10.) It is hornbook law that the words of an attorney are not evidence. Moreover, Commission's counsel twice noted the title of box 7 of the 1099. (12/5/12 Hear. Trans. 78:7-10, 22-23.) However, this does not constitute going "through the various boxes." Moreover, the 1099 might use the term "[n]onemployee compensation," but this does not mean the money reflected in that box of the 1099 failed to include money Appellant gave Akinnibosun to reimburse him for buying furniture and other assets for the firm. Moreover, when asked about the correctness of the 1099 that Appellant's "firm paid Mr. Akinnibosun $154,769.98 in compensation for tax year 2005," Appellant said in his deposition "that's what it reads here." (10/3/12 Trans 98:20-25.) This does not mean the amount in box 7 of the 1099 fails to include money Appellant gave Akinnibosun for buying furniture and other assets for the firm. Appellant did say "[y]eah, paid to [Akinnibosun] for -- that was what would have been paid to him for services he rendered." (10/3/12 Trans. 99:23-25.) However, paying for furniture and other assets for the firm and waiting for reimbursement, which Akinnibosun did (*e.g.* 10/3/2012 Hear. Trans. 142:11-14, 12/5/12 Hear. Trans. 58:10-12, 2/26/13 Hear. Trans. 70:16-18) is a service. The first paragraph of the standard of review section *supra* incorporated by reference in this section, shows an abuse of discretion is a question of law and entitled to de novo review. If the BODA disagrees, the second paragraph of the standard of review section *supra* incorporated by reference in this section, shows so heavy a judgment is an abuse of discretion. If a judgment against the evidence is not so heavy a judgment what type of judgment is so heavy? Thus, either way the treatment of the 2005 Form 1099 as entirely reflecting compensation was error.

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C. The fee splitting count infringed Tex. R. Disp. Proc. 15.06.

"No attorney licensed to practice law in Texas may be disciplined for Professional Misconduct occurring more than four years before the time when the allegation of Professional Misconduct is brought to the attention of the Office of Chief Disciplinary Counsel." Tex. R. Disp. Proc. 15.06 "Petitioner, Petitioner's counsel, myself, became aware of [Appellant's] activity regard[ing] fee splitting during the deposition that was taken on November 14, 2011." 10/3/12 Hear. Trans. 122:6-9. Applying Rule 15.06 to this sentence allows Commission to look back only to November, 14, 2007.

Appellant did not think he gave "Akinnibosun any money from January of 2008 to August of 2008." (10/3/12 Hear. Trans. 160:17-20.) Appellant neither paid nor promised to pay Akinnibosun money in 2012, 2011, 2010, 2009, 2008 and did not pay money in December 2007. (*Id.* at 187:5-188:3.) Commission is likely to argue the fee splitting count was timely because Appellant said "[t]he intent was, at the end of the year, every year was look back and see what he made, and if there was -- if the company made money, then of course I make it up for him." (*Id.* at 95:8-11.) Moreover, Commission's likely argument fails because the logic of Commission's argument is that Appellant paid Akinnibosun "if the company made money." The hearing transcripts do not show Appellant's law firm made money in 2007. Frankly, Appellant finds it most curious that the evidence of Appellant's actual payment of money to Akinnibosun is the 2005 1099 Appellant provided Akinnibosun. This is most curious because as shown in section III.A *supra* and incorporated by reference into this section, this document is untimely under Tex. R. Disp. 15.06 by more than a year. Moreover, Appellant's last payment to Akinnibosun would have occurred "way prior to" January 2008. (*Id.* at 159:21-25-160:1.) Additionally, *Delhomme* indicates the standard of review for the applicability of a statute of limitations is de novo. 113 S.W.3d at 619. Thus, the fee splitting count is untimely under Tex. R. Disp. Proc. 15.06.

D. Appellant did not violate TDRPC 5.03(b)(1) because he did not know of Akinnibosun's conduct in the Foster and Teketele matters.

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The BODA need not accept Appellant's sworn testimony he lacked knowledge of Akinnibosun's conduct in the Foster and Teketele matters (10/3/2012 Hear. Trans. 137:19-25, 138:7-24, 163:5 ("I learned about Ms. Foster from the State Bar.")) because Commission said the Foster incident occurred without Appellant "knowing anything about it" and said Appellant "didn't know anything about [Teketele] at the time either." (12/5/12 Hear. Trans. 25:15-17, 25:20-22.) TDRPC 5.03(b)(1) reads, in pertinent part, "the lawyer orders, encourages, or permits the conduct involved." Ex. 12 "Comment by Bob Schuwerk from the Handbook of Texas Lawyer and Judicial Ethics" shows no violation of that rule occurs without the attorney's knowledge of the non-lawyer's activities. Mr. Schuwerk described a drafting process where knowingly was knowingly deleted because "one committee member observed the word 'permits' implied the requirement…a person could not 'permit' something" of which he lacked knowledge. (10/3/2012 Hear. Trans. at 108:1-5 (describing Ex. 12 (quotation marks in original.))) While the observation prevailed, "the committee overlooked the need to make a parallel change in 501(a) (sic)" (10/3/2012 Hear. Trans. at 108:6-9 (describing Ex. 12.))

