

SUBJECT: State Bar disciplinary process for certain prosecutor disclosure violations

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendments

VOTE: 7 ayes — Lewis, Farrar, Farney, Hernandez Luna, K. King, Raymond, S. Thompson

0 nays

2 absent — Gooden, Hunter

SENATE VOTE: On final passage, (March 26) — 31-0

WITNESSES: For — Thomas Ratliff, representing Michael Morton (*Registered, but did not testify*: Rebecca Bernhardt, Texas Defender Service; Cindy Eigler, Texas Interfaith Center for Public Policy; Kristin Etter, Texas Criminal Defense Lawyers Association; Andrea Marsh, Texas Fair Defense Project; Matt Simpson, ACLU of Texas; Ana Yanez-Correa, Texas Criminal Justice Coalition)

Against — None

On — (*Registered, but did not testify*: Linda Acevedo, State Bar of Texas, Shannon Edmonds, Texas District and County Attorneys Association)

BACKGROUND: Under Government Code sec. 81.071, attorneys practicing in Texas are subject to the disciplinary and disability jurisdiction of the Texas Supreme Court and the Commission for Lawyer Discipline, a committee of the State Bar.

Under sec. 81.072(b) the Supreme Court is required to establish minimum standards and procedures for the attorney disciplinary and disability system. Those standards must include requiring the Commission for Lawyer Discipline to adopt rules governing the use of private reprimands by grievance committees.

Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct requires prosecutors to disclose to criminal defendants all evidence and

information that tends to negate the guilt of the accused or mitigate the offense. This is sometimes called the disclosure rule.

Government Code sec. 501.101 defines “wrongfully imprisoned” as someone who has:

- received a pardon for innocence after having served all or part of a sentence in the Texas Department of Criminal Justice system;
- been granted relief under a writ of habeas corpus based on a court finding or determination that the person was actually innocent; or
- been granted relief under a writ of habeas corpus and: 1) the state district court in which the charge was pending dismissed the charge; 2) the dismissal was based on a motion in which the prosecutor says no credible evidence exists against the defendant; and 3) the prosecutor believes the defendant is actually innocent.

DIGEST:

SB 825 would require the Texas Supreme Court to adopt rules requiring the Commission for Lawyer Discipline to prohibit a grievance committee from giving a private reprimand concerning a violation of a disciplinary rule that requires a prosecutor to disclose to the defense all evidence and information that tends to negate the guilt of the accused or mitigate the offense. This would include Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct.

The Supreme Court would have to ensure that the statute of limitations that applied to a grievance filed against a prosecutor alleging a violation of the disclosure rule did not begin to run until the date on which a wrongfully imprisoned person was released from prison.

The bill would take effect September 1, 2013. By December 1, 2013, the Supreme Court would have to amend the Texas Rules of Disciplinary Procedure to conform with the bill.

**SUPPORTERS
SAY:**

SB 825 would strengthen the process used by the State Bar to hold prosecutors accountable when it is alleged that they did not disclose required information in cases in which persons were wrongfully convicted. Questions about this came to light with the case of Michael Morton, who was exonerated after spending nearly 25 years in prison for the murder of his wife.

At issue is the statute of limitations for filing grievances with the state bar

in such cases and the appropriateness of keeping reprimands in these cases private. SB 825 would address these issues with a fair, limited response narrowly drawn to apply only to cases in which persons were wrongfully imprisoned and when an allegation of a violation of the disclosure rule was at stake.

Currently, allegations of attorney misconduct must be filed with the State Bar's grievance system within four years of the date the conduct occurred. An exception to this allows the limit in cases involving fraud and concealment to begin four years after the misconduct was discovered or should have been discovered. The interplay of these two sections and the different interpretations of the language in the exception have raised questions about whether the deadline should be changed in cases in which a person was wrongfully convicted.

SB 825 would clear up these questions by establishing a rule for cases in which someone was wrongfully convicted by allowing grievances to be filed for four years after release from prison. The wrongfully convicted should not have to overcome the barrier of proving fraud or concealment to file a grievance under the current exception to the deadline.

This change would strike a fair balance by maintaining the four-year statute of limitations but requiring that it begin to run only after a person had been released from prison. Exonerees should have a full four years to pursue a grievance in free society, where they would have access to resources and assistance.

The bill also would address accountability issues in the current system by requiring reprimands in these cases to be public. Currently, in most cases when a State Bar panel rules on a grievance, the panel decides whether to make any reprimand public or private. In all cases of persons wrongfully convicted and involving a prosecutor's violation of the disclosure rule, a private reprimand would be inappropriate because the case involves public officials acting in their public capacity. Making these reprimands public would enhance open government and public confidence in the criminal justice system.

Requiring public reprimands in these cases would be consistent with current law that prohibits certain private reprimands when it is in the public interest. Current law names two other situations in which private reprimands are prohibited: giving more than one private reprimand within

five years for a violation of the same rule and giving a reprimand for a violation that involves a failure to return a fee, a theft, or a misapplication of fiduciary property. The need for public accountability in the situation described by SB 825 is at least as great — if not much greater — than those in current law.

SB 825 bill would not infringe on the discretion of grievance committees to make decisions in these cases. The bill would apply only to the type of reprimand, not whether one should be given. As in the case of the other prohibitions on private reprimands, these decisions should continue to be based on the facts of an individual case. The seriousness of all violations of the disclosure rule in cases in which persons were wrongfully convicted warrants a consistent policy for these types of reprimands.

OPPONENTS
SAY:

Requiring reprimands in these cases to be public would decrease the discretion of grievance committees to handle these cases as they saw fit. In some cases, for example, a grievance committee might want to make a private reprimand if it thought the misconduct was of a lower level and that a public reprimand would be inappropriate. This could lead to some cases being dismissed if a private reprimand was unavailable.

OTHER
OPPONENTS
SAY:

The provisions in SB 825 dealing with the statute of limitations could be unnecessary because the current rules allow for the deadline in cases involving fraud and concealment to begin when the conduct was discovered or should have been discovered, and most cases described by the bill could fall under this exception, allowing time to file a grievance.

It is unclear what limitation would apply if a wrongfully convicted person discovered disclosure rule misconduct involving fraud and concealment more than four years after being released from prison.

NOTES:

The companion bill, HB 1921 by S. Thompson, was referred to the House Judiciary and Civil Jurisprudence Committee on March 4.