

**CAUSE NO. CV20-02-085**

**COMMISSION FOR  
LAWYER DISCIPLINE**

v.

**JASON LEE VAN DYKE  
File No. 201807880**

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**IN THE DISTRICT COURT OF**

**WISE COUNTY, TEXAS**

**271st JUDICIAL DISTRICT**

**PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes the Commission for Lawyer Discipline, Petitioner, and would respectfully show the following:

**I. OVERVIEW**

Respondent Jason Van Dyke stands charged with acts of professional misconduct, namely violations of the Texas Rules of Professional Conduct Rules 8.04(a)(2)<sup>1</sup>, 8.04(a)(3)<sup>2</sup>, and 8.04(a)(4)<sup>3</sup>. The Commission alleges that in or around September 2018, Respondent made a false statement(s) to law enforcement relating to the alleged theft of Respondent's firearms. Respondent was subsequently charged with filing a false report to a peace officer. Prior to Respondent's trial related to this criminal charge, and while Respondent was incarcerated in the Denton County jail, Respondent asked his father to encourage a State's witness, Isaac Marquardt (Marquardt), to not answer the door and to tell Marquardt to "make himself scarce." On or about January 28, 2019, the Court found that Respondent wrongfully procured the unavailability of Marquardt and granted the

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<sup>1</sup> Rule 8.04(a)(2) states: A lawyer shall not commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects.

<sup>2</sup> Rule 8.04(a)(3) states: A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

<sup>3</sup> Rule 8.04(a)(4) states: A lawyer shall not engage in conduct constituting obstruction of justice.

State's motion requesting forfeiture by wrongdoing. On or about February 26, 2019, Respondent pled *nolo contendere* to the charge of filing a false report to a peace officer, in violation of Texas Penal Code 37.08. Respondent received deferred adjudication for a period of 24 months.

Partial summary judgment is proper as to Rules 8.04(a)(2), 8.04(a)(3), and 8.04(a)(4) on the basis of collateral estoppel and judicial estoppel. All facts necessary for demonstrating a violation of these rules have been litigated and resulted in findings against Respondent in separate court proceedings.<sup>4</sup> Such findings demonstrate conclusively that Respondent has violated these rules and Respondent is collaterally and judicially estopped from making inconsistent statements with or re-litigating those findings in this disciplinary action. Accordingly, summary judgment is proper.

The Petitioner filed this disciplinary action seeking the following: (1) a determination that Respondent committed misconduct by violating the Texas Disciplinary Rules of Professional Conduct and (2) the imposition of an appropriate sanction for the misconduct committed. No issue of material facts exists and, due to the prior litigation establishing the misconduct, Respondent has, in fact, committed the misconduct alleged in Petitioner's Disciplinary Petition. Petitioner, therefore, requests that this Court enter partial summary judgment on the issue of Respondent's professional misconduct leaving only a determination of the appropriate sanction for trial.

## II. SUMMARY JUDