No. 69845

BOARD OF DISCIPLINARY APPEALS

ON APPEAL FROM

EVIDENTIARY PANEL 4-6 OF
THE STATE BAR DISTRICT NO. 4 GRIEVANCE COMMITTEE

VY THUAN NGUYEN,
State Bar of Texas Card No. 24060334,
Appellant,

V.

COMMISSION FOR LAWYER DISCIPLINE,
Appellee,

APPELLANT VY THUAN NGUYEN'S REPLY BRIEF

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Introduction

As the prosecuting arm of the State Bar of Texas, the Commission for Lawyer Discipline ("CFLD") should have the obligations to ensure not only that justice is served, but also that the appearance of justice is maintained. *See Dreyer v. State*, 309 S.W.3d 751, 755-56 n. 1 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *see also* Tex. Disc. R. Prof'l Conduct 3.09, comment 1.[1] Simply getting a "conviction," *i.e.* a judgment of disbarment, absent both actual and apparent fairness should not be the goal. Yet that appears to be the CFLD's goal here. Perhaps that is why the CFLD largely argues waiver to defend a structurally flawed and unfair "trial" by which five unrelated grievance complaints filed by five unrelated complainants regarding five unrelated matters, each involving completely different documentary and testimonial evidence, were joined and tried together in a single remote (virtual) Evidentiary Hearing with an arbitrary one-day time limit.

As we discuss in this reply, both the CFLD's waiver arguments and the CFLD's substantive arguments are without merit, particularly

[1] Nguyen acknowledges that Disciplinary Rule 3.09 applies only to prosecutors in a criminal case, but the policies underlying the rule should apply equally to the CFLD.

considering the Evidentiary Panel's structural errors that affected the entire trial process. The Board should reverse the judgment of the Evidentiary Panel and remand the case for a new hearing or hearings or, alternatively, render the judgment that the Evidentiary Panel should have rendered.

Argument

A. The Panel's Conducting The Evidentiary Hearing Remotely Constituted Structural Error Requiring Reversal.

To support its erroneous argument that the Texas Rules of Disciplinary Procedure permit an Evidentiary Hearing to be conducted remotely, the CFLD does not rely on the actual rules at all. Rather, the CFLD relies on a single, general "comment" that accompanies a set of 27 rules. *See* CFLD Brief, pp. 32-33. The comment states:

> Consistent with section 81.086 of the Texas Government Code, these rules permit the Office of the Chief Disciplinary Counsel to allow or require anyone involved in an investigatory hearing, a summary disposition setting, or an evidentiary hearing—including but not limited to a party, attorney, witness, court reporter, or grievance panel member—to participate remotely, such as by teleconferencing, videoconferencing, or other means.[2]

[2] Section 81.086 of the Texas Government Code states that, "[t]he chief disciplinary counsel may hold investigatory and disciplinary hearings by teleconference."

Tex. R. Disc. Proc. Part II, Comment (emphasis added).

The CFLD's reliance on the comment is misplaced for multiple reasons.[3]

(i) <u>The CFLD Ignores The Rules Of Statutory Construction.</u>

As the CFLD concedes, "the rules of statutory construction" apply in "resolving issues regarding the construction of the Texas Rules of Disciplinary Procedure." *Cantu v. Comm'n for Lawyer Discipline*, No. 13-16-00332-CV, 2020 Tex. App. LEXIS 9434, *104-105 (Tex. App.—Corpus Christ Dec. 3, 2020); *see In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988); *Comm'n for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 178 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see* CFLD Brief, p. 30. This means that, in construing the Rules, courts "look to the plain meaning of the words used **<u>in the rules</u>**." *Cantu*, No. 13-16-00332-CV, 2020 Tex. App. LEXIS 9434 at *104-105.

[3] The CFLD also references a virtually identical comment contained in Part VII of the Texas Rules of Disciplinary Procedure, regarding "proceedings before the Board." CFLD Brief, p. 33. While the Evidentiary Hearing here was not a proceeding before the Board, and thus Part VII of the Rules does not apply as the CFLD admits, the Part VII comment nevertheless would <u>not</u> support the CFLD's argument for the same reasons that the virtually identical Part II comment does <u>not</u> support the argument.

The rules of statutory construction do not include disregarding the plain meaning of the actual Texas Rules of Disciplinary Procedure themselves and, instead, replacing that meaning with a "comment" to the rules. *See In re Brookshire*, No. 12-23-00236-CV, 2023 Tex. App. LEXIS 8470, *11 (Tex. App. – Tyler, Nov. 8, 2023) ("the comments to the Texas Rules of Professional Conduct do not add obligations to the rules"); *In re Liebbe*, No. 12-19-00044-CV, 2019 Tex. App. LEXIS 2534, *15 (Tex. App.—Tyler Mar. 29, 2019, orig. proceeding) (same).

As Justice Willet wrote in *Klein v. Hernandez*:

> [T]he "truest manifestation" of what lawmakers intended is what lawmakers enacted—"the literal text they voted on."… 'The statute itself is what constitutes the law; it alone represents the Legislature's singular will….'"

315 S.W.3d 1, 10-11 (Willet, J., concurring).

Here, the truest manifestation of what the Supreme Court of Texas intended in enacting Rule 2.17 is what the Supreme Court enacted—the literal text. *Id*. That literal text, and the plain meaning of the words included in and excluded from the literal text, show that remote Evidentiary Hearings are not permitted. Specifically, Rule 2.17 governs Evidentiary Hearings, but contains no provision that permits the hearing

to be conducted by video, by teleconference, or otherwise remotely. Tex. R. Disc. Proc. 2.17. On the other hand, when the intent of the Rules is that a hearing may be conducted remotely, the Supreme Court of Texas expressly says so in the rule. Tex. R. Disc. Proc. 2.12(F) (regarding Investigatory Hearings, "the hearing…may be conducted by teleconference.").

