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Robert S. Bennett
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Re: Grievance regarding Charles Sebesta

Dear Mr. Bennett:

At your request I have examined materials in connection with a grievance you filed with the State Bar of Texas on behalf of Anthony Graves against Charles Sebesta, A0020710876. In addition to the materials you sent to the Chief Disciplinary Counsel of the Texas State Bar on January 30, 2007(comprising the "Complaint"), I have also reviewed the March 29, 2007, and April 16, 2007, letters from Mr. Sebesta to the Chief Disciplinary Counsel.

Opinion

Based on my review of these materials and independent research, along with my background and experience,[1] I have concluded that the materials suggest "enough evidence, or Just Cause, to support the allegation of professional misconduct"[2] due to

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[1]Resume is attached.

[2]"The Investigatory Panel is charged with determining whether there is enough evidence, or Just Cause, to support the allegation of professional misconduct." Commission for Lawyer Discipline, 2000 Attorney Disciplinary and Disability Report, 10. "The investigation and determination of Just Cause by the Chief Disciplinary Counsel as set forth in new Rule 2.12 takes the place, in part, of the investigatory panel hearing under old Rule 2.11 . . . ." Steve Moyik, Field Counsel, CDC, Austin, "Investigations and Summary Disposition of Complaints under the New Procedural Rules," 3; part of Texas Disciplinary System Training Seminar, Jan. 2004.

convicted defendants may raise violation of Rule 3.09(d) as a tactical means of succeeding on appeal, in this instance the charge of contravening Rule 3.09(d) follows that success.

Rule 3.03(a)(5): Introducing false evidence

Texas Rule 3.03(a)(5) ("A lawyer shall not knowingly . . . offer or use evidence tht the lawyer knows to be false") reads identically to Model Rule 3.3(a)(3) ("A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false"). The Model Rule differs in that it has additional language regarding remedial measures, which the Texas Rule places in a separate paragraph. Although both versions indicate the requisite scienter twice–knowingly and knows–Comment 8 to the Model Rule far more clearly indicates the significance of that standard: "The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances."

On its face, Rule 3.03(a)(5) appears to consider the scenario of a criminal defense lawyer whose client wants to perjure himself, with the lawyer sensitive to her client's Constitutional right to testify and torn between the duty of candor to the court and the duty to her client. The ABA comment provides leeway. Still, the Fifth Circuit applied the language of this Rule (without citing to the Rule) to District Attorney Sebesta and decided the question of scienter in even this instance in favor of the complainant: "the state suppressed two statements of Carter, its most important witness that were inconsistent with Carter's trial testimony, and then presented false, misleading testimony at trial that

was inconsistent with the suppressed facts."[21]

Conclusion

Based on my review of the supplied materials and independent research (some of which I am attaching), along with my background and experience, my **opinion** is that these materials comprise "enough evidence, or Just Cause, to support the allegation of professional misconduct."[22] Additional materials generated or facts discovered and relayed to me may alter or strengthen this conclusion.

Sincerely,

Lillian B. Hardwick

attachments (resume, table, amici brief in *Williams v. Taylor*)

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[21] *Id.* at 344. *See also In re* Thomas, 337 B.R. 879, 892, 892 n. 50, 97 A.F.T.R.2d 2006-1296 (Bankr. S.D. Tex. 2006) ("If you know you can deal with it, why not disclose it? ... It's not an admission that you give up your rights to it. You disclose it. You explain it. You deal with it. But you chose, instead, on behalf of your client to hide it. You were hiding it from the Trustee, the creditors and the Court ... You are an officer of the Court. You have an obligation under the Rules of Professional Conduct to disclose to the Tribunal a material fact with knowledge that the Tribunal may tend to be misled by such failure. That's RPC 3.3.") (citing to and quoting from "an unpublished decision in *Henry Lubaczewski* case number 98-19398, United States Bankruptcy Court, District of New Jersey").

[22] "The Investigatory Panel is charged with determining whether there is enough evidence, or Just Cause, to support the allegation of professional misconduct." Commission for Lawyer Discipline, 2000 Attorney Disciplinary and Disability Report, 10. "The investigation and determination of Just Cause by the Chief Disciplinary Counsel as set forth in *new Rule 2.12* takes the place, in part, of the investigatory panel hearing under old Rule 2.11 . . . ." Steve Moyik, Field Counsel, CDC, Austin, "Investigations and Summary Disposition of Complaints under the New Procedural Rules," 3; part of Texas Disciplinary System Training Seminar, Jan. 2004 (emphasis added).