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## COMMENT

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Use of Expunged Records in Attorney-Disciplinary  
Proceedings

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## I. INTRODUCTION

A recent decision by the Texas Supreme Court allows a defendant's expunged records to be used in a disciplinary proceeding against an attorney.<sup>1</sup> In *In re State Bar of Texas*,<sup>2</sup> the Commission for Lawyer Discipline sought to use a defendant's expunged records against the prosecuting attorney in a subsequent disciplinary proceeding.<sup>3</sup> The defendant in the underlying case consented to the use of the expunged documents against the attorney.<sup>4</sup> The Texas Supreme Court reasoned the defendant's waiver, the relevancy of the expunged records, and the Commission's need for the records allowed the Commission to use the expunged records against the attorney.<sup>5</sup> This unusual decision<sup>6</sup> goes against the purpose of Texas's expunction statutes.<sup>7</sup>

1. *In re State Bar of Texas*, 440 S.W.3d 621, 622 (Tex. 2014). See generally John Council, *High Court Allows Expunged Records for Use in Discipline Case*, TEX. LAW., Aug. 25, 2014 (on file with the *St. Mary's Law Journal*) (providing an overview of the Texas Supreme Court's decision in *In re State Bar of Texas*).

2. *In re State Bar of Texas*, 440 S.W. 3d 621 (Tex. 2014).

3. *Id.* at 622–23; see also Interested Party, Jon L. Hall's Response to Relator's Brief on the Merits at 12, *In re State Bar of Texas*, 440 S.W.3d 621 (Tex. 2014) (No. 13-0161), 2013 WL 3789672 [hereinafter Hall's Response to Relator's Brief] (arguing the Commission based its allegations on expunged documents); Jeremy Heallen, *Texas Bar Allowed to Use Expunged Records Against Ex-DA*, LAW360 (Aug. 22, 2014, 6:02 PM), <http://www.law360.com/articles/570137/texas-bar-allowed-to-use-expunged-records-against-ex-da> (reporting the Commission sought permission to use expunged records against the attorney).

4. *In re State Bar of Texas*, 440 S.W.3d at 622; see also Hall's Response to Relator's Brief, *supra* note 3, at 29 n.48 (recognizing the defendant consented to the use of his expunged records in the attorney-disciplinary proceeding after he was presented with a prepared waiver by the Commission for Lawyer Discipline).

5. *In re State Bar of Texas*, 440 S.W.3d at 627.

6. See Council, *supra* note 1 (“In the unusual mandamus decision, a majority on the high court balanced the interests of Texas[s] expunction statute . . . against the bar's interest to use expunged records to discipline a former prosecutor.”).

7. See TEX. CODE CRIM. PROC. ANN. art. 55.03, § 1 (West 2006) (stating expunged records may not be used for any purpose once an expunction order is final); 3 D. MARK ELLISTON & TERRENCE W. KIRK, TEXAS PRACTICE GUIDE CRIMINAL PRACTICE & PROCEDURE § 30:1, at 236 (2015) (“The statute was enacted to prevent the record of a wrongful arrest from negatively impacting a person for the remainder of his life.”); 27A TEX. JUR. 3D *Criminal Procedure: Post-Trial Proceedings* § 1189, at 433–44 (2010) (“The purpose of the statutes is to allow a person who has been wrongfully arrested to expunge those arrest records.”).

There is no exception for the Commission's proposed use of the documents.<sup>8</sup> Therefore, the use of expunged documents in attorney-disciplinary proceedings would be a direct violation of the law.<sup>9</sup> The Texas Code of Criminal Procedure states, "A person who acquires knowledge of an arrest . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files."<sup>10</sup> The Code continues, noting "[a]n offense under this article is a Class B misdemeanor."<sup>11</sup> The court's mandamus decision to allow expunged records to be used in attorney-disciplinary proceedings is a violation of the Texas statute prohibiting the use of expunged records for any purpose.<sup>12</sup>

This decision opens the door for an expunged record, which is confidential information, to be used in a disciplinary proceeding against an attorney.<sup>13</sup> The court suspended the application of the law for the Texas Commission for Lawyer Discipline,<sup>14</sup> and the decision may prove problematic for both current and future attorneys. A potential issue with this decision is an attorney's expunged records may become subject to use

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8. See CRIM. PROC. arts. 55.03, 55.04 (providing no exceptions for the use of expunged records); *W.V. v. State*, 669 S.W.2d 376, 378 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (determining the retention of expunged records for protection against a possible civil action did not fall within the exceptions). But see CRIM. PROC. art. 55.02, § 4(a–2) (West Supp. 2014) (providing exceptions for the use of expunged records in subsequent proceedings when the ordering court allows for such use in a final expunction order).

9. See CRIM. PROC. art. 55.03, § 1 ("[T]he release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited. . ."); *Id.* art. 55.04, § 1 (declaring a state agency "commits an offense if [it] knowingly releases, disseminates, or otherwise uses the records or files"); *W.V.*, 669 S.W.2d at 378 (recognizing there are sanctions if expunged records are used in any unauthorized way).

10. CRIM. PROC. art. 55.04, § 1.

11. *Id.* § 3. One of the main arguments in a brief to the court by an interested party was that it was a Class B misdemeanor for the Commission for Lawyer Discipline to use the expunged records against the prosecutor in the subsequent disciplinary proceeding. Brief of Real Party in Interest Jack Rody In Response to Relator's Brief on the Merits at 5, *In re State Bar of Texas*, 440 S.W.3d 621 (Tex. 2014) (No. 13-0161), 2013 WL 3930094 [hereinafter Brief of Jack Rody].

12. CRIM. PROC. art. 55.03, § 1.

13. See *In re State Bar of Texas*, 440 S.W.3d 621, 622 (Tex. 2014) (declaring expunged records may be used in a disciplinary proceeding against an attorney). Another case allowed expunged records to be used in a disciplinary proceeding against an attorney; however, that case differed from the foregoing case because the final expunction order permitted the use of the expunged records in subsequent proceedings. *In re Expunction of R.A.*, 417 S.W.3d 569, 577–79 (Tex. App.—El Paso 2013, no pet.); see also CRIM. PROC. art. 55.02, § 4(a–2) (providing a court may allow for expunged records to be maintained for use in subsequent proceedings).

14. See *In re State Bar of Texas*, 440 S.W.3d at 622 (allowing the Commission to use expunged records in a disciplinary proceeding against an attorney); Brief of Jack Rody, *supra* note 11, at 7 (warning the court would suspend the law if the Commission were allowed to use the expunged records in the disciplinary proceeding).

by the Commission.<sup>15</sup> Although the court's decision does not specifically allow an attorney's own expunged records to be used in a disciplinary proceeding, it sets a precedent that could be interpreted to allow for that use.<sup>16</sup>

This Comment provides insight into the Texas Supreme Court's recent decision in *In re State Bar of Texas* regarding the use of expunged records in attorney-disciplinary proceedings<sup>17</sup> and discusses why the decision should be altered to be in alignment with the purpose of expunction statutes. Section II provides an overview of attorney-disciplinary proceedings and the evidence used in those proceedings, examines Texas's expunction statutes and their purpose, and discusses how the right to expunction may be waived. Section III analyzes the Texas Supreme Court's decision and its conflict with the purpose of Texas's expunction statutes. This section then relates how the court's decision compares with other jurisdictions and exposes the possible ramifications the decision will have on attorney-disciplinary proceedings. In closing, section IV recommends the issue be resolved by either: (1) making expunged records unavailable for use as evidence in attorney-disciplinary proceedings; or (2) if expunged records are allowed to be used in attorney-disciplinary proceedings, such use should be limited only to situations when the final expunction order permits the retention of records for use in future proceedings, the expunged records are directly at issue, or the person with the expunged records allows the records to be used in the proceeding.

## II. ATTORNEY-DISCIPLINARY PROCEEDINGS, EXPUNCTION, AND WAIVER OF RIGHTS: AN OVERVIEW

“The Supreme Court of Texas has the constitutional and statutory responsibility within the State for the lawyer discipline and disability system . . . . [T]he responsibility for administering and supervising lawyer

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15. Since the court failed to limit the instances when it would be permissible to use expunged records in attorney-disciplinary proceedings, it is possible other courts could read the decision broadly and find an attorney's expunged records are admissible in disciplinary proceedings. See *In re State Bar of Texas*, 440 S.W.3d at 626–27 (failing to limit the use of expunged records in attorney-disciplinary proceedings). But see *In re Expunction of R.A.*, 417 S.W.3d at 577–79 (recognizing expunged records were available for use in subsequent proceedings because the trial court permitted the retention of expunged records for use in another case).

16. See *In re State Bar of Texas*, 440 S.W.3d at 626–27 (failing to include language that would limit the permissible uses of expunged records in attorney-disciplinary proceedings).