The presence of express authority for remote Investigatory Hearings in the literal text of Rule 2.12(F), but the absence of any such authority for Evidentiary Hearings in the text of Rule 2.17, means that Evidentiary Hearings may not be conducted remotely. *See, e.g.*, *City of Houston v. Bates,* 406 S.W.3d 539, 549 (Tex. 2013) (presuming that the omission of a provision contained within similar statutes was intentional and indicated that the provision was not applicable); *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998) (same).

Additionally, to accept the CFLD's "comment" argument would be to improperly render as mere surplusage Rule 2.12(F)'s language that an Investigatory Hearing "may be conducted by teleconference." *In re Caballero*, 272, S.W.3d 595, 599 (Tex. 2008); *see State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006). In other words, if the language in the

comment that the Office of the Chief Disciplinary Counsel ("OCDC") may "allow or require anyone involved in an investigatory hearing…or an evidentiary hearing…to participate remotely, such as by teleconferencing" means that the OCDC may require an entire Investigatory Hearing or Evidentiary Hearing to be "conducted" remotely, then the language in Rule 2.12(F) that an Investigatory Hearing "may be conducted by teleconference" is wholly unnecessary and mere surplusage. Fatal to the CFLD's argument, the Supreme Court of Texas does "not treat any statutory language as mere surplusage." *In re Caballero*, 272, S.W.3d 595, 599 (Tex. 2008); *see State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006). This, too, means that Evidentiary Hearings may not be conducted remotely. *Id*.

Notably, the CFLD admits that "the plain meaning (and intent) of [Rule 2.17] is clear and unambiguous." *See* CFLD Brief, p. 48. That is exactly the point! Because Rule 2.17 is clear and unambiguous, resort to the comment is both unnecessary and improper. *Cantu*, No. 13-16-00332-CV, 2020 Tex. App. LEXIS 9434 at * 104-105; *Klein*, 315 S.W.3d at 10-11. And because Rule 2.17 does not say that an Evidentiary Hearing may be conducted remotely, an Evidentiary Hearing may not be conducted

remotely. *Id*; *compare* Tex. R. Disc. Proc. 2.17 *with* Tex. R. Disc. Proc. 2.12(F) (expressly saying that an Investigatory Hearing "may be conducted by teleconference."). The CFLD's argument that the comment alters or expands the clear and unambiguous literal text of Rule 2.17 is misplaced.

Regardless, however, the comment does not mean, much less say, that an Evidentiary Hearing may be conducted remotely. We discuss this next.

(ii) <u>The Comment Does Not Say Or Mean That An Evidentiary Hearing May Be Conducted Remotely.</u>

Even if the rules of statutory construction permitted ignoring the literal text and actual words of the Texas Rules of Disciplinary Procedure in favor of a general "comment," the CFLD's argument would fare no better.

Assuming that the comment applies to an Evidentiary Hearing as defined by Texas Rule of Disciplinary Procedure 1.06(O), even though as we discuss below an Evidentiary Panel and <u>not</u> the OCDC conducts Evidentiary Hearings, the comment does not say that an entire Evidentiary Hearing may be <u>conducted</u> remotely. Rather, the comment says that the OCDC may allow or require "anyone" involved in an

evidentiary hearing—including a party, attorney, witness, court reporter, or grievance panel member—to "participate remotely." Tex. R. Disc. Proc. Part II, Comment.

The clear intent of the comment, which was adopted in June 2021 on the heels of COVID and at a time when the Supreme Court of Texas's emergency COVID orders were still in effect,[4] is to allow or require a particular person or persons "involved in" an Evidentiary Hearing to "participate" remotely if need be—not to authorize the OCDC to require that the entire hearing be conducted remotely. This is underscored by the fact that, when the Supreme Court of Texas intends to permit an entire attorney-discipline hearing to be conducted remotely, the Supreme Court unambiguously says just that.

Again, in promulgating Rule 2.12(F) regarding Investigatory Hearings, the Supreme Court wrote that, "the hearing…may be conducted by teleconference." Tex. R. Disc. Proc. 2.12(F). The complete lack of any such language in the comment at issue speaks volumes as to

[4] *See* Misc. Docket No. 21-9070, Order Adopting Comment To Part II Of The Texas Rules Of Disciplinary Procedure (Tex. June 15, 2021); see also Thirty-Sixth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 21-9026 (Tex. S. Ct. March 5, 2021).

the Supreme Court's intent, as does the comment's language that "anyone," not "everyone," may be allowed or required to "participate remotely." Allowing or requiring someone "involved in…an evidentiary hearing" to "participate remotely" is a far cry from allowing or requiring the entire Evidentiary Hearing to be "conducted" remotely. *Id*.

That the comment does not mean that an Evidentiary Hearing may be conducted remotely is further confirmed by the fact that, while the comment says that the OCDC may allow or require anyone involved in an Evidentiary Hearing to "participate remotely," the OCDC does not conduct Evidentiary Hearings and thus does not have the power and authority to require that an Evidentiary Hearing be conducted remotely. Rather, Evidentiary Hearings are conducted by an Evidentiary Panel. Tex. R. Disc. Proc. 2.07 ("Committees shall act through panels, as assigned by the Committee chairs, to conduct…evidentiary hearings."); Tex. R. Disc. Proc. 2.11 ("Proceedings of an Evidentiary Panel shall be conducted by a Panel…"); Tex. R. Disc. Proc. 2.17(L) ("The Evidentiary Panel Chair shall admit all such probative evidence as he or she deems necessary for a fair and complete hearing"); Tex. R. Disc. Proc. 2.17(P)(1)

("After conducting the Evidentiary Hearing, the Evidentiary Panel shall issue a judgment…").

Indeed, the OCDC is the State Bar of Texas's in-house counsel. Tex. R. Disc. Proc. 1.06(C). The CFLD is a permanent committee of the State Bar of Texas. Tex. R. Disc. Proc. 1.06(D). The OCDC represents the CFLD in this case. *See* CFLD Brief, cover page & p. 58. Thus, if the OCDC conducts Evidentiary Hearings, as the CFLD necessarily contends to support its comment argument, then the OCDC is the prosecutor, judge, jury, and career executioner. Of course, that is not the case, which the Supreme Court of Texas recognized by not saying in the comment that the OCDC can require an Evidentiary Hearing to be conducted remotely. In that the OCDC does not conduct Evidentiary Hearings, the comment could not mean what the CFLD argues it means. *See id.*

(iii) Accepting The CFLD's Argument Could Lead To Fundamentally Unfair Or Absurd Results.

Accepting the CFLD's argument that the comment has the same weight as or greater weight than the actual Texas Rules of Disciplinary Procedure could lead to fundamentally unfair or even absurd results. Again, the comment says that the OCDC may "allow or require anyone involved in…an evidentiary hearing—including but not limited to a

party, attorney, witness, court reporter, or grievance panel member—to participate remotely, such as by teleconferencing, videoconferencing, or other means." Tex. R. Disc. Proc. Part II, Comment.

Under the OCDC's interpretation of the comment, therefore, the OCDC could "require" the respondent and her attorney to "participate remotely" in an Evidentiary Hearing that is conducted in-person for everyone else. Even more unfair, the OCDC could "require" the respondent to "participate remotely," but not "allow" the respondent's attorney to participate remotely, thereby separating the respondent from her attorney for the hearing. Or the OCDC could "require" all of the respondent's witnesses to "participate remotely," while allowing all of the CFLD's witnesses to testify in-person. The OCDC could even "require" the chair of the Evidentiary Panel, or the entire panel, to "participate remotely" by "teleconferencing" in an Evidentiary Hearing that is conducted in-person for the parties, attorneys, and witnesses—such that the Panel members could not see the witnesses while testifying to assess their credibility or the exhibits that are contemporaneously offered during witness testimony.

Indisputably, these are not results that the Supreme Court of Texas intended in adopting the comment. Nor did the Supreme Court intend for the comment to permit the OCDC to "require" that an entire Evidentiary Hearing be conducted remotely, which is why the Supreme Court did not say in the comment that the OCDC could require an Evidentiary Hearing to be conducted remotely. Rather, the Supreme Court's intent, and the only interpretation of the comment that is consistent with the literal text of the Texas Rules of Disciplinary Procedure and the only reasonable interpretation of the comment, was to allow or require a particular person or persons "involved in" an Evidentiary Hearing to "participate" remotely if need be. *Compare* Tex. R. Disc. Proc. 2.17 *with* 2.12(F). Again, the comment cannot be interpreted to change or add to the actual rules. *Brookshire*, 2023 Tex. App. LEXIS 8470 at *11; *Liebbe*, 2019 Tex. App. LEXIS 2534 at *15.

As Nguyen explained in her Appellant's Brief, conducting the Evidentiary Hearing remotely was fundamentally and structurally unlawful and erroneous, which requires reversal. *See* Nguyen Appellant's Brief, pp. 18-24.

(iv) The CFLD's Reference To The Board's Internal Procedural Rules Is Misplaced.

In addition to its misplaced reliance on a comment to the Texas Rules of Disciplinary Procedure, the CFLD makes reference to the express authorization for remote hearings contained in Rule 1.04 of this Board's Internal Procedural Rules, although the CFLD concedes that those rules do not apply here. CFLD Brief, pp. 32-33 (citing Tex. Bd. Disc. App. Internal Proc. R. 1.04(c)). To be sure, the CFLD actually raised the issue of Rule 1.04 in response to "Nguyen's reference to the Board's IPRs," which the CFLD contends is inapposite because "the Board does not promulgate the rules that govern evidentiary hearings." CFLD Brief, p. 32. So, despite its assertion that Rule 1.04 does not apply, the CFLD points to the rule as another situation in which remote proceedings are permitted. *Id*. at 32-33.

In any event, Rule 1.04's express authorization of remote hearings, even though it does not control Evidentiary Hearings, more strongly supports *Nguyen's* argument because it reflects that the rule drafters were well aware of how to authorize remote hearings where they intended for them to be permitted and, in Texas Rule of Disciplinary

Procedure 2.17 governing Evidentiary Hearings, no such authorization is included. Tex. R. Disc. Proc. 2.17.

(v) Nguyen Did Not Waive Her Complaint Regarding Conducting The Evidentiary Hearing Remotely.

