No. 56375

APPEAL TO THE STATE BOARD OF
DISCIPLINARY APPEALS

JERRY SCARBROUGH
Appellant

VS.

THE STATE BAR OF TEXAS
COMMISSION FOR LAWYER DISCIPLINE
Appellee

BRIEF OF JERRY SCARBROUGH

Respectfully submitted,

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ORAL ARGUMENT REQUESTED

NO. 56375

Scarbrough vs. Commission for Lawyer Discipline

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STATEMENT OF THE CASE

This is a disciplinary appeal from the decision of the Evidentiary Panel for the State Bar District No. 08-5, State Bar of Texas. The actions complained of all occurred during the prosecution of a single civil case, Trial Court No. 236,117-B in the 146th Judicial District Court of Bell County, Texas. The case was styled *Olivera v. Freytag Irrigation LLC, et al v. Steele, et al and Deaton v. Elizabeth Purser Tipton, et al.* The Evidentiary Panel entered a ten-year partially probated suspension of Jerry Scarbrough's right to practice law in this state on April 7, 2015. (CR Vol. 1, page 02013). Mr. Scarbrough is sixty-seven years of age and has practiced law without incident for 34 years.

Mr. Scarbrough entered a Motion to Stay Disciplinary Panel's Judgment of Suspension during the pendency of appeals. (CR Vol. 2, pages 02038-42). The Motion was filed on May 7, 2015 (CR Vol. 2, page 02039). A hearing was not held until July 6, 2015, (RR Motion for Stay Hearing, cover page), and the Motion was denied the next day. (CR Vol. 2, page 3973). Mr. Scarbrough filed a Motion for New Trial on May 7, 2015. (CR Vol. 2, page 02043), an Amended Motion on May 8, 2015, (CR Vol. 2, page 02813) and a timely Notice of Appeal on July 6, 2015. (CR Vol. 2, page 03906). Motions to Extend the time for filing Respondent's brief have been granted, making this brief due on January 19, 2016.

STATEMENT ON ORAL ARGUMENT

This case presents issues of interest to every litigator in Texas: (1) When can the counsel to one of the parties be "dragged in" to a case as a third party defendant simply because he is doing a good job for his client (none of the actions about which the opposition complained had occurred at the time Mr. Scarbrough was made a party), and (2) what are the limits for qualified immunity and reporting immunity for attorneys in Texas.

On the disciplinary side, it raises questions about whether an attorney should lose his right to practice law for an exceptionally long period when neither he nor his client claim to have had any knowledge of the recording he allegedly "failed to produce" and he had no knowledge that the tape recorder or recording device were sought in production at any time during which they were in his possession. It raises the question of whether a statement that was obviously an opinion rather than a statement of fact can ever be "dishonest conduct." It raises the question of whether any breach of a confidentiality order can ever occur when the attorney met the literal language of the order, and the other side had already waived confidentiality of the records: (1) by written directive of the person whose records they were; (2) by sworn statement in open court; (3) and by filing these records *en masse* in the district clerk's public records; and (4) the alleged disclosure was made after the party whose records were disclosed was no longer a party to the suit under the order.

Most importantly, it raises the question of the proper use of offensive collateral estoppel in the disciplinary realm. It specifically raises questions of constitutionality (federal due process and Texas open courts) when its application prohibits the Respondent from illustrating harm on the points for which collateral estoppel has been applied, thereby withholding his true right to appeal these points.

Equally importantly, it raises the question of whether a Respondent can *ever* meet his burden of proof to rebut the presumption that stay of his suspension would be harmful when: (1) a LEXIS search of the subject finds no Respondent who has ever been able to do so and (2) Mr. Scarbrough was deemed unable to do so when he brought forth witness after witness to testify on every angle of his continuing practice of law not being harmful to his clients or the public. One wonders what the Supreme Court was thinking when it used the mandatory word "*must*" in relation to being granted a stay. TEX. R. DISCIPLINARY P. 2.25.

Additionally, this case has an exceptionally long and confusing record, made more confusing by extensive attorney "testimony", and oral argument may help the Board get to the actual evidence introduced.

STATEMENT OF JURISDICTION

The Board of Disciplinary Appeals has jurisdiction over this appeal pursuant to Texas Rule of Disciplinary Procedure 2.24.

ISSUES PRESENTED

1. The Panel reversibly erred when it denied Respondent's Motion to Stay the Suspension, because Scarbrough met his burden by proving that his continued practice of law during the time the case was on appeal would not pose a threat to the welfare of his clients or the public.
2. The Panel reversibly erred when it denied Respondent's special exceptions to the First Amended Petition because there was legitimate confusion about the allegations such that Mr. Scarbrough could not fairly defend his case.
3. The Panel reversibly erred when it applied the doctrine of collateral estoppel to prevent Mr. Scarbrough from presenting his complete case.

   A. Introduction

   B. Mr. Scarbrough's underlying case was not fully and fairly litigated so that collateral estoppel would apply.

   C. The final judgment vacated the interlocutory sanctions orders, and the final judgment was void for lack of detail under CPRC § 10.005, so the sanctions order could not be used for collateral estoppel purposes.

   D. The case of *Scurlock Oil v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), which created the preclusive effect of judgments while on appeal, contrary to long years of Texas tradition, should be reversed, albeit only in disciplinary cases.

E. Application of offensive collateral estoppel was unconstitutional because it effectively made those allegations to which it was applied unappealable, offending federal due process and Texas open courts requirements.

4. There is no substantial evidence that Jerry Scarbrough received from his IT specialist "an additional recording" other than the ones he produced to the Purser Family, or ever knowingly possessed the "secret" recording, therefore the decision that Scarbrough made a false statement of material fact to a tribunal is reversible error. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03A1
5. There was no substantial evidence that Mr. Scarbrough violated Rule. 3.04A by failing to preserve the recorder when he had a duty to do so. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04A.
6. The Panel Chair's action in denying Jerry Scarbrough's attempt to question Elizabeth Purser Tipton, Jeff Ray, and other witnesses for bias, prejudice and credibility, and to question any witness about factors that would be considered in his punishment, was a denial of due process and equal protection, and, as such, constituted reversible error.
7. There is no substantial evidence that Mr. Scarbrough violated a valid confidentiality order by disclosing Gary Purser's medical records to a homicide detective of the Killeen Police Department or to Ms. Bolling,

therefore the decision that Scarbrough violated Rule 3.04(d) is reversible error.

8. Entry of the Panel's Judgment and Findings of Fact and Conclusions of Law was reversible error because evidence must match the pleadings, and judgment and Findings of Fact and Conclusions of Law must match the pleadings and evidence, and they do not.
9. There is no substantial evidence that Jerry Scarbrough violated Rule 8.04(a)(1) of the Texas Rules of Professional Conduct because there was no evidence that Scarbough violated these Rules or knowingly assisted or induced another to do so.
10. There is no substantial evidence that Mr. Scarbrough violated Rule 8.04A3.
11. Based on the proof presented by the bar and the factors set out in Texas Rules of Disciplinary Procedure Rule 2.18, the sanctions levied against Mr. Scarbrough were excessive and should be reduced or eliminate

No. 56375

APPEAL TO THE STATE BOARD OF
DISCIPLINARY APPEALS

JERRY SCARBROUGH
Appellant

VS.

THE STATE BAR OF TEXAS
COMMISSION FOR LAWYER DISCIPLINE
Appellee

TO THE HONORABLE STATE BOARD OF DISCIPLINARY APPEALS:

COMES NOW, JERRY SCARBROUGH, and brings this, his appeal of the State Bar of Texas Evidentiary Panel No. 08-5's judgment against him and his resultant suspension from the practice of law in Texas entered on April 7, 2015. Mr. Scarbrough also appeals the denial of a temporary stay of suspension during the proceedings. Mr. Scarbrough would show:

STATEMENT OF FACTS:

Jerry Scarbrough is a 34-year Texas attorney who is Board Certified in Personal Injury Trial Law and has no prior sanctions or disciplinary actions on his record. Elizabeth Purser Tipton, a party in the underlying case, was found to

have "misconstrued the record" when she attempted to bring sanctions against Mr. Scarbough in an earlier case, Case No. 03-97-00638, *Emmons and Scarbrough v. Gary Purser*. (RR-Exhibit Vol. Tab R1). Arguably, she was unforgiving of Mr. Scarbrough from having "caused" her to be chastised by the appellate court. The earlier judgment of sanctions against Mr. Scarbrough was reversed by the appellate court.

All of the violations found by the Evidentiary Panel took place in one court case. Mr. Scarbough was brought into the underlying case to prosecute a clear case of trespass and assault against Ms. Deaton, a disabled person, which had been videotaped by the Pursers. (Ms. Deaton passed away the week of December 13, 2015.) He also helped Attorney John Redington defend her against multiple torts, most prominently allegations of defrauding Gary Purser, Sr. Gary Purser, Sr., the family patriarch was a multi-millionaire businessman in the construction and land development businesses. He headed a trust, which contained all his assets, and which his wife believed should be broken up to give more money to their children. Purser Sr. and his wife had had marital problems and were soon in the middle of a contested divorce. Around the time that the wife argued for the trust disbandment, she brought Purser, Sr. to doctors at Scott & White Hospital, claiming that he had frontotemporal dementia. (RR- Ex. Vol. Tab R18).

Purser, Sr. did not believe that he had memory problems and the initial doctor found that his problems, if any, were very mild. (R-11, p. 4).

Suddenly, Mr. Scarbrough and Mr. Redington found themselves as defendants in the Purser's First Amended Third Party Petition. (R-11, p. xviii). There was no evidence of commission of any tort or sanctionable conduct by the attorneys at the time they were brought into the case, but both had to cease their representation of Ms. Deaton. Mr. Scarbrough had a no-evidence summary judgment presented to the judge, but could never get a ruling. (R-11, p. xviv).

Up to this time, counsel for The Pursers had propounded only Requests for Disclosures, asking for witness statements, but not any recording devices. (R-10).(Note that there are none of the "Requests for Production" claimed by Ms. Tipton in the record. This is because there were none at this time.) Mr. Scarbrough's legal assistant *had asked* Ms. Deaton whether she had any statements, (RR Motion to Stay, p. 89), but Ms. Deaton had denied them, despite Mr. Redington having recorded one. Ms. Deaton made a second one later in October, (after Mr. Scarbrough became her attorney and reviewed the discovery responses with her), but did not tell Mr. Scarbrough about it. (RR Evidentiary Hearing, Vol. 1, p. 10-11). At the second deposition of Ms. Deaton, on January 7, 2011, Ms. Deaton announced that she had two recordings. As counsel for Ms. Deaton, Mr. Scarbrough did not feel he could do anything to put his client in a

bad light, such as say that the failure to produce the statements was Ms. Deaton's fault. Mr. Scarbrough immediately went about trying to get the statements to the Purser's counsel, but Mr. Redington was nonchalant and uncooperative about giving the tape he made to Mr. Scarbrough. (P-2, pp. 32, 35, 37). Mr. Redington didn't think he had recorded a tape. (R-11, p. 15). Mr. Scarbrough did get Ms. Steel's digital recorder from Ms. Deaton, and he couldn't work it, so he immediately brought it to his IT person. (RR Evidentiary Hearing, Vol. 2, p. 152). The IT person, Shawn Richeson testified that he only gave Mr. Scarbrough one recording back on a CD, and Mr. Scarbrough produced this recording to the Purser's counsel. (RR Evidentiary Hearing Vol. 2, p. 151). Mr. Richeson did, however, allegedly allow the Pursers to obtain other recordings from the recorder from his website – he just didn't give them to Mr. Scarbrough. (R-11, p. 18). Mr. Scarbrough was merely a low-volume customer of Mr. Richeson; Mr. Richeson was a longtime close friend of the Pursers who frequently played poker with Purser, Sr. Mr. Richeson's testimony about giving Mr. Scarbrough only one recording was backed up at trial by the fact that it was marked as if only one of several filters had been run on the CD and it was still scratchy, with "popping"

noises when played, unlike the version Mr. Ray obtained from Mr. Richeson's website. (R-12, p. 20; P-13?; P-14 ?).[1]

Jeff Ray wrote to Mr. Scarbrough after he had received the other recordings, but Mr. Scarbrough did not know of them, so he asked Mr. Ray for a copy. Mr. Ray refused. He later played the "secret" or "fantasy" tape for the court. The recording was of an adult nature and echoed Mr. Purser, Sr.'s distrust of his family. Mr. Scarbrough did not think it was particularly incriminating because, in the recording, the women had suggested to Mr. Purser that he hire an attorney and see a doctor and that only Mr. Purser retain access to his money. However, Mr. Scarbrough was stunned that he hadn't known about it. (R-13 or 14?).[2] His alleged obstruction of access to these other recordings is (probably)[3] the violation of Rule 3.04A that collateral estoppel was granted on. His earlier statement to the Court that there were no other recordings was (probably) the violation of Rule 3.03A1 that was found by the Evidentiary Panel. It seems that the violation of Rule 8.04A1 that was found by the Evidentiary Panel may[4] be an allegation that he encouraged Ms. Deaton to lie about the tapes, although the only

[1] Question marks are used here because these exhibits are flash drives, which were not produced to the author.
[2] *See, infra* footnote 1.
[3] The word "probably" is used because the pleadings in the Amended Petition are simply too sketchy to be sure.
[4] Special exceptions were filed on both petitions, but they were denied. The Petitioner did not replead.

evidence garnered was exactly the opposite – Ms. Ximenez had "pushed on her" and she insisted that she didn't have any. (RR Motion to Stay, Testimony of Amy Ximenez, at 87). It was not exactly clear to Mr. Scarbrough what actions were encompassed in the Rule 8.04(a)(1) violation.