Texas courts have cited Mr. Schuwerk. *In re Rose*, 144 S.W.3d 661, 672-74, 714, f.n. 32 (Tex. Rev. Trib. 2004); *Vickery v. Comm. for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App.-Houston [14 Dist.] 1999); *Hawkins v. Comm. for Lawyer Discipline*, 988 S.W.2d 927, 933, 934 and f.n.8, 935 and f.n.12 (Tex. App.-El Paso 1999) (spelled as "Schwerk") ; *Brown v. Comm. for Lawyer Discipline*, 980 S.W.2d 675, 680 (Tex. App.-San Antonio 1998); *In re News Am. Pub., Inc.*, 974 S.W.2d 97, 100 (Tex. App.-San Antonio 1998); *Spain v. Montalvo*, 921 S.W.2d 852, 859, f.n. 6 (Tex. App.-San Antonio 1996); *Delta Air Lines, Inc. v. Cooke,* 908 S.W.2d 632, 633 (Tex. App.-Waco 1995); *Rangel v. State Bar of Texas,* 898 S.W.2d 1, 3 (Tex. App.-San Antonio 1995). These cases show the persuasive power of Mr. Schuwerk and that the Panel should not have rejected his opinion, which it did by finding violation of TDRPC 5.03(b)(1) even though Commission's counsel said Commission said the Foster incident occurred

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without Appellant "knowing anything about it" and said Appellant "didn't know anything about [Teketele] at the time either." (12/5/12 Hear. Trans. 25:15-17, 25:20-22.)

The Texas Court of Appeals, Beaumont has examined whether a statute using the word permit meant permission could not occur without knowledge. *Rose v. Ben C. Hebert Heirs*, 305 S.W.3d 874, 877 (Tex. App.-Beaumont 2010). The Sixth Edition of Black's Law Dictionary defines permit as "to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." *Id.* "Each of these concepts presupposes knowledge on the part of the person permitting a particular act, [and e]ven the failure to prevent is a form of acquiescence which, likewise, would require knowledge." *Id.* The Grievance Panel decision in this case does not accord with *Rose's* conclusion one cannot permit without knowledge of the occasion permitted.

The Texas Rules of Disciplinary Procedure are treated as statutes. *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008). Plain meaning of statutory text governs "unless a different meaning is apparent from the context of the statute or the plain meaning would yield absurd results." *Rachal v. Reitz*, 403 S.W.3d 840, 844 (Tex. 2013). Applying the definition of permit cited in *Rose*, 305 S.W.3d at 877, concluding one can permit without knowledge is absurd because one cannot give consent without knowing what one is giving consent to. Appellant picked one of the words from the definition of permit from *Rose*, he emphatically contends placing any other word from the definition into the previous sentence would not alter the applicability of that sentence.

The Texas Supreme Court's overruling of the Texas Court of Civil Appeals in a case involving providing liquor to minors is instructive because of the latter court's discussion of what is meant by the word permit. *A.E. Holly & Co. v. Simmons*, 85 S.W. 325, 327 (Tex. Civ. App. 1905) (overruled by *Holly v. Simmons*, 99 Tex. 230, 233, 89 S.W. 776, 777 (Tex. 1905)). The Texas Court of Civil Appeals spilled much ink about the meaning of permit. 85 S.W.3d at 327. The Texas Supreme Court overruled the Texas

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Court of Civil Appeals because the former court could not believe the Texas Legislature intended such an unreasonable result of acquitting for selling liquor and convicting for providing liquor. *Holly v. Simmons*, 99 Tex. at 233, 89 S.W. at 777. If an unreasonable result occurs upon acquitting for selling liquor and convicting for providing liquor, an absurd result occurs upon concluding one can permit, much less order or encourage something one knows nothing about because that conclusion defies the definition of permit while it is at least conceivable to be acquitted of selling liquor and convicted of providing it. Moreover, *Holly v. Simmons* shows statutory interpretation in Texas has long (at least since 1905) established text is not everything or the only thing in statutory interpretation. Finally, "[i]n resolving the meaning of these rules, [the Texas Supreme Court] appl[ies] statutory construction principles....Statutory construction is a legal question, which [the Texas Supreme Court] review[s] de novo." *Caballero*, 272 S.W.3d at 599 (internal citation omitted). Thus, it was error for the Panel to conclude Appellant violated TDRPC 5.03(b)(1).

E. <u>It was error for the judgment to include the words "ordered" and "encouraged."</u>

It was error for the judgment to include the words "ordered" and "encouraged" in recounting Appellant's actions towards Akinnibosun. (Judgment of Evidentiary Panel 4C at 2 in Foster/Teketele (contains the words "ordered" and "encouraged.")) Commission's Petition regarding Appellant does not allege "ordered," or "encouraged." (2/26/13 Hear. Trans. 46:4-5.) "Pleadings shall give fair notice of the claim or defense asserted to provide the opposing party with enough information to enable him to prepare a defense or answer to the defense asserted." *Favaloro v. Comm. for Lawyer Discipline*, 13 S.W.3d 831, 837, (Tex. App.-Dallas 2000) (internal citations omitted). Using a form of the word "permit" and not a form of the word "order" and "encourage" tells an attorney facing disciplinary proceedings that the Commission is not accusing him of ordering or encouraging.

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"A petition is sufficient if a cause of action or defense may be reasonably inferred from what is specifically stated." 13 S.W.3d at 837-38 (internal citation omitted). This does not save the pleading in this case because including a form of the word permit, not a form of the word order or encourage does not reasonably infer the Commission will allege the very actions, i.e. ordering and governing that are conspicuous by their absence from the petition in this case. In fact, Commission's counsel even asserted the Foster case and Teketele case occurred without Appellant's knowledge. (12/5/12 Hear. Trans. 25:15-17, 25:20-22.) Among the definitions for order is "to direct or command…." www.dictionary.com . Among the definitions for encourage is to "stimulate by assistance…." *Id.* The 10/3/12 hearing provides no evidence Appellant's actions vis a vis Akinnibosun satisfy these definitions. Moreover, most tellingly, at the 2/26/13 hearing, Commission's counsel used the word "allowed" to describe what Appellant did vis a vis his law license and Akinnibosun. (10/3/12 Hear. Trans. 54:4-6), (*See also* 206:6 question of Commission's counsel: Did Appellant "permit?") Allow is not language that connotes ordering or encouraging.