17. See *id.* at 622 (declaring expunged records could be used by the Commission for Lawyer Discipline against an attorney in a disciplinary proceeding); see also Heallen, *supra* note 3 (“The Texas Supreme Court said Friday that the state bar can use records from an expunged criminal case to pursue a disciplinary action against a former state prosecutor . . .”).

discipline and disability is delegated to the Board of Directors of the State Bar of Texas.”<sup>18</sup>

A. *Attorney-Disciplinary Proceedings and the Evidence Used in Those Proceedings*

Every practicing attorney in the state of Texas “is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline.”<sup>19</sup> Attorneys are held to standards outlined in the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure.<sup>20</sup> The Texas Rules of Civil Procedure apply to attorney-disciplinary proceedings<sup>21</sup> because they are essentially civil actions.<sup>22</sup> Once an attorney has notice of allegations made against him or her, the attorney must decide whether to have a hearing in front of a district court or an evidentiary panel of the grievance committee.<sup>23</sup> When in front of the evidentiary panel, the chief disciplinary counsel and the respondent may present evidence.<sup>24</sup> The evidentiary panel chair decides whether the evidence is admissible based on the Texas Rules of Evidence, but the chair also has discretion to act outside of the

18. TEX. RULES DISCIPLINARY P. pmbl. reprinted in TEX. GOV'T CODE ANN., tit. 2 subtit. G, app. A-1 (West 2013).

19. TEX. GOV'T CODE ANN. § 81.071 (West 2012); see also *In re Caballero*, 441 S.W.3d 562, 570–71 (Tex. App.—El Paso 2014, no pet.) (echoing the language of section 81.071 of the Texas Government Code); *Willie v. Comm'n for Lawyer Discipline*, No. 01-11-00428-CV, 2012 WL 761241, at \*3 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (citing GOV'T § 81.071 (West 2005)) (acknowledging every attorney licensed in Texas is subject to the jurisdiction of the Texas Supreme Court and the Commission for Lawyer Discipline).

20. GOV'T § 81.072(d) (West Supp. 2014); see also *In re Caballero*, 441 S.W.3d at 570–71 (acknowledging standards that govern attorneys in Texas).

21. See TEX. RULES DISCIPLINARY P. R. 3.08(B) (“Except as varied by these rules, the Texas Rules of Civil Procedure apply.”); *In re Caballero*, 441 S.W.3d at 570 (stating the Texas Rules of Civil Procedure apply to attorney-disciplinary proceedings).

22. TEX. RULES DISCIPLINARY P. R. 3.08(A); see also *In re Caballero*, 441 S.W.3d at 571 (conceding disciplinary proceedings are civil matters); ELLISTON & KIRK, *supra* note 7, § 30:2, at 237 (providing “[a] statutory expunction proceeding is civil rather than criminal in nature”); 7 TEX. JUR. 3D *Attorneys at Law* § 42, at 541 (2010) (recognizing attorney-disciplinary proceedings are civil actions).

23. Rule 2.15 of the Texas Rules of Disciplinary Procedure notes:

A Respondent given written notice of the allegations and rule violations complained of, in accordance with Rule 2.14, shall notify the Chief Disciplinary Counsel whether the Respondent seeks to have the Complaint heard in a district court of proper venue, with or without a jury, or by an Evidentiary Panel of the Committee.

TEX. RULES DISCIPLINARY P. R. 2.15.

24. See *id.* R. 2.17(L) (“The Respondent, individually or through his or her counsel[,] if represented, and the Commission, through the Chief Disciplinary Counsel, may, if they so choose, offer evidence, examine witnesses and present argument . . .”).

Rules when deciding to admit or exclude the evidence.<sup>25</sup>

In *In re State Bar of Texas*, the underlying attorney-disciplinary proceeding was initially held before an evidentiary panel; the panel found the expunction order was inadmissible and possession of the expunged records was a violation of the expunction order given by the district court.<sup>26</sup>

#### B. *Meaning and Purpose of Expunction Statutes*

Black's Law Dictionary defines expunge as "to erase or destroy."<sup>27</sup> When a record is expunged, it is generally understood the conviction is removed "from a person's criminal record."<sup>28</sup> Most states have expunction statutes that allow or require criminal records to be expunged once certain requirements are fulfilled.<sup>29</sup> Texas's expunction statutes are

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25. *Id.*

26. See *In re State Bar of Texas*, 440 S.W.3d 621, 623 (Tex. 2014) (recognizing the grievance panel's decision to exclude the expunged records); Hall's Response to Relator's Brief, *supra* note 3, at 15–16 (reiterating the decision of the evidentiary panel in the underlying disciplinary proceeding).

27. *Expunge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

28. *Expungement of Record*, BLACK'S LAW DICTIONARY (10th ed. 2014). A number of legal periodicals recognize expunged records are supposed to be erased or destroyed and should no longer appear on record. See Tim Gallagher, *Innocent Until Proven Guilty? Not for Bar Applicants*, 31 J. LEGAL PROF. 297, 304 (2007) ("Though the law varies by state, generally 'the practical effect of expungement is usually to allow a person to say legally that he was never arrested, charged, convicted, or sentenced in connection with the crime involved in an expunged case.'" (quoting Kurt L. Schmoke, *Gone but Not Forgotten: Bar Examiners Cheat Would-Be Lawyers of Second Chance by Asking Them to Disclose Expunged Convictions*, LEGAL AFF, Jan.–Feb. 27, at 27 (2006))); Karen Ann Henson, *Criminal Procedure: Expunction—Fact or Fiction?*, 31 OKLA. L. REV. 978, 979 (1978) (recognizing expunged records should not be available to the public); Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1057 (stating expungement "entails the destruction or sealing of a criminal record when the offender completes certain requirements"); Amy Shlosberg et al., *The Expungement Myth*, 75 ALB. L. REV. 1229, 1229 (2012) ("Expungement is the '[p]rocess by which [a] record of criminal conviction is destroyed or sealed' from the state or federal repository." (citing *Expungement*, BLACK'S LAW DICTIONARY (6th ed. 1990))); Mitchell M. Simon, *Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case for Not Creating Unnecessary Problems*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 79, 86 (2014) (claiming the term expungement generally means criminal files are erased or destroyed).

29. See Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1509 (2003) (citing many state statutes regarding expungement of criminal records). Mukamal and Samuels found forty states allow some or all records to be expunged where there was not a final conviction. *Id.* "[I]twenty-nine states permit the subject of the expunged/sealed records to deny their existence if asked about them on employment applications or similar forms." *Id.* Sixteen states permit some adult convictions to be expunged. *Id.* at 1510. While ten states "do not permit people to expunge or seal arrest records." *Id.* at 1509–10. The article also recognized the issue of the availability of criminal history record information on the Internet. *Id.* at 1510.

codified in the Texas Code of Criminal Procedure.<sup>30</sup> Although Article 55.01 of the Code is titled “Right to Expunction,”<sup>31</sup> courts have held expunction is not a right, but a statutory privilege.<sup>32</sup> Article 55.02 of the Code outlines the procedures that must be followed for expunction.<sup>33</sup> Once an expunction order is final, the expunged documents may not be used for any purpose.<sup>34</sup> An expunction order is violated if the expunged records are knowingly released or used for any reason,<sup>35</sup> and violations are treated as Class B misdemeanors.<sup>36</sup>

Although the Code states expunged records may not be used for any purpose, it contains exceptions allowing for their use in certain situations.<sup>37</sup> However, these exceptions apply only when the court’s final expunction order permits the expunged records to be retained for future use.<sup>38</sup> Based on the definition of expunge and the language within the

30. TEX. CODE CRIM. PROC. ANN. art. 55 (West 2006 & Supp. 2014).

31. CRIM. PROC. art. 55.01 (West Supp. 2014).

32. See *Ex parte* S.C., 305 S.W.3d 258, 260 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (claiming expunction is not a right but a statutory privilege); *T.C.R. v. Bell Cty. Dist. Attorney’s Office*, 305 S.W.3d 661, 663 (Tex. App.—Austin 2009, no pet.) (explaining expunction “is not a constitutional or common-law right”); *Ex parte* Meyers, 24 S.W.3d 477, 480 (Tex. App.—Texarkana 2000, no pet.) (“Expunction is a statutory privilege which is granted and can be limited by the legislature.”); *State v. Autumn Hills Ctrs, Inc.*, 705 S.W.2d 181, 182 (Tex. App.—Houston [14th Dist.] 1985, no writ) (asserting the right to expunction is a statutory privilege). But see CRIM. PROC. art. 55.01 (stating a person is entitled to expunction if all conditions are met); *Moore v. Dall. Cty. Dist. Attorney’s Office*, 670 S.W.2d 727, 728 (Tex. App.—Dallas 1984, no writ) (“Article 55.01 [of the Texas Code of Criminal Procedure] specifically requires that all the listed conditions must be met before expunction is a right.”).

33. CRIM. PROC. art. 55.02 (West Supp. 2014).

34. *Id.* art. 55.03, § 1 (West 2006); see also *K.P. v. State*, 373 S.W.3d 198, 203 (Tex. App.—Beaumont 2012, no pet.) (“Article 55.03 prohibits the release or use of expunged records when the order of expunction has become final.”); 4A TEX. JUR. PLEADING & PRACTICE FORMS § 84:149, at 1064 (2d ed. 2014) (reiterating expunged records are prohibited from use once an expungement order is final).