There was no request for production of the recorder until June 30, 2011 (P-8). This was *after* Mr. Scarbrough had given the recorder back to his client, and even this first request did not comport with the Texas Rules of Civil Procedure Rule 196.4 Failure to preserve the recorder was (probably) the violation of Rule 3.04A that was found by the Evidentiary Panel.

Mr. Ray intimated to Mr. Scarbrough that he had other recordings, but he would not produce them to Mr. Scarbrough pursuant to multiple requests. Therefore, Mr. Scarbrough had the appearance of a blind duck in a shooting gallery during the sanctions hearings. (P-2). He knew absolutely nothing about additional recordings. Had collateral estoppel not applied, he could have done a more credible job defending himself, comparing his "draft" CD with the complete CD in the possession of the Pursers and also presenting the testimony of Ms. Deaton, who believed that a private investigator had taped the women for the "secret" recording. He could point to the testimony of Ms. Steele and Ms. Deaton that the "secret" recording was not a recording of one conversation, but bits and pieces of several conversations. He could also point to an instance where

someone on the Purser's side had presented recordings for a court which were "doctored", without acknowledging this fact.[5] Mr. Scarbrough simply didn't "know what hit him" because the trial judge did not make Mr. Ray produce the full recording to him and Scarbrough had never heard it.

The other sanctions arose out of a confidentiality order concerning "the party's" medical records, and a taped telephone conversation with Ms. Bolling, a relative of Mr. Purser, Sr. TEX. R. DISCIPLINARY R. 3.04D and 8.04A3. The only true disclosure of the medical records was to a homicide detective when Mr. Scarbrough was trying to get an autopsy to prove his position in the court case that Mr. Purser, Sr. did not have dementia. The Austin Court of Appeals, in *Davis v. State*, 169 S.W.3d 660 (Austin 2005) aff'd 203 S.W.3d 845 (Ct. Crim. App. 2006), wrote that a homicide detective was an expert on death. Therefore, Mr. Scarbrough's disclosure met the terms of the Court Order. The order had allowed disclosure to experts and only applied to a "party's" medical records. After his

[5] Other tapes played during the Scarbrough cases raised more questions than they solved. The recording played for the bankruptcy court was supposedly 30 minutes long, but, when played, it was only 14 minutes long, with no obvious breaks. It had clearly been altered, with all the favorable parts taken out. Both women alleged that the "secret" tape was a compendium of a number of conversations, cut short and spliced together to make them sound worse. Had not collateral estoppel applied, Mr. Scarbrough could likely have demonstrated this, which combined with Richeson's testimony and the fact that he had never heard the "secret" recordings may have provided credibility for his argument that he was not guilty of withholding known discovery.

death, Purser, Sr. was no longer a party to the case. This violation was clearly a misunderstanding. In the future, Mr. Scarbrough will clarify all misunderstandings before acting, but the violation was not deliberate. Meanwhile, while the Pursers did not promptly produce Mr. Purser, Sr.'s medical records to Mr. Scarbrough, they testified in the bankruptcy case that they had waived confidentiality on them so they could use them at trial. They openly filed them several times in the district clerk's public record of the case. (R-12, p. 39). No action was taken against them for this wide-scale disclosure. The *de minimus* disclosure "that Mr. Purser may have had dementia" to Ms. Bolling, however – with nothing more, including the fact that Mr. Scarbrough *did not* show her the records – cannot be held to be a disclosure. (RR Evidentiary Hearing Vol. 1, p. 150). Ms. Bolling already knew about the dementia, and knew more about Mr. Purser's medical health than Mr. Scarbrough did. (RR Evidentiary Hearing Vol. 1, p. 150). There was never any testimony or evidence that Mr. Scarbrough approached the Pursers during the period immediately after Mr. Purser, Sr.'s death, or that he joined the funeral procession. This was simply a lie. (RR Evidentiary Hearing Vol. 2, p. 39). It was stated to inflame the panel in the same way Mr. Ray's "testimony" of facts not in evidence within the text of his questions inflamed the judge and jury at trial. The "fact" that the Pursers had to employ police to guard the funeral was also a lie, which Mr. Scarbrough could

have shown, but for collateral estoppel. (Mr. Scarbrough later went back to the police department and was told no such guard was sent out. He, of course, did not have personal knowledge that the police weren't there because he kept his distance from the family while they were making arrangements and holding the funeral.)

Mr. Scarbrough contends that he did not violate the actual terms of the order. At the time he made disclosures, Mr. Purser, Sr. was no longer a "party" and the order applied only to the medical records of any "party". (R-11, p. 67). Additionally, he believed that the police detective was an expert, and disclosures to "experts" were allowed by the order. (R-11, p. 66). Mr. Scarbrough had come to believe, as some of Mr. Purser's doctors had initially believed, that Mr. Purser, Sr. did not have Alzheimer's disease, dementia, or other mental disorders as the family claimed in their pleadings, nor did he suffer from frontotemporal dementia, as alleged in the Third Amended Petition. Mr. Scarbrough discovered that Gary Purser, Sr.'s wife had been giving him Resperidone, a drug which has a blackbox warning that it should not be given to elderly patients. (R-11, p. 13). The main danger of these medicines was that the elderly patient would contract a fatal pneumonia. (R-12, Appx. "A"). Mr. Purser, in fact, contracted such pneumonia and died. (R-11, p. 56). The word "murdered" was the word of his questioners, not Mr. Scarbrough's, but he did believe that Mr. Purser had

sustained a premature death. Who but a murder investigator would be an expert to assess whether a death was premature? Mr. Scarbrough obtained this medical information from Mr. Purser's medical records that were filed by Mr. Ray in the open records of the court, which this Panel refused to admit into evidence.

The introduction to Ms. Bolling, for which Mr. Scarbrough was sanctioned, was not intended to be a literal truth. First, Mr. Scarbrough answered with the literal truth: He represented himself. This should have been enough to let Ms. Bolling know he was adverse to the Pursers. Then he said he "*thought" he represented Mr. Purser more than anyone else in the world*. This is clearly an opinion not intended to be acted on. Sanctions were awarded.

Ultimately, after many hearings and a trial in September 2012, a verdict was rendered against Deaton, Steele, and Respondent on a jury verdict of many millions of dollars. (RR-Exhibit Vol., Tab P-4). An appeal has been brought to advance "no evidence" issues on the fraud judgments and to show that any defamation was an integral part of the prosecution of Mr. Scarbrough's case, and hence privileged.

Respondent declared bankruptcy and was sued by the Pursers over dischargeability of the multi-million dollar judgment. The bankruptcy court also applied collateral estoppel, so it cannot be said to have been a full and fair

hearing, but it found that the judgment was non-dischargable. (RR-Exhibit Vol., Tab P-5). This bankruptcy judgment has also been appealed.

The Grievance

Alice Oliver Parrott and Elizabeth Purser Tipton, two old friends, filed identical complaints right after the trial. (CR 00010).

Prior to the scheduled evidentiary hearing, the Panel sought and obtained an order granting the Panel's application for collateral estoppel, which prevented the Respondent from offering evidence on the matters which were estopped. Respondent was denied the right to contest allegations of misconduct in regards to Rules 3.04(a) and 3.04(d) and therefore the panel found Respondent violated Texas Disciplinary Rules of Professional Conduct 3.04(a) and 3.04 (d) by precluding Respondent from offering evidence to rebut their findings. (CR 01923). He was also kept from full cross-examination of Mr. Ray and Ms. Tipton as to credibility and harm under the guise of "collateral estoppel".

SUMMARY OF THE ARGUMENT

Due process, equal protection, and open courts are fundamental to our federal and Texas Constitutions. These concepts assure that decision-making will be fair, and, if all possible, justice will be attained. The first element of a fair proceeding is to allow an accused attorney to continue to earn a living during the appellate process,

if his alleged faults are not enough for him to be disbarred and he is not a danger to the public or his clients. Mr. Scarbrough was denied this.

The second element of a fair proceeding is fair notice. The Respondent must know, in no uncertain terms, what he is accused of. Petitioner's Amended Petition did not give fair notice.

The third element of a fair proceeding is the ability to fully and completely put on one's case. If the state and federal underlying cases have not been "fully and fairly litigated" they cannot be used for collateral estoppel. Most disciplinary cases will not be appropriate for collateral estoppel because the difference in the stakes at issue between one, finite lost case and a lost legal career are too different for the Respondent to have similar incentive to put on his best case in both proceedings.

The fourth element of a fair proceeding is, to support a judgment for the Petitioner, substantial evidence must have supported a finding of misconduct under Rules 3.03A1, 3.04A, 3.04D, 8.04(a)(1) and 8.04(a)(3). It did not.

The fifth element of a fair proceeding is that the Respondent must have the opportunity to fully question the witnesses. Where collateral estoppel has been found, the testimony relating to the estopped issue will not be applied to topple that issue, but questioning must be allowed as to credibility and the factors relevant to assessing sanctions. This is essentially a "he said / the other said" case. Credibility is key.

To make a whole that is fair, the proof must match the pleadings and the judgment and Findings of Fact must match the pleadings and proof. It did not.

Finally, the punishment must be fair. Rule 2.18 factors argue that a lesser punishment, or no punishment, would have been fair.

ARGUMENT & AUTHORITIES

FIRST ISSUE

> The Panel reversibly erred when it denied Respondent's Motion to Stay the Suspension, because Scarbrough met his burden by proving that his continued practice of law during the time the case was on appeal would not pose a threat to the welfare of his clients or the public.e

Mr. Jerry Scarbrough was suspended from the practice of law by the Evidentiary Panel which heard his case. The Respondent (Mr. Scarbrough) may within thirty days from entry of judgment petition the Evidentiary Panel to stay a judgment of suspension. TEX. R. DISCIP. P. 2.25. The Disciplinary Rules create a rebuttable presumption that a lawyer's continued practice of law will threaten clients or the public. *Wade v. Comm'n for Lawyer Discipline*, 961 S.W.2d 366 (Tex. App. – Houston [1st Dist.] 1997, no pet.). The Rules give the Respondent the opportunity to rebut that presumption. *Id.* Rule 2.25 says, in pertinent part:

> "The Respondent carries the burden of proof by preponderance of the evidence to establish by competent evidence that the Respondent's continued practice of law does not pose a continuing threat to the welfare of Respondent's clients or to the public. An order of suspension ***must*** be stayed during the pendency of any appeals therefrom if the Evidentiary Panel finds that the Respondent has met that burden of proof."

TEX. R. DISCIP. P. 2.25 (emphasis added).

Judgment had been entered against Mr. Scarbrough on April 7, 2015. (CR 2013). On May 7, 2015, Mr. Scarbrough timely filed a Motion to Stay Suspension, (CR 2038), and on July 6, 2015, he timely filed a Notice of Appeal. (CR 3906). A hearing was held on the Motion for Stay on July 6, 2015 (RR from Hearing on Motion for Stay and Motion for New Trial, cover page). The Evidentiary Panel denied Relator's Motion to Stay his Suspension the next day, despite the fact that approximately four hours of testimony, with ten witnesses providing evidence in favor of Respondent's ability to safely continue to practice law during the appeal of his judgment and no direct rebuttal argued in favor of staying the suspension. (CR Vol. 2, p. 03973)

Counsel did not find authority on the standard of review for appeal of a denial of a stay of suspension, but arguably, the language of the Rule that holds that Respondent shall meet his burden "by the preponderance of the evidence" suggests that factual sufficiency, rather than "substantial evidence" should be the standard applied.

Four cases were found discussing appeals of a denial of stay. All of them are distinguishable from the instant case. The most well-known of these is the *Wade*

case. 961 S.W.2d at 366.[6] In that case, the court affirmed suspension of the lawyer's license because he had to be sued before he provided an accounting for fees and expenses to his clients. This was relevant to suggest that he was going to continue to mishandle client funds, therefore, he did not meet his burden. In the instant case, six former clients testified that they trusted – still trusted – Mr. Scarbrough to handle their business much more than they trusted the lawyers they would have to use instead. (RR on Motion to Stay, at 44, 53, 60, 66, 70, and 74). They testified to a person that Mr. Scarbrough's continued practice of law would not threaten clients or the public.

