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Supreme Court of Texas.
Boma O. Allison, Appellant,
v.
Commission for Lawyer Discipline, Appellee.
No. 08-0705.

March 11, 2009.

Appearances:
Wayne H. Paris, Gillis, Paris & Heinrich, Houston, TX, for the appellant.
Cynthia W. Hamilton, Assistant Disciplinary Counsel, Austin, TX, for the appellee.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice Harriet O'Neill, Justice David M. Medina, Justice Paul W. Green, Justice Nathan Hecht, Justice Dale Wainwright, Justice Phil Johnson, and Justice Scott A. Brister.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready now to hear argument in 08-0705 Boma O. Allison v. Commission for Lawyer Discipline.
MARSHALL: May it please the Court, Mr. Paris will present argument for the Appellant. Appellant reserves three minutes for rebuttal.

ORAL ARGUMENT OF WAYNE H. PARIS ON BEHALF OF THE PETITIONER

ATTORNEY WAYNE H. PARIS: Thank you, Your Honor. May it please the Court, Wayne Paris on behalf of Boma O. Allison, who is appealing from a sanctioned Evidentiary Panel judgment of the D4 District 4 DO7 Committee and the vote of opinion of August 21, 2008. Ms. Allison's plain and simple position here is that the sanction judgment was not rendered by a quorum of the panel that was properly composed. The rules involved here are Rule 2.07 and 732.02 and 2.17 of the Texas Disciplinary Rules of Procedure or the Texas Rules of Disciplinary Procedure I say and the question springs from the legislative statute amendment to the State Bar Act Section 81.072J, which was passed in 2001 in which the Supreme Court, your Court, subsequently used to amend the Section 2.07 of the Texas Rules of Disciplinary Procedure by adding some phraseology. Basically, we believe and Ms. Allison believes that the intent of the legislative statute Section 81.072J was to ensure a

certain level of participation by public members in an Evidentiary Panel quorum that was to hear evidentiary disciplinary matters under the State Bar Act and in that connection, the, your Court, in fact, in 2.07 amended the quasi statute or amended the quasi statute rule 2.07 to, in fact, provide that at least one public member must be present for every two attorney members present. Now the problem has come about and the two or three other appeals that I know of pending on this issue, back on May 10, 2007, BODA, the Board of Disciplinary Appeals, rendered a decision Cafiero v. Commission for Lawyer Discipline. In the Cafiero case, there was a composition of the quorum of the panel that heard the disciplinary matter of four attorneys and one layperson and in the Cafiero case, the Board of Disciplinary Appeals said that was an improper composition that was jurisdictional. It wasn't procedural and cited some cases on that, including the Greater Ft. Worth and Tarrant County Community, action agency case v. Mims, which held that when a Board of Directors of a community action agency was illegally constituted, it had no authority to render a decision. So in the Cafiero case, the Board of Disciplinary Appeals said the rendering of a disciplinary decision in an Evidentiary Panel by a quorum composed of four lawyers and one layperson is improper. It's an improper composition and so, therefore, they vacated that particular disciplinary sanction judgment and they remanded it for a hearing to the State Grievance committee for a rehearing. Now the Boma Allison case is a little bit different in the sense that instead of four attorneys and one public member, it was heard by three attorneys and one public member, which was, in effect, a ratio of 25% public member participation and 75% lawyer participation, attorney participation and so Boma Allison based upon Cafiero appealed first, by filing a motion for new trial at the level because at that time the Cafiero decision has just been published. So she filed a motion for new trial at the Grievance Panel level and it's interesting to note that the quorum of the panel that heard the motion for a new trial was composed of three lawyers and two laypersons, which was a different quorum that had been made up to render the sanctions judgment, which was, in fact, three lawyers and one layperson. The Commission took the discipline.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what was in the motion for new trial? Was it just based on the lack of a proper quorum or did you all?

ATTORNEY WAYNE H. PARIS: It was based, your honor, it was based upon the lack, primarily upon the lack of the proper quorum and they overruled it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was there also contest to the underlying?

ATTORNEY WAYNE H. PARIS: There was a contest claiming that the case had been settled before, in fact, based upon an offer that had been sent out that she claimed was accepted. I didn't represent her at the level of the hearing, but there was a point in the motion for a new trial that regarded settlement of the case prior to the time that it ensued forward. We were overruled. We brought that point forward in the BODA brief and we were overruled on that point. We are not bringing that point forward to this Court. We're only bringing the composition point forward to this Court. But, at any rate, motion for a new trial or motion for a new hearing is that as, is stated in the particular Texas Disciplinary Rules of Procedure, in fact, was overruled and they overruled that point. There was some discussion, I will tell you, at the Grievance Panel quorum hearing on the motion for a new trial about well how do we cut a person in half or how do we cut, you know, a

layperson in half and that kind of discussion. The Commission took the position that for every two sets of lawyers or two groups of lawyers, there only needed to be one layperson at the quorum hearing and so as the consequence since there were three attorneys and one layperson and we hadn't reached the level of four attorneys, then, in fact, there wasn't another layperson needed. We took the position that was consistent, we felt was consistent with the Cafiero opinion of the Board of Disciplinary Appeals, which had just been published in May of 2007, that no, that's an improper position because we need another layperson once you get past at least another layperson once you get past three lawyers so that you could have at least a participation of a one-third to two-thirds percentage or ratio, which we believed was the intent of the Legislature.