35. CRIM. PROC. art. 55.04, §§ 1–2 (West 2006); see also *W.V. v. State*, 669 S.W.2d 376, 378 (Tex. App.—Dallas 1984, writ ref’d n.r.e.) (recognizing Article 55.04 imposes criminal sanctions for violations of expunction orders); Brief of Jack Roady, *supra* note 11, at 5–6 (arguing the Commission violated Article 55.04 of the Texas Rules of Criminal Procedure by using expunged records against an attorney).

36. CRIM. PROC. art. 55.04, § 3; see also Brief of Jack Roady, *supra* note 11, at 5–6 (contending the Commission’s use of expunged records in an attorney-disciplinary proceeding is a Class B misdemeanor); 4A TEX. JUR. PLEADING & PRACTICE FORMS, *supra* note 34, § 84:149, at 1066 (emphasizing a person employed by a state entity “commits a misdemeanor criminal offense” if the person knowingly makes expunged records public).

37. See CRIM. PROC. art. 55.02, § 4(a–2)(1) (West Supp. 2014) (allowing expunged records to be used in a subsequent case against an individual who is not the subject of the expunction order); *Id.* § 4(a–2)(2)(B) (authorizing courts to permit retention of expunged records for use in subsequent civil cases when provided for in the expunction order).

38. *Id.* § 4(a–2); see also *In re* Expunction of R.A., 417 S.W.3d 569, 583 (Tex. App.—El Paso

expunction statutes, the purpose of expunging records is to, with narrow exception, remove those records from existence.<sup>39</sup> To allow expunged records to be used in subsequent proceedings when no exception applies directly opposes the purpose of expunction statutes.

### C. *Waiver of Rights*

One of the key points for the Texas Supreme Court in *In re State Bar of Texas* was the acquitted defendant voluntarily waived his right to the expunction order.<sup>40</sup> Texas Code of Criminal Procedure Article 1.14 states a “defendant in a criminal prosecution for any offense may waive any rights secured him by law,”<sup>41</sup> and courts have found this waiver right to include the right to waive an expunction order.<sup>42</sup> However, the purpose of the waiver statute is to allow a criminal defendant to waive any rights secured by law prior to invoking that right.<sup>43</sup> Thus, allowing a defendant to waive his or her right to expunction after an expunction order is final—

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2013, no pet.) (allowing expunged records to be used in an attorney-disciplinary proceeding where the “order permitted the records to be used by various entities, including the State of Texas, the 41st District Court, the State Bar Commission on Lawyer Discipline and its Chief Disciplinary Counsel”). *But see In re State Bar of Texas*, 440 S.W.3d 621, 626–27 (Tex. 2014) (deciding expunged records may be used in an attorney-disciplinary proceeding even if the final expunction order did not provide for the exception).

39. *See* CRIM. PROC. art. 55.03, § 3 (West 2006) (authorizing individuals who are subject to expunction orders to state “the matter in question has been expunged” when asked under oath in certain legal proceedings); *Id.* art. 55.04, § 3 (West 2006) (asserting a person commits an offense by failing to destroy identifying documents ordered expunged); *K.P. v. State*, 373 S.W.3d 198, 203 (Tex. App.—Beaumont 2012, no pet.) (recognizing expunged records may not be used for any purpose once an expunction order is final); *see also* Hall’s Response to Relator’s Brief, *supra* note 3, at 29 (arguing the purpose of the statute is not to permit expunged records to be used in attorney-disciplinary proceedings when almost all records have been destroyed).

40. *In re State Bar of Texas*, 440 S.W.3d at 626. The court relied on Article 1.14 of the Texas Code of Criminal Procedure to find the defendant had the right to waive expunction. Article 1.14 allows defendants subject to criminal prosecution to waive any rights secured by law. CRIM. PROC. art. 1.14(a) (West 2005).

41. CRIM. PROC. art. 1.14(a); *see also* ELLISTON & KIRK, *supra* note 7, § 30:9, at 245 (finding presumption against waiver and courts “do not presume acquiescence in the loss of fundamental rights”).

42. *See In re State Bar of Texas*, 440 S.W.3d at 625 (acknowledging an individual may “unexpunge” his or her records “by putting those records at issue in another proceeding”); *In re Expunction of Jones*, 311 S.W.3d 502, 506 (Tex. App.—El Paso 2009, no pet.) (holding the defendant’s signature unambiguously expressed his “intent” to waive expunction rights).

43. *See In re Expunction of M.C.*, 412 S.W.3d 48, 54 (Tex. App.—El Paso 2013, pet. denied) (allowing waiver of the right to expunction for the purposes of pretrial diversion programs); *In re Expunction of R.B.*, 361 S.W.3d 184, 186–87 (Tex. App.—El Paso 2012, pet. denied) (declaring the petitioner waived his right to expunction upon signing a pretrial agreement); *In re Expunction of Jones*, 311 S.W.3d at 505–06 (denying the petitioner’s right to expunction when that right had been waived in order to receive a plea deal).

the exercising of the right to expunction—would undermine the purpose of Texas’s waiver statute.

### III. THE REPERCUSSIONS OF *IN RE STATE BAR OF TEXAS*

On January 15, 2014, the Texas Supreme Court granted six cases for argument, including *In re State Bar of Texas*.<sup>44</sup> This case arose out of “a disciplinary proceeding against former prosecutor Jon L. Hall, who allegedly suppressed exculpatory evidence in an aggravated robbery prosecution.”<sup>45</sup>

#### A. *The Path to the Texas Supreme Court*

Jon L. Hall was the prosecuting attorney in an aggravated robbery trial against Joshua Bledsoe.<sup>46</sup> The Commission for Lawyer Discipline began investigating Hall after receiving an article reporting Bledsoe was acquitted because Hall suppressed exculpatory evidence during trial.<sup>47</sup> During the investigation, a partial transcript was anonymously delivered to the Commission indicating Hall withheld an audio recording that would have revealed contradictory statements made by the victim.<sup>48</sup> Based on its findings, the Commission initiated disciplinary action against Hall.<sup>49</sup> As previously stated, an attorney may choose to have his case heard in district court or in front of an evidentiary panel once notified of pending allegations.<sup>50</sup> Hall chose to have his case heard by the evidentiary panel.<sup>51</sup> The Commission based a portion of its case against Hall on expunged records from the aggravated robbery prosecution.<sup>52</sup> Hall filed a motion to exclude the expunged records, and the evidentiary panel chair granted his motion.<sup>53</sup> The panel chair further held “any document or other evidence derived from the underlying criminal case and subject to the 212[th] District Court’s expunction order may not be used, directly or indirectly,

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44. Don Cruse, *SCOTX Grants Six Cases Today for Argument in February*, THE SUP. CT. OF TEX. BLOG (Jan. 15, 2014), <http://www.scotxblog.com/orders/scotx-grants-six-cases-today-for-argument-in-february-jan-15-2014>.

45. *In re State Bar of Texas*, 440 S.W.3d at 622.

46. *Id.* at 622–23.

47. *Id.*

48. *Id.* at 623.

49. *Id.*

50. See TEX. RULES DISCIPLINARY P. R. 2.15, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (West 2013) (allotting twenty days after receipt of written notice for a Respondent to notify the Chief Disciplinary Counsel their chosen method of election).

51. *In re State Bar of Texas*, 440 S.W.3d at 623.

52. Hall’s Response to Relator’s Brief, *supra* note 3, at 14.

53. *In re State Bar of Texas*, 440 S.W.3d at 623.

to prosecute this disciplinary proceeding.”<sup>54</sup>

Based on the decision by the panel chair, the Commission for Lawyer Discipline filed a motion with the 212th District Court to modify the expunction order.<sup>55</sup> The district court conducted a hearing on November 19, 2012.<sup>56</sup> The Commission’s motion was denied, and the court “ordered the [Commission for Lawyer Discipline] to return the partial transcript to the court[] and prohibited use of expunged documents by any party.”<sup>57</sup> Subsequently, the State Bar evidentiary panel granted Hall’s no-evidence motion for summary judgment.<sup>58</sup> As a result of the evidentiary panel’s decision, the Commission filed a petition for a writ of mandamus, challenging the district court’s decision to prevent the Commission from relying on expunged records in the disciplinary proceeding.<sup>59</sup>

### B. *The Texas Supreme Court Decides*

On February 6, 2014, the Texas Supreme Court heard oral arguments in *In re State Bar of Texas*.<sup>60</sup> The Commission argued the district court’s preclusion of the expunged records violated the purpose of expunction statutes and interfered with the disciplinary proceedings.<sup>61</sup> The Commission further argued Bledsoe, whose expunged records were in question, supported the Commission’s use of his records in the disciplinary proceeding.<sup>62</sup> Hall asserted the district court did not interfere with the evidentiary panel’s decision to exclude the expunged records;

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54. Hall’s Response to Relator’s Brief, *supra* note 3, at 15–16.

55. *In re State Bar of Texas*, 440 S.W.3d at 623.

56. Hall’s Response to Relator’s Brief, *supra* note 3, at 17.

57. *Id.* at 18; *see also In re State Bar of Texas*, 440 S.W.3d at 623 (“[T]he visiting judge concluded that the underlying expunction order precluded the Commission from relying on any of the expunged records and ordered the Commission to turn over all information in its possession related to Bledsoe’s arrest . . .”).