In addition, Mr. Scarbrough offered evidence at the Evidentiary Hearing and at the Hearing on the Motion to Stay from attorneys from inside and outside Bell County as to Mr. Scarbrough's honesty, such having been an issue in the disciplinary proceeding. *See* TEXAS R. DISCIPLINARY P. Rules 3.03A1 and 8.04A3. Attorney David Fernandez, who was very familiar with the accusations of dishonesty in the

[6] In *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227 (Tex. App. – Houston [14th Dist.] 2000, no pet, the attorney could not point to any place in the record where there was "competent evidence" that her continued practice of law did not pose a threat to the public or her clients. Evidence abounds in Mr. Scarbrough's case. In *Hawkins v. Comm'n for Lawyer Discipline*, 988 S.W.2d 927 (Tex. App. – El Paso 1999, pet. denied), the opinion appeared to use the 3.10 standards to determine whether continued practice constituted as danger. Mr. Scarbrough argues that the language of Rule 2.25 should be followed instead. In *Favaloro v. Comm'n for Lawyer Discipline*, 13 S.W.3d 831 (Tex. App. – Dallas 2000, no pet.) the attorney could not point to any motion to stay he had filed.

underlying trial, testified that Mr. Scarbrough is "absolutely honest." (RR Evidentiary Hearing, Vol. 2, p. 145). Michele Barber Chimene, the appellate attorney in the underlying case, wherein the sanctions involving alleged dishonesty are being appealed, testified that the chance of these sanctions being reversed is "Absolutely excellent." (RR Evidentiary Hearing,Vol 1, p. 218). Richard Mason, an assistant attorney general who sees attorneys from across the state, testified that he had a "very good" opinion of Mr. Scarbrough regarding his honesty as a lawyer and felt like he was an upfront person and very ethical. (CR 1, p. 221-224). Gary Jordan, an attorney for 42 years in Waco, testified about his good professional relationship with Mr. Scarbrough and opined that Mr. Scarbrough was an honest and fair lawyer. (RR Evidentiary Hearing, Vol. 2, p. 180-83). Mr. Scarbough has never before been the target of sanctions which would call his honesty into question. (P-1). In telephonic testimony with Ms. Bolling, the lady with whom he allegedly was dishonest in introducing himself to, he honestly testified as to what he had said. He said, "I'm representing myself – the literal truth, which would mean he was in opposition to the Pursers. Then he added a statement that was obviously meant to be taken as an opinion: "and I'm not representing –I'm not – I'm not – in fact, I *think* I *probably* represent Mr. Purser more than anybody in the world right now…" (emphasis added). (RR Motion for Stay, p. 141). He later expounded on that, telling Ms. Bolling he had represented Melissa Deaton and asked, "Did I tell you that Ms.

Deaton was being sued by your cousins and your aunt in a lawsuit?" and Ms. Bolling replied," Well, yeah, I believe you did, yes." At that point, Ms. Bolling should not reasonably have believed that the statement that he thought he represented Mr. Purser was a literal statement. (RR Evidentiary Hearing, Vol. 1, p. 145-46). Mr. Scarbough obviously realized that he had made a mistake by voicing his personal opinion as to who he was helping. The incorrect impression he gave was allowed to linger all of about two minutes before he realized that the impression he had given may have been misleading. Someone who makes a mistake by giving a misleading impression, but who corrects it in the same phone conversation, but who nonetheless pays a huge personal price of having his bar license suspended because of his misstep, is very unlikely to give any similar misleading or dishonest impressions in the future. As was testified to by twelve witnesses in the Motion to Stay and Evidentiary hearings, (RR Motion to Stay, p. 40-41, 47, 50, 54, 62, 68, 72, 77, 97, 82, 82; RR Evid. Hearings, Vol. 2, 145, 171, 178, 183), the continued practice of law by Mr. Scarbrough would not pose a threat to the welfare of his clients or the public.

Even if he was dishonest, (for reasons of argument), however, two pieces of testimony make it more likely than not that Mr. Scarbrough will be honest about discovery in the future. First, the testimony that he had not had discovery battles or truth problems in the past suggests that, in the past, Mr. Scarbrough had produced

what he was supposed to produce, without any dishonesty to the Court and did not lie to members of the public, even for two minutes. This makes him likely to produce what he is supposed to produce, without being dishonest, in the future. (Ex. P-1; RR Motion to Stay, p. 50; Evidentiary Hearing Vol. 2, p. 220). Second, the testimony of Amy Ximenes added evidence in favor of his future honesty which he had been unable to give at the trial, because he had represented Ms. Deaton and could not do anything to put Ms. Deaton's case into a bad light. Ms. Ximenes testified that they had a system in place to make sure that they produced all the requested items: "When they [the clients] come in, we will go over it again and say, 'Are you sure you don't have this.' We make a list, like I need this information." (RR Motion to Stay, p. 87-88). And she testified to something Mr. Scarbrough had not been able to testify to at trial. "They asked her [Melissa Deaton] to produce documents and recordings and everything that's on the request for production." [She had not done so.] (RR Motion to Stay, p. 89). (Melissa Deaton passed away the week of December 13, 2015.) With this kind of checklist procedure and the fact that they ask it of every client – including Ms. Deaton – it is likely that Mr. Scarbrough will be honest in the future.

Additionally, the Conclusions of Law, (CR Vol. 1, p. 02024), found that Mr. Scarbrough was false to a tribunal about the existence of other recordings. (CR Vol. 1, p. 2025, no. 4). TEX. R. DISCIPLINARY P. 3.03A1. Initially, Mr. Scarbrough responded to the Request for Disclosures, not by saying there were no statements, as

alleged, (RR Evidentiary Hearing, Vol. 1, p. 193), but by saying, "None at this time. Third Party Defendant reserves the right to supplement." (R-9). The recordings that he supplemented with were made in October, after completion of his response to Requests for Disclosures. (RR Evidentiary Hearing, Vol. 1, p. 11). When he became aware of the two recordings Ms. Deaton revealed at her deposition January 7, 2011, Mr. Scarbrough set about obtaining them. Delay was caused by Ms. Deaton and Mr. Redington. The recording that Deaton had made was on a digital recorder, and the other recording was made by John Redington, Ms. Deaton's initial lawyer, on an analog mini-cassette recorder. They were produced by Mr. Scarbrough as supplemental disclosures in February and May. As to other recordings, however, there was no specific finding by the evidentiary panel that Mr. Scarbrough had knowledge of the other recordings, including the "secret" recording and there was no evidence presented to the evidentiary panel that he did. If he did not – and he steadfastly insists that he did not – then the fact that he did not inform the court of the "secret" recording does not tend to make him likely to be dishonest in the future.

At this juncture, counsel for the bar may raise an objection that failure to ever admit he was false argues that he is likely to be false in the future. There is a problem with this. Most of the evidence adduced in the Evidentiary Hearing suggests that he *didn't* know about any other recordings. The IT person, Shawn Richeson testified that Scarbrough's answer to the court was true because the CD Richeson gave him

only had one recording on it. (RR Evidentiary Hearing, Vol. 2, p. 151). Melissa Deaton testified that she did not make the other recordings, and, when Scarbrough told the court that the only recorder he knew about was the one she had given him, he was telling the truth. (RR Evidentiary Hearing, Vol. 2, p. 165). Jerry Scarbrough testified that he had never heard any of the recordings. He could never play the recorder. (RR Evidentiary Hearing, Vol. 2, p. 196). He testified, "Those are the only two that I knew about as far as from my client or supposedly from my client. She [Melissa Deaton] never told me about any other one. She's always denied that there were other ones." (RR Evidentiary Hearing, Vol. 2, p. 200). (Both the women testified at trial that they thought the other recordings, when they surfaced, had been made by one of the private investigators following Mr. Purser or had been made "through Mr. Purser's phone," an alternative that is possible with today's technology.) So the question poses itself: Must a movant for stay *falsely admit* that a statement was false, even though he believes it was true, just to get the stay of his suspension (that he is appealing on these grounds as well as others) while the appeal is ongoing. Is this bogus *mea culpa* what is necessary to obtain a stay of suspension? Scarbrough argues that the Board should weigh the overwhelming amount of evidence that he has always been honest – *see, e.g.* Testimony of Dan Corbin: Scarbrough has always been cooperative with him and given full discovery in any cases they've ever been involved with (RR Evidentiary Hearing, Vol. 2, p. 176), and

Testimony of Gary Jordan: He's never had any discovery disputes with Scarbrough and thinks Scarbrough is a fair and honest lawyer. (RR Evidentiary Hearing, Vol. 2, p. 182), and many others – *see* RR Motion for Stay. It should find this evidence to greatly overpower the failure to make a dubious *mea culpa* and find that the testimony on Rule 3.03A1 to argue for Scarbrough being able to practice as a lawyer without harm to clients or the public.

Mr. Scarbrough was also found guilty by collateral estoppel of Rule 3.04A for failing to produce the digital recorder. It is not an attack on the collateral estoppel judgment to cite reasons why he is unlikely to "sin again" in this manner. His IT person referred to Mr. Scarbrough as a "technical idiot, to put it mildly." (R-11, p. 31). He now knows that additional information can be obtained from a recorder and would not return a recorder to the party that gave it to him. He would listen to the entire recording at the IT tech's office, once the tech started it for him, so that he would know what was on it. And, even if, as here, **there was no discovery request pending for recorders**, he would notify the opposing counsel of its existence, to see if he wanted to have an independent technician analyze the recorder for other recordings. He is unlikely to be harmful to his clients or the public in this way again.

Finally, it is not an attack on collateral estoppel to look closely at the facts of the two violations of Rule 3.04D, violation of a Court order. The "disclosure" to Ms. Bolling was not a disclosure, because he did *not* show her anyone's medical

records, and the *de minimus* verbal disclosure that Mr. Purser, Sr. "may have dementia" was something that had been pled in the pleadings, filed in the District Court's records, and was already known by Ms. Bolling, i.e. no new information was "disclosed." It is an honest misunderstanding that three words that happen to be in the medical records and which were necessary for him to investigate his case could not be transmitted under the terms of the order. In the future, Mr. Scarbrough will ask for clarification of any such order, even when it seems clear to him. But such a mistake is not likely to be repeated in the future, since it has never happened in the past, and he is not likely to be harmful to his clients or the public.

As to the disclosure to the homicide expert, it is understandable that a person might think the records could be disclosed to her, when the terms of the order allowed disclosures to experts. There is no quality of "dishonesty" about this disclosure, either. However, in the future, Mr. Scarbrough will ask for clarification of any such order, even when it seems clear to him. But such a mistake is not likely to be repeated in the future, since it has never happened in the past, and he is not likely to be harmful to his clients or the public.

Finally, it is uncertain whether Rule 8.04(a)(1) refers to Scarbrough's supposed fraud with the two women or his unproven encouragement to the two women to lie about the recordings. However, such conduct is not likely to be

repeated in the future, since it has never happened in the past, and he is not likely to be harmful to his clients or the public.

In rebuttal to Respondent's Motion for Stay, Petitioner brought forward the testimony that Mr. Scarbrough had not met the written requirements for proving that he was not practicing law. (RR Hearing on Motion for Stay, pp. 113-16). Testimony from Amy Ximenes and Jerry Scarbrough was that he had, in fact, met the requirement that he not practice law past the beginning of May. (RR Hearing on Motion for Stay, pp. 87, 94, 100). He had phoned clients. Mr. Scarbrough had a good faith argument that the requirement that he *write* to his clients and judges and turn in his bar card before the Hearing on the Motion to Stay and a decision thereon was illogical, unfairly punitive and not encompassed by the rule that the Panel *must* give a stay if he wasn't going to be a danger to anyone while his appeal was pending. All of the rule violations alleged against Mr. Scarbrough alleged acts of dishonesty. There was nothing dishonest about Mr. Scarbrough's good faith argument about when he should have to provide written notice. (In fact, the bar states that non-practicing status shall not appear until disciplinary measures are *final* on the attorney profiles on its website. Yet someone has noted on Mr. Scarbrough's profile that he is ineligible to practice, even though his proceedings are not final – smacking of the personally punitive.) Because there was nothing dishonest indicated by the testimony of Ms. Ashcroft, (RR Hearing on Motion to Stay, p. 113 *et seq.*), her

testimony is irrelevant to the question of whether Mr. Scarbrough poses a danger to the public or his clients if allowed to practice. Mr. Scarbrough should have been allowed to practice at least until his appeals are final.

SECOND ISSUE

> The Panel reversibly erred when it denied Respondent's special exceptions to the First Amended Petition because there was legitimate confusion about the allegations such that Mr. Scarbrough could not fairly defend his case.