JUSTICE DALE WAINWRIGHT: Let me, to your .07.

ATTORNEY WAYNE H. PARIS: Yes, sir.

JUSTICE DALE WAINWRIGHT: It defines the composition for panels and for quorums of panels.

ATTORNEY WAYNE H. PARIS: That's correct.

JUSTICE DALE WAINWRIGHT: Panels must be composed of two attorney members for each public member. A quorum of the panel must include at least one public member for every two attorney members present. Are those two requirements in your mind the same or are they different? I mean does the composition public compared to attorney of a panel have to be the same as the composition public compared to attorney of the panel, I mean of the quorum.

ATTORNEY WAYNE H. PARIS: That's our position. And I tell what we had drawn for that position, Your Honor. We go back to 2.02, which talks about grievance committees and 2.02 of the Texas Rules of Disciplinary Procedure defines the grievance committee in terms of percentages, two-thirds and one-third.

JUSTICE DALE WAINWRIGHT: Right, it defines the panel to be that.

ATTORNEY WAYNE H. PARIS: That's correct.

JUSTICE DALE WAINWRIGHT: But it doesn't say quorum in that language though.

ATTORNEY WAYNE H. PARIS: No, it does not. And then if you go up to 2.17, 2.17, which defines the panel, that speaks in terms, Your Honor, of ratios, including a ratio of one public member to every two attorney members. So when you take, we don't.

JUSTICE SCOTT A. BRISTER: You're complaining about the Evidentiary Panel right?

ATTORNEY WAYNE H. PARIS: The quorum of the Evidentiary Panel that heard the case. The construction or the composition of the quorum.

JUSTICE SCOTT A. BRISTER: So would that have to comply with, I'm trying to find the difference between a committee panel and Evidentiary Panel and they seem like the same thing to me.

ATTORNEY WAYNE H. PARIS: They are the same thing.

JUSTICE SCOTT A. BRISTER: And so 2.07 and 2.17 are talking about the same thing?

ATTORNEY WAYNE H. PARIS: To some degree they're talking about the same thing. I think historically, 2.02 is talking about the grievance committee as a whole and then 2.17 talks about the panel.

JUSTICE SCOTT A. BRISTER: 2.17 talks about evidentiary panels and 2.07 talks about panels.

ATTORNEY WAYNE H. PARIS: And 2.07 talks about panels.

JUSTICE SCOTT A. BRISTER: Which includes evidentiary panels.

ATTORNEY WAYNE H. PARIS: Correct, Your Honor.

JUSTICE SCOTT A. BRISTER: But they seem to be inconsistent.

ATTORNEY WAYNE H. PARIS: Well.

JUSTICE SCOTT A. BRISTER: Was to have, 2.07 says at least one public member for every two. That sounds like you could have two public members for every two attorneys.

ATTORNEY WAYNE H. PARIS: That sounds like this.

JUSTICE SCOTT A. BRISTER: 2.17 says you can't do that.

ATTORNEY WAYNE H. PARIS: That's correct and well it doesn't say you can't do that.

JUSTICE SCOTT A. BRISTER: So which one.

ATTORNEY WAYNE H. PARIS: It speaks.

JUSTICE SCOTT A. BRISTER: Sure it does. It says you got to have a ratio of two attorney members for every public member. So looks to me like.

ATTORNEY WAYNE H. PARIS: It speaks in terms of ration.

JUSTICE SCOTT A. BRISTER: 2.07 says two public and two attorneys would be fine and 2.17 says it wouldn't.

ATTORNEY WAYNE H. PARIS: Well I think 2.17 talks in terms of ratio, that's correct, Your Honor, and then 2.02 talks in terms of percentages and our position, Your Honor, is that you can't read 2.07 without harmonizing it with 2.17 and 2.02 and we go back to the legislative statute, the amendment of the State Bar Act, Your Honor, which was 81.072J.

JUSTICE SCOTT A. BRISTER: The purpose was to make sure the attorneys were nominating.

ATTORNEY WAYNE H. PARIS: Exactly, the purpose was to make sure that the, that there reached a certain level of participation by lay people.

JUSTICE SCOTT A. BRISTER: Help me with the other critical question, which is whether this is voidable and you had to object to it at the time or void because certainly I suppose during that evidentiary hearing, whoever was representing your client at the time would have known that there wasn't enough, would have known that there wasn't enough under you view of the rules of public members present.