The CFLD essentially argues that, under Texas law, attorney disciplinary proceedings are not considered "quasi-criminal" in nature and, for that reason, Nguyen's complaint of structural error cannot be reviewed. The CFLD's argument fails for two reasons. First, Nguyen is entitled to both federal due process and state due process. *In re Ruffalo*, 390 U.S. 544, 550 (1968) (protections afforded under the United States Constitution); *University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (protections under the Texas Constitution pursuant to the "due course of law" clause). Under the United States Constitution that governs Nguyen's federal due process rights, disbarment proceedings are considered "adversary proceedings of a quasi-criminal nature." *Ruffalo*, 390 U.S. at 550. Second, the determination of whether a proceeding is "quasi-criminal" or "civil" in nature is not dispositive of whether structural error may be reviewed for the first time on appeal.

Thus, while it is true that disciplinary proceedings may not be considered "quasi-criminal" under Texas law, they are considered "quasi-

criminal" under the federal law that governs Nguyen's federal Constitutional protections because the proceedings are "designed to protect the public" and authorize "punishment or penalty imposed on the lawyer." *Id*. Furthermore, the term "quasi-criminal" simply means "less than criminal," which actually encompasses all civil cases. *See Crowe v. Smith*, 151 F.3d 217, 226, 229-30 (5th Cir. 1998).

Most importantly, the issue of reviewability does not, and should not, turn on a matter of mere semantics. Acknowledging this axiom, Texas courts have permitted complaints of structural error to be raised for the first time on appeal in civil cases. *See e.g. In re S.A.G.*, 403 S.W.3d 907, 918 (Tex. App. – Texarkana 2013, pet. denied) (J. Carter, concurring) (citing *In re D.I.B.*, 988 S.W.2d 753, 758-59 (Tex. 1999). Indeed, the "quasi-criminal" juvenile delinquency cases that the CFLD cites are themselves civil cases. Moreover, the CFLD simply ignores the *S.A.G.* case that Nguyen cited, including Justice Carter's concurring opinion therein, which concluded that the doctrine of structural error is recognized in civil cases under Texas law. *Id*.

Thus, whether analyzed under the United States Constitution or the Texas Constitution, and the issue must be examined under both, the

Panel's conducting the Evidentiary Hearing remotely was structural error that necessarily affected the entire trial process. *Id*; *Ruffalo*, 390 U.S. at 550. For that reason, Nguyen may raise the error for the first time on appeal. *See, e.g., Narasimha v. State*, No. 05-15-01410-CR, 2016 Tex. App. LEXIS 11771, *7 (Tex. App.—Dallas Oct. 31, 2016, pet. ref'd). And because structural error "defies harm analysis because the error affects the framework of the trial," the Panel's conducting the Evidentiary Hearing remotely triggers automatic reversal. *Id*; *Hernandez v. State*, 683 S.W.3d 586, 592 (Tex. App.—Dallas 2024, no pet.) (suggesting that errors affecting the framework of a trial may be raised for first time on appeal).

Nguyen did not waive her complaint regarding conducting the Evidentiary Hearing remotely.

B. The Panel Abused Its Discretion By Limiting The Time Of The Evidentiary Hearing To One Day.

(i) The One-Day Time Limitation Was Arbitrary And Unreasonable, And Was Calculated To Result In An Unfair Trial.

In arguing that it was not arbitrary for the Panel to limit to one day an Evidentiary Hearing that effectively involved trying five unrelated cases, the CFLD fails to address the fact that the Panel gave no reasoned

basis for the limitation except the Chair's comparison of the hearing to a "temporary orders" hearing in a divorce case. RR 20. That comparison was grossly unfair for multiple reasons, most notably that a "temporary orders" hearing simply results in temporary orders that the parties may seek to modify at any time. *In re McPeak*, 525 S.W.3d 310, 312-13 (Tex. App.—Houston [14th Dist.] 2017, no pet.). By contrast, there is nothing temporary about disbarment.

And while the CFLD notes that the Panel inquired about the amount of time the parties each anticipated needing for their cases-in-chief and cross-examination, the portion of the transcript that the CFLD cites shows that the Chair had already decided and pre-determined that he would not allow the hearing to proceed beyond one day. *See* CFLD Brief, p. 41 (citing RR 22). In fact, during Nguyen's cross-examination of the very first witness, the Chair interrupted and announced:

> You have now consumed 19 minutes [and] we're still on the first witness…Don't interrupt me, please. We are going to get this done today.

RR 49-50 (emphasis added).

"Arbitrary" simply means acting in a manner that is non-rational or without apparent reason or judgment. *Pizzitola v. Houston Indep. Sch.*

Dist., No. 13-05-249-CV, 2006 Tex. App. LEXIS 4369, *4 (Tex. App.—Corpus Christi May 18, 2006, no pet.) (citing *Webb v. Dameron*, 219 S.W.2d 581, 584 (Tex. Civ. App.-Amarillo 1949, writ ref'd n.r.e.)). Not only was the time limitation non-rational given that the Evidentiary Hearing constituted trials of five unrelated grievance complaints filed by five unrelated complainants regarding five unrelated matters, each involving completely different documentary and testimonial evidence, but it is indisputable that the limitation was without apparent reason. RR 20. Thus, the one-day limitation was arbitrary. *Id.* And because the limitation was arbitrary, it was an abuse of discretion that requires reversal. *In re Academy, Ltd.*, 625 S.W.3d 19, 25 (Tex. 2021).

The CFLD repeatedly emphasizes the term "full day" in its brief, even bold facing the term no less than five times, apparently suggesting that a single day is a generous amount of time for Nguyen to defend her law license and livelihood in connection with five wholly unrelated grievance complaints that spanned over several years. *See e.g.* CFLD Brief, at pp. 39, 50. Indeed, that was the expressed view of the Panel Chair when, at the end of the hearing, he stated that he believed the

hearing should have been completed within two hours. RR 179. And that is the real problem!

Considering the time devoted to procedural issues and pre-trial matters, pre-trial admission of exhibits, opening statements, lunch, breaks, and arguments, the CFLD's "full day" of trial really amounted to just a few hours for the actual presentation of evidence—including the CFLD's presentation. Perhaps that is why the CFLD failed to cite any portion of the record to support its erroneous argument that Nguyen was "granted" the "seven-hour" hearing that she "first suggested she believed was necessary." *See* CFLD Brief, p. 43. To the contrary, the record affirmatively shows that Nguyen received far less time for presentation of evidence than she anticipated was necessary. Specifically, the record shows that the proceeding started at 9:11 a.m., and that more than an hour elapsed before the parties even commenced their opening statements. RR 8, 22. It is likely, therefore, that the first witness was called no earlier than 10:30 a.m. RR 22-29. Additional procedural issues and housekeeping matters were taken up before the Panel recessed the proceeding for lunch. RR 178-183. So, with lunch, breaks, and two hours for the Panel to consider the exhibits and other evidence, deliberate, and

announce its verdict, the actual trial time for the presentation of evidence was approximately 4.5 hours at most. RR 50-51. Of that 4.5 hours, the CFLD was allocated 3 hours to Nguyen's 1.5 hours for witness examinations. RR 50-51.

In that six witnesses were called, Nguyen's 1.5 hours for witness examinations amounted to fifteen minutes per witness, at the conclusion of which the Panel would decide whether to disbar her. *Id.* And that appears to be what the Panel intended, as evidenced by the Chair's interruption of Nguyen's cross-examination of the first witness to caution her that "you have now consumed 19 minutes [and] we're still on the first witness…We are going to get this done today." RR 49-50. In fact, based on the Chair's earlier comments, it appears that he initially intended to allow Nguyen no more than one hour to examine seven proposed witnesses. RR 50 (Panel Chair asserting, erroneously, that Nguyen had "requested" one hour "for your case," including cross examination). In any scenario, one hour or 1.5 hours or 4.5 hours or the CFLD's "seven hours," these were staggeringly short and arbitrary time limitations to effectively try five cases in which Nguyen's law license, livelihood, and professional reputation were at stake.

The CFLD highlights the frailty of its position in the very first "substantive" argument that it makes regarding the one-day time limitation. The CFLD argues that "[t]he clerk's record does not show that Nguyen filed any pre-trial or trial pleading requesting any particular amount of time for her evidentiary hearing." CFLD Brief, p. 41. Notably, the CFLD cites no authority for this argument because none exists. There is no requirement that a party file a pre-trial or trial "pleading" requesting any specific amount of time to fairly try a case, particularly when the party is a respondent who cannot know the amount of time that she will need until the petitioner (the CFLD here) rests its case-in-chief or thereafter.

The Panel's arbitrary, one-day time limit constituted an abuse of discretion requiring reversal. *In re Academy, Ltd.*, 625 S.W.3d at 25.

(ii) Nguyen Did Not Waive Her Complaint Regarding The Time Limitation Of The Evidentiary Hearing.

The CFLD argues that Nguyen "was required to object to such limitation when it was imposed," meaning that the alleged waiver occurred when the Chair first announced the limitation at the beginning of the hearing. CFLD Brief, p. 39. But when the Chair first announced the limitation, Nguyen did not know how long the CFLD would question

its witnesses on direct examination or the substance of those witnesses' testimony. RR 21-22; *see also* CFLD Brief, p. 41 (conceding that the CFLD had only indicated that it may call "up to" seven witnesses). For this reason, Nguyen did not know and could not have known how much time she would need "when [the time limitation] was imposed." RR 21-22; *see* CFLD Brief, p. 39.

The prejudice to Nguyen's defense only became apparent gradually, with the Chair's continued hectoring of Nguyen to hurry her examinations as the trial proceeded—hectoring that began as early as during Nguyen's cross-examination of the first witness when the Chair said, "you have now consumed 19 minutes [and] we're still on the first witness…We are going to get this done today." RR 21-23, 49-51, 53, 71, 75, 103, 112, 119, 121.

And as the prejudice did become apparent, Nguyen complained of the Panel's decision to "jumble of all [sic] these complaints into one instead of doing it individually," and that she was prejudiced by having so many allegations and evidence considered in the same hearing. RR 256-57. Part of this prejudice was the arbitrary and unreasonably short time limit that the Chair imposed. *Id.*

Implicitly acknowledging that the one-day time limitation was arbitrarily and unreasonably short, the CFLD argues that Nguyen needed to make "an offer of proof of the evidence that she was prevented from presenting in order to preserve error for appeal." CFLD Brief, p. 39. This argument further underscores, and compounds, the problem. The argument, if accepted, necessarily means that Nguyen was required to shorten the already-unreasonably-short amount of time that she was allotted to examine each witness, so that she would have time to make offers proof in order to "get this done today." RR 49-50. The CFLD essentially argues that, to preserve error, Nguyen had to incur even more harm by limiting her witness examinations even more. The CFLD's argument also further underscores why the arbitrary and unreasonably short time limitation should constitute structural error that required no objection and that triggers automatic reversal. *See Narasimha*, No. 05-15-01410-CR, 2016 Tex. App. LEXIS 11771 at *7; *Hernandez*, 683 S.W.3d at 592.