Special exceptions may be used to challenge the sufficiency of a pleading. *Frisenhahn v. Ryn,* 960 S.W.2d 656, 658 (Tex. 1998); TEX. R. CIV. P. 91. The purpose of a special exception is to compel the clarification of the opposing party's pleading when that pleading is not sufficiently specific or fails to plead a cause of action…Pleadings are liberally construed, but special exceptions are appropriate when a pleading does not meet the threshold of "fair notice." *James v. Underwood*, 438 S.W.3d 704 (Tex. App. – Houston [1st Dist.] 2014, no pet.). The very essence of special exceptions is to force clarification of and specification in pleadings that are vague, indefinite or uncertain. *Subia v. Tex. Dep't of Human Services*, 750 S.W.2d 827, 829 (Tex. App. – El Paso 1988, no writ). Lack of fair notice violates both the Texas and U.S. Constitutions. TEX. CONST. art. I § 19; UNITED STATES CONST. amd. XIV. "A petition is sufficient if it gives fair and adequate notice of the facts upon which a pleader bases his claim." *Roark v. Allen*, 633 S.W.2d 804, 810

(Tex. 1982); *Wooley v. Schaffer,* 447 S.W.3d 71 (Tex. App. – Houston [14th Dist.] 2014, pet. ref'd).

It is not unusual in a petition to first give a recitation of the facts, then to set out the causes of action, with just enough facts to give notice as to what acts are alleged. The problem with the State Bar petition is that it gives no information as to the acts which make up the individual Rule violations (similar to causes of action), and the Rule violations are broad and vague – they could each cover a number of the actions set out in the earlier part of the Amended Petition. (CR Vol. 1, p.00062). Because the acts alleged occurred in a single court case, the various actions are fairly similar to each other, each alleging "dishonesty". Therefore, for each Rule which is alleged to be violated, Mr. Scarbrough had no idea which acts he would be defending against. This violates "fair notice", whereby a defendant is supposed to have a good understanding of the claims he will be facing before he goes to trial.

In the Amended Petition, the Bar referenced the Purser's petition, which alleged such acts as conspiracy and fraud. (CR Vol. 1, p. 00062). They also alleged facts related to the recordings, additional recordings, the recorder, spoliation, the conversation with Ms. Bolling, and the Court's Confidentiality Order. (CR Vol. 1, p. 00062).

Mr. Scarbrough excepted to Evidentiary Petition Paragraph V, sentence one, which was too global to tell what conduct was alleged. He excepted to Paragraph

V, 3.01, which appears not to be in the Amended Petition. He excepted to Paragraph V, 3.03A1: "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal." He was left with not knowing whether a false statement of fact – maybe the statement that allegedly enticed Mr. Purser to give the women his money (not that this happened) – or a false statement of law – such as litigation immunity applied to the case (which was only argued by the Pursers to be false) was the statement in question. Or was it the statement that he didn't know of any other recordings? Or the (actually true) statement that he had not violated the Confidentiality Order. When there are this many guesses possible – when the Respondent has to *guess at all*, fair notice has not been met and the special exceptions should have been granted. The Bar should have been required to replead. The harm caused by failure to require this was that he could not fairly prepare for the Evidentiary Hearing, because he did not know the charges he was preparing for. This is a serious proceeding. There should have been no improvisation required.

Similar problems existed with the pleading for Paragraph V, 3.04A, Paragraph 3.04D, Paragraph V, 8.04A1, and Paragraph 8.04A3. Rule 8.04A1 is particularly troubling because the Bar did not produce any evidence at the hearing of Mr. Scarbrough assisting or inducing someone else to violate these rules. If the Bar could not think up any possible evidence of this, how could Mr. Scarbrough, who assisted or induced *no one*, know what the Bar meant by this pleading. Just the fact

that he had to spend serious preparation time – when he had little to spend, (Mr. Fernandez testified he had 35 boxes of documents for 25 causes of action during four months of prep time to get ready, RR Evidentiary Hearing, Vol. 2, p. 137) – trying to decipher who he could have possibly led astray and how it was harmful. It directly caused less preparation time in a case where more preparation time could have allowed him to clear up the misconceptions the Panel was left with, leading to a wrongful decision. Mr. Scarbrough *never* rebutted the Rule 8.04A1 accusation, as he had no idea what it was about.

The vague Rule 3.04A allegation that, "A lawyer shall not unlawfully obstruct another party's access to evidence…" was harmful because Mr. Scarbrough thought the petition was talking about the recording which Redington delayed the production of, when it probably meant not producing the recorder before it was asked for – a stretch in any way you look at it. An allegation that he destroyed, altered, or concealed a recorder, when his only fault was that he didn't know extra data could be obtained from it, so he did not produce it *without being asked*? Or was the Bar talking about obstructing access to "other" recordings, which Mr. Ray "arm-waved" about but had no proof that they ever existed? This does not meet "fair notice" requirements.

Rule 3.04(d) pleading also does not meet "fair notice." It is multifarious, global, fails to set forth with particularity what Mr. Scarbrough allegedly did,

whether he knowingly disobeyed or advised his client to disobey under standing rules or ruling from a tribunal -- is the Bar accusing Mr. Scarbrough of telling Ms. Deaton to lie about the existence of recordings under the standing discovery rules? Or is it talking about the instance where Mr. Scarbrough did not show Ms. Bolling any confidential records but "violated a ruling" by mentioning something previously made public by the Pursers, that Mr. Purser, Sr. may have had Alzheimers? We can't tell and neither could Mr. Scarbrough.

Lastly the allegations for Rule 8.04A3 are multifarious, global and fail to set out with particularity what conduct Mr. Scarbrough allegedly violated. It alleges that, "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation" without setting forth any allegations that Respondent violated any of these tenets. Is the Bar accusing Mr. Scarbrough of taking Mr. Purser's money? Is it accusing Mr. Scarbrough of malice in posting on the internet? Is it accusing him of failing to produce tapes he knew about? Such a broad range of possibilities is inherently reversible harm because the accused faces a "trial" wherein he doesn't know what he is accused of, cannot prepare, cannot make a coherent presentation and cannot effectively convey the truth to get a not guilty verdict. This is the rare case wherein denial of special exceptions was reversible error.

Third Issue:

> The Panel reversibly erred when it applied the doctrine of collateral estoppel to prevent Mr. Scarbrough from presenting his complete case

A. INTRODUCTION

On July 23, 2014, Counsel for the Bar filed a Motion to Apply Collateral Estoppel Against Mr. Scarbrough on all Disciplinary Violations Charged (CR Vol. 1, p. 00156), and on October 29, 2014, she filed an Amended such motion. (CR Vol. 1, p. 00381). Respondent filed a Response and First Supplemental Response to these Motions, (CR Vol. 1, pp. 01116; 01209), and the Bar filed a Reply to Respondent's Responses. (CR. Vol. 1, p. 01885). Respondent had set out a number of reasons why the use of collateral estoppel was inappropriate in this case under the Supreme Court case of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331, 58 L.Ed 2d 552, 99 S. Ct. 645 (1979). None-the-less, the Panel allowed the application of offensive collateral estoppel to find that Mr. Scarbrough had violated Disciplinary Rules 3.04(a) and 3.04(d). When Mr. Scarbrough tried to impeach the character of an opposing witness or show mitigating factors relevant to punishment, counsel for the Bar inevitably objected that it was an attack on collateral estoppel, and these objections were generally upheld. (*See, e.g.* RR Hearing Vol. 1, p. 197).

The underlying principal of collateral estoppel is that facts which have been fully litigated should not be retried. *Gainsborough v. Lutfak*, 536 B.R. 765 (Bankr. S. D. Tex. 2015). When a plaintiff uses a prior result against a defendant in a subsequent action, the doctrine is referred to as "offensive collateral estoppel." A. Kennamer, *Issues Raised by the Potential Application of Non-Mutual Offensive*

Collateral Estoppel in Texas Products Liability Cases, 30 TEX. TECH. L. REV. 1127 (1999). *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 821 (Tex. 1984), eliminated the mutuality requirement in collateral estoppel cases, but non-mutual collateral estoppel should still be used with caution as this author believes that non-mutuality increases the risk that offensive collateral estoppel will be unfair to the defendant. It is at least coincidentally so in this case, as is discussed later in this Issue. All of the disciplinary uses of collateral estoppel by the Bar are, of necessity, non-mutual in that someone other than the Bar was the plaintiff in the court case in which the alleged infraction(s) occurred.

Texas courts have historically been cautious in their application of offensive collateral estoppel. The doctrine of collateral estoppel is most often used defensively, meaning that a defendant will use collateral estoppel to prevent a plaintiff from relitigating specific fact issues the plaintiff lost in a prior trial. *Trapnell v. Sysco Food Serv., Inc.*, 850 S.W.2d 529, 536 (Tex. App. – Corpus Christi 1993) aff'd 890 S.W.2d 796 (Tex. 1994).

In determining whether to apply collateral estoppel offensively the United State Supreme Court has said that the trial court (or hearing panel) must consider the *Parklane Hosiery* factors. 439 U.S. at 331. The first factor is whether application of the doctrine will tend to increase litigation by allowing a plaintiff to "wait and see" before filing suit instead of joining in the prior litigation. *Id.* Second, the

offensive use of collateral estoppel may be unfair under the circumstances of a particular case. *Id.* Under this factor, we consider the defendant's incentive in the first action to vigorously defend the suit, the foreseeability of future suits, and the availability of procedural safeguards in the second suit that were not available in the first suit. 439 U.S. at 330.

The case of *Neeley v. Comm'n for Lawyer Discipline*, 976 S.W.2d 824, 829 (Tex. App. – Houston [1st Dist.] 1998, no writ) examined the use of non-mutual offensive collateral estoppel in the attorney discipline setting. The court of appeals found that, even where an evidentiary hearing was conducted on the underlying sanctions issue, the attorney's motivation in that underlying hearing was so different – with only the outcome of an individual case at stake, rather that the attorney's entire practice – that application of collateral estoppel to the second (disciplinary) proceeding would be inappropriate. In addition, the court noted a long list of factors not evaluated in a(n underlying) sanctions hearing that must be examined before lawyer discipline can be imposed, meaning that no judicial resources would be saved if a sanctions finding were adopted using collateral estoppel. 976 S.W.2d at 829.

The case of *Goldstein v. Comm'n for Lawyer Discipline*, 109 S.W.3d 810 (Tex. App. – Dallas 2003, pet denied), which was noted by counsel for the Bar (CR Vol. 1, p. 01116), did find that the use of collateral estoppel was applicable in its discipline case, but it did not overrule *Neely*. Rather, it found that the two cases were

different types of cases with different facts. *Id.* Counsel for Mr. Scarbrough suggests instead that the dissent in *Goldstein* merits attention.

In *Goldstein*, the errant attorney handled a divorce case for a cash fee and a verbal contingent fee. After the divorce case was settled, the client transferred a large amount of stock to her attorney. *Id.* The client contended that the transfer was to satisfy an oral contingency agreement. The attorney in her malpractice case was ordered to repay the contingent fee. *Id.* Then the Bar action stepped in.

The Dissent held that, to determine if offensive collateral estoppel was appropriate, one needed to look at the nature of the proceedings, the issues set forth in each, and the consequences faced in each proceeding, to determine fairness as in *Neely*. 976 S.W.2d at 827. (The Dissent noted that the majority had offered no authority for distinguishing *Neely*.) The Dissent noted that one's personal value of the dollar amount involved should not control how much incentive we find the attorney had to litigate the first suit. *Id.* The first suit had a one time, finite amount damages at stake. The second suit had his Bar license and lifetime earnings at stake.

Looking further at whether the attorney had a full and fair opportunity to litigate the "ultimate issue" in the prior suit, the Dissent found that the "ultimate issues" in the two cases were not the same. "Ultimate issues" are those factual issues submitted to a jury [ed: or findings of fact] that are necessary to form the basis of the judgment. *Tarter v. Metro Savings & Loan Ass'n*, 744 S.W.2d 926, 928 (Tex.

1998) (editorial comment added by author). The ultimate issue in the malpractice action was whether the money was "a fair gift or bonus." 109 S.W.3d at 817-18. The ultimate issue in the disciplinary action was whether it was a "contingent fee." *Id.* The two were not the same.

Looking at procedural protections, the majority found that the attorney had the advantage of a jury in the first suit. However, the court took the ultimate issue away from the jury; it was decided by one person. The attorney would have had more safeguards if he tried his ultimate issue to the panel, which was made up of more than one person.

Finally, even if the disciplinary action could be foreseeable – if they could be treated as one issue – the attorney noted that the result of the malpractice trial was suspect because his client had brought a new action in which she claimed her testimony in the malpractice trial was perjured. Such a trial could hardly be called fair to the attorney. Thus, based on fairness factors, the application of collateral estoppel was not appropriate in this disciplinary proceeding either. The *Neely* factors – which were not overturned in *Goldstein* – should continue to be applied and should be applied to Mr. Scarbrough's case.

B. Mr. Scarbrough's underlying case was not fully and fairly litigated so that collateral estoppel would apply.

Collateral estoppel was applied to the alleged violation of Disciplinary Rules 3.04A and 3.04D in Mr. Scarbrough's case. Collateral estoppel can only apply when a party against whom it is asserted had a full and fair opportunity to litigate the ultimate issues in the prior suit. *Tex. Dept. of Pub. Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001).