The first paragraph of the standard of review section *supra* incorporated by reference in this section shows an abuse of discretion is a question of law and entitled to de novo review. If the BODA disagrees, the second paragraph of the standard of review section *supra* incorporated by reference in this section shows so heavy a judgment is an abuse of discretion. If a judgment against the evidence is not so heavy a judgment what type of judgment is so heavy? Thus, either way, it is error for the judgment to include the words "ordered" and "encouraged."

F. <u>If the BODA rejects Appellant's arguments about fee splitting *supra*, the evidence regarded one fee splitting claim, not one claim for Teketele and another for Foster.</u>

If the BODA rejects Appellant's arguments about fee splitting in III.A-C *supra*, 10/3/12 Hear. Trans. 232:15-21 says "[t]here is one fee splitting…generally…not specific to Ms. Foster or specific to

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Ms. Teketele but that there was an agreement or a promise to fee split generally with regard to…Akinnibosun.") However pages 1-2 of the Judgment of Evidentiary Panel 4C in Foster/Teketele contain two fee splitting claims. Appellant emphatically contends the fee splitting count was untimely and adheres to that contention. However, he recites the Commission's likely argument about fee splitting from section B supra:"[t]he intent was, at the end of the year, every year was look back and see what he made, and if there was -- if the company made money, then of course I make it up for him" (*id.* at 95:8-11) only to show the Commission's own evidence shows 232:15-21 more accurately describes the fee splitting count.

The first paragraph of the standard of review section *supra* incorporated by reference in this section shows an abuse of discretion is a question of law and entitled to de novo review. If the BODA disagrees, the second paragraph of the standard of review section *supra* incorporated by reference in this section shows so heavy a judgment is an abuse of discretion. If a judgment against the evidence is not so heavy a judgment what type of judgment is so heavy? Thus, either way, it is error for the judgment to contain two fee splitting claims.

G. <u>A due process violation occurred because Appellant and his counsel had no notice of the telephonic hearing and had to guess why trust account monitoring was dropped and replaced by attorney's fees as sanction.</u>

Appellant received the following sanctions at the end of the 12/5/2012 hearing: "a four-year suspension partially probated, six-month active suspension; CLEs of ten hours in law practice management, six hours in ethics, to be completed during -- not later than the probationary suspension period. Expenses of $811.65 that [Appellant] will pay to the State Bar." (12/5/12 Hear. Trans. 101-24-25, 102:1-5.) Appellant also received the sanctions of law practice monitoring twice annually and trust account monitoring with twice yearly audits during probation. (*Id.* at 102:6-13.) However, "no attorney fees," and "[a]gain, no attorney fees." (*Id.* at 102:5, 15.)

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The chair asked Commission's counsel, "if you will present me with an order with those specifics, I will sign it." (12/5/12 Hear. Trans. 102:16-17.) "Due process requires, at a minimum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner….An attorney in a disciplinary proceeding is entitled to procedural due process." *Comm. for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 137 (Tex. App.-Houston [1 Dist. 2011]) (internal citations omitted). "[A]fter [that] hearing, the Panel met without notice to [Appellant and his counsel]." (*See* 2/26/13 Hear. Trans. 8:11-17.) Substantive due process raises questions of law. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 45 (Tex. 1998). The fact that this section features procedural due process is a distinction without a difference. The first paragraph of the standard of review section *supra* incorporated by reference to this section indicates de novo review applies.

The absence of notice infringed this due process. "[T]hen there was a trading of sanctions" where Commission's counsel indicated trust account monitoring was inappropriate, and "then somehow we got substituted in for attorney's fees that weren't part of the original judgment." (*Id.* at 8:12-17.) How can procedural due process exist when an attorney has to use words such as "somehow" to recount how a body made its decision? Commission's counsel says "[n]o counsel was present for the telephonic hearing" (2/26/13 Hear. Trans. at 27:19-20) but he knew it was a telephonic hearing while Appellant did not. (*See id.* and 8:12-17.) Commission's counsel says "the Chair gave me a directive," *id.* at 27:23 and 8:11-17 indicate Appellant's counsel lacked knowledge of this. Moreover, why should belief be given to Commission's counsel when "somehow lost in [Commission's counsel's] office" was "the written hearing report that, Mr. Anderson[, the panel chair,] filled out immediately upon conclusion of the [12/5/12] hearing." (2/26/13 Hear. Trans. 24:22-25.)

"Perhaps the simplest and ultimate test of due process of law is the presence or absence of rudiments of fair play." *Skelton v. Comm. for Lawyer Discipline*, 56 S.W.3d 687, 693 (Tex. App.-Houston

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[14 Dist.] 2001) (citing *State v. Crank*, 666 S.W.2d 91, 94 (Tex.1984)). To recap the prior two paragraphs: Appellant had no notice of the hearing, Commission's counsel sent a letter about trust account monitoring that Appellant never saw, Appellant's counsel has to use the term "somehow" to describe events, while Commission's counsel's description has more detail, and Commission's counsel lost the written hearing report the panel chair gave him, which means Appellant did not receive a copy of that report. This cannot constitute the rudiments of fair play.

In the 2/26/13 hearing, Commission contends that which was announced in the 12/5/12 hearing has no effect. 25:15-16. This contention is incredible because it means the sanctions announced at a State Bar District Grievance Committee hearing have no value and the chair asking Commission's counsel, "if you will present me with an order with those specifics, I will sign it" (12/5/12 Hear. Trans. 102:16-17) also has no value. Everyone could have gone home with the time and money saved with the no value given to the sanctions announced at the hearing or the instruction to Commission's counsel. Surely, the statements made at a grievance committee hearing have more value than this.