Nguyen did not waive her complaint regarding the time limitation of the Evidentiary Hearing.

C. The Panel Abused Its Discretion By Permitting Joinder Of Five Unrelated Complainants And Complaints For Trial.

(i) Permitting Joinder Of Five Unrelated Complainants And Complaints For Trial Was Arbitrary And Unreasonable, And Was Calculated To Result In An Unfair Trial.

The CFLD's first response to Nguyen's "improper joinder" complaint is its suggestion that Nguyen does not understand that the individual complainants, who for the most part are Nguyen's former clients, are not actual parties to this proceeding.[5] CFLD Brief, pp. 45-46. The CFLD argues that, if Nguyen simply understood that the party-plaintiff was the CFLD, she would understand why Texas Rule of Civil Procedure 40, if otherwise applicable, allegedly would not prevent "joinder" here because there was but one "party" prosecuting the claims, the CFLD. *Id*.

Of course, the CFLD really knows that Nguyen understands that the CFLD was the only party-petitioner in the proceeding below. But that alignment is no different from a criminal prosecution where the State is the prosecuting "party" and a district attorney represents only

[5] Complainant Cody Martin was Nguyen's opposing counsel in a divorce case, not a former client.

the State, and not the complaining witnesses. *In re State*, 599 S.W.3d 577, 601 (Tex. App.—El Paso 2020, orig. proceeding). Nevertheless, in a criminal prosecution, it is recognized as unfairly prejudicial to force a defendant to trial on unrelated crimes: (1) because of the risk that the trier of fact will be influenced merely by the fact that multiple charges have been asserted against the defendant; and (2) because prejudicial evidence relevant to only one charge may be admitted and may prejudice the defense of an unrelated charge. *See, e.g., Llamas v. State*, 991 S.W.2d 64, 68-69 (Tex. App.—Amarillo 1998). This is true even though there is only one prosecuting "party" in a criminal proceeding, *i.e.*, the State.

The *Llamas* approach should be followed in disciplinary proceedings as well, rather than relying in the abstract on the procedural posture of a single "party" seeking to prove wrongful conduct based on the allegations of multiple complainants.

The CFLD's argument that Texas Rule of Civil Procedure 40 does not strictly apply to this proceeding ignores that the rule, as well as Texas Rules of Evidence 401 through 404, are but an incorporation of longstanding common law concepts requiring the segregation of unrelated matters for trial because of the obvious prejudice that may

result. *See e.g. Oakwood Mobile Homes. Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App. – El Paso 2002, pet. denied) (addressing the common law doctrine of *res inter alios acta*). In fact, to accept the CFLD's argument would be to preclude a panel's ability to order separate trials in a disciplinary proceeding even when the panel concludes that separate trials would be appropriate because the panel would lack the authority to do so under Rule 40(b) or the policies underlying the rule.

But that would be wrong because the rules are intended to facilitate just adjudicatory outcomes. *See, e.g.*, Tex. Disc. R. Proc. 2.17(L) (instructing the admission of such evidence deemed necessary for a fair trial in accord with the Texas Rules of Evidence). The CFLD's position that it has the sole discretion to determine what and how many complaints to combine into a single trial would displace a panel's authority for ensuring fair proceedings. Furthermore, the *Worldpeace* case relied upon by the CFLD has no application here because the issue of improper joinder was never raised in that case, either at trial or on appeal. CFLD Brief, p. 49 (citing *Worldpeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 457 (Tex. App. – Houston [14th Dist.] 2005,

pet. denied) ("WorldPeace does not dispute that joinder was proper under Rule 51(a)")).

For these reasons, the Board should recognize that the principles of improper joinder embodied in the Texas Rules of Civil Procedure (and the Texas Rules of Evidence), if not the Rules themselves, afforded the Panel the discretion to require that charges against Nguyen based on unrelated complainants and complaints be tried separately; and that the Panel abused that discretion by permitting the joinder of five unrelated complainants and complaints for a single trial. *In re Hochheim Prairie Farm Mut. Ins. Ass'n*, 296 S.W.3d 907, 912 (Tex. App.—Corpus Christi 2009, orig. proceeding) (citing *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007).

(ii) Nguyen Did Not Waive Her Complaint Regarding The Improper Joinder Of Five Unrelated Complainants And Complaints For Trial.

Once again, the CFLD asserts that Nguyen's complaint regarding the improper joinder of five complainants and complaints for a single trial should not be considered because Nguyen allegedly waived it. First, the CFLD invites the Board to ignore Nguyen's letter to the Chair prior to commencement of the hearing by suggesting that it was only an inquiry,

as though Nguyen was simply curious about which rules would apply to the Evidentiary Hearing. CFLD Brief, p. 44 (citing Nguyen's May 7, 2024, 2:40 p.m. email to the Panel Chair and counsel for the CFLD); RR, Respondent's Ex. 1, p. 1. But that is hardly a reasonable interpretation of the communication and, taken in context, it is actually misleading.

The letter appears as part of Respondent's Exhibit 1 immediately after an earlier exchange of emails between Nguyen and William Nichols, counsel for the CFLD, that same day. *Id*. at p. 2. In the prior email exchange, Nguyen asked Mr. Nichols what rule he was relying on "for consolidation of Evidentiary Hearings?" *Id*. Mr. Nichols replied:

> The cases are consolidated into one petition. They have to be heard together. If misconduct is found it will result in one judgment. TRDP 2.17 discusses petitions.[6]

Id.