Looking first at the nature of the proceedings, the evidentiary panel provided procedural safeguards that the earlier "jury trial" did not. There is no right to a jury trial for a hearing on sanctions. *Brantley v. Etter*, 662 S.W.2d 752, 756 (Tex. App. – San Antonio 1983, writ ref'd n.r.e.). In the first trial, the sanctions were imposed by one judge. (P-2). If collateral estoppel hadn't been imposed, Rules 3.04A and 3.04D would have been tried completely to a three-person panel, with each individual bringing their own knowledge, recollections and insights. (RR Evidentiary Hearing, Vol. 1&2). This argues for collateral estoppel being in error.

Concerning the ultimate issues addressed[7], the ultimate issue for 3.04D appears to be the same – willful violation of the court's order on Defendant's motion to require confidentiality of medical records. However, the ultimate issues for 3.04A are a distinction with a difference. In the limited Findings of Fact for the February 15, 2012 Order on the recordings, Mr. Scarbrough is found guilty of "nonproduction

[7] Note from the prior definition, spoliation instructions do not provide "ultimate issues."

of audio recordings." It is true that Mr. Scarbrough did not produce the recordings. (He didn't have them.) But the issue for 3.04A is "obstructing access to evidence." That would have been the issue tried if collateral estoppel had not been applied and the panel had heard the allegation on Rule 3.04A. It is unlikely that "obstructing access to evidence" could have been proven because Mr. Ray had the recordings before Mr. Scarbrough did. No one has "obstructed your access" if you are the one holding the recording in your own two hands. On this count, also, collateral estoppel was inappropriate for 3.04A.

Concerning the consequences faced in the two proceedings, there is no comparison: Mr. Scarbrough had a greater incentive to litigate effectively before the panel than before Judge Mayfield. At risk before Judge Mayfield was a finite, one-time sum of money and one possibly lost case. At risk before the panel is disbarment or suspension, plus the (intangible but real) loss of honor to a man who has spent an entire career following a path of honesty and hard work. Mr. Scarbrough would have greater incentive to litigate well before the panel. Another thing that speaks to his incentive to litigate: on every cause of action pled by the Pursers and on every sanctionable act there was exactly zero evidence presented of at least one necessary element. (R-11 and R-12). Mr. Scarbrough made the decision to put on *zero* third party defendant's case on the causes of action after the Pursers closed because they had not proven the case on which they had the burden of proof.

With the sanctions, there is no evidence that he broke the Rules knowingly. He understood his obligations, (P-2, p. 53), and he testified to the reasons that were outside his control that production had been delayed. (P-2). The party seeking sanctions holds the burden of proof. *See, e.g. Low v. Henry*, 221 S.W.3d 609 (Tex. 2007). If collateral estoppel didn't apply, he could have brought in every soul who had contact with the recordings or recorder - Denise Steel, Amy Ximenes, Melissa Deaton, John Redington, Redington's paralegal, Morgan Driscoll, Shawn Richeson, John Fisher, Mr. Ray's IT guy, and Mr. Scarbrough – and the homicide detective for the Confidentiality Order, as well as introducing the Order so the panel could read the terms of the Order and totally traced the chain of custody and furnished a fuller explanation of why the detective was an expert, as well as providing a greater explanation, with now-non-confidential medical records why he formulated his theory that Mr. Purser was killed by his medicine, and had the homicide detective introduce the official paperwork on the request so that the panel could see that the detective had, at the time of the autopsy request, adjudged the request to be not motivated by malice. On this factor, also, collateral estoppel was not appropriate.

On foreseeability of future suits, Mr. Scarbrough did not foresee future suits on this matter because the Pursers had not proven that he knowingly did either: obstructed access to the recordings or violated a court order. He expected appeal to clear up any sanctions that were awarded and he never expected the bankruptcy court

to use collateral estoppel to prevent him from showing the fact that the Purser's witnesses had lied (which he had more proof of at the time of the bankruptcy case) and that he was not guilty of dishonest conduct. On this point, also, collateral estoppel was inappropriate.

Finally, there is the question of overall fairness. The centerpiece of the Purser's case was the testimony of the Hon. Ms. Alice Oliver Parrott, an extremely well-liked jurist who happened to be good friends with Elizabeth Purser Tipton. (R-11, p. 34, 46). Hon. Ms. Oliver Parrott gave no evidence of having *any* personal knowledge of the facts in the case and was clearly testifying from her good friend's version of the case. She went forward, however, with a great lack of candor to deliberately confuse the jury on the concepts of "fraud on the court" – which was not on trial – and common law fraud, which was. *Id.* Her rhetoric was inflammatory and believable and Mr. Scarbrough was not allowed by the judge to have a meaningful cross-examination of her testimony. (R-11, p. 34). The bias of the Court was further shown by the things Judge Mayfield sanctioned Mr. Scarbrough for that he allowed the Pursers to do with impunity. Mr. Scarbrough was sanctioned for not producing tapes there was no evidence he even had control of. (R-11, p. 7146). The Pursers were allowed to withhold a tape of Mr. Purser that would have won the case for all three third-party defendants. (RR Evidentiary Hearing Vol. 2, p. 207, R-11, p. 23). The Pursers were allowed to file over a hundred pages of medical records in

the district clerk's office before Mr. Scarbrough breathed a word about the medical records to anyone, yet they were not sanctioned. (RR Evidentiary Hearing Vol. 1, pg. 171). Simply based on the unfairness of the first trial, collateral estoppel was not appropriate.

Additionally, the bankruptcy judgment cannot be used for the purposes of collateral estoppel because it was not fully and fairly litigated. It relied on collateral estoppel itself to find fault with Mr. Scarbrough, and could not be said to be a full trial. (P-6, p. 18).

Additionally, the purpose of collateral estoppel is the saving of judicial resources. Because of the many factors a panel must consider under Texas Rules of Disciplinary Procedure Rule 2.18 in assessing a punishment, judicial resources were not saved by application of collateral estoppel. Because Mr. Scarbrough should have been able to question opposing witnesses for credibility even with collateral estoppel, collateral estoppel should not have saved judicial resources for this reason, also.

A judge or panel has broad discretion on the application of collateral estoppel. But when they ignore the rules of *Parklane Hosiery*, 439 U.S. at 331, *Goldstein v. Comm'n for Lawyer Discipline*, 109 S.W.3d 810 (Tex. App. – Dallas 2003, pet denied)(dissent), and *Neely v. Comm'n for Lawyer Discipline,* 976 S.W. 2d at 829 in applying collateral estoppel, they have abused their discretion. This abuse of

discretion was harmful because, both when Mr. Scarbrough wanted to question the Bar's witnesses, to expose a crucial lack of candor, or have some of his witnesses go into convincing detail that would show either he was not guilty of breaking these rules or show some factor that was relevant to the sanction selected, the Panel shut him down, based on collateral estoppel or relevance (an objection akin to collateral estoppel). (RR Evidentiary Hearing Vol. 1, p. 177, 196-99). The abuse of discretion was also harmful because, without collateral estoppel, the Bar could not win its case on these two Rules. On Rule 3.04D, the Bar did not even introduce the Confidentiality Order, to know what actions were allowed or banned, and on Rule 3.04A, the first request for a recorder that's in the record is P-8, which happened after Mr. Scarbrough did not have control of the recorder, and the only evidence that he didn't produce "the other recordings" when he knew about them is Mr. Ray's hearsay, which was objected to. Without collateral estoppel, the Bar cannot make its case on Rule 3.04A and 3.04D. The holdings on 3.04A and 3.04D must be stricken from the judgment and the sanctions must be lessened to reflect their absence.

C. The final judgment vacated the interlocutory sanctions orders, and the final judgment was void for lack of detail under CPRC § 10.005, so the sanctions order could not be used for collateral estoppel purposes.

The interlocutory orders on the motions for sanctions were merged into the

final judgment in the underlying case. The second judgment vacated the interlocutory orders. *Quanaim v. Frasco Restaurant*, 17 S.W.3d 30, 39-40 (Tex. App. – Houston 2000, pet. denied) (The second judgment presumptively vacates the first judgment.) Therefore, if the Bar was to use the findings of an order for collateral estoppel, it had to use those of the final judgment. (It is also the only judgment filed in this case.) The fact that the court made the judgment "referable" to the other orders is not sufficient to incorporate their terms in the final judgment because they were vacated and because reference is not the same as "incorporation by reference". In any case, the interlocutory orders were not sufficient to meet the requirements of Civil Practice & Remedies Code Section 10.005.

Section 10.005 holds that when a court imposes sanctions, it shall include in the order a description of the conduct that violated Civil Practice & Remedies Code § 10.001 and an explanation of the basis for the sanctions imposed. *Univ. of Tex. v. Bishop*, 997 S.W.2d 350, 355 (Tex. App. – Fort Forth 1999, pet, denied.) It must include (1) a description of the sanctionable conduct, (2) the relationship between the conduct and the sanctions, and (3) the necessity for the severity of the sanctions. *See Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003). Because the interlocutory orders are vacated, they cannot be used to provide any findings of fact which they contained, but they were, also, insufficient. Therefore, this failing is

reversible error and the Rule 3.04A and 3.04D judgments must be stricken and the disciplinary punishments revised.

Counsel for the bar may raise the possibility that the sanctions were levelled under the inherent powers of the court or Texas Rules of Civil Procedure 215. No motions for sanctions were filed in this case, however, to know under what authority they were requested, and arguably, the purposes of the Section 10.005 requirement are applicable to sanctions levelled under the inherent power of the court or Rule 215, so these requirements should be applicable to such sanctions, also.

D. The case of *Scurlock Oil v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), which created the preclusive effect of judgments while on appeal, contrary to long years of Texas tradition, should be reversed, albeit only in disciplinary cases.

Scurlock Oil v. Smithwick, 724 S.W.2d 1 (Tex. 1986) is the law of the land in Texas, bringing Texas in line with the RESTATEMENT 2d OF JUDGMENTS § 13 and the law in many other jurisdictions. In Texas, a judgment is final for the purposes of issue and claim preclusion despite the taking of an appeal, unless what is called an appeal actually consists of a trial *de novo*. 724 S.W.2d at 5-6. Certainly uniformity of law between jurisdictions is desirable, because conformance with the RESTATEMENT eliminates the unfairness of an earlier Texas judgment not being preclusive and being trumped by a later, conflicting judgment from a state which follows the RESTATEMENT. *See Nowell v. Nowell*, 254 A.2d 889 (Ct. 1969) cited in

Scurlock, 724 S.W.2d at 6. It also acknowledges the fact that some of the great legal minds of our time are employed in the drafting of the RESTATEMENT.

Mr. Scarbrough does not suggest a wholesale change in the law, thus, but suggests that an exception be created for disciplinary proceedings. The right to work in a particular profession is not a fundamental right. *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L.Ed 2d 520 (1976); *Maudin v. Tex State Bd. Of Plumbing Examiners*, 94 S.W. 3d 867 (Tex. App. – Austin 2002, no pet.) It *is*, however, a protected right, subject to rational regulation. *Id.* (emphasis added). A man must earn his daily wage in order to obtain the basic necessities for his family. The provision in Texas Rules of Disciplinary Procedure Rule 2.25 was possibly enacted due to cognizance of this fact.

If ultimate issues are not allowed preclusive effect until after the court appellate process has run, the accused will at least get the chance to have a prompt, complete hearing on his alleged disciplinary faults, so that the inability to earn gainful employment at least lasts for a shorter period of time in cases where the trial was inflamed by error and a mistake has been made. In cases where no mistake has been made, the experience of trial will allow the presentation of evidence to be condensed, and the evidentiary hearings will not be expanded as much as feared. The present situation of possibly guilty attorneys not working during their suspensions will not change, and the continued unemployment of the guilty will also

continue. And the main reason for the adoption of the *Scurlock* rule, 724 S.W. 2d at 5-6, the need to conform to the law of other jurisdictions, is not a major concern in the disciplinary arena, where discipline is usually a state matter.

Mr. Scarbrough asks that this exception for preclusive effect in the disciplinary arena be given retroactive effect, and the application of collateral estoppel in this case be held to be reversible error.

E. Application of offensive collateral estoppel was unconstitutional because it effectively made those allegations to which it was applied unappealable, offending federal due process and Texas open courts requirements.

The Texas Constitution provides that "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities or in any manner disenfranchised, except by due course of the law of the land. TEX. CONST. art. I § 19. Due course of law exists to prevent government from depriving persons of property without notice and hearing. *Nelson v. Clements*, 831 S.W.2d 587, 589 (Tex. App. – Austin 1992, writ denied).