"Due process requires, at a minimum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner.... An attorney in a disciplinary proceeding is entitled to procedural due process." *Stern*, 355 S.W.3d at 137 (internal citations omitted). Thus, the absence of notice before the grievance committee changed the sanctions announced at the 12/5/12 hearing infringes due process.

H. <u>The Tex. R. Disp. Proc. 3.10 factors do not support actively suspending Appellant.</u>

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned;
B. The seriousness of and circumstances surrounding the Professional Misconduct;
C. The loss or damage to clients;
D. The damage to the profession;
E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found;
F. The profit to the attorney;
G. The avoidance of repetition;
H. The deterrent effect on others;
I. The maintenance of respect for the legal profession;

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J. The conduct of the Respondent during the course of the Committee action;
K. The trial of the case; and
L. Other relevant evidence concerning the Respondent's personal and professional background."

Factor A: Filing of the Steptoe grievance occurred in February 2008. (10/3/12 Hear. Trans at 156:18-21.) The Foster case was over after the granting of dismissal for want of prosecution in August 2007. (10/3/12 Hear Trans. 210:11-18, 85:8-11.) Ms. Teketele filed a grievance in January 2009, almost a year after Appellant fired Akinnibosun and closed the Dallas office. (*Id.* at 102:22-25, 103:1-2, 65:12-20.) Thus, Appellant had no opportunity to learn from the Steptoe grievance in the context of the Foster and Teketele matters. Thus, this case does not involve an attorney who did not learn from the previous sanctions placed upon that attorney. Accordingly "[t]he nature and degree of the Professional Misconduct for which the Respondent is being sanctioned" does not warrant actively suspending Appellant.

Factor B: The Commission describes Appellant's conduct as "very serious." (12/5/12 Hear. Trans. 71:7-8.) However, Appellant contends the Texas State Bar's actions in other cases involving Akinnibosun provide a much better window into how it really views cases involving Akinnibosun than the statement of its counsel. Mr. Fuller's case not only involved Akinnibosun but also involved at least two others. (12/5/12 Hear. Tran. 83:9-13.) (*See also* Ex. 7 at 10[1]) (featuring Akinnibosun and Mr. Charlie Parker)); (Ex. At 11-12 (featuring Mr. J.W. Grigsby settling a case without a client's consent or knowledge); (Mr. Fuller "allowed J.W. Grigsby or another individual to sign [the client's] name to the settlement disbursement sheet, the release[,] and four (4) settlement checks without" the client's consent or knowledge.) Akinnibosun's conduct in that case is almost identical to his conduct in this case. (12/5/12 Hear. Trans. at 83:14-25, 84:1-11.) Among the rule violations in Mr. Fuller's case were 5.03(a)(b), 5.03(b)(1), 8.04(a)(1) and (3), which involves "dishonesty, deceit, fraud and misrepresentation." (*Id.* at 84:12-17); (*See also* Ex. 7 at 12.) Mr. Fuller received a one-year fully probated suspension. (Ex. 7 at 4-5.)

[1] Page numbers for Exhibit 7 reflect the page number on the top of the page.

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How can this case be sufficiently "very serious" to justify another active and probated suspension and other sanctions for Appellant when he had one Akinnibosun, not three, and Commission has not alleged any dishonesty, deceit, fraud, or misrepresentation? Moreover, Appellant has already served an active suspension that was as long as Mr. Fuller's fully probated suspension. (Compare 10/3/12 Hear. Trans. 165:22-25, 166:4-6 with Ex. 7 at 4-5.)

Theophilus Ekwem is another attorney who employed Akinnibosun. (12/5/12 Hear. Trans. 28:23:24.) When Mr. Ekwem was out of the office Akinnibosun tried "to pass himself as a lawyer and tried to represent clients without [Mr. Ekwem's] knowledge." (*Id.* at 30:12-14.) Akinnibosun "signed up many clients without [Mr. Ekwem's] knowledge," and tried to attend mediation on Mr. Ekwem's behalf without his knowledge. (*Id.* at 30:15-21.) The chair sustained the objection of nonresponsive, "going way beyond what the question" asked. (*Id.* at 30:25-31:1-3.)

"A decision to admit or exclude evidence rests within the sound discretion of the trial court." *Neely v. Comm. for Lawyer Discipline*, 302 S.W.3d 331, 339 (Tex. App.-Houston [14 Dist.] 2009) (internal citations omitted). "A trial court abuses its discretion when a decision is arbitrary, unreasonable, or without reference to guiding principles." *Id.* "A reviewing court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling and will not disturb the trial court's ruling absent an abuse of discretion." *Id.* "Moreover, a reviewing court will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused rendition of an improper judgment." *Id.* Excluding the evidence was unreasonable because the question was "[w]hy did you terminate Mr. Akinnibosun," and the quoted sentences answer the question. (*Id.* at 30:10-11.)

Commission successfully objected on speculation grounds to an offer of proof that Mr. Ekwem received a private reprimand in his disciplinary action involving Akinnibosun. (12/5/12 Hear. Trans. 64:16-24, 65:4-11.) This was unreasonable because no speculation is needed for an attorney to know what

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discipline, if any, the attorney received in a disciplinary case. This exclusion combined with the exclusion in the prior paragraph "probably caused rendition of an improper judgment" because Ekwem's testimony helped show Commission really did not view disciplinary cases involving Akinnibosun were "very serious." Moreover, this exclusion affects factors D and H as shown *infra*. Again, how is this case "very serious" enough to justify another active suspension and probated suspension for Appellant when Mr. Ekwem received a private reprimand?