58. *In re State Bar of Texas*, 440 S.W.3d at 622. Texas is one of few states that recognize a no-evidence motion for summary judgment, which differs from a traditional summary judgment motion. *See* TEX. R. CIV. P. 166a(i) (allowing parties to move for summary judgment by asserting the adverse party does not have evidence to prove at least one essential element of their claim or defense).

59. *In re State Bar of Texas*, 440 S.W.3d at 622.

60. *Id.* at 621; *see also* Cruse, *supra* note 44 (reporting the date arguments would be heard in the case).

61. *In re State Bar of Texas*, 440 S.W.3d at 625. *See generally* Real Party in Interest’s Brief on the Merits at 1–8, *In re State Bar of Texas*, 440 S.W.3d 621 (Tex. 2014) (No. 13-0161), 2013 WL 3551430 [hereinafter Real Party in Interest’s Brief] (providing an in-depth argument for the Commission’s case).

62. *In re State Bar of Texas*, 440 S.W.3d at 625; *see also* Real Party in Interest’s Brief, *supra* note 61, at 6–8 (noting Mr. Bledsoe “never intended for an expunction order” to impede the Commission from prosecuting Hall).

therefore, the Commission had no basis for seeking mandamus relief.<sup>63</sup> Additionally, Hall claimed the Commission's use of the expunged records would undermine the purpose of expunction statutes and Bledsoe's support for the use of the records came after most of the files had been destroyed.<sup>64</sup> Another interested party supported Hall's contention<sup>65</sup> and argued the court had no power to suspend the laws of the state for the Commission.<sup>66</sup>

The court made several findings in the case and noted several applicable rules.<sup>67</sup> Notably, the court's decision was guided by a few key factors: the defendant's waiver of the already finalized expunction order, the relevance of the records, and the Commission's argument that it needed the expunged records for the disciplinary proceeding.<sup>68</sup> The court asserted expunctions are not absolute and exceptions may allow the use of expunged records in certain circumstances.<sup>69</sup> In addition to discussing the exceptions to expunction statutes, the court discussed the right of a person to waive expunged records, so they may be used in other proceedings.<sup>70</sup> Ultimately, the court interpreted the district court's decision as conflicting with both the expunction statute and the acquitted defendant's interest.<sup>71</sup>

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63. See Hall's Response to Relator's Brief, *supra* note 3, at 23 (arguing the evidentiary panel's exclusion ruling takes precedence unless the district court amends their order; thus, redress must be sought through substantive appeal).

64. See *id.* at 30 (contending the acquitted defendant should have requested an exception before the expunction order was final or filed a separate grievance against Hall).

65. See Brief of Jack Roady, *supra* note 11, at 4 (asserting the Commission's use of the expunged records would violate the expunction statute). This brief relied on Article 55.04 of the Texas Code of Criminal Procedure, which outlines methods of violating expunction orders. TEX. CODE CRIM. PROC. ANN. art. 55.04 (West 2006).

66. See Brief of Jack Roady, *supra* note 11, at 7 (claiming it "would violate the Texas Constitution" to allow the Commission to use expunged records in the disciplinary proceeding). The Texas Constitution grants the power to suspend laws solely to the state legislature. TEX. CONST. art. I, § 28.

67. The Texas Supreme Court focused on articles of the Code of Criminal Procedure and cases regarding expunction as well as waiver of the right to expunction. *In re State Bar of Texas*, 440 S.W.3d at 622–27.

68. *Id.* at 627.

69. *Id.* at 624–25; see also CRIM. PROC. art. 55.02, § 4(a–2) (West Supp. 2014) (providing exceptions that allow expunged records to be kept for use in future cases); *In re Expunction of R.A.*, 417 S.W.3d 569, 578–79 (Tex. App.—El Paso 2013, no pet.) (acknowledging exceptions within the expunction statutes).

70. See *In re State Bar of Texas*, 440 S.W.3d at 626 (noting the district court's abuse of discretion in disregarding Bledsoe's voluntary waiver); see also CRIM. PROC. art. 1.14(a) (West 2005) (stating a defendant in a criminal case "may waive any rights secured him by law").

71. *In re State Bar of Texas*, 440 S.W.3d at 626; see also Heallen, *supra* note 3 (reiterating major aspects of the court's decision concerning the use of the expunged records, including the acquitted defendant's federal lawsuit against Hall).

It further found, “An order that directly interferes with the Commission’s ability to collect and present evidence is as much a direct interference in the disciplinary process as an order directed to a grievance panel itself.”<sup>72</sup> The court granted the mandamus relief and ordered “the trial court to vacate its order.”<sup>73</sup> Thus, this decision effectively allows expunged records to be used in attorney-disciplinary proceedings.<sup>74</sup> In his concurrence, Justice Boyd agreed with the court’s decision but believed the court went too far in its conclusion.<sup>75</sup> In Justice Boyd’s view, the only proper reason for the court’s decision was the defendant from the underlying criminal case voluntarily waived his expunction rights.<sup>76</sup>

C. *The Decision Opposes the Purpose of Expunction Statutes*

The Texas Supreme Court’s decision goes against the purpose of expungement statutes.<sup>77</sup> The court stated, “The expunction statute’s purpose is not to eradicate all evidence of wrongful conduct.”<sup>78</sup> Rather, it is meant to protect a defendant who has been wrongfully accused.<sup>79</sup> While the statutes are meant to protect a defendant, they are also meant to prevent those records from being used in future proceedings.<sup>80</sup> The expunction statute clearly imposes criminal liability in the event it is

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72. *In re State Bar of Texas*, 440 S.W.3d at 627.

73. *Id.*

74. *See id.* at 622 (“[W]e conclude that the expungement order does not bar the Commission from using records from the criminal trial in the grievance proceeding . . .”); *see also* Council, *supra* note 1 (providing an overview of the Texas Supreme Court’s decision allowing expunged records to be used in attorney-disciplinary proceedings).

75. *See In re State Bar of Texas*, 440 S.W.3d at 627 (Boyd, J., concurring) (finding the majority’s latter two reasons for their holding inadequate and lacking justification to disregard the expunction statute’s unambiguous language).

76. *See id.* at 627–28 (“Because the defendant has waived his rights under the expunction statute, I agree that the trial court abused its discretion by denying the Commission access to the criminal trial record.”).

77. *See* TEX. CODE CRIM. PROC. ANN. art. 55.03, § 1 (West 2006) (“[T]he release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited . . .”); Hall’s Response to Relator’s Brief, *supra* note 3, at 29 (arguing the purpose of the statute is not to allow the Commission to wait until almost all records are destroyed and then attack an attorney with expunged records that have yet to be destroyed).

78. *In re State Bar of Texas*, 440 S.W.3d at 626.

79. *Id.* at 624; *see also* ELLISTON & KIRK, *supra* note 7, § 30:1, at 236 (asserting expunction statutes protect wrongfully arrested individuals from the negative impact of that arrest); 27A TEX. JUR. 3D, *supra* note 7, § 1189, at 434 (stating the expunction law is not intended to benefit persons who are arrested, plead guilty, and receive probation as a result of their guilty plea).

80. *See* CRIM. PROC. art. 55.03, § 1 (prohibiting the use of expunged records for any purpose after an expungement order is final); Brief of Jack Roady, *supra* note 11, at 8 (acknowledging there are restrictions against using expunged records).

violated.<sup>81</sup> By this standard, the Commission's use of the expunged records to formulate arguments against the attorney would constitute a crime.<sup>82</sup> Nevertheless, the court effectively suspended a valid statute by allowing expunged records to be used after an expunction order had been finalized,<sup>83</sup> and the decision to allow the Commission to use Bledsoe's expunged records in the attorney-disciplinary proceeding violates Texas's Constitution and expunction statutes.<sup>84</sup>

A counter argument to this view, as the court points out, is there are exceptions within the expunction statutes that allow expunged records to be used in certain situations.<sup>85</sup> Although this is true, the records in this case did not fall within those exceptions. The order did not include language allowing the records and files to be maintained for use in future proceedings; in fact, the Commission sought to have the order modified to allow for the use of expunged records and the motion for modification was denied.<sup>86</sup> The statute clearly permits law enforcement personnel and the prosecuting attorney to retain expunged records if they are necessary for use in future proceedings;<sup>87</sup> however, for this exception to apply, the court ordering the expunction would have to include language in the order allowing the maintenance and use of records or files in subsequent proceedings.<sup>88</sup> Here, the order did not include such language.<sup>89</sup> Thus,

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81. CRIM. PROC. art. 55.04, § 3 (West 2006) (stating the use of expunged records is a Class B misdemeanor).

82. *Id.*

83. *Id.* art. 55.03, § 1; *Id.* art. 55.04, § 3.

84. The only circumstance in which expunged records may be used occurs when the final expunction order permits the use of the expunged records in subsequent proceedings. CRIM. PROC. art. 55.02, § 4(a-2) (West Supp. 2014). The court suspended the law for the Commission for Lawyer Discipline. *See In re State Bar of Texas*, 440 S.W.3d at 627 (allowing the use of expunged records by the Commission). The power to suspend the law does not belong to the court; it belongs solely to the legislature. TEX. CONST. art. I, § 28.