The Fourteenth Amendment to the United States Constitution provides that "…nor shall any State deprive any person of life liberty or property, without due process of law." U. S. CONST. art. XIV. Additionally, because contempt is a quasi-criminal offense, *Ex Parte Griffin*, 682 S.W.2d 261 (Tex. 1984), and, in one occasion, Mr. Scarbrough was held in criminal contempt, arguably Article VI also applies, "In all criminal prosecutions, the accused shall have the right to…be

confronted with the witnesses against him." U. S. CONST. art. VI. Mr. Scarbrough should have had the right to question the witnesses and to impeach their credibility. He should have had the right to introduce evidence relevant to Rules 3.04A and 3.04D, to show the harm of the application of collateral estoppel for these offenses. He should have had the right to introduce evidence on the punishment issue, his character and the likelihood that the offenses would be repeated – that he didn't commit the offenses intentionally. Instead, every time that presentation of the evidence touched upon the failure to produce the recordings or the failure to keep medical records confidential, or the failure of the trial court to hold the Purser's counsel accountable to the same standards he was being held to, counsel for the Bar objected that the proffered evidence was an attack on collateral estoppel and, generally, the leading member of the panel sustained their objection. (RR Evidentiary Hearing, Vol. 1, pp. 34,149-50, 188-89, 195-196, 199; Vol. 2, pp. 122, 139-40-148-50, 159, 168, 192, 208-210, 214 and many others). Evidence would have shown that both the main witnesses for the Bar, Mr. Ray and Ms. Tipton, had lied to the trial court and were lying to the panel. Their credibility would have been lessened significantly. And inability to impeach the sanctions to show harm amounted to a severely hampered ability to appeal this case. This was a denial of Mr. Scarbrough's right to due process under both the Texas and United States Constitutions. It was thus harmful error for collateral estoppel to have been applied

and the judgments as to Rules 3.04A and 3.04D must be stricken and the punishment adjusted downward.

FOURTH ISSUE

> There is no substantial evidence that Mr. Scarbrough received from his IT specialist "an additional recording" other than the one he produced to the Purser Family, or ever knowingly possessed the "secret" recording, therefore the decision that Scarbrough made a false statement of material fact to a tribunal is reversible error. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03A1

The Panel found that Mr. Scarbrough violated Texas Disciplinary Rules of Professional Conduct 3.03A1 by making a false statement of material fact to Judge Mayfield in the underlying trial. (CR Evidentiary Hearing Vol. 1, p. 02025).

> "At a discovery sanctions hearing on May 27, 2011, in sworn testimony before the 146th District Court, Respondent denied having knowledge of any recordings of Gary Purser other than (1) a recording involving Gary Purser, Melissa Deaton, and Kathy Purdue, and (2) a recording involving Gary Purser, Melissa Deaton and John Redington. However, there existed at least one additional recording, referred to as the "two good bitches" recording, involving Gary Purser, Melissa Deaton and Denise Steel, which Respondent had previously given to an information technology professional named Shawn Richeson together with the two other recordings."

(CR Evidentiary Hearing Vol. 1, p. 02025). Logically, the fact that the "two good bitches" recording – or as we prefer to call them, the "secret" recording – existed does not mean that it was within Mr. Scarbrough's possession or control, or that he knew about it. The hearsay from Olvera's deposition that Olivera (the Plaintiff in the main case, who was thoroughly uninvolved in Mr. Scarbrough's third party matter), said there were other recordings is both hearsay and irrelevant because Mr.

Scarbrough had no knowledge of whether Olvera's rambling accusations were true, and he had no means or duty to get control of these other recordings from Olvera. He was responsible for what he and his clients had. If he had answered the Court, as an affirmative fact, that Olvera said there were additional recordings, he would be even more likely to have been lying to the court. One only has the responsibility to testify to the Court as to one's actual knowledge.

This does not mean that one has the right to stick one's head in the sand, to not look through boxes or to not try to find out what recordings were on a recorder that had been in one's client's possession. But when Ms. Deaton gave Mr. Scarbrough the recorder and he found that neither of them could work it, (RR Evidentiary Hearing Vol. 2, p. 196, p. 154), he *immediately* went to an IT technician who was likely to be able to give him all the recordings on the recorder in a form he could operate. (RR Evidentiary Hearing Vol 2, p. 148-151). That tech gave him only the "sister" recording, as the only product off the recorder. (RR Evidentiary Hearing Vol. 2, p. 151). He produced this to Mr. Ray. Melissa Deaton also confirmed that Mr. Scarbrough was telling the truth when he told the court that the only recorder he knew about was the one she had given him. (RR Evidentiary Hearing Vol. 2, p. 165). And she testified that she did not make the other recordings. *Id.* She certainly did not make the recording of Mr. Scarbrough and his wife in their car. Ms. Tipton admitted that they had hired investigators to work on this case. (RR

Evidentiary Hearing Vol. 1, p. 65). Both women, Deaton and Steele, believed that the recordings had been made by investigators, edited to make them look worse, and delivered straight to Mr. Ray. It is unlikely that Mr. Scarbrough "butt recorded" the conversation in the truck cab because there were no external recording buttons on the recorder and the recording stopped as soon as the Scarbroughs got out of their car. Every time Mr. Scarbrough attempted to question Ms. Tipton and Mr. Ray, however, he was refused the right to inquire into credibility, wrongly, based on "collateral estoppel" or "relevance." (RR Evidentiary Hearing Vol. 1, pp 121-22, 132; RR Evidentiary Hearing Vol. 2, p. 190, 188-89).

The fact that a violation of 3.04A has been found due to collateral estoppel does not prove knowledge, because knowledge was not one of the findings in the Final Judgment from the trial, (P-4), nor were there findings of fact introduced from the bankruptcy case to support a finding of knowledge relevant to Rule 3.03A1. (Recitations in an "opinion" are not the equivalent of findings of fact and conclusions of law. *John G. & Marie Stella Kennedy Mem. Found. v. Dewhurst*, 994 S.W.2d 285 (Tex. App. – Austin 1999) rev. o.g. 90 S.W.3d 268 (Tex. 2001)(findings of fact set out in a trial court memorandum are not findings of fact as contemplated by Tex. R. Civ. P. 296-99…the findings set out in an opinion are explanatory at best and not binding). Additionally, because the bankruptcy judgment was improperly based on

collateral estoppel from a trial that was not a full and fair hearing, it cannot be used to support a finding of knowledge, even if it had been included in findings of fact.

Mr. Ray, Ms. Tipton, and Ms. Stephens continually tried to say that Mr. Scarbrough had answered a categorically negative "None" when asked about any other recordings. (RR Evidentiary Hearing Vol. 2, p. 218). This is not true. Mr. Scarbrough asked that the actual discovery documents be admitted to show what his actual answers were, but this was not allowed. (RR Evidentiary Hearing Vol. 2, p. 193). Continually, the panel would not allow Mr. Scarbrough to require that the "best evidence" original discovery be admitted. His response to the Request for Disclosures had not been, "None," but "None at this time. Will supplement." He was very careful to make his answers to the Court absolutely accurate. When asked by Mr. Ray, "So your representation to Judge Mayfield is that you have provided a true and correct unedited copy of the conversation between Melissa Deaton, Mr. Purser, Sr. and Redington," Mr. Scarbrough responded, "That is correct. But… Well, I'm not sure it's unedited. I don't know how you have knowledge of what happened to the microcassette or mini cassette before I got it last Friday." (P-2, pp 32-33). In his written responses to Mr. Ray, he wrote candidly, "I have provided all of the tapes and audio recordings that I have in my possession or my client's possession, as far as I know, to you as of April 26, 2011." (P-7, P-2, p. 31). He was similarly candid to the Court when talking about the "sister" tape which was innocuous, "But needless

to say, we had a duty to produce it as soon as we found it. And I presented it and prepared it as soon as I found it." But also truthfully, he testified, "In regards to – I can't produce things that I can't – I don't have. I think as a lawyer, I have a duty to make sure that when I tell somebody that I have a recording that I actually do have a recording."

His responses were of a consistent tone – very carefully worded to make sure that they were absolutely candid and accurate. They are the responses and testimony of a man who is used to telling the truth, but who also knows that Mr. Ray is trying to set him up for something. There is absolutely no evidence, in all this testimony, that Mr. Scarbrough knowingly had something and did not produce it. There is no evidence that he knowingly lied to the tribunal.

And even though the panel pretty much shut him down by upholding objections based on collateral estoppel or relevance every time he tried to explore the credibility of the two witnesses against him, he did expose Ms. Tipton as someone who had misconstrued evidence in a different case against him, (RR Evidentiary Hearing, Vol. 1, p. 119-121[8]), as someone who lied about assaulting Ms.

[8] The Panel Chair upheld an objection to this questioning, but Mr. Scarbrough clearly explained that he was trying to show her dishonesty in increments and the substance of what the testimony would have been is available for the Board to read.

Deaton, (RR Evidentiary Hearing, Vol. 2, pp. 188-89[9]) and who misspoke carelessly about where she had been born, i.e. someone who would lie about even innocuous things. (RR Evidentiary Hearing Vol. 1, p. 112-13[10]). He did expose Mr. Ray as someone who would outright lie to make Mr. Scarbrough's conduct much worse than it was, saying he attended the funeral procession or interfered with the funeral arrangements, neither of which was true. (RR Evidentiary Hearing, Vol. 2, p. 39). He exposed Mr. Ray as someone who would also lie about innocuous things, putting a non-existent honor on his resume. (RR Evidentiary hearing Vol. 2, pp 120-22, R-22)[11]. In contrast, Mr. Scarbrough is a board-certified personal injury trial lawyer who has never had a disciplinary finding against him in the thirty-four years that he has practiced. (P-1). He was vouched for as being honest by several lawyers who know his work. (RR Evidentiary Hearing Vol. 2, pp. 172; 176-78; and 181-82). We have rules, including the Rules of Evidence, in order to best decipher the truth, when two different sides are telling two different stories. Just because: (1) a recording

[9] The Panel Chair refused to admit the photographs that showed Ms. Tipton was lying about the assault, the error of which will be discussed in more detail in a following issue, *see, infra*, but as Mr. Scarbrough explained to the court honesty is always an issue and Ms. Tipton was dishonest about a serious matter. (RR Evidentiary Hearing, Vol. 2, p. 190).

[10] It was alleged to be a typo, but Mr. Scarbrough had been present and said it was not.

[11] An objection by Ms. Stephens to questioning "on this subject" was upheld, but the reviewing Court can see that Mr. Scarbrough, if he'd been allowed, was again successfully impeaching Mr. Ray's credibility

came from somewhere (it was never authenticated, RR Evidentiary Hearing Vol. 2, p. 165), and (2) may or may not have been on the digital recorder that was briefly in Mr. Scarbrough's possession, (3) but no one with personal knowledge testified in this hearing that the "secret" recording *was* on the recorder when it was in Mr. Scarbrough's possession, (and his tech testified that only one recording was given back to Mr. Scarbrough, RR Evidentiary Hearing Vol. 2, p. 151), but (4) the "secret" recording eventually ended up with Mr. Ray – does not mean that there is any evidence that Mr. Scarbrough made a false statement of material fact to the tribunal when he said, "Yes," to the question of whether it was a true statement then and now[12] that, "[Mr. Scarbrough had] provided all of the tapes and audio recordings that I have in my possession or my client's possession, as far as …[Mr. Scarbrough knew] as of April 26, 2011." (P-2, p. 31). There is no substantial evidence that Mr. Scarbrough ever lied to the tribunal and a disciplinary finding under Rule 3.03A1 is reversible error. Sanctions should be lessened accordingly.

FIFTH ISSUE:

> There was no substantial evidence that Mr. Scarbrough violated Rule. 3.04A by failing to preserve the recorder when he had a duty to do so. TEX. DISCIPLINARY R. PROF. CONDUCT 3.04A.

The first time that Mr. Scarbrough learned that there were two recordings, (despite having questioned his client and being told that there were none), was at

[12] This hearing took place on May 27, 2011.

Ms. Deaton's last deposition, January 7, 2011. He promptly took the digital recorder to his IT man, and got what he was told was a copy of all the recordings that had been on the recorder. He produced the CD on February 22 to the Purser family counsel, very shortly after he received it from the IT man. (P-2, pp. 45-46). He was unable to get the other recording from John Redington until May, but he promptly produced it to the Pursers as soon as he could. Contrary to assertions by Ms. Tipton, (*See* RR Evidentiary Hearing, Vol. 1, p. 73), there was no request for production of the recorder. There was only a Request for Disclosures for "witness statements." The first time Mr. Scarbough knew that opposing counsel wanted the digital recorder was June 30, 2011. (P-8). That was *four months* after the production of the recording from the recorder and *two months* after Mr. Ray allegedly received the "secret" recording around Easter time. (RR Evidentiary Hearing Vol. 2, p. 233). The panel sanctioned Mr. Scarbrough for something that had never been requested of Mr. Scarbrough while he had possession or control of the recorder.

Texas Rules differ from federal rules somewhat in that there is no production which can be compelled without a specific request. Texas Rules of Civil Procedure Rule 196 sets out the steps to discovery, and each of those steps begin with a request. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party *must* specifically request production of electronic or magnetic data and the specify the form in which the requesting party wants it produced. TEX.

R. CIV. P. 196.5. (emphasis added). The mandatory nature of this rule was written on by the Texas Supreme Court, who found that Rule 196.4 requires a specific request to ensure that requests for electronic information are clearly understood and disputes avoided. *In re Weekley Homes, LP*, 295 S.W.3d 309, 314 (Tex. 2009). The recorder in this case had not been specifically requested before Mr. Scarbrough properly returned it to Melissa Deaton to return to its owner. (R-20). Ms. Tipton mentions requests for production but that is just their way – recite a string of things or events, one of which is made out of the whole cloth (i.e a lie), and because that thing or event appears to "fit in" with the other things or events that are known to be true, the reader or listener believes that the lie is true. If there had been timely requests for production with the recorder requested, they would be Petitioner's exhibit #1. There was no request.

One can argue that Mr. Scarbrough should have known that the recorder might be useful. However, this is a requirement for foresight on the level of the magical. Attorneys are used to producing copies and recordings, not hard drives and recorders. As the First Court of Appeals stated in *In re Harris*, 315 S.W.3d 685 (Tex. App. – Houston [1st Dist.] 2010, no pet.), "providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be." *Id.* *In re Harris* required concrete showing

that something was missing, as well as a balancing test and *a specific request* before any production of an electronic storage device could be compelled. *Id.* Given that Mr. Ray refused to produce the "secret" recording to Mr. Scarbrough, despite valid requests, so that he would have some sense of a special importance to the recorder, Mr. Scarbrough had no duty to retain and preserve the recorder during the time it was within his possession and control. A sixty-seven-year-old attorney simply wouldn't even realise that information could be gotten off of a recorder without a request to produce it. Sanctions under Rule 3.04A for failing to produce the recorder must be overruled and the overall punishment lessened.

SIXTH ISSUE:

> The Panel Chair's action in denying Jerry Scarbrough's attempt to question Elizabeth Purser Tipton, Jeff Ray and other witnesses for bias, prejudice, and credibility and to question any witness about the factors that would be considered in his punishment, was a denial of due process and equal protection and, as such, constituted reversible error.

The Panel Chair repeatedly wrongly upheld objections to Mr. Scarbrough's attempts to inquire into bias, prejudice and credibility, or into factors that would potentially lessen the sanction imposed. A witness' credibility, bias and prejudice are always relevant. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992); TEX. R. EVID. 401; *Williams v. State*, No. 14-99-01230-CR, 2001 Tex. App. LEXIS 5384 (Tex. App. – Houston [14th Dist.] Aug. 9, 2001, pet. ref'd). Where contradicted upon a material matter, the jury may deem contradiction affects credibility on all testimony.

St. Louis B & M Ry. Co. v. Price, 244 S.W. 642 (Tex. Ct. App. 1922) aff'd 269 S.W. 422 (Tex. Comm'n App. 1925). Therefore, testimony which touches on collateral estoppel, or even challenges the issue to which collateral estoppel is applied should be relevant and not "barred" as "an attack on collateral estoppel" if it is evidence of the witness' credibility on other testimony which is not on the issue to which collateral estoppel was applied. Likewise, testimony which touches on the estopped finding may still be admissible if it is relevant to the factors set out in Texas Rules of Disciplinary Procedure 2.18 as factors to be considered in setting the proper sanction on the attorney. TEX. R. DISCIPLINARY P. 2.18. The Panel Chair shall admit all probative and relevant evidence deemed necessary for a fair and complete hearing. *In re Caballero*, 441 S.W.3d 562 (Tex. App. – El Paso 2014, orig. proceeding). For example, Mr. Scarbrough attempted, unsuccessfully, to elicit testimony that the Pursers had already divulged all the medical information that Mr. Scarbrough had given Ms. Bolling.[13] (RR Evidentiary Hearing Vol. I, p. 150)[14] This testimony would have gone to the harm of the alleged misconduct – Rule 2.18 (A) and (B) – the nature of the misconduct and the seriousness of the misconduct. While Mr. Scarbrough would go to the Court first and have the order lifted, if he had it to

[13] All he essentially told Ms. Bolling was that Mr. Purser had Alzheimers.

[14] Also, this testimony was not hearsay because it did not go to the truth of the out-of-court statement but only to the fact that she already "knew" the "facts". (RR Evidentiary Hearing, Vol. 1, p. 151).

do over again, the testimony, had it been allowed would have shown that none of the confidential information which was the subject of the Order had been divulged, and the Pursers were in no way harmed by what he divulged. This should argue for a lesser sanction than if he had maliciously informed Ms. Bolling about the Purser's divorce, Mr. Purser's violence and his alleged hypersexuality. He was harmed by not being able to get this evidence in. If it had come in, it would not have been applied to undercut the collaterally estopped violation, but would have been relevant to the sanctioning phase.

The Panel hearing was arguably a litany of these wrongful inadmissibility rulings. The following tables give a number of (but not all) the examples of these wrongful rulings. "CRED" means the testimony would have gone to credibility, bias, or prejudice and "SANC" means the testimony would have potentially gone to the factors to be assessed according to Rule 2.18 in assessing punishment. TEX. R. DISCIPLINARY P. 2.18. Ms. Tipton (RR Evidentiary Hearing Vol. 1) and Mr. Ray were the main witnesses for the bar. It seemed that only when the evidence they

supplied, which was marginally relevant or touched on collateral estoppel, served to argue for harsher sanctions, was the evidence held to be admissible.[15][16]

Witness:	**Cite:**	**Purpose:**	**Description:**
Ms. Tipton	Vol. 1, pp 108-12	CRED	Obj. to rel. when S trying to show she lied about hand on Melissa.
Ms. Tipton	Vol. 1, pp. 115-19	CRED	Obj. to rel when S showed she was lying re never meeting in a ct. rm. And that she knew nothing about a judge calling her out for misrepresenting a record.
Ms. Tipton	Vol. 1, p. 130-32	CRED	Allowed her to say she didn't have a camera and then say she took pictures, but obj to rel. as to whether she was invited into the gate.
Ms. Tipton	Vol. 1, p. 193-95	CRED & SANC	Obj to collateral estoppel when S attempted to show she was lying about there ever being req for prod and about him saying "None".

[15] Ms. Tipton was allowed to testify as to attorney costs despite a relevancy objection. The attorney fees were not relevant because Mr. Scarbrough already had been hit with a judgment that would cover all the extra attorneys' fees expended. They were not going to be out any money from his conduct. (RR Evidentiary Hearing Vol. 1, p. 76).

[16] Ms. Tipton was allowed to testify to the effect listening to the "secret" tape had on her, when it was irrelevant and nonresponsive: The effect of not producing the tape would have been relevant, but not the effect of producing it. It wasn't a tape of Mr. Scarbrough's making and he wasn't in it. (RR Evidentiary Hearing, Vol. 1, p. 77.)

Mr. Ray	Vol. 2, p. 69-70	CRED	Ray portrayed a rosy marriage & Pursers were fighting & divorcing. Obj to relevance upheld
Mr. Ray	Vol. 2, pp 71-72	CRED & SANC	S accused of divulging pers. info when Ray had the info all over his pleadings. Obj to collateral estoppel.
Mr. Ray	Vol. 2, pp. 96	CRED	Asked Ray how much he earned from Pursers. Obj to relevance upheld.
Mr. Ray	Vol. 2, p. 99	CRED	Obj to rel: Ray got paid much money for sanc hearings.
Mr. Ray	Vol. 2, p. 113	CRED	Mistatement to ct that S said he had no recordings Obj to collateral estoppel.
Mr. Richeson	Vol. 2, p. 148	CRED & SANC	If MD didn't make a second recording, he couldn't have lied to the court, which was not estopped. Obj to collateral estoppel

In Volume 1 of the Evidentiary Hearing testimony, an argument about "credibility" comes up approximately 7 times on a computer search; in Vol. 2, it comes up approximately 10 times. Most of the testimony where Mr. Scarbrough was trying to cross-examine a witness to show their lack of credibility was kept out. In Vol. 1, the objection of testimony being an attack on collateral estoppel was raised approximately 13 times; in Vol. 2, it was raised 20 times. The tabulated instances

cited are just a fraction of the whole. Mr. Scarbrough was denied his right to cross-examination and denied his right to put on his case. This is a denial of due process under the Texas and United States Constitutions. U.S. CONST. amd. XIV and TEX. CONST. art I § 19. It affects all the alleged and "proven" violations. The Panel's decision should be reversed.

SEVENTH ISSUE:

(This issue should only be considered if the Board agrees with Mr. Scarbrough that application of collateral estoppel was in error. If it does, then consideration of this Seventh Issue would prevent a retrial, as there is no evidence to support the disciplinary finding.)

> There is no substantial evidence that Jerry Scarbrough violated a valid confidentiality order by disclosing Gary Purser's medical records to a homicide detective of the Killeen Police Department or to Ms. Bolling, therefore the decision that Scarbrough violated Rule 3.04(d) is reversible error.

The actual Confidentiality Record has not been introduced into the record of the Evidentiary Hearing. Therefore, no matter what actions are testified to, the panel cannot know if Mr. Scarbrough violated the terms of the order. The Panel doesn't know what those terms were. If collateral estoppel is not upheld as to Rule 3.04D, then the finding of misconduct under Rule 3.04D must be reversed because there's no substantial evidence that Mr. Scarbough violated any order and the punishments assigned must be re-evaluated.

EIGHTH ISSUE:

Entry of the Panel's Judgment and Findings of Fact and Conclusions of Law was reversible error because evidence must match the pleadings, and judgment and Findings of Fact and Conclusions of Law must match the pleadings and evidence, and they do not.

The proof must match the pleadings, and the judgment must match the pleadings and the case made by the evidence. *Lingwiler v. Anderson*, 270 S.W. 1052, 1055 (Tex. App. 1925, writ dism'd w.o.j.). Such rule of law is a fundamental step in assuring a fair trial. Both fair notice and the rule that the plaintiff bears the burden to put on sufficient evidence to support his claim are implicated by this rule.

A. The proof must match the pleadings

On a number of different points, sufficient evidence was not put on to support the allegations pled. These are summarized here:

Pleading allegation:	Respective proof:	Harm:
"…Respondent responded to various discovery requests on behalf of Deaton. In two of those responses, sent prior to Deaton's first deposition…" CR 1:00064	Only one request for discovery, requesting *disclosures of witness statements* (R-10); despite Tilton claiming there were Req. for Prod., none were filed and there were none. (RR Evid. Hearing Vol. 1, p. 73	Pleading makes it look like he *repeatedly* denied the recordings and recorder, when reasonable inquiry would show that the recorder wasn't even asked for when it was in Mr. Scarbrough's possession. (P-8).
"Respondent denied the existence of "any discoverable witness statements…and denied the existence of	Res. To Req. for Disclosures was not "None" but "None at this time; will supplement" (RR Evid. Hearing Vol. 2, p. 114); no req was made	Actual response shows he would continue to work with the discovery process to supplement; resp. as pled was that he

recording/documentation…" (CR 1: 00064)	for recording, so he couldn't have made any response such as a denial.	just "blew them off" multiple times. Reasonable inq. would show this to be incorrect.
"The CD/ROM contained the Sister recording disclosed by Deaton…and several other recordings" (CR 1: 00065)	There was no evid presented that the CD contained "several other recordings" and evid that it did not. (RR Evid Hearing Vol. 2, p. 151)	This was not an ultimate fact determined in either the underlying trial or the bnkrcy case, thus not proper for collateral estoppel & reasonable discovery after the 1st Pet. would have shown it was untrue.
"Neither Respondent or Deaton preserved the device…" (CR 1: 00065)	No evidence that the device was requested.	Allegation that they had no duty to do. Reasonable inq would show they hadn't been asked for it before it was stolen.
Improper quote: "he said he represented himself and Gary" (CR 1: 00065)	Actual quote: "My name is Jerry Scarbrough…I'm a lawyer…I'm representing myself and I'm not…I'm not…in fact, I think I probably represent Mr. Purser more than anyone in the world right now…" (RR Evid. Hearing, Vol. 1, p. 141) "…do you recall me telling you I represented the lady who worked in that beauty shop? A: That might have come up later." (RR Evid. Hearing Vol. 1, p. 145)	The quote in the pleading was a lie, but reasonable inq would show that's not what he said. He stated an opinion when he said "I *think* I *probably* represent…*more than anyone in the world*…"

"Respondent twice violated the confidentiality order." (CR 1: 00065)	The confidentiality order was not introduced as evid at the Evid. Hearing.	A quick reading of the order would show he did not violate it.
"Respondent…disclosed the contents of Gary Purser's medical records to Ms. Bolling." (CR 1: 00065)	The only evidence disclosed was that he may have had Alzheimers, which she already knew. He asked her what P died from and if JoAnn told her he had Alzheimers" (RR Evid. Hearing Vol. 1, p. 150)	A quick phone call to Ms. Bolling, which billing records show Stevens later made, would show that he showed her no medical records and only told her one thing, that she already knew. This was not an ultimate fact in either case, so it was not proper for collateral estoppel.

Most commonly, the rule set out in this issue is used to require that only evidence related to points pled in the pleadings be admitted or considered. However, the reverse is also true. When fact after fact introduced at trial shows the pleading to be groundless, the pleadings and evidence also do not match, as is required. Making allegations that are far worse than the facts that can be introduced – when reasonable inquiry would show they were incorrect – tend to demonize the Respondent, such that it is very difficult, if not impossible, for the Respondent to get a fair hearing.

Likewise, the Judgment and Findings of Fact must match the pleadings and proof. Here, they do not. The Findings of Fact which do not are as follows:

(1) "Opposing counsel made repeated requests to Respondent for production of any recordings involving Gary Purser" (CR 1: 2025) – Only one request was made to Mr. Scarbrough during the time he had the recorder; there is no evidence of any other (R-10);

(2) "Respondent had previously given at least one additional recording to Shawn Richeson." (CR 1: 2025) – The evidence, in the form of the testimony of Respondent and Shawn Richeson did not hold that the "secret" recording came through Respondent and Shawn. And Mr. Ray's testimony only was that he got the "secret" recording through Richeson, not that Mr. Scarbrough gave it to Richeson. (RR Evid. Hearing Vol. 2, p. 107);

(3) "146th District Court and the Bankruptcy Court made Fact Findings"(CR 1: 2025) – None are filed as exhibits in this case and are needed for collateral estoppel to apply;

(4) Finding that Respondent knowingly disobeyed an order not to disclose medical records (CR 1: 2026) – No findings of fact or verdict to this effect was filed in this case and are needed for collateral estoppel to apply. No copy of the Order was filed in this case. Ms Bolling's testimony (RR Evid Hearing Vol. 1, p. 140-51) did not show a breach of the Order and Mr. Ray's testimony did not show a breach of the order without a copy of the Order being filed. (RR Evid. Hearing Vol. 2, p. 38);

(5) "Respondent did not disclose his representation of Melissa Deaton." (CR 1: 2026) – Ms. Bolling's testimony is contrary to this and no evidence supports it. (RR Evid Hearing Vol. 1, p. 145-46).

NINTH ISSUE:

There is no substantial evidence that Jerry Scarbrough violated Rule 8.04(a)(1) of the Texas Rules of Professional Conduct because there was no evidence that Scarbough violated these Rules or knowingly assisted or induced another to do so.

The allegation that Mr. Scarbrough violated Rule 8.04(a)(1) was at the heart of Mr. Scarbrough's special exceptions, because, even now, this counsel does not know what the Bar is alleging. The Rule reads:

> (a) A lawyer shall not:
>
> (1) Violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client lawyer relationship.

TEX. R. PROFESSIONAL CONDUCT 8.04(A)(1).

- First off, it is unclear whether the panel was accusing Mr. Scarbrough of having acted alone or in concert with someone else.

- If the panel was accusing Mr. Scarbrough of having acted with someone else, who? His expert, who should not have taken the medical records along when she went to investigate the Purser family -- Mr. Scarbrough told her the records were for her eyes only? Shawn Richeson – who decided to only give Mr. Scarbrough the CD with one recording on it?

- We can't tell whether the panel is alleging that Mr. Scarbrough acted within the course of a lawyer client relationship?

- Moreover, how were the rules violated?

Did Mr. Scarbrough allegedly induce Melissa Deaton to make a false 911 report? There is absolutely no substantial evidence that he knowingly did this. Did Mr. Scarbrough allegedly knowingly induce Melissa Deaton to withhold recordings that she had, including the "secret recording"? Mr. Scarbrough could not, during the hearing, feel that he could point the finger at his client as the one who withheld recordings. Yet it was Deaton and Redington who were responsible for the delay in

getting the recordings to the Purser's counsel sooner, and probably Richeson who was responsible for Mr. Scarbrough not having the "secret recording' to pass on to the Pursers. After Deaton had passed away, Mr. Scarbough's legal assistant was willing to testify that she had fully informed Ms. Deaton that witness statements must be produced *now*. (RR Hearing on Motion for Stay, p. 87-89). When Mr. Scarbrough learned in June that the recorder was requested, he immediately wrote and called Melissa Deaton, telling her to preserve the recorder and recordings. (R-20). There's no other substantial evidence of communications between Mr. Scarbrough and Melissa Deaton concerning the recordings. There is certainly no substantial evidence that Mr. Scarbrough *knowingly* induced Melissa Deaton to withhold any recordings. Therefore any decision that Mr. Scarbrough violated Texas Rules of Discipline 8.04(a)(1) must be reversed and rendered that he did not, because there is no substantial evidence to support the claim. And if the claim is just that Mr. Scarbrough withheld a recording from the Court and the Pursers, Mr. Scarbrough cannot be found guilty of both Rule 8.04(a)(1) *and* one of the other Rules relating to obstruction of access to evidence (e.g. Rule 3.04A) unless different acts were found to have occurred. The problem is that the elements of Rule 3.04A and Rule 8.04(a)(1) appear to overlap exactly. The Supreme Court has ruled that disciplinary proceedings are civil, rather than quasi-criminal in nature, *The State Bar of Texas v. Evans*, 774 S.W.2d 656 (Tex. 1989), but in civil law, one is not allowed

to be convicted of two different wrongs based on exactly the same facts. *See e.g. Federal Deposit Ins. Corp v. Coleman*, 795 S.W.2d 706 (Tex. 1990). For this reason also, depending on what the panel was alleging, the holding that Rule 8.04(a)(1) was violated should be reversed and rendered not to have been violated. It should not be possible for the panel to raise the number of violations using violations based on the exact same facts, just so that they can support a harsher punishment.

TENTH ISSUE:

There is no substantial evidence that Mr. Scarbrough violated Rule 8.04A3.

There is a difference between the declarative assertion of a supposed fact – which can be dishonest – and a statement of opinion – which is true is the speaker believes it, even if it is not accurate. Mr. Scarbrough's introduction to Ms. Bolling was a statement of opinion. His initial statements – that he represented himself – and his later statements – that he represented Ms. Deaton against the Pursers – were statements of supposed fact, which could be true or false. *These* statements of fact were not misleading. The statement of opinion was never intended to be relied upon.

In telephonic testimony with Ms. Bolling, the lady with whom he allegedly was dishonest in introducing himself to, he honestly testified as to what he had said. He said, "I'm representing myself – the literal truth, which would mean he was in opposition to the Pursers. Then he added a statement that was obviously meant to be taken as an opinion: "and I'm not representing –I'm not – I'm not – in fact, I *think*

I *probably* represent Mr. Purser more than anybody in the world right now…" (emphasis added). (RR Evid. Hearing Vol. 1, p. 141). He later expounded on that, telling Ms. Bolling he had represented Melissa Deaton and asked, "Did I tell you that Ms. Deaton was being sued by your cousins and your aunt in a lawsuit?" and Ms. Bolling replied," Well, yeah, I believe you did, yes." At that point, Ms. Bolling should not reasonably have believed that the statement that he thought he represented Mr. Purser was a literal statement. (RR Evidentiary Hearing, Vol. 1, p. 145-46). Mr. Scarbrough obviously realized that he had made a mistake by voicing his personal opinion as to who he was helping. The incorrect impression he gave was allowed to linger all of about two minutes before he realized that the impression he had given may have been misleading. This is not substantial evidence of a violation of Rule 8.04A3.

ELEVENTH ISSUE:

> Based on the proof presented by the Bar and the factors set out in Texas Rules of Disciplinary Procedure Rule 2.18, the sanctions levied against Mr. Scarbough were excessive and should be reduced or eliminated.

Rule 2.18 spells out the factors to be considered by the Panel in determining the appropriate sanctions. TEX. R. DISCIPLINARY P. 2.18. Starting from the last factor, Mr. Scarbrough's disciplinary record, it is spotless. If Mr. Scarbough were the raving rule-breaker that Mr. Ray and Ms. Tipton say that he is, certainly some grievance would have been pressed in his thirty-four years of practice. Instead, there

is nothing. (P-1). There are only a great many attorneys from his part of Texas who willingly stepped away from their practices and waited lengthy periods of time in uncomfortable chairs to testify that he was an honest and competent attorney. (*See* RR Motion to Stay (entire) and RR Evidentiary Hearing Vols. 1 and 2). An attorney who, for thirty-four years of practice has never made a misstep, and who has not hurt a client, and has not even hurt the Pursers, because they already, miraculously, had the tape on which these sanctions focus. A ten-year suspension for a sixty-seven year old man is one glimmer short of disbarment. Certainly Mr. Scarbrough's long history of exemplary behavior should argue for reduction of such a sanction even though the charges against him were serious.

Second, the conduct of the Respondent during the proceedings is to be considered in setting the sanction. Right from the beginning, Mr. Scarbrough took his discovery obligations seriously. First and foremost, *he respected the court and he showed up*. At the sanctions hearing, Mr. Redington, who was entirely responsible for the delay in the production of the micro-cassette recording, was on vacation and *didn't show up*. (P-2, p. 5). Granted, showing up isn't something that should earn you the Medal of Honor, but it does show a basic level of respect. And Mr. Scarbough testified as to the large amount of records he *had* produced to Mr. Ray. (P-2, p. 48-49). At the Motion for Stay Hearing (RR Motion for Stay, entire), and at the Evidentiary Hearing, Mr. Scarbrough took the proceedings very seriously

and took the time to assemble a number of witnesses for the Panel. He maintained proper decorum and treated the Panel with respect. The objections he raised were proper and he was an attentive representative for his case. This decorum indicates that he will likely take seriously the eventual findings of the court and not repeat the actions complained of. Lesser sanctions would achieve the same positive result.

Respect for the legal profession has been earned by Mr. Scarbrough by the way he has practiced for thirty-four years. It is unlikely that the allegations against him now will bring much dishonor to the profession, given his long track record to the good.

The deterrent effect on others by this case is negligible. Severe punishment for Mr. Scarbrough in a highly questionable case is more likely to encourage others to do what the women alleged Mr. Ray did: Use investigators to make a "fake" recording, then produce it amid inflammatory accusations of hidden recordings to drive a rival out of business.

It is likely that Mr. Scarbrough will never be in this situation again. He will ask for clarification on orders and follow his past history of producing everything that is requested.

There was no profit made by Mr. Scarbrough for his actions. In fact, there was no reason for Mr. Scarbrough to act as he is alleged to have acted at all. He did not think the "secret" tape was particularly damaging.

Those who seek legal services in the future will be insulated from the professional misconduct found. Mr. Scarbrough's clients were not injured by their relationship with him, and he has thirty-four years of not injuring his adversaries, either.

This is an unusual, unlikely to reoccur event that is very limited in its damage to the bar. How often is an adversary likely to "find" a recording that the party was "supposed" to produce before the adversary has even properly requested it?

There was no loss to Mr. Scarbrough's clients and there was no loss to the Pursers. Mr. Scarbrough has a judgment he will pay (if it is upheld) for all the attorneys' fees incurred in these discovery battles, and the Pursers got to use the recording in their case – it was not damaged or destroyed. There is no evidence of other recordings out there that they could have additionally wanted to use.

Any discovery battle or misleading statement or misunderstood order is serious. However, the Pursers attained all the discovery products they properly sought, and some they didn't properly seek. Mr. Scarbrough has learned never to interject his opinions in a way that might be misleading. And he has vowed to ask for clarification if there is any possibility that an order is misunderstood or should be stricken.

As to nature and degree, any alleged misconduct is serious. However, allowing a trial to descend into chaos, where the sanctions testimony becomes the

heart of the "fraud evidence" (see Trial Testimony) and where court employees are betting in the halls of the courthouse against the Respondent's chances (personal conversations of counsel with said employees) - that is even more serious. The first is an isolated incident. The second is an all out attack on the judicial system. How could the Hon. Ms. Oliver Parrott have "testified" solely on *hearsay* the way she did, to help a friend?

CONCLUSION & PRAYER

Mr. Scarbrough believes that the application of collateral estoppel to this case was improper. He also argues that the Bar failed to prove its case on any of the alleged Rule violations. They should be dismissed or the case reversed and rendered in his favor.

Any misconduct is serious. But thirty-four blameless years of practice argues that these allegations will never have cause to reoccur. A much-reduced sanction, or no sanction at all, is merited in this case.

Mr. Scarbrough prays that this case be reversed and rendered in his favor, or such other and further relief as may be just.

Respectfully submitted,

____/s/ MB CHIMENE_____

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CERTIFICATE OF COMPLIANCE

This brief contains 18,408 words in 14 pt. proportional Times Roman font with one inch margins. It does not comply with the length limits of the Rules of Appellate Procedure, but a Motion to Expand the Length is filed with this document.

_____/s/ MB CHIMENE_____

CERTIFICATE OF SERVICE

A true and correct copy of this brief and appendix was served on Julie Liddell at Julie.liddell@texasbar.com via email today, 1/19/16, as certified by my signature below.

_____/s/ MB CHIMENE_____

APPENDIX

The Appendix to this brief is filed as a separate document.