ATTORNEY WAYNE H. PARIS: Well, Ms. Gladney was representing her at the time and at the time, I don't know that he or she knew about the recent publication of the Cafiero decision to be quite frank with you, but, and it wasn't raised. It wasn't raised at the hearing. When I got into it, I raised it by motion of a rehearing so they would have a chance to rule on that, but it wasn't raised at the hearing, but I do think that it is void and I think it's void based upon a 10-person decision which rules though in the Cafiero decision, which is.

JUSTICE SCOTT A. BRISTER: Those are all BODA cases right?

ATTORNEY WAYNE H. PARIS: That's the underlying BODA case to this appeal.

JUSTICE SCOTT A. BRISTER: We haven't said one way or the other?

ATTORNEY WAYNE H. PARIS: You have not said one way or the other and your intent.

JUSTICE SCOTT A. BRISTER: We usually, we usually, of course, try to avoid saying things are void because we want, you know, before we waste a bunch of time on a, I don't know how long this evidentiary hearing lasted, but before we waste a bunch of time on it, if we got the wrong number there, somebody speak up and we'll fix it.

ATTORNEY WAYNE H. PARIS: Understood and I know BODA quoted the Greater Ft. Worth and Tarrant County Community Action Agency v. Mims case, which is a 1982 Supreme Court case, which talked about when the Board of Directors of a Community Action Association was, in fact, illegally constituted because it didn't have the proper constitution,

then, in fact, it had no authority to go forward and it was void. I will say in the Cafiero decision the Commission raised the question of it being a procedural matter and not a jurisdictional matter and so, therefore, that there was a waiver by not raising it in the hearing. However, BODA overruled that position in the Cafiero decision. Later in our case, in our case that was heard by BODA that's here today, in the Allison case, that position was not raised in their brief. They didn't raise. They gave up on that position from the procedural versus the jurisdictional standpoint.

JUSTICE SCOTT A. BRISTER: Well, they have one view of it, but we always are concerned about subject matter jurisdiction and as I understand it, the reason we wanted to make sure there was plenty of that the process, these panels weren't dominated by attorneys was not pro attorney. It was anti-attorney.

ATTORNEY WAYNE H. PARIS: That's correct.

JUSTICE SCOTT A. BRISTER: They're thinking that the public members are going to clamp down on these bad attorneys and those attorneys were always giving each other a break and so I'm wondering if it's correct that it's void, doesn't that kind of give the accused lawyer the chance to have it both ways? On the one hand, you don't want many public members there because they're supposedly appointed to clamp down on bad attorneys like whoever the accused is and so you don't say anything because there are not public members there, but then if it turns out the attorneys clamp down on you too, well then you can say it's all void and you get it both ways.

ATTORNEY WAYNE H. PARIS: Justice Brister, it could be a two-edged sword. You're absolutely correct. It could be as far where the lawyer says, you know, I don't want the lawyers here because of their intelligence visa vie the law. On the other hand, he could say I want the lawyers here and I don't want the layperson here because of their inability to necessarily understand the import of some of these general disciplinary rules that I'm charged with violating. So it's a two-edged sword, but let me say this. I think that the intent of the legislative statute and when I go back to 81.072J, in amending the State Bar Act was to ensure that level of participation. The reason I say that is because.

JUSTICE DON R. WILLETT: But that level and exactly precisely.

ATTORNEY WAYNE H. PARIS: At least that level.

JUSTICE DON R. WILLETT: At least that level.

ATTORNEY WAYNE H. PARIS: And I think that's what this Court's intent was in amending 2.07 when it said at least one public member to every two attorney members.

JUSTICE DALE WAINWRIGHT: But the statute doesn't say that. The statute says the.

ATTORNEY WAYNE H. PARIS: The statute does not say that, Your Honor.

JUSTICE DALE WAINWRIGHT: Must include one public member for each two attorney members. That's different from saying at least one public member for each attorney member.

ATTORNEY WAYNE H. PARIS: That's true.

JUSTICE DALE WAINWRIGHT: The statute is framed in mandatory terms, must.

ATTORNEY WAYNE H. PARIS: That's correct and I think.

JUSTICE DALE WAINWRIGHT: Rule adds at least to it.

ATTORNEY WAYNE H. PARIS: Well in the sense that rule.

JUSTICE DALE WAINWRIGHT: If you're following the rule, 2.07, at least one public member for every attorney member, you could have more

public members than attorneys and that would still satisfy the rule.

ATTORNEY WAYNE H. PARIS: I don't think you could have more public members than attorney members because you couldn't satisfy a quorum properly if you did that based on the one-third, two-third dichotomy that would come out of the panel to begin with. So if you had a one-third, two-third dichotomy in the whole panel, not the quorum that heard the matter, but the whole panel, then you might only have two public members or three public members and so you couldn't get a quorum with two or three public members only.