Filing of the Steptoe grievance occurred in February 2008. (10/3/12 Hear. Trans at 156:18-21.) The Foster case was over after the granting of dismissal for want of prosecution in August 2007. (10/3/12 Hear Trans. 210:11-18, 85:8-11.) Ms. Teketele filed a grievance in January 2009, almost a year after Appellant fired Akinnibosun and closed the Dallas office. (*Id*. at 102:22-25, 103:1-2, 65:12-20.) Thus, Appellant had no opportunity to learn from the Steptoe grievance in the context of the Foster and Teketele matters. Thus, "[t]he seriousness of and circumstances surrounding the Professional Misconduct" do not weigh in favor of actively suspending Appellant.

Factor C: Appellant went into debt to make Ms. Teketele financially whole. (12/5/12 Hear. Trans. at 44:25-45:1-7.) Bridget Myers, an individual who faced a situation similar to Ms. Teketele was made financially whole as Appellant and his law firm took a default judgment and she did not file a grievance. (12/5/12 Hear. Trans. 60:19-22, 63:6-12, 63:14-18, 64:4-5.) Ms. Foster did not testify at a hearing, and no evidence was presented regarding her monetary loss. Thus, "[t]he loss or damage to clients" does not weigh in favor of actively suspending Appellant.

Factor D: Commission is likely to argue the harm to the profession factor weighs in favor of actively suspending Appellant. However, as detailed more fully *supra* in Factor B and incorporated by reference into this section, Commission's actions do not reflect its likely argument. To summarize the incorporated material, Mr. Fuller received a one-year fully probated suspension. (Ex. 7 at 4-5) despite his

case involving not only Akinnibosun but also involving at least two others (*See also* Ex. 7 at 10-12) and involving violations of TDRPC 5.03(a)(b), 5.03(b)(1), 8.04(a)(1) and (3), which involves "dishonesty, deceit, fraud and misrepresentation." (12/5/12 Hear. Trans. at 84:12-17); (*See also* Ex. 7 at 12.) Appellant was not even charged with rule violations involving "dishonesty, deceit, fraud and misrepresentation," and his conduct only involved Akinnibosun. (*See* Judgment of Evidentiary Panel 4C in Foster/Teketele at 2.)

Nevertheless, not only was he sanctioned and served a one-year active suspension for the Steptoe grievance, which involved Akinnibosun (see Ex. 9 at 2-4) but among the sanctions he received for this case is a six-month active suspension. (*See* Judgment of Evidentiary Panel 4C in Foster/Teketele at 3.) In the Theophilus Ekwem case, (*see* Factor B *supra* incorporated by reference into this section and summarized briefly) when he was out of the office, his employee Akinnibosun, tried "to pass himself as a lawyer and tried to represent clients without [Mr. Ekwem's] knowledge." (12/5/12 Hear. Trans. at 30:12-14.) Akinnibosun "signed up many clients without [Mr. Ekwem's] knowledge," and tried to attend mediation on Mr. Ekwem's behalf without his knowledge. (*Id.* at 30:15-21.) Commission successfully objected on speculation[2] grounds to an offer of proof that Mr. Ekwem received a private reprimand in his disciplinary action involving Akinnibosun. (12/5/12 Hear. Trans. 64:16-24, 65:4-11.) "The damage to the profession factor" does not warrant another active suspension for Appellant when he already successfully completed a one-year active suspension and two year probated suspension for conduct involving Mr. Akinnibosun (10/3/12 Hear. Trans. 171:4-15) and Mr. Fuller and Mr. Ekwem did not even receive a single active suspension in their disciplinary matters involving Akinnibosun.

Factor E: Appellant fired Akinnibosun and closed the Dallas office in April 2008. (10/3/2012 Hear. Trans. 65:12-20.) All 3 of the grievances filed against Appellant involve Mr. Akinnibosun. (*See*

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[2] As shown *supra* in the section regarding factor B, and incorporated by reference into this section, it was error to sustain this objection.

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2/26/13 Hear. Trans. 63:14-17.) Moreover, since firing Akinnibosun and closing the Dallas office, "other than Foster [and] Teketele" and Steptoe, which already occurred, Appellant has not "been the subject of any other grievance" and no client has "threatened to file a grievance" against Appellant. (*Id.* at 63:14-24). Appellant also said "I have to get things done myself," and "I can not (sic) trust anybody working for me." (2/26/13 Hear. Trans. 64:13-15.) He also said "[b]ut for Akinnibosun, the State Bar would not have even known that I'm here." (10/3/2012 Hear. Trans. 190:13-14.) Finally, he said "[n]ext time, if I have the opportunity, I will certainly, certainly, certainly be more careful about hiring decisions," and "I have to be very careful." (12/5/12 Hear. Trans. 43:5-7, 43:9) Thus, "[t]he assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found" does not warrant actively suspending Appellant.

Factor F: Appellant did not profit from either the Teketele matter or the Foster matter. 2/26/13 Hear. Trans. 65:1-6. In fact, Commission even asserted the Foster case and Teketele case occurred without Appellant's knowledge. (12/5/12 Hear. Trans. 25:15-17, 25:20-22.) Thus, the absence of "profit to the attorney" weighs against actively suspending Appellant.

Factor G: Appellant fired Akinnibosun and closed the Dallas office in April 2008. (10/3/2012 Hear. Trans. 65:12-20.) He commenced taking remedial action after learning of Steptoe, i.e. closing "down the operational bank account in Dallas." (12/5/12 Hear. Trans. 56:19-24.) All 3 of the grievances filed against Appellant involve Akinnibosun. (*See* 2/26/13 Hear. Trans. 63:14-17.) Moreover, since firing Akinnibosun and closing the Dallas office, "other than Foster [and] Teketele" and Steptoe, which already occurred, Appellant has not "been the subject of any other grievance" and no client has "threatened to file a grievance" against Appellant. (*Id.* at 63:14-24). Appellant said "I have to get things done myself," and "I can not (sic) trust anybody working for me." (2/26/13 Hear. Trans. 64:13-15.) He also said "[b]ut for Akinnibosun, the State Bar would not have even known that I'm here." (10/3/2012 Hear. Trans. 190:13-

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14.) Finally, he said "[n]ext time, if I have the opportunity, I will certainly, certainly, certainly be more careful about hiring decisions," and "I have to be very careful." (Hear. Trans. 43:5-7, 43:9) Thus, "[t]he avoidance of repetition" factor weighs against actively suspending Appellant.

Factor H: The write-up of the Fuller suspension in the Texas Bar Journal did not identify Akinnibosun. (*See* Ex. 8.) Moreover in recounting what Mr. Fuller did to warrant discipline, the write-up said "[t]he 101st District Court of Dallas County found Fuller failed to supervise a nonlawyer assistant." (Ex. 8.) The phrase "failed to supervise…" provides no specifics regarding what Mr. Fuller did, which meant other Texas attorneys such as Appellant could not learn from Mr. Fuller's actions. The write-up provides no information regarding what the non-lawyer assistant did. (*See* Ex. 8.) Thus, other Texas attorneys such as Appellant could not read this write-up and even learn of the type of scam Akinnibosun and others perpetrated in the Fuller discipline or even learn Akinnibosun's name.

The private reprimand, discussed in Factor B *supra* and incorporated by reference into this section, given to Mr. Ekwem meant neither Texas lawyers nor the Texas bar would learn of Akinnibosun from the discipline imposed in that case. The write-up of Appellant's discipline in the Steptoe case also did not mention Akinnibosun. (10/5/12 Hear. Trans. 179:1-5.) Moreover, Commission describes as quite a burden monitoring all Texas legal assistants and those "purport[ing] to be a legal assistant and then alert[ing]…the public to any wrongdoing on the [legal assistant's] part." (12/5/12 Hear. Trans. 74:14-21.)

This is not at all what Appellant said. Appellant suggests the State Bar should protect the profession and the public by publishing names of legal assistants such as Akinnibosun who steal an attorney's identity to recruit clients, file cases, and steal settlement money. This cannot constitute that many people and if it does, it is all the more reason for the Texas State Bar to act to protect lawyers and the public. Appellant respectfully contends the Texas State Bar's actions mean the "deterrent effect on others" does not support actively suspending Appellant.

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Factor I: Appellant has served a one-year active, two year probated suspension for conduct involving Akinnibosun. He fired Akinnibosun and closed his Dallas office almost a year before Teketele filed her grievance. (10/3/12 Hear. Trans. 65:12-20, 162:4-6.) The only grievances Appellant has had were Steptoe, Foster, and Teketele and no client has "threatened to file grievance" against Appellant. (*Id.* at 63:14-24.) Appellant said "I have to get things done myself," and "I can not (sic) trust anybody working for me." (2/26/13 Hear. Trans. 64:13-15.) He also said "[b]ut for Akinnibosun, the State Bar would not have even known that I'm here." (10/3/2012 Hear. Trans. 190:13-14.) Finally, he said "[n]ext time, if I have the opportunity, I will certainly, certainly, certainly be more careful about hiring decisions," and "I have to be very careful." (Hear. Trans. 43:5-7, 43:9) Thus, "[t]he maintenance of respect for the legal profession" does not warrant actively suspending Appellant.

Factor J: Appellant has fully cooperated with the attorney disciplinary process. Commission even described Appellant's deposition as "very candid." (10/3/12 Hear. Trans. 114:23.) Thus, "[t]he conduct of [Appellant] during the course of the Committee action" does not weigh in favor of actively suspending Appellant.

Factor K: The portion of the hearing transcripts which feature Commission's counsel cross-examining Appellant show that he fully answered Commission's counsel's questions even involving the 2005 1099 of Akinnibosun, which Tex. R. Disp. Proc. 15.06[3] clearly forecloses. (*See* 12/5/12 Hear. Trans. 59:13-62:12; 2/26/13 Hear. Trans. 69:6-78:14. Thus, "[t]he trial of the case" factor does not support actively suspending Appellant.

Factor L: As part of his service to the community, Appellant "teach[es] law students how to pass the [b]ar." (12/5/12 Hear. Trans. 40:4-5.) Appellant uses his legal "skills to help my community, my church." (12/5/12 Hear. Trans. 40:11.) He also counsels young men about their need to avoid

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[3] See Section III.A *infra* incorporated by reference into this section.

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incarceration. (12/5/12 Hear. Trans. 41:17-21.) Thus, "[o]ther relevant evidence concerning the Respondent's personal and professional background" does not support actively suspending Appellant.

The first paragraph of the standard of review section *supra* incorporated by reference in this section shows an abuse of discretion is a question of law and entitled to de novo review. If the BODA disagrees, the second paragraph of the standard of review section *supra* incorporated by reference in this section shows so heavy a judgment is an abuse of discretion. If a judgment in violation of a rule such as Tex. R. Disp. Proc. 3.10 is not so heavy a judgment what type of judgment is so heavy? Thus, either way, it is error for the Panel to actively suspend Appellant.

I. BODA May Modify Its Written Orders To Avoid the Manifest Injustice Created by Contravening Prior Inconsistent Oral Directives by the Texas State Bar.

The State Bar recommendation issued in open court that the Teketele and Foster matters would be dismissed and then only later informing Appellant, after the time to appeal the Steptoe matter had already lapsed, that its oral recommendation would not be enforced, infringed due process. [4] "Due process requires, at a minimum, notice and an opportunity to be heard at a meaningful time and in a meaningful manner.... An attorney in a disciplinary proceeding is entitled to procedural due process." *Comm. for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 137 (Tex. App.-Houston [1 Dist. 2011]) (internal citations omitted). "[D]ue process ... is not implicated by a grievance committee investigation because it is not accorded finality; the lawyer has a right to respond to charges either before an evidentiary panel of the grievance committee or at trial in district court." Id. at 137 (brackets and ellipsis in original).