85. *See* CRIM. PROC. art. 55.02, § 4(a-2)(1) (stating the court's expunction order may provide for the records to be used in a subsequent case against an individual other than the one "who is the subject of the expunction order"); *Id.* § 4(a-2)(2)(B) (allowing the use of expunged records in subsequent civil cases when a court provides for it in the order); *see also In re State Bar of Texas*, 440 S.W.3d at 624-25 (recognizing exceptions for the use of expunged records within the expunction statute).

86. *In re State Bar of Texas*, 440 S.W.3d at 624; Hall's Response to Relator's Brief, *supra* note 3, at 16-19.

87. CRIM. PROC. art. 55.02, § 4(a-2) ("In the case of a person who is the subject of an expunction order on the basis of an acquittal, the court may provide in the expunction order that the law enforcement agency and the prosecuting attorney retain records and files . . .").

88. *Id.* Notably, the statute does not make it mandatory for expunged records or files to be maintained for use in certain situations. *See id.* (allowing expunged records to be maintained or used *if* the court includes language in the order but not requiring expunged records *always* be made available). In another Texas case, the judge in the underlying proceeding explicitly made a partial

the court should not have allowed their use.

The Texas Supreme Court also claimed Bledsoe waived his right to the expunction, making the records available for use in the subsequent proceeding against Hall.<sup>90</sup> However, while Article 1.14 of the Texas Code of Criminal Procedure allows the waiver of “any rights secured” by law,<sup>91</sup> it does not appear the right to waiver would apply after a right has been invoked.<sup>92</sup> Thus, the court suspended the law for the Commission to use expunged records in disciplinary proceedings,<sup>93</sup> but it is not within the court’s discretion to do so; the power to suspend the law belongs solely to the legislature.<sup>94</sup>

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expungement order to allow the expunged records to be maintained and used in a subsequent attorney-disciplinary proceeding. *In re* Expunction of R.A., 417 S.W.3d 569, 577–79 (Tex. App.—El Paso 2013, no pet.). *But cf. In re State Bar of Texas*, 440 S.W.3d at 626–27 (holding exceptions were applicable even though the final expunction order did not provide the expunged records could be maintained for use in future proceedings).

89. *See In re State Bar of Texas*, 440 S.W.3d at 625 (noting the trial court’s order did not “make an exception for the Commission to use expunged records in its prosecution”).

90. *Id.*; *see also In re* Expunction of Jones, 311 S.W.3d 502, 506 (Tex. App.—El Paso 2009, no pet.) (explaining expunction may be waived); *In re* Expunction of Arnold, 34 S.W.3d 583, 586–87 (Tex. App.—El Paso 2000, no pet.) (affirming the defendant voluntarily waived his expunction rights); ELLISTON & KIRK, *supra* note 7, § 30:9, at 245 (acknowledging a defendant may waive the right to expunction).

91. CRIM. PROC. art. 1.14(a) (West 2005); *see In re State Bar of Texas*, 440 S.W.3d at 626 (recognizing the Code establishes the ability to waive rights secured by law); *In re Expunction of Jones*, 311 S.W.3d at 505 (explaining expunction is a right that may be waived under the Code); *see also* ELLISTON & KIRK, *supra* note 7, § 30:9, at 245 (reiterating the fact a defendant may waive any rights secured by law).

92. *See In re* Expunction of M.C., 412 S.W.3d 48, 54 (Tex. App.—El Paso 2013, pet. denied) (concluding the right to expunction was waived upon entering a pretrial diversion program); *In re* Expunction of R.B., 361 S.W.3d 184, 186–87 (Tex. App.—El Paso 2012, pet. denied) (confirming the petitioner waived his right to expunction after entering into a pretrial agreement); *In re Expunction of Jones*, 311 S.W.3d at 505–06 (holding the petitioner’s right to expunction had been waived after entering into a plea deal). *But see In re State Bar of Texas*, 440 S.W.3d at 625 (establishing the defendant could voluntarily waive expunction rights after the expunction order had been finalized); *Id.* at 627 (Boyd, J., concurring) (acknowledging the right to expunction could be waived after the order was finalized).

93. *See In re State Bar of Texas*, 440 S.W.3d at 627 (majority opinion) (allowing the use of expunged records after the right to expunction was waived and the order already finalized); *see also* CRIM. PROC. art. 55.04 (West 2006) (asserting it is a violation of the law to use expunged records after an order has been finalized); Brief of Jack Roady, *supra* note 11, at 7 (citing TEX. CONST. art. I, § 28) (arguing the court would violate the Texas Constitution if it allowed the records to be used).

94. TEX. CONST. art. I, § 28 (“No power of suspending laws in this State shall be exercised except by the Legislature.”); *see also* *State v. Ferguson*, 125 S.W.2d 272, 276 (Tex. 1939) (recognizing the power to suspend laws belongs exclusively to the legislature).

D. *How the Texas Supreme Court's Decision Compares to Other Jurisdictions*

Other courts in the nation have issued opinions on whether expunged records may be used after an expunction order has been finalized.<sup>95</sup> The opinions of these courts differ, demonstrating nationwide inconsistency on the issue. Some courts have decided expunged records may not be used,<sup>96</sup> while others have allowed them.<sup>97</sup> Although there may not be a definitive answer regarding the use of expunged records, the Texas Supreme Court should not have allowed the expunged records to be used in the attorney-disciplinary proceeding. Regardless of the correctness of the decision as a whole, the Texas court should have included language in its decision limiting the permissible uses of expunged records in subsequent proceedings.

E. *Repercussions of the Texas Supreme Court's Decision*

The actual and potential repercussions of the Texas Supreme Court's decision are chilling and may have an effect on both current and future attorneys. The obvious and real result is expunged records may be used in attorney-disciplinary proceedings even if the final expunction order did not contain language permitting such use.<sup>98</sup>

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95. See generally *People v. Field*, 37 Cal. Rptr. 2d 803 (Ct. App. 4th Dist. 1995) (considering whether a witness could be impeached with a prior expunged conviction); *Meyer v. Superior Court of Sacramento Cty.*, 55 Cal. Rptr. 350 (Ct. App. 5th Dist. 1966) (contemplating whether expunged records were available for evidentiary use at a later trial); *Myers v. Div. of Vehicles*, 596 P.2d 181 (Kan. Ct. App. 1979) (deciding whether expunged records could be considered when suspending driving privileges); *People v. Smith*, 470 N.W.2d 70 (Mich. 1991) (considering whether expunged juvenile records could be considered in sentencing); *In re Meaden*, 628 N.W.2d 129 (Minn. 2001) (discussing the use of expunged records in a disciplinary proceeding); *McLaughlin v. Commonwealth*, 751 A.2d 714 (Pa. Commw. Ct. 2000) (determining whether an expunction order barred the use of expunged documents in a civil action to suspend driving privileges).

96. See *Field*, 37 Cal. Rptr. 2d at 810 (holding a witness could not be impeached with a prior expunged conviction); *Myers*, 596 P.2d at 182–83 (concluding expunged convictions could not be considered by the Division of Vehicles in ordering suspension of driving privileges); *State v. Leitner*, 646 N.W.2d 341, 352 (Wis. 2002) (“An expunged record of a conviction cannot be considered at a subsequent sentencing; an expunged record of a conviction cannot be used for impeachment at trial... and an expunged record of a conviction is not available for repeater sentence enhancement.”).

97. See *Meyer*, 55 Cal. Rptr. at 356 (permitting expunged records to be used for evidentiary purposes in a later trial); see also *Smith*, 470 N.W.2d at 75 (allowing an expunged juvenile record to be considered in sentencing of an adult defendant); *In re Meaden*, 628 N.W.2d at 132–33 (accepting a New Jersey court's decision that allowed the use of expunged records in an attorney-disciplinary proceeding); *McLaughlin*, 751 A.2d at 717 (determining the expunction order did not bar the use of expunged documents in a civil action to suspend driving privileges).

98. See *In re State Bar of Texas*, 440 S.W.3d at 627 (holding expunged records from a criminal trial may be used in a grievance proceeding); Hall's Response to Relator's Brief, *supra* note 3, at 19

One of the potential repercussions—seemingly the most unsettling—is the decision may be interpreted to allow an attorney’s expunged records to be used in a disciplinary proceeding against him or her.<sup>99</sup> Although the Texas Supreme Court’s decision does not explicitly allow for this, it fails to limit the use of expunged records to situations such as the one presented in the case.<sup>100</sup> This is already problematic for persons applying to law school and law students applying for admission to the state bar.<sup>101</sup> For example, in Texas, the State Bar and the Board of Law Examiners are entitled to obtain criminal history information regarding applicants to take the bar and attorneys seeking reinstatement to the bar.<sup>102</sup> However, these entities are allowed only to obtain criminal history information when permitted by statute, rule, or court order.<sup>103</sup> This case opens the door for this problem to be extended to those who are already attorneys in Texas. Without limitation, this decision has the potential to cause significant harm to Texas attorneys.

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(advancing the decision by the district court not to modify the expunction order to allow its use in the disciplinary proceeding); Council, *supra* note 1 (discussing the opinion in *In re State Bar of Texas*). *But see In re Expunction of R.A.*, 417 S.W.3d 569, 577–79 (Tex. App.—El Paso 2013, no pet.) (permitting expunged records to be used in a subsequent disciplinary proceeding when the expunction order allows the records to be maintained for use in a subsequent proceeding).

99. The Minnesota Supreme Court allowed an attorney’s expunged records to be used in a disciplinary proceeding against him after analyzing the New Jersey Supreme Court’s decision to allow the same attorney’s expunged records to be used in a disciplinary proceeding in that state. *In re Meaden*, 628 N.W.2d at 132–33.

100. *See In re State Bar of Texas*, 440 S.W.3d at 627 (allowing expunged records to be used in a disciplinary proceeding but failing to limit when the use is permissible). *But see In re Expunction of R.A.*, 417 S.W.3d at 577–79 (permitting expunged records to be used in future proceedings where the expungement order was partial).

101. A 2014 *Notre Dame Journal of Law, Ethics, & Public Policy* article found 58% of law school applications explicitly require disclosure of expunged offenses. Simon, *supra* note 28, at 120. Thirty-two percent of applications do not instruct applicants on whether to disclose expunged offenses. *Id.* Only 10% of law schools explicitly “do not require disclosure of expunged criminal offenses.” *Id.* Another article from the *Journal of the Legal Profession* found “some states require [the applicant to divulge any instance where he or she has been charged with or arrested for a crime] even if it has been sealed or expunged.” Gallagher, *supra* note 28, at 297.

102. *See* TEX. GOV’T CODE ANN. § 411.100(a) (West 2012) (allowing the Board of Law Examiners to obtain criminal history record information regarding an applicant to take the bar exam); *Id.* § 411.1005(a) (permitting the State Bar of Texas to obtain criminal history record information regarding attorneys, witnesses, and applicants for reinstatement to the state bar); *see also id.* § 411.083(b) (authorizing certain entities to gain access to criminal history record information). However, the code does limit the extent to which criminal history record information may be used. *Id.* § 411.084(a).

103. *See id.* § 411.084(a)(2) (stating criminal history record information is available only if authorized by subchapter, statute, rule, or court order).

## IV. TWO RECOMMENDED SOLUTIONS

This Comment proposes two solutions. The first is to explicitly deny the use of expunged records in attorney-disciplinary proceedings. This recommendation would be ideal, but it is clear there are situations where the use of expunged records may be necessary to ensure justice. The second, more reasonable solution, is to limit the use of expunged records in disciplinary proceedings to certain situations.

A. *Expunged Records Should Not Be Used in Attorney-Disciplinary Proceedings*

There are various reasons why expunged records should not be used in disciplinary proceedings. First, the clear and unambiguous language of one Texas's expunction statute states once the expunction order is final, "the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited."<sup>104</sup> However, expunction statutes do allow for the use of expunged records when such use is permitted in the final expunction order.<sup>105</sup> Following this language, it is apparent expunged records should not be used for any purpose once an expunction order has been finalized unless such use is provided for in the order. Second, the use of expunged records should be prohibited because it is against the law to violate an expunction order by knowingly using expunged records or files in any manner.<sup>106</sup>

Allowing the use of expunged records once an order has been finalized violates the law.<sup>107</sup> The Texas Supreme Court does not have the power to

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104. TEX. CODE CRIM. PROC. ANN. art. 55.03, § 1 (West 2006); see *K.P. v. State*, 373 S.W.3d 198, 203 (Tex. App.—Beaumont 2012, no pet.) (holding the trial court abused its discretion by allowing expunged records to be made available for inspection); see also 4A TEX. JUR. PLEADING & PRACTICE FORMS, *supra* note 34, § 84:149, at 1064–65 (recognizing a person may deny their arrest and the existence of the expunction order once it is finalized); 27A TEX. JUR. 3D *supra* note 7, § 1195, at 442 (acknowledging the use of expunged records for any purpose is prohibited).

105. CRIM. PROC. art. 55.02, § 4(a–2) (West Supp. 2014); see *In re State Bar of Texas*, 440 S.W.3d at 624 (recognizing two exceptions permitting retention of expunged records in subsequent criminal or civil proceedings); *In re Expunction of R.A.*, 417 S.W.3d at 577–79 (permitting the use of expunged records where the final expunction order allowed for subsequent use).

106. CRIM. PROC. art. 55.03, § 1; *id.* art. 55.04, § 3 (West 2006). Criminal history record information may be only used when permitted, and based on the expunction statutes, criminal history records may not be used unless the final expunction order includes language that would permit the use of the expunged records. See GOV'T § 411.084(a)(2) (stating the use of criminal history record information is permissible only when allowed by statute, rule, or court order); CRIM. PROC. art. 55.02, § 4(a–2) (West Supp. 2014) (allowing expunged records to be retained for use when the ordering court permits such use).

107. See Brief of Jack Roady, *supra* note 11, at 7 ("This Court would violate the Texas Constitution . . . by allowing the Commission [for Lawyer Discipline] to obtain and use expunged records."); see also CRIM. PROC. art. 55.03, § 1 (mandating the use of expunged records for any

suspend the law for the Commission; that power belongs solely to the Texas legislature.<sup>108</sup> Finally, the court's decision may be the first of its kind in the jurisdiction.<sup>109</sup> Although the argument that the use of expunged records should not be done simply because it has never been done before is not very strong, the argument should carry some weight. The historical argument should not be the deciding factor, but it is a factor to be considered when determining whether the use of expunged records in attorney-disciplinary proceedings is permissible.<sup>110</sup>

There are multiple reasons to prohibit the use of expunged records in attorney-disciplinary proceedings, and the court in *In re State Bar of Texas* should not have allowed the expunged records to be used in the underlying disciplinary proceeding. However, courts may be reluctant to bar the use of expunged records completely.

B. *Use of Expunged Records in Attorney-Disciplinary Proceedings Should Be Limited*

Although there are reasons expunged records should not be allowed in attorney-disciplinary proceedings, there may be times when the use of such records could be permitted. In these instances, the use of expunged records should be limited.

The first situation is when the retention of expunged records for future use is permitted in the expunction order. Texas's expunction statutes clearly state the use of expunged records, once an order has been finalized, is against the law,<sup>111</sup> but Article 55.02 of the Code of Criminal Procedure

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purpose is prohibited); *Id.* art. 55.04, § 3 (condemning any prohibited use of expunged records as a Class B misdemeanor).

108. TEX. CONST. art. I, § 28; *see also* *State v. Ferguson*, 125 S.W.2d 272, 276 (Tex. 1939) ("Not only may judges and courts not suspend a statute, but neither may they supervise and direct the manner and method of its enforcement . . ."); Brief of Jack Rody, *supra* note 11, at 7 (recognizing the legislature holds the power to suspend laws).

109. *See* Council, *supra* note 1 (claiming the Texas Supreme Court's decision was an unusual one). There is another case that is on point but distinguishable because it permits the use of a defendant's expunged records but only because such use is permitted in the final expunction order. *See In re Expunction of R.A.*, 417 S.W.3d at 583 (explaining the use of expunged records in this case was permitted because such use was temporarily provided for in the expunction order).

110. The historical argument has arisen a number of times in different legal areas. *See* Phillip Morris USA v. Williams, 549 U.S. 346, 351 (2007) (recognizing a long standing practice of setting punitive damages was guiding but not binding); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (finding the long history of legislative prayer was reason to allow the practice to continue); *Al Bahlul v. U.S.*, 767 F.3d 1, 73 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part, dissenting in part) (acknowledging historical practice supports conclusions regarding practices of Congress in war times).

111. CRIM. PROC. art. 55.03, § 1; *Id.* art. 55.04, § 3; *see also* Brief of Jack Rody, *supra* note 11, at

allows for the use of expunged records in subsequent proceedings when provided for in the final expunction order.<sup>112</sup> This was the situation in *In re R.A.*; the court allowed the defendant's expunged records to be used in a later disciplinary proceeding against the defendant's attorneys because the expunction order permitted the retention of the expunged records for use in that proceeding.<sup>113</sup> *In re R.A.* can be distinguished from *In re State Bar of Texas* because the expunction order did not permit use in future proceedings in the latter case.<sup>114</sup> If the expunction order at issue in *In re State Bar of Texas* allowed for the use of the expunged records in subsequent proceedings, it is unlikely the case would have gone to the Texas Supreme Court because the State Bar of Texas would have been permitted to use the expunged records in the disciplinary proceeding. Therefore, the court in *In re State Bar of Texas* should have factored that into its decision and held the expunged records could not be used in the attorney-disciplinary proceeding.

The second possible situation occurs when the expunged records are directly at issue in the matter. Some courts have found expunged records are discoverable in a civil proceeding where the suit is brought as a result of the expunged matter.<sup>115</sup> Similar rules exist for privileges under the Texas Rules of Evidence.<sup>116</sup> The court in *In re State Bar of Texas* found

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6–7 (reiterating it is a violation of the law to use expunged records once an expunction order has been finalized).

112. CRIM. PROC. art. 55.02, § 4(a–2) (West Supp. 2014); see also *In re State Bar of Texas*, 440 S.W.3d 621, 624–25 (Tex. 2014) (recognizing the court ordering the expunction may include language permitting retention and use of expunged records); *In re Expunction of R.A.*, 417 S.W.3d at 578 (acknowledging the Texas Code of Criminal Procedure authorizes a court to permit retention of expunged records for future use).