JUSTICE DALE WAINWRIGHT: That depends on whether you think the statute trumps or the rule trumps because the statute says a quorum of the panel must include one public member for each two attorney members. The rule says the panel must be composed of two-thirds attorneys and one-third public members. That's 2.02.

ATTORNEY WAYNE H. PARIS: That's 2.02, yes sir.

JUSTICE DALE WAINWRIGHT: And then when you're looking at the quorum, which is what the statute addresses, not the panel, then the statute says must include one public member for each two attorneys. So under the, if the panel is composed per rule 2.02, you could have two-thirds attorneys and one-third public members, but then when you're looking at the quorum of the actual evidentiary hearing, then the statute says one public member for each two attorney members. So there's some difference between the rule and the statute.

ATTORNEY WAYNE H. PARIS: That's correct. There's a difference, is a difference between.

JUSTICE DALE WAINWRIGHT: And if our rule was amended to comply with the statute, what should we look to as the most persuasive?

ATTORNEY WAYNE H. PARIS: I think that both could be construed as requiring at least one-third public members and I think you can read both that way to harmonize both of them without promulgating or re-promulgating rule 2.07 in a different language.

JUSTICE DALE WAINWRIGHT: So then as you read them in harmony, could you have the same number of public members as attorneys to satisfy our quorum for a panel?

ATTORNEY WAYNE H. PARIS: In theory, that's correct. You could have two public members and two attorney members.

JUSTICE DALE WAINWRIGHT: But you couldn't have more public members than attorneys, I think you just said.

ATTORNEY WAYNE H. PARIS: That's correct because I think you would run into, you would run into quorum problems then based upon the panel. The one-third, two-thirds on the panel or the ratio of one-third, two-thirds on the panel. You couldn't get enough public members to sit in a quorum where you wouldn't have to have some lawyer members based upon the overall quorum; I mean the overall panel dichotomy.

JUSTICE DALE WAINWRIGHT: Why couldn't you satisfy the rule 2.02 on the composition of the panels, but then when you have the quorum show up to actually conduct the hearing, most of the lawyers don't show up and all the public members do so you end up with more public members as a quorum than you do attorney members without violating the rule on committee panels. Could that happen?

ATTORNEY WAYNE H. PARIS: Could that happen? I don't think so because the panels are normally six in number and two of which are, in fact, in fact, public members and so you'd have to some, some attorney members to reach a quorum.

JUSTICE DALE WAINWRIGHT: Is it different from a committee panel?

ATTORNEY WAYNE H. PARIS: Is it what?

JUSTICE DALE WAINWRIGHT: 2.02 says the committee must consist of

no fewer than nine members.

ATTORNEY WAYNE H. PARIS: That's a grievance committee. That's the grievance committee and then your panel is controlled normally by 2.17, which is what and the panels that have been appointed are four and two, which.

JUSTICE SCOTT A. BRISTER: The panel's got to be, it can't be more than half of the whole committee.

ATTORNEY WAYNE H. PARIS: That's correct. That's correct, Your Honor. So I think you could harmonize all three of these rules, 2.02, 2.07, 2.17 with the legislative statute by ruling that, in fact, there has to be at least a 33-1/3 percent participation of public members in the quorum and that would seem logical because why would you want to have that percentage of a third, two-thirds at the grievance committee level and then have that ratio of one-third two-thirds at the panel level and not continue that ratio at the hearing level, which is as the dissent in this case says is the most important level because that's where the people hear the evidence, see the demeanor of the respondent and, in fact, vote.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. You can complete that thought on rebuttal. The Court is now ready to hear argument from the Appellee.

ATTORNEY WAYNE H. PARIS: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you.

MARSHALL: May it please the Court, Ms. Hamilton will present argument for the Appellee.

ORAL ARGUMENT OF CYNTHIA W. HAMILTON ON BEHALF OF THE RESPONDENT

ATTORNEY CYNTHIA W. HAMILTON: May it please the Court, good morning. The issue before the Court in this appeal is whether the Court should hold the that Board of Disciplinary Appeals and the Evidentiary Panel that presided over the hearing below and that the State Bar's chief disciplinary counsel have all misconstrued rule 2.07 of the Rules of Disciplinary Procedure. And the answer to that question is a decided no for three reasons. And first and foremost, if you look at their construction and by their construction, I mean BODA and the Evidentiary Panel and the chief disciplinary counsel, if you look at their construction, it's based on a longstanding, reasonable interpretation of the language that's used in the rule and the clear purposes of that language. Second, because of the roles that each of them play in the administration of the disciplinary rules, their construction is entitled to some deference and then, finally, if the Court were to construe rule 2.07 as urged by the dissent and by Ms. Allison, there'd be substantial consequences that can and should be avoided.

JUSTICE DALE WAINWRIGHT: Why don't you start there explaining what these consequences are.