Nguyen then wrote:

> I have attached the Texas Rules of Disciplinary Procedure. I do not see any reference regarding the Panel's ability to 'consolidate' Evidentiary Hearings that involve separate complaints, witnesses, facts, law and Court jurisdiction under TRDP 2.17.

[6] It is noteworthy that even the CFLD's counsel refers to the allegations of each complainant as a separate "case."

Id.

It is clear that Nguyen was not merely being inquisitive, but rather was objecting to proceeding with five separate and unrelated complaints in a single Evidentiary Hearing. *Id.*

The CFLD similarly, and erroneously, argues that Nguyen's complaints on the record at the Evidentiary Hearing regarding the improper joinder of five unrelated complaints for trial did not include an "actual objection" sufficient to "alert the Panel to her potential issue." CFLD Brief, p. 45. That is a grossly unfair and restrictive interpretation of Nguyen's comments. Specifically, at the outset of the hearing, Nguyen stated to the Panel:

> [The five complainants' allegations] are separate and apart. They are different complaints and they are different types of cases – when I say different, I mean different kinds of clients with different time frames.[7]

RR 26-27.

[7] Later during the hearing, Nguyen complained of the Panel's decision to "jumble of all [sic] these complaints into one instead of doing it individually," and that she was prejudiced by having so many allegations and evidence considered in the same hearing. RR 256-57.

Along with her written complaint that the joinder of all five complainants and complaints into a single hearing did not appear to be permitted by the rules, Nguyen's oral statement on the record could only reasonably be interpreted as an objection the Panel's decision to proceed on that basis. *Id*. That was sufficient to comply with Texas Rule of Appellate Procedure 33 (Preservation of Appellate Complaints), which is liberally construed. *See Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 758 (Tex. 2006). No magic words are required. *Barina v. Barina*, No. 03-08-00341-CV, 2008 Tex. App. LEXIS 8747, *4-7 (Tex. App.—Austin Nov. 21, 2008, no pet.) (objection to trial court's entry of final order was preserved even though the appellant "did not use the magic words 'I object' or 'objection'"); *see B.B. v. A.C.B.*, 693 S.W.3d 501, 508-09 (Tex. App. – Houston [14th Dist.] August 15, 2023) (no pet.) (objection preserved despite not saying "objection" where grounds of complaint were apparent from the context).

Even more importantly, as Nguyen addressed in her opening brief, it is clear that the Panel Chair understood Nguyen's comments to be an objection to the joinder. RR 234 (in response to Nguyen's statement that she had previously challenged the trial of all five complaints in a single

hearing because of potential damage to her credibility, the Chair stated "I get that.").

Additionally, the CFLD's argument that Nguyen waived her complaint because she did not "obtain a ruling" is completely undone by Texas Rule of Appellate Procedure 33, which neither requires a written order nor an express ruling, and certainly does not require the use of any particular or special words to indicate that the issue was decided. Tex. R. App. P. 33; *B.B.*, 693 S.W.3d at 509 (trial court held to have implicitly overruled objection by continuing the proceedings); *Barina*, No. 03-08-00341-CV, 2008 Tex. App. LEXIS 8747 at *4-7.

Rather, Rule 33 provides that error is preserved so long as the grounds upon which the complaint rests were made known to the presiding judge "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context" and the judge "expressly or implicitly" made a ruling thereon.[8] Tex. R. App. P. 33.1(a)(1)(A), *and* (a)(2)(A) (emphasis added).

[8] In its comments regarding the *Hyundai* opinion cited by Nguyen, the CFLD seemingly addresses everything except the salient part, which similarly states that the error-preservation rule simply requires that the presiding judge be made aware of the complaint, which "provides the trial court with an opportunity to cure [the]

Nguyen's statements to the Chair, both oral and written, were sufficient to make known the basis of her objection. And by proceeding to hear the evidence of all five unrelated complainants and complaints in a single hearing, it is clear that the Panel implicitly overruled her objection. As a matter of law, this was sufficient to preserve error. Tex. R. App. P. 33.1(a). Further, this error, like the Panel's other errors that we have discussed, should be considered structural error for which no objection was required. *In re Academy, Ltd.*, 625 S.W.3d at 25.

Nguyen did not waive her complaint regarding the joinder of five unrelated complainants and complaints for trial.

D. The CFLD's Response To Nguyen's Cumulative Error Issue Is Largely A Reiteration Of Its Previous And Erroneous Arguments.

The CFLD primarily argues that the doctrine of cumulative error does not apply because Nguyen's points of error allegedly lack substantive merit or allegedly were waived. CFLD Brief, pp. 51. Nguyen therefore incorporates her previous reply arguments to further show the Panel's cumulative error.

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error," and that was indisputably done here. *Hyundai Motor Co.*, 189 S.W.3d at 758; *see Borne v. State*, 593 S.W.3d 404, 409 (Tex. App.—Beaumont 2020, no pet.) (same).

Otherwise, aside from again emphasizing the term "full day" as if to suggest that a single day was a generous amount of time to try five unrelated cases (CFLD Brief, p. 50), the CFLD simply comments that Nguyen's cumulative error argument was "broadly conclusory" in regards to the prejudicial relationship between the erroneous imposition of a one-day time limit and the erroneous decision to permit the CFLD to combine five unrelated complainants and complaints into a single trial. CFLD Brief, pp. 50-51.

