void and/or unenforceable, leaving Davidson and Sharp with recovery based only on quantum meruit. Davidson counterclaimed for his entire fee and Sharp filed a third-party complaint.

After a bench trial in which the contract itself was found to have been voided, the district court awarded Davidson $1.3 million and Sharp $700,000, based on quantum meruit. The court held that Sharp's own conduct and disbarment prevented his completing the case but, looking at "all the factors," including the fact that he got the case near a point of settlement, a figure of $700,000 reflected the value he added while recognizing his problematic behavior.

All the parties appealed, seeking to resume litigation of a Rule 54 motion that was pending in the district court. In a separate decision, the Fifth Circuit held that Davidson's only recovery was pursuant to quantum meruit, because the entire contract had been voided due to Sharp's inability to perform. Sharp persisted at district court, but lost his Rule 54 motion for two reasons. First, the court noted that his disbarment was the reason for his termination under the contract and, with a failure of the contract for lack of consideration, his only available remedy was in quantum meruit. Second, the severability clause did not save his claim; when terminated for cause, the entire contract was terminated.

HELD: The Fifth Circuit affirmed the district court, holding that since another panel of the Fifth Circuit had already ruled on the contingency fee issue, the panel hearing the current appeal was required to hold the same.

DISCUSSION: The Fifth Circuit panel hearing the Sharp appeal began with the its own rule of orderliness, namely that "only an intervening change in the law (such as by a Supreme Court case) permits a subsequent panel to decline to follow a prior Fifth Circuit precedent." It then went on to explain that while Sharp's case was pending in the district court based on the parties' joint motion to dismiss the appeal and argue the Rule 54 motion in the district court, Davidson's appeal went to a panel of the Fifth Circuit. In that appeal the panel held Davidson could not collect his contingency fee and could not recover his fees because Sharp's disbarment prevented Davidson from fulfilling the indivisible contract. It pointed out that in his current appeal, Sharp was trying to collect on the exact same contract. His loss in the district court on his Rule 54 motion was therefore affirmed.

https://www.ca5.uscourts.gov/opinions/unpub/13/13-30364.0.pdf (last accessed Mar. 19, 2014).

Due Process: Requiring Sex Offenders to Register For Deferred Adjudications Back to 1970 Is Constitutional

King v. McCraw, No. 13-20092 (5th Cir. Mar. 10, 2014).

Against due process and *ex post facto* challenges, the Fifth Circuit has upheld provisions of a Texas law amended in 2005 to require that sex offenders register for deferred adjudications of indecency with a child going back to 1970.

In 1990 Reginald King pleaded guilty to a charge of indecency with a child. As part of his plea he received a deferred adjudication and agreed to sex offender counseling; after ten years of

probation, the proceedings were dismissed. In 2001 King was charged with burglary, to which he pleaded guilty, and was released on parole in 2008.

The Texas Sex Offender Registration Act (SORA) was enacted in 1991. At that time, deferred adjudications were not considered convictions under SORA. In 2005, however, SORA was amended such that deferred adjudications for indecency with a child occurring as far back as 1970 became reportable convictions. King was therefore required to register as a sex offender once released on parole in 2008. He complied, and then filed suit. He alleged SORA's requirement that he register as a sex offender violated his Fourteenth Amendment Due Process rights, both substantive and procedural, and Equal Protection. Moreover, he argued the law was unconstitutional under the e*x post facto* Clause.

King lost on summary judgment motions filed by the La Porte, Texas Chief of Police (where King had to register) and the Texas Department of Public Safety Director. He appealed to the Fifth Circuit.

HELD: The Fifth Circuit affirmed the district court, holding that SORA does not violate substantive or procedural due process and is not an *Ex Post Facto* law.

DISCUSSION: As to the e*x post facto* Clause, King argued that SORA did not exist when he plead guilty to indecency with a child--given that fact, SORA's limitation on where he could live, work, and with whom he could associate was punitive. The Circuit Court agreed with the lower court, finding that the rules about where King could live and work were not based on SORA, but on the ordinances of La Porte. (King had not challenged the ordinances below, so that argument had been abandoned at the appellate level.)

The Circuit Court also stated that it had "repeatedly affirmed" lower courts' dismissals of these types of claims against SORA. Though none of these opinions were published, according to the bench, they were persuasive because they are based on the Supreme Court's holding in *Smith v. Doe*, 538 U.S. 84 (2003), wherein the Court rejected an *ex post facto* challenge to Alaska's sex offender registry. Using the reasoning in *Smith*, King argued that SORA's application to him in particular was "excessive in relation to the statute's stated purpose of public safety." But the Fifth Circuit Court stated that SORA's requirement that King re-register as a sex offender annually was not overly burdensome. Moreover, the Circuit Court found that the legislature had characterized SORA as a civil statute, not a criminal one, and "only the clearest proof will suffice to override legislative intent to transform what has been denominated a civil remedy into a criminal penalty."

As to procedural due process, King claimed SORA automatically categorized him as a sex offender "without notice or an individual determination" as to the danger he posed to the community. The Fifth Circuit answered by citing its precedent: once convicted of a sex offense in an adversarial setting, defendants have "received the minimum protections required by due process."

Finally, as to substantive due process, King again pointed to *Smith* and argued the burdens of SORA were excessive in comparison to its public safety purpose. However, only the most egregious of arbitrary government action violates substantive due process, and the court held that SORA registration requirements did not "shock the conscience."

https://www.ca5.uscourts.gov/opinions/unpub/13/13-20092.0.pdf (last accessed Mar. 19, 2014).