ATTORNEY CYNTHIA W. HAMILTON: Yes. And the best way to look at the consequences because, of course, consequences can and should be considered by the Court, it's a rule of statutory construction that's well established, been around for a long time, you should look at both positions here and starting with the commission's position. Neither Ms. Allison nor the dissent has identified a single substantive consequence that would flow from the Commission's construction of this rule and there's not a consequence that's apparent.

JUSTICE DALE WAINWRIGHT: Except they argue that the decision is void because the panel wasn't properly comprised.

ATTORNEY CYNTHIA W. HAMILTON: Well and, yes, that would be a consequence of accepting their construction of the rule, but if you accept the Commission's construction of the rule and BODA's construction, the Evidentiary Panel's construction, we wouldn't end up there. So really accepting our construction of the rule results in not a negative consequence that's at least been identified. Now they basically complained that what the problem is you end up with 25% public members or you can have 25% public members instead of a minimum of 33-1/3 public members.

JUSTICE SCOTT A. BRISTER: Well but, I mean, are you, do you think, if their interpretation is right, does that, are they also right that the, that anything an improperly constituted panel does is void rather than voidable?

ATTORNEY CYNTHIA W. HAMILTON: No. The Commission clearly doesn't agree with that position.

JUSTICE SCOTT A. BRISTER: Well the statute says a quorum must include one public for each two attorneys and normally a quorum is the power to act. So if there's not a quorum, if a committee had only two people there so there was no, never a quorum on the panel, Evidentiary Panel, would that be void?

ATTORNEY CYNTHIA W. HAMILTON: Well, then you get closer to something that probably is a void decision and that's because if you look at the language of the rule, it sets forth two separate requirements.

JUSTICE SCOTT A. BRISTER: Just looking at the statute right now. I will get to the rule in just a second, but if one person, the Evidentiary Panel was one person, nobody said anything. It goes all the way through BODA and then years after the fact, the attorney involved says it was all void. That's there only one person on the Evidentiary Panel under the statute, would it be void.

ATTORNEY CYNTHIA W. HAMILTON: Probably yes if there were only one person because you wouldn't have a majority. Now not because you hadn't complied with this procedural requirement that's established by the statute and it was also amended into the quorum rule, but because you wouldn't have that majority that we know is necessary to even constitute a quorum in the first place. That's clear from the rule. It says a quorum consists of a majority of the members of the panel.

JUSTICE SCOTT A. BRISTER: Anything in the statute that defines a quorum?

ATTORNEY CYNTHIA W. HAMILTON: No there's not.

JUSTICE DON R. WILLETT: Panels are commonly how many.

ATTORNEY CYNTHIA W. HAMILTON: Either three or six members. Most often they're six members, but they some, there are a few panels that are three members and so if you look at the language in the rule, well look a little bit at the history of the rule. Originally the rule just said you have to have a majority of the members to constitute a quorum and then a panel can act. So a three-member panel could act with only its two attorney members present in the past. And then the Legislature noticed that that was happening and said that doesn't make sense. We require public members on these panels. We want some public participation whenever the panel acts. We don't want them making decisions with only attorney members.

JUSTICE DALE WAINWRIGHT: And that was the 2001 amendment?

ATTORNEY CYNTHIA W. HAMILTON: That's correct.

JUSTICE DALE WAINWRIGHT: Now what is the consequence or remedy other than declaring the action of an improperly composed panel or quorum void? What remedy is there other than redoing it?

ATTORNEY CYNTHIA W. HAMILTON: Well I think the remedy is to redo it. I think that if it's timely raised, though, it's a waivable error. It's more of a mandatory requirement that has to be satisfied. A panel has to follow that requirement, but if it doesn't follow that requirement and the complaining party fails to object in a timely manner, then it should be waived. It's something that can be addressed through the ordinary appellate process, but it shouldn't result in a void judgment. It's not just the kind of error that calls into question the integrity of the proceeding, doesn't implicate fundamental fairness. It's something that can be raised, can be corrected if it's raised timely. It's more similar, for example, to raising recusal. Normally, there's a 10-day deadline has to be raised. Recusal has to be raised at least 10 days before trial unless the party learns of the reason for recusal later than that and then the rule is the party has to raise that immediately.

CHIEF JUSTICE WALLACE B. JEFFERSON: Must you raise it also if there are just no public members at all or is that waivable or is that void?

ATTORNEY CYNTHIA W. HAMILTON: That would fall, if you have a majority of members there, so, for example.

CHIEF JUSTICE WALLACE B. JEFFERSON: Attorneys only, the majority attorneys.

ATTORNEY CYNTHIA W. HAMILTON: Like four attorneys only, that's the kind of error that should render the judgment voidable, but not void. It's apparent at the time it happens, doesn't call into question the integrity of the proceedings. What it does it just means that the panel failed to follow what is more like a procedural requirement than some kind of fundamental issue that like the subject matter jurisdiction of the panel. That's not in question. The personal.