113. See *In re Expunction of R.A.*, 417 S.W.3d at 583 (“[T]he order provides for the temporary retention of the records until the ancillary proceedings are concluded.”).

114. Compare *id.* at 577–79 (allowing the use of expunged records in a disciplinary proceeding where the final expunction order permitted such use), with *In re State Bar of Texas*, 440 S.W.3d at 622 (permitting the use of expunged records in a disciplinary proceeding when the final expunction order did not provide that the expunged records could be retained for future use).

115. See *Thomas v. City of Selma*, No. SA-06-CA-0119-XR, 2006 WL 2854405, at \*3 (W.D. Tex. Oct. 4, 2006) (holding expunged records of a plaintiff were discoverable in a civil suit where the plaintiff brought suit as a result of the expunged matter); *Goss v. Hous. Cmty. Newspapers*, 252 S.W.3d 652, 656 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (stating expunged records were discoverable because the lawsuit was brought regarding the expunged arrest); *W.V. v. State*, 669 S.W.2d 376, 379 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (“If the petitioner should file a civil action arising out of his arrest, he necessarily by his own allegations makes the materials contained in the expunged records, as well as the contents of the expunction file, a matter of public record subject to discovery proceedings.”); see also *In re State Bar of Texas*, 440 S.W.3d at 625–26 (recognizing expunged records may be discoverable where the expunged records are put at issue in the proceeding).

116. See TEX. R. EVID. 509(e)(4) (allowing privileged physician–patient information to be discovered when any party is relying on “the physical, mental, or emotional condition of a patient” as

Bledsoe essentially “unexpunge[d]” his records by putting those records at issue” in the proceeding.<sup>117</sup> However, Bledsoe filed his own *separate* lawsuits against Hall,<sup>118</sup> whereas the Commission for Lawyer Discipline brought suit against Hall in the disciplinary proceeding.<sup>119</sup> According to the court, Bledsoe made “his arrest and prosecution a matter of public record” by filing his own lawsuits.<sup>120</sup> Based on the precedents set by other courts, bringing suit as a result of an expunged matter would make the expunged records discoverable in *that suit* but would not completely remove the expunction and make those records public information.<sup>121</sup>

part of a claim or defense); *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994) (“The exception now terminates the privileges whenever any party relies upon the condition of the patient as a part of the party’s claim or defense, even though the patient has not personally placed the condition at issue, and even though the patient is not a party to the litigation.”); see also *In re Collins*, 286 S.W.3d 911, 916 (Tex. 2009) (determining the physician–patient privilege does not apply when privileged information relevant to medical issues is relied upon by a party as part of a claim or defense); *In re Jarvis*, 431 S.W.3d 129, 135 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (acknowledging privileged information is available when the information is at issue in the suit). A number of law journals discuss the patient–litigant exception for privileged physician–patient information. See Erin Dwyer & Donald Colleluori, Note, *Texas Civil Procedure*, 48 SMU L. REV. 1615, 1631 (1995) (recognizing there is no privilege when privileged information regarding medical conditions is relied upon by any party as part of a claim or defense); John Matney, Note, *What’s it Worth? The Patient-Litigant Exception Whittles away at the Physician-Patient and Medical Health Information Privileges: R.K., M.D. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994), 26 TEX. TECH. L. REV. 993, 997–99 (1995) (providing an overview of the patient–litigant exception); John M. Suarez & Jan Hunt, *The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since In re Lifschutz*, 1 UCLA-ALASKA L. REV. 2, 7–8 (1971) (discussing the use of the patient–litigant exception). A similar doctrine known as the offensive use doctrine is derived from the Texas Rules of Evidence and provides when a privilege may be waived: “(1) the party asserting the privilege seeks affirmative relief; (2) the information, if believed by the trier of fact, would probably be outcome determinative; and (3) disclosure of the privileged communication is the only means of obtaining the evidence.” *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 478 (N.D. Tex. 2004); see also *Transamerican Natural Gas Corp. v. Flores*, 870 S.W.2d 10, 11 (Tex. 1994) (reiterating the test for the offensive use doctrine). Although these two doctrines are similar, courts have distinguished between them and found they are independent and unrelated to one another. See *R.K.*, 887 S.W.2d at 841 (“[T]he offensive use doctrine is independent from and unrelated to the privilege exception for patient[–]litigants . . . .”); *Midkiff v. Shaver*, 788 S.W.2d 399, 402–03 (Tex. App.—Amarillo 1990, no pet.) (finding although privileged information was not discoverable under Texas Rule of Evidence 509(e)(4), privileged information was discoverable under the offensive use doctrine because a party sought damages to cover medical treatment); see also Dwyer & Colleluori, *supra*, at 1631 (acknowledging “that the patient[–]litigant exception stated in Rule [509(e)(4)] is unrelated to the offensive use doctrine” (citing *R.K.*, 887 S.W.2d at 841)).

117. *In re State Bar of Texas*, 440 S.W.3d at 625 (citing *W.V.*, 669 S.W.2d at 378–79).

118. *Id.* at 625–26.

119. *Id.* at 623; Hall’s Response to Relator’s Brief, *supra* note 3, at 11–12.

120. *In re State Bar of Texas*, 440 S.W.3d at 626.

121. See *Thomas*, 2006 WL 2854405, at \*3 (noting because the plaintiff brought suit regarding expunged records those records were discoverable in that proceeding); *Goss*, 252 S.W.3d at 656 (finding expunged records were subject to discovery in the lawsuit where the expunged records were

Thus, the court's interpretation of that exception is overbroad.

Another possible situation when the use of expunged records could be permissible is when the person with the expunged records allows those records to be used in a subsequent proceeding. This was the situation in *In re State Bar of Texas*.<sup>122</sup> Article 1.14 of the Code of Criminal Procedure allows a defendant to "waive any rights secured him by law."<sup>123</sup> Many courts have found this to include the right for a defendant to waive his or her right to expunction.<sup>124</sup> While courts have found defendants possess this right, the waiver would need to be made prior to the finalization of the expunction order.<sup>125</sup> Based on these other courts' decisions, the Texas Supreme Court improperly found Bledsoe waived his expunction rights

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at issue). *But see In re State Bar of Texas*, 440 S.W.3d at 625–26 (deciding expunged records become a matter of public record when put at issue in any proceeding). Comparatively, the exception for the discovery of privileged information of a patient–litigant under Texas Rules of Evidence destroys the privilege as to any confidential information available in a lawsuit. *Compare* EVID. 509(e)(4) (providing an exception for the discovery of privileged physician–patient information when any party relies on a patient's medical condition as part of a claim or defense), *and* R.K., 887 S.W.2d at 842 (claiming the patient–litigant exception "terminates" the privilege making the confidential information subject to discovery), *and In re Collins*, 286 S.W.3d at 916 (finding no privilege exists when privileged physician–patient information is relied upon by a party as part of a claim or defense), *with Thomas*, 2006 WL 2854405, at \*3 (acknowledging expunged records could be discovered where plaintiff brought suit regarding the expunged records), *and Goss*, 252 S.W.3d at 656 (determining an exception exists for the discovery of expunged records in a lawsuit when the expunged records are at issue), *and W.V.*, 669 S.W.2d at 379 (declaring expunged records become a matter of public record when an action is filed as a result of the expunged matter).

122. *See In re State Bar of Texas*, 440 S.W.3d at 627 (claiming the defendant's waiver of his right to expunction was one of the deciding factors); *Id.* (Boyd, J., concurring) (agreeing the defendant's waiver of right to expunction should be the deciding factor).

123. TEX. CODE CRIM. PROC. ANN. art. 1.14(a) (West 2005); *see also Ex parte McKinney*, 688 S.W.2d 559, 559 (Tex. Crim. App. 1985) (acknowledging a defendant may waive rights provided by law other than the right to a jury trial in a capital felony case); ELLISTON & KIRK, *supra* note 7, § 30:9, at 245 (recognizing a defendant has a right to waive any rights secured by law under Texas Code of Criminal Procedure Article 1.14).

124. *See In re State Bar of Texas*, 440 S.W.3d at 627 (finding the defendant had the ability to waive his right to expunction); *In re Expunction of Jones*, 311 S.W.3d 502, 506 (Tex. App.—El Paso 2009, no pet.) (mentioning expunction may be waived); *In re Expunction of Arnold*, 34 S.W.3d 583, 586–87 (Tex. App.—El Paso 2000, no pet.) (holding the defendant voluntarily waived his expunction rights); *see also* ELLISTON & KIRK, *supra* note 7, § 30:9, at 245 (concluding the right to waiver includes the right to waive expunction).