Specifically, this does not bar a due process claim regarding Exhibits 4 and 5 because the right to respond to charges does not save Appellant's ability to request joinder or consolidation of the grievances

[4] Appellant timely objected to the overlooking of the State Bar's representation, therefore this case may readily be distinguished from the facts in *Sherman v. Triton Energy Corp.* 124 S.W.3d 272 (Tex.App.–Dallas 2003) (where the appellant failed to preserve the point that the court's final judgment as to sanctions contradicted the trial court's oral pronouncement on the corporation's motions for sanctions, where appellant failed to raise the argument in the trial court.)

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involving Akinnibosun: The failure to save stems from Respondent receiving a letter in the mail from the State Bar two days after his time to appeal Steptoe lapsed telling him it would not dismiss Teketele and Foster. (10/3/2012 Hear. Trans. 167:23-168:8.) "Perhaps the simplest and ultimate test of due process of law is the presence or absence of rudiments of fair play." *Skelton v. Comm. for Lawyer Discipline*, 56 S.W.3d 687, 693 (Tex. App.-Houston [14 Dist.] 2001) (citing *State v. Crank*, 666 S.W.2d 91, 94 (Tex.1984). It seriously violates these rudiments to tell an attorney other grievances will be dismissed only for him to find out after the running of the time to appeal Steptoe - and accordingly long after the time to request consolidation or joinder of all grievances involving Akinnibosun - that dismissal will not occur. Moreover, but for this signal from the Texas Bar, the Appellant would have promptly moved to consolidate all three matters, and specifically refrained from doing so in reliance upon the Texas Bar's oral pronouncement of dismissal (Cite counsel's reference to Commissions in-court comments to other attorney here); also compare, in the criminal context, *Thompson v. State*, 108 S.W.3d 287, 290 (Tex.Crim.App.2003)(when there is a conflict between the oral pronouncement of sentence in open court and the sentence set out in the written judgment, the oral pronouncement controls.)

The State Bar's representation should be upheld as an oral order and not contradicted without a hearing. See *Blain v. James* Not Reported in S.W.2d, 1992 WL 216092 (Tex.App.-Hous. 14 Dist 1992) (Relator asks that we rescind the trial court's oral order dismissing relator's court appointed attorney. We decline to do so and overrule the motion for leave to file petition for writ of mandamus.) In order to make the oral pronouncement that the non-Steptoe matters were being dismissed in order to avoid duplicative sanctions against Appellant, the court had to conclude legally and factually sufficient evidence supported the contents of its oral rendition. In light of the State Bar's in-court representation to Appellant, at a time when Steptoe was still appealable, that dismissal/consolidation would eliminate the potential for

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duplicative sanctions for the same conduct and was therefore appropriate, and the subsequent orders contravening the State Bar's misrepresentation, due process is implicated.

Rule 166 of the Texas Rules of Civil Procedure authorizes the trial court to make orders to control proceedings and gives authority to modify an order to prevent manifest injustice. *Palmer v. Performing Arts Fort Worth, Inc.* Not Reported in S.W.3d, 2012 WL 2923290 (Tex.App.-Fort Worth 2012)(The court may modify by affirmative direction, a written order, an oral direction in the record, *Susanoil, Inc. v. Cont'l Oil Co.*, 516 S.W.2d 260, 264 (Tex.Civ.App.-San Antonio 1973, no writ.), or by implicit modification, such as setting a hearing, *Trevino*, 64 S.W.3d at 170; *Ocean Transp., Inc. v. Greycas, Inc.*, 878 S.W.2d 256, 262 (Tex.App.-Corpus Christi 1994, writ denied). "Rule 166 recognizes the fundamental rule that a trial court has the inherent right to change or modify any interlocutory order or judgment until the time the judgment on the merits in the case becomes final." Tex.R. Civ. P. 166. ; *Schoen v. Redwood Const., Inc.* Not Reported in S.W.3d, 2011 WL 478563 (Tex.App.-Houston [1 Dist.] 2011)(A trial court is also given wide discretion in managing its docket and enforcing scheduling orders and retains authority under Rule 166 to modify a scheduling order to prevent manifest injustice.); *In re General Agents Ins. Co. of America, Inc.* 254 S.W.3d 670 (Tex.App.–Houston 14 Dist. 2008)(Because all requirements have been met to sever the declaratory judgment and lack of a severance in this case will cause manifest injustice to Gainsco, we conclude that respondent abused her discretion in denying Gainsco's motion to sever the interlocutory summary judgment to render it final and appealable and to abate the proceedings.)

More specifically, BODA acts within its discretion when modifying written orders to conform to its prior **oral** directives in order to prevent the manifest injustice created by duplicative attorney sanctions, and the adherence to due process should arguably be all the more strict given that the Appellant is being held liable for the knowing malfeasance of a paralegal employee who actively concealed that malfeasance

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from his employer. See *Henry v. Cullum Companies, Inc.* 891 S.W.2d 789 (Tex.App.–Amarillo 1995)(Trial court rendered summary judgment when it orally announced that it was granting partial summary judgment, even though there was no statement of facts showing the trial court's comments at the conclusion of the summary judgment hearing, where agreed motion for severance of the claims acknowledged the rendition of partial summary judgment at the close of the hearing and docket sheet notation evidenced the trial court's action.); *Alexander v. Alexander* 539 S.W.2d 347 (TEX 1976)(Although no notice of appeal was recorded in court's order or on docket sheet or otherwise included in transcript, where parties stipulated that oral notice was given in open court after overruling of motion for new trial, Court of Civil Appeals' dismissal of appeal for failure to give notice of appeal as required by applicable rule in effect at time of judgment should be reversed.) Here, the award of duplicate sanctions by definition contradicts the State Bar's earlier, unconditional oral directive that it was recommending the dismissal of both non-Steptoe cases. (See p. ___, Ex. "__") To now contradict the trial court's prior in-court ruling of dismissal and continue to treat all three matters as independently sanctionable offenses establishes at least a plausible basis for contending that such sanctions are the result of error and in disregard of the Texas Bar's own affirmative representations, upon which the Appellant has justifiably relied.