JUSTICE DALE WAINWRIGHT: I'm sorry, Counsel. So the rule you would draw, the line you would draw is the quorum's decision is void if there's too few members there. It's voidable if the composition is inappropriate although the proper number of persons are there to constitute a quorum.

ATTORNEY CYNTHIA W. HAMILTON: That's correct and that's consistent with the very definition of the word "quorum" which quorum is defined as the number of people that are required in order for a body to be able to transact its business. So we're talking about that number. How many people are required.

JUSTICE DALE WAINWRIGHT: Let's go back then to the statute versus the rules. We're clear and I think everybody agrees that the Legislature wanted to ensure that there's public members on the quorum. And the ratio here in the statute must include one public for each two attorneys. Why shouldn't we read that to mean there has to be at least one-third representation of public members?

ATTORNEY CYNTHIA W. HAMILTON: Well first and foremost because that's not the language that either the Court or the Legislature chose to use. We know from looking at other provisions of the rules and other provisions of the statute that when the Court and the Legislature meant one-third, they knew how to say that and that easily could have been accomplished here if that's what was intended. In addition, if we look at the statute and if we did read that statute to mean that there must be precisely one-third public members present at all times, then and then what we would have is a situation where a panel could never operate as a quorum because with the three-member and six-member panels, the only way you get one-third public members and two-thirds attorneys is when you have all members present that's because we have

to satisfy that majority rule also.

JUSTICE DON R. WILLETT: [inaudible] into multiples, you got them in exactly in multiples of three?

ATTORNEY CYNTHIA W. HAMILTON: Yes, so that, it would create a situation where although it's clear that both the rule and the statute intends to allow for panels to operate in groups less than a whole, in reality they could never do that. So clearly that's not what was intended. It's that would be an absurd result. It would render that quorum language essentially meaningless. And in addition, there does appear to be on its face this discrepancy between the rule and the statute, but when you really analyze the statute, you consider the purpose of the statute which was to promote the participation of public members in these panel decisions. That's what the Legislature was concerned about. You see that the Court made the right decision to insert the words "at least" there. It's consistent with the language. Keeps us from having what would be an unacceptable result in that statutory language would be rendered meaningless. So the Court made the right decision with the language that it chose in amending the rule. And the most important point to remember about the Commission's argument, the Commission's position here is that it's the language of the rule that leads to the inescapable conclusion that one public member for each group of two attorneys is what's required here. That's at least one public member and you only need to look at that language to get that far. The language is simple. It's straightforward. And it's the ordinary meaning of the language that leads you to that result. Ms. Allison and dissent, they criticized the Commission's position based on three arguments. The first thing they say is the argument that what this language really means is you have to have a minimum of one-third and we've talked about that. That's not what the language says and we should presume that different language was chosen for a reason. And another argument that we haven't talked about yet that they've raised is this notion of counting attorneys in groups and they say that the Commission has made a mistake counting attorneys in groups, but if you look at the language again, we have, there's a word in the rule that leads us, dictates that we're supposed to count attorneys in groups and that's the word "every." So look at the word "every." It modifies the phrase "two attorney members" and the meaning of the word "every" tells us that we're supposed to consider those two attorney members as a single unit.

JUSTICE DALE WAINWRIGHT: That's in 2.17?

ATTORNEY CYNTHIA W. HAMILTON: 2.07.

JUSTICE DALE WAINWRIGHT: 2.07? Because it's in .172. You're looking at . 07?

ATTORNEY CYNTHIA W. HAMILTON: That's correct. I'm looking at 2.07, the quorum provision and it says at least one public member for every two attorney members and what that means is that two attorney members are to be counted as a single unit or a group. So that notion didn't come out of nowhere. It's actually dictated by the language of the rule and Ms. Allison's position, on the other hand, would essentially disregard that word "every" and treat it was mere surplus, which we know is inappropriate.

JUSTICE DALE WAINWRIGHT: So then in this case, there are three attorney members, one public member constituting the quorum and Ms. Allison says there should have been two public members?

ATTORNEY CYNTHIA W. HAMILTON: Correct.

JUSTICE DALE WAINWRIGHT: At least one-third representation of public members?

ATTORNEY CYNTHIA W. HAMILTON: That's correct. That's right.

JUSTICE DALE WAINWRIGHT: And BODA's position is there doesn't need to be another, didn't need to be another public member in this case unless another attorney member were added to make four attorneys, then there would need to be a second public member.

ATTORNEY CYNTHIA W. HAMILTON: That's correct and that's the Commission's position here that when you have three attorney members present, you still only have one group of two attorneys and so only one public member is absolutely required. You need to have a minimum of one public member. It's not until you get to four attorneys that you have two groups of attorneys and, therefore, you need to have at least two public members and, again, that result is dictated by the ordinary meaning of the language of the rule.

JUSTICE DALE WAINWRIGHT: This was not an ordinary BODA case. This was an [inaudible] where there was a 6-4 split and a strong dissent written. That doesn't happen often in BODA.