Nguyen frankly did not anticipate that the CFLD would dispute that additional complainants, complaints, allegations, and witnesses require additional trial time, particularly when Nguyen made the basis of her argument clear in her opening brief. Nguyen Brief, pp. 32-35. That being the case, however, the interrelationship between the arbitrary time limit and the improper joinder of unrelated complaints is that each of those respective errors exacerbated the other. *Id.*

To belabor the obvious, had no arbitrary time limit been imposed, it is likely that Nguyen would not have been instructed to unreasonably restrict her witness examination time and thus Nguyen may not have been as harmed by the improper joinder of numerous claims as she

actually was.[9] On the other hand, had the Panel not permitted the CFLD to join unrelated complainants and complaints in the same trial, the arbitrary time limit may have been less harmful—or perhaps not harmful at all—because the arbitrarily restricted time would be allocated to a much smaller number of witnesses and evidentiary exhibits.

The doctrine of cumulative error applies, and requires reversal. *Klein v. Sporting Goods, Inc.*, 772 S.W.2d 173, 179 (Tex. App. – Houston [14th Dist.] 1989, writ denied).

E. The Panel Abused Its Discretion By Imposing Excessive Sanctions.

The CFLD purports to belittle as irrelevant Nguyen's citation to twelve (12) published opinions for the purpose of demonstrating that, in this instance, the punishment did not fit the crime. CFLD Brief, pp. 51-52. But despite accusing Nguyen of "cherry-picking" only supportive decisions (with the implication that they do not accurately reflect Texas courts' tendency to impose disbarment for only the most serious violations), the CFLD apparently could not cherry-pick even a single case

[9] In this instance, Nguyen would still have sustained harm resulting from a substantial amount of irrelevant, prejudicial evidence being considered by the fact finder in connection with its assessment of any individual complaint.

reflecting disbarment imposed for violations that were equally severe or less severe than those found against Nguyen.

To the contrary, the CFLD's response to Nguyen's excessive-sanctions point consists largely of just parroting the punishment guidelines set forth in the Texas Rules of Disciplinary Procedure. Notably, while accusing Nguyen of providing "little or no substantive argument" in support of this point of error, the CFLD literally spends pages of its brief reciting boilerplate language directly out of the Rules and comments. CFLD Brief, pp. 53-56. Moreover, in support of its contention that each of the Panel's findings is supported by "substantial evidence," the CFLD only cites generally to its entire Statement of Facts. *Id*. at p. 57. And despite repeating the Panel's findings verbatim, the CFLD never even addresses Nguyen's assertion that those findings are entirely conclusory because they contain only the rote elements of misconduct and aggravating factors set forth in the Rules without any actual reference to anything Nguyen allegedly did or failed to do.[10] *Id*. at 56-57.

[10] *See* Nguyen Brief, p. 38.

In some instances, the Panel's findings adhered so closely to the boilerplate content of the Rules that the Panel ends up reciting only that Nguyen either (1) submitted false evidence, or (2) made false statements, or (3) engaged in other deceptive practices, without ever stating which conduct they actually found Nguyen committed. RR 278; *see* Nguyen Brief, p. 38. Not only does the CFLD entirely fail to respond to that argument, but it also entirely fails to respond to Nguyen's assertion that the Panel's finding that Nguyen should be disbarred for simply failing to timely respond to a grievance complaint that was itself dismissed on the merits reveals that the Panel did not utilize an appropriate standard to assess punishment.[11] *State v. Ingram*, 511 S.W.2d 252, 252-53 (Tex. 1974) (disciplinary sanction may be so severe as to constitute an abuse of discretion).

Nor does the CFLD address Nguyen's argument that the recitation in the Panel's judgment that its disbarment of Nguyen "was not the result

[11] As Nguyen also pointed out in her opening brief, the Panel purported to find that disbarment was the appropriate sanction for each violation found and stated in its findings that the sanction of disbarment "was not the result of aggregating or combining any of the violations." One of those violations was Nguyen's failure to timely respond to the complaint of Jason Nasra, which was dismissed by the CFLD without the presentation of evidence. RR 262.

of aggregating or combining any of the violations" (CR 278, ¶ 19) is completely inconsistent with the portion of the judgment reciting that the Panel found Nguyen's "pattern of misconduct [and] multiple violations" to be aggravating factors weighing in favor of harsher punishment. CR 278, ¶ 22.

The CFLD failed to respond to any of these arguments because it has no response. No reasonable tribunal could find that, standing alone, a respondent's failure to timely respond to a single grievance complaint that was dismissed on the merits should result in permanent disbarment. Yet that is what this Panel found. This shows that the Panel utilized an improper standard for administering punishment or that its punishment is otherwise unreasonable and/or erroneous. In either case, the judgment is not supported by the evidence and should be reversed.

Conclusion

Nguyen respectfully requests the Board to reverse the judgment of the Panel and to remand this case for a new hearing or hearings or, alternatively, to render the judgment that should have been rendered by the Panel. Nguyen requests any other, further, or alternative relief, legal or equitable, to which she may be justly entitled.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because it contains **7,347** words, excluding any parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: November 22, 2024.

/s/ *Billy Shepherd*
Billy Shepherd

Certificate of Service

I hereby certify that, on November 22, 2024, a true and correct copy of the foregoing instrument was served on all counsel of record via electronic service in accordance with the Internal Procedural Rules of the Board of Disciplinary Appeals and the Texas Rules of Appellate Procedure.

/s/ Billy Shepherd
Billy Shepherd