The State Bar presumably rested on the relevant facts and applicable law when initially addressing the two non-Steptoe matters and rendering its in-court oral recommendation they each be dismissed or consolidated, and BODA has the discretion to enforce that recommendation, which was specific and not conditioned on any procedural prerequisites.[5]

J. <u>It was error for the Panel to require the completion of additional CLE as a sanction.</u>

[5] See *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex.1967), is the case frequently cited for the degree of specificity required of a court order: It is an accepted rule of law that for a person to be held in contempt for disobeying a court decree, the decree must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him.)

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Among the terms of Appellant's probation for the Steptoe matter was "[Appellant] shall comply with Minimum Continuing Legal Education requirements." (Ex. 9 at 5-6). Additionally, "[Appellant] shall complete fifteen (15) additional hours of continuing legal education in the area of Ethics." (Ex. 9 at 6.) Appellant "completed 15 additional hours of CLE in Ethics" and "12 hours in Law Practice Management." (2/26/13 Trans. 59:23-25, 60:1-2) Nevertheless, one of the terms of probation in this case is the completion of "ten…additional hours of [CLE] in…Law Practice Management and six…in…Ethics." (Judgment of Evidentiary Panel 4C in Foster/Teketele at 5.) He really thinks he has "a really good understanding and appreciation for [his] obligations under the disciplinary rules" because he "took a lot of them[, which is] why [he is] to be hard-pressed to find some more to take this time." (*Id.* at 68:9-14.) (*See also* 12/5/12 Trans. 42:25, 43:1-4 ("I have taken a lot of CLE. It got to the point that I have to be looking for CLE. I cannot find any that I have not taken during my suspension. I have learned a lot. I regret having to know" Akinnibosun.)

Filing of the Steptoe grievance occurred in February 2008. (10/3/12 Hear. Trans at 156:18-21.) The Foster case was over after the granting of dismissal for want of prosecution in August 2007. (10/3/12 Hear Trans. 210:11-18, 85:8-11.) Ms. Teketele filed a grievance in January 2009, almost a year after Appellant fired Akinnibosun and closed the Dallas office. (*Id.* at 102:22-25, 103:1-2, 65:12-20.) Thus, Appellant had no opportunity to learn from the Steptoe grievance in the context of the Foster and Teketele matters. Given that CLE stands for continuing legal education, its purpose is learning. However, in light of the timeline set forth in this paragraph Appellant could not have applied what he learned because the misconduct in Foster and Teketele already occurred. The first paragraph of the standard of review section *supra* incorporated by reference in this section shows an abuse of discretion is a question of law and entitled to de novo review. If the BODA disagrees, the second paragraph of the standard of review section *supra* incorporated by reference in this section shows so heavy a judgment is an abuse of discretion. If a

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judgment against the evidence is not so heavy a judgment what type of judgment is so heavy? Thus, either way, it is error for the Panel to impose the sanction of additional CLE on Appellant.

IV. Prayer For Relief

Appellant respectfully prays the following relief from the BODA:

1. Conclude the fee splitting claims against Appellant were untimely under Tex. R. Disp. Proc. 15.06 and accordingly dismiss the claims.

2. To the extent the BODA concludes otherwise on #1, conclude Commission's counsel asking about the 2005 1099 Appellant gave Akinnibosun and the Panel's consideration of the 1099 infringed Tex. R. Disp. Proc. 15.06 and accordingly reverse the judgment of the Panel in this case to the extent either the Panel considered the 1099, Appellant's answers in cross-examination about the 1099, or both.

3. To the extent the BODA concludes otherwise on #2, conclude the 2005 1099 regarded Appellant's reimbursement of Akinnibosun's payment of law firm expenses such as furniture and accordingly reverse the Panel's judgment on the fee splitting claims to the extent the claims relied on the 1099 or Appellant's answers in cross-examination about the 1099, or both.

4. Conclude Appellant did not violate TDRPC 5.03(b)(1) because he did not know of Akinnibosun's conduct in this case.

5. To the extent the BODA concludes otherwise on #4, delete the words "ordered" and "encouraged" from page 2 of the Panel's judgment because the evidence did not show Appellant "ordered" or "encouraged" Akinnibosun's conduct.

6. To the extent the BODA has not already reversed the fee splitting claims in the Panel's judgment, conclude the evidence regarded a single fee splitting claim, not one each for Foster and Teketele and enter judgment accordingly.

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7. Conclude a due process violation occurred because Appellant and his counsel had no notice of the telephonic hearing and had to guess why trust account monitoring was dropped and replaced by attorney's fees as sanction and accordingly reinstate the Panel's judgment with two exceptions detailed in the following #8 and #9:

8. Conclude the 3.10 factors do not support actively suspending Appellant, an active suspension accordingly was so heavy as to constitute an abuse of discretion, and reverse the imposition of the active suspension. Appellant represents he is willing to serve a 4-year probated suspension if the imposition of active suspension is reversed and the BODA concludes a 4-year probated suspension is warranted.

9. Conclude the imposition of additional CLE as a sanction was also so heavy as to constitute an abuse of discretion and accordingly reverse the imposition of additional CLE.

Respectfully submitted:

Date: 12/17/2013

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