ATTORNEY CYNTHIA W. HAMILTON: That's correct.

JUSTICE DALE WAINWRIGHT: So BODA is fractured on this, strong feelings on both sides.

ATTORNEY CYNTHIA W. HAMILTON: That's correct.

JUSTICE DALE WAINWRIGHT: You don't seem to think that this is very, a very close call though.

ATTORNEY CYNTHIA W. HAMILTON: No and mainly because if you look at the three points that the dissent makes, they just really don't stand up to scrutiny. The main one being their concern about preserving this one-third to two-thirds ratio and for two reasons that argument doesn't hold up. The first reason being, as I've said, that you just cannot maintain that ratio and still allow for a quorum. So it would render the quorum provisions completely meaningless, both the rules and the statute. But in addition, Boda's position of Ms. Allison's position really isn't honoring that one-third, two-thirds ratio anyway. They're saying it's okay for the level of participation by attorneys to sink. We just want to make sure that we honor that at least one-third for public members. So really they're not honoring the ratio either. The other points they make are simply that this word, that the majority should not be counting in terms of groups of attorneys. That that's not consistent with the statute. We've talked about that. And then also when you consider the consequences of their position, that's relevant. You know another well-accepted rule of statutory construction, of course, is that you have to consider those, the consequences of the two offered interpretations. And Ms. Allison's construction brings with it several negative consequences. First of all, in its simplest form, we would be saying that all public members have to be present all the time, which is just inconsistent with the notion of a quorum. There's also the one-third to two-thirds argument which fails because it again would render the quorum provision meaningless. There are inevitable delays that would result in the process and this.

JUSTICE SCOTT A. BRISTER: How many of these evidentiary hearings are there a year in the State?

ATTORNEY CYNTHIA W. HAMILTON: Between 100 and 200. There are quite a few. There are quite a few evidentiary panels that are hearing these cases.

JUSTICE SCOTT A. BRISTER: And normal length of time they last, any?

ATTORNEY CYNTHIA W. HAMILTON: This one seems to have been unusually long. Most of the ones I see last probably around a day or less. This one did span three different days and I'm not sure why that

was, but this was an unusually long hearing.

JUSTICE SCOTT A. BRISTER: And nobody's paid public member or attorney members of the panels?

ATTORNEY CYNTHIA W. HAMILTON: That's correct. They're all volunteer members.

JUSTICE SCOTT A. BRISTER: And so, and how often is this a problem to, I assume you, I assume appointing the panels is not a problem. You just write two attorneys for every one and that's standard. Never, are panels ever appointed that have anything other than 2 to 1 ratio?

ATTORNEY CYNTHIA W. HAMILTON: No. Hopefully that's something that wouldn't happen.

JUSTICE SCOTT A. BRISTER: The trick is the quorum.

ATTORNEY CYNTHIA W. HAMILTON: Yes.

JUSTICE SCOTT A. BRISTER: Getting them to show up.

ATTORNEY CYNTHIA W. HAMILTON: Yes.

JUSTICE SCOTT A. BRISTER: And are most panels would you say the majority of panels are six members or three members?

ATTORNEY CYNTHIA W. HAMILTON: Definitely six members. Almost all panels are six members. There are only, there's a small number of three-member panels and [inaudible]. It can be.

JUSTICE SCOTT A. BRISTER: And so if they prevailed, the trick is going to be getting those six members to talk to make sure that two and no more than two attorneys show up and one, and no more than one, public member show up.

ATTORNEY CYNTHIA W. HAMILTON: Well with the, for the six-member panels, we'd have to have a majority so we'd have to have four. So we'd either have to have the whole panel or we'd have to have two and two, two attorneys and two public members or two public members and three attorneys. Those combinations would work. But if you look at this case itself, we had three settings where there were, we had a one to three panel. So all of those settings would have to be rescheduled. So the opportunity to delay the proceeding is huge. That's something that, it's inevitable that the proceedings are going to be delayed if this if the rule is interpreted the way that they're urging. And that, not only would it lead to delays which harm, clearly harm the system. They harm the parties. They also potentially harm the public if you've got an attorney that needs to be disciplined and that's just dragged out forever, that potentially harms the public as well. But also, there have been recent efforts by both the Legislature and this Court to streamline the disciplinary system to sort of find these sources of delay and root them out so that the process will move more efficiently. That goal would be harmed as well. And, again, there, on the other side, interpreting the rule according to its language to allow for quorums of one public member and three attorney members just wouldn't carry those kinds of consequences with it. Another important point to remember is that we're talking about in this case, an interpretation by the Board of Disciplinary Appeals and this Court has delegated part of its authority to regulate the practice of law to BODA and so, therefore, BODA's role in the administration of the disciplinary rules is substantial. We're talking about an Evidentiary Panel, which is an administrative tribunal that's specially created to preside over these hearings and so their role in the administration of the rules is also significant and then, finally, we have the Chief Disciplinary Counsel and the State Bar notes that this Chief Disciplinary Counsel is the administrator of the State Bar's grievance procedure. So we have those three entities that have all interpreted this rule in this way and that, their interpretation because of their roles is entitled to some