125. *See In re Expunction of M.C.*, 412 S.W.3d 48, 54 (Tex. App.—El Paso 2013, pet. denied) (allowing expunction to be waived for a defendant to participate in a pretrial diversion program); *In re Expunction of R.B.*, 361 S.W.3d 184, 186–87 (Tex. App.—El Paso 2012, pet. denied) (stating the petitioner waived his right to expunction by entering into a pretrial agreement); *In re Jones*, 311 S.W.3d at 505–06 (holding the right to expunction had been waived in order to receive a plea deal). *But see In re State Bar of Texas*, 440 S.W.3d at 625 (finding the defendant voluntarily waived expunction rights after the order had been finalized); *Id.* (Boyd, J., concurring) (agreeing the right to expunction could be waived after the order was finalized).

after the expunction order had been finalized.<sup>126</sup> While the court should not have allowed the defendant to waive the right to expunction in *In re State Bar of Texas*, regardless of the timing of the waiver, it is another possible situation where the use of expunged records in attorney-disciplinary proceedings could be deemed permissible.

Notwithstanding the fact that there may be situations where the use of expunged records could be permissible,<sup>127</sup> there are more situations where such use is impermissible.<sup>128</sup> A complete bar from using expunged

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126. See *In re State Bar of Texas*, 440 S.W.3d at 627 (allowing the defendant to voluntarily waive expunction rights after the expunction order was finalized); *Id.* (Boyd, J., concurring) (approving the waiver of expunction rights after the order was final).

127. For example, situations in which the court ordering the final expunction includes language in the expunction order allowing the retention of expunged records for use in subsequent proceedings. See *In re Expunction of R.A.*, 417 S.W.3d 569, 583 (Tex. App.—El Paso 2013, no pet.) (granting the use of expunged records in a disciplinary proceeding where the expunction order permitted retention of records for subsequent use); see also CRIM. PROC. art. 55.02, § 4(a–2) (West Supp. 2014) (permitting a court ordering expunction to authorize retention of expunged records for future use in certain situations). But see *In re State Bar of Texas*, 440 S.W.3d at 627 (holding expunged records from a criminal trial could be used in a grievance proceeding where the final expunction order did not allow for such use). A second situation could arise when the person with the expunged records puts those records directly at issue in a case. See *Thomas v. City of Selma*, No. SA-06-CA-0119-XR, 2006 WL 2854405, at \*3 (W.D. Tex. Oct. 4, 2006) (deciding the plaintiff in a civil suit subjected expunged records to discovery by bringing suit as a result of the expunged matter); *Goss v. Hous. Cmty. Newspapers*, 252 S.W.3d 652, 656 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (claiming expunged records were discoverable in a lawsuit that was brought because of the expunged arrest); *W.V. v. State*, 669 S.W.2d 376, 379 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (determining expunged records were subject to discovery where petitioner filed a civil suit as a result of the expunged arrest); see also *In re State Bar of Texas*, 440 S.W.3d at 625–26 (acknowledging expunged records could be discovered when the expunged records are put at issue in the proceeding). Another possible situation is when the person with the expunged records permits those records to be used in a proceeding. See *In re State Bar of Texas*, 440 S.W.3d at 627 (declaring the waiver expressed by the defendant made it permissible to use expunged records in a disciplinary proceeding); *Id.* (Boyd, J., concurring) (stating the only reason the use of the expunged records was permissible was because the defendant had waived his right to expunction); see also CRIM. PROC. art. 1.14(a) (West 2005) (granting a defendant the right to waive any rights secured by law); *In re Jones*, 311 S.W.3d at 506 (concluding the right to expunction may be waived by a defendant); *In re Arnold*, 34 S.W.3d at 586–87 (mentioning the right to waiver allows the defendant to voluntarily waive the right to expunction).

128. Expunction statutes explicitly prohibit the use of expunged records once an expunction order has been finalized. CRIM. PROC. art. 55.03, § 1 (West 2006); see also TEX. GOV'T CODE ANN. § 411.084(a)(2) (West 2012) (stating disclosure of criminal history information is permissible only when authorized by statute, rule, or court order). But see CRIM. PROC. art. 55.02, § 4(a–2) (West Supp. 2014) (authorizing courts to permit expunged records to be used in subsequent proceedings when provided in the expunction order). It is a Class B misdemeanor to violate an expunction order. CRIM. PROC. art. 55.04, § 3 (West 2006). The power to suspend laws belongs solely to the state legislature and the court would suspend the law by allowing the Commission for Lawyer Discipline to use expunged records in a disciplinary proceeding when no exception exists. See Brief of Jack Roady, *supra* note 11, at 7 (arguing the court would violate the Texas Constitution if it were to suspend the law as to the Commission); see also TEX. CONST. art. I, § 28 (granting the power to

records in attorney-disciplinary proceedings is unlikely; thus, permissible use of those records should be limited to ensure justice and prevent harm to the legal system.

## V. CONCLUSION

Present and future attorneys should take note of the Texas Supreme Court's decision in *In re State Bar of Texas* to allow a defendant's expunged records to be used in a subsequent attorney-disciplinary proceeding against the prosecuting attorney.<sup>129</sup> This fairly recent and unusual decision<sup>130</sup> potentially opens the door for an attorney's expunged records to be used against the attorney in a disciplinary proceeding. While the court allowed the use of a defendant's expunged records against an attorney, the court did not include language in its decision to prevent a broad interpretation that would allow an attorney's expunged records to be used in such disciplinary proceedings.<sup>131</sup>

In addition, the Texas Supreme Court's decision should be modified because it is at odds with the purpose of expunction statutes.<sup>132</sup> Expunged records should not exist anymore but if they are in existence, they should not be used in attorney-disciplinary proceedings.<sup>133</sup> Texas's expunction statutes do not permit expunged records to be used in any subsequent proceedings unless such use is provided for in the final

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suspend laws explicitly to the legislature). Lastly, there is the historical argument *In re State Bar of Texas* is an unusual decision that changed the law to allow expunged records to be used in attorney-disciplinary proceedings. See Council, *supra* note 1 (claiming the decision in *In re State Bar of Texas* was an unusual decision); see also *In re State Bar of Texas*, 440 S.W.3d at 622 (allowing expunged records to be used in attorney-disciplinary proceeding where no exceptions were provided for in the final expunction order). But see *In re Expunction of R.A.*, 417 S.W.3d at 577–79 (permitting expunged records to be used in attorney-disciplinary proceedings where the final expunction order permitted the use of records in subsequent proceedings).

129. *In re State Bar of Texas*, 440 S.W.3d at 627.

130. See *id.* at 621 (reaching a decision on August 22, 2014); Council, *supra* note 1 (stating this decision by the Texas Supreme Court was unusual).

131. See *In re State Bar of Texas*, 440 S.W.3d at 626–27 (determining expunged records may be used in disciplinary proceedings without limiting when such use would be permissible).

132. See CRIM. PROC. art. 55.03, § 1 (prohibiting the use of expunged records once an expunction order is finalized); *Id.* art. 55.04, § 3 (making it a Class B misdemeanor to violate an expunction order); see also ELLISTON & KIRK, *supra* note 7, § 30:1, at 235 (claiming the purpose of the statute is to prevent any record of an arrest from existing); 27A TEX. JUR. 3D *supra* note 7, § 1189, at 433 (contending the purpose of the statute is to have records of a wrongful arrest erased or destroyed).

133. See Mayfield, *supra* note 28, at 1057 (contending expungement means criminal records are destroyed or sealed); Amy Shlosberg et al., *supra* note 28, at 1229 (acknowledging expungement means to destroy or seal); Simon, *supra* note 28, at 86 (recognizing expunged records generally means the records are erased or destroyed).

expunction order.<sup>134</sup> Allowing expunged records to be used in future proceedings when such use is not permitted in the expunction order contravenes the law.<sup>135</sup> The court suspended the law for the Commission for Lawyer Discipline by allowing a defendant's expunged records to be used in a subsequent attorney-disciplinary proceeding.

Although expunged records should generally not be used in attorney-disciplinary proceedings, there are two situations where such use may be permissible. One situation in which it may be permissible for expunged records to be used in a subsequent proceeding is when the expunction order provides for such use. A second potential situation occurs when a defendant waives his right to expunction; although that would apply only prior to the order being finalized. *In re State Bar of Texas* did not deal with either of these exceptional situations because the expunction order did not allow the expunged records to be used in subsequent proceedings and the defendant waived his expunction rights after the order had been finalized.

*In re State Bar of Texas* creates dangerous issues, both actual and potential, and it is imperative the decision be altered to ensure it does not create improper precedent or is not misinterpreted to allow for improper uses of expunged records in attorney-disciplinary proceedings. The decision should either be overturned to prohibit using expunged records in attorney-disciplinary proceedings altogether, or in the alternative, it should be altered to limit the use of expunged records to certain situations. Implementing either recommendation would prevent expunged records from being used improperly in attorney-disciplinary proceedings.

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134. CRIM. PROC. art. 55.03, § 1; CRIM. PROC. art. 55.02, § 4(a-2); *see In re Expunction of R.A.*, 417 S.W.3d 569, 577-79 (Tex. App.—El Paso 2013, no pet.) (authorizing the use of expunged records in attorney-disciplinary proceedings where the final expunction order provided for the expunged records to be maintained for future use).

135. TEX. CONST. art. I, § 28; *see also* *State v. Ferguson*, 125 S.W.2d 272, 276 (Tex. 1939) (agreeing the legislative branch has the power to suspend laws); Brief of Jack Roady, *supra* note 11, at 7 (arguing the court would violate the constitution by suspending the law to allow the Commission for Lawyer Discipline to use the expunged records).