deference. It's also important to note that this construction is not new. It's not being asserted for the first time in this case. This interpretation has been consistent since the rule, the quorum requirements changed in 2001 and BODA notes even in its opinion that the Commission has taken this same position in past cases. So because all three of those bodies play important roles in the system, this Court should consider and defer to their interpretation of this rule. So in conclusion, this Court should affirm the decision of the Board of Disciplinary Appeals because to adopt Ms. Allison's construction of the rule would be to adopt a construction that's inconsistent with the language of the rule. It also would lead to substantial consequences that can be avoided and would undermine the clear purposes of both the rule and the statutory provision on which it's based.

CHIEF JUSTICE WALLACE B. JEFFERSON: Do you know how many other cases this question is being presented on appeal or is this the only one?

ATTORNEY CYNTHIA W. HAMILTON: No, this is not the only one. Right now, I believe there are four, including this one, four cases pending before this Court where this question has been raised in some form.

CHIEF JUSTICE WALLACE B. JEFFERSON: And how about in Appellate Courts, were there others that are on the web here that you know of?

ATTORNEY CYNTHIA W. HAMILTON: No, not that I know of. There's been kind of a flood of them since the Cafiero decision was handed down.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you.

JUSTICE DALE WAINWRIGHT: And the four are Roses, Allison, Clark and what's?

ATTORNEY CYNTHIA W. HAMILTON: Perry, a new case, a brief that was recently filed.

JUSTICE DALE WAINWRIGHT: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Hamilton.

ATTORNEY CYNTHIA W. HAMILTON: Thank you.

REBUTTAL ARGUMENT OF WAYNE H. PARIS ON BEHALF OF PETITIONER

ATTORNEY WAYNE H. PARIS: Your Honor, I tired the Perry case at the Corpus Christi. He's appealing that himself, but I'm the one that raised the question on that so there are four cases and the last one, Perry, I, in fact, tried in over 200 [inaudible] per year Evidentiary Panel quorum hearings. I don't think it will create an adverse effect in the Cafiero case, which the Board of Disciplinary Appeals decided, which we rely on. There was a remand to a statewide committee. I assume they reheard the case and that was the end of it. The argument on waiver and procedural versus substantive. Here's what Cafiero says exactly on that argument. The Commission argues that while the departure of one public member may have resulted in an improperly constituted panel, at page 12 by the way, Cafiero waived the defect by not objecting to the remaining members at the hearing. We disagree. The law is clear that a judgment rendered by a court without capacity to act is void and they cite several cases, including the Mims case that I was talking about. They go on in Cafiero to say when the remaining of the members of the panel proceeded with a numerical quorum that, nevertheless, had an incorrect ratio of members to public, of lawyer members to public members. It lost its capacity to act as a properly constituted grievance committee panel forum and the decision was, therefore, void. A couple more quick points before I sit down or

conclude and that is they talk about administrative deference that sets the legislative statute was passed since this rule, this Court promulgated the change in rule 2.07. They have been construing this as meaning one particular public member for every two sets of lawyers. You know, that's not necessarily the case. There wasn't any statistical evidence presented it's simply an argument. That was not presented at the level of the panel. It was not presented at the BODA hearing. There may be many, many, many hearings out there in these 200 per year that, in fact, have a proper composition. That, in fact, have, you know, two lawyers for every one public member that just haven't been complained about. We have four cases that have come up on an appeal since, which have this question in them since the Legislature passed a statute in 2001 and since this Court implemented the rule beginning January 1st, 2004. So you're dealing with a time period from January 1st, 2004 to the date of the Cafiero opinion, which is May 10, 2007 where some of these cases have ended up being appealed with regard to the composition of the panel. I don't think that is, that runs to their position that we're going to open up the floodgates or cause an untold problem in the system. It was very easy in the motion to rehearing in this case for the Chief Disciplinary Counsel and the Commission to get that one extra public member in there so the motion for rehearing could be heard and they had them in there. They had four; they had three attorneys and two public members in the motion for rehearing in this case, which is pointed out in the dissent in this particular case. Finally, the dissent in this case, Your Honors, says, in fact, that the construction of claiming that it takes two groups or two sets of lawyers for every layperson is the construction that's the strained construction. It is not an unstrained construction visa vie their position that they've been treating it this way. So, in conclusion, we would ask that the Allison judgment be vacated and that BODA be instructed or this Court remand her hearing to a statewide committee as was done in the Cafiero case. Thank you, Your Honors.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. That cause is submitted and that concludes the oral arguments for this morning and the Marshall will now adjourn the Court.

MARSHALL: All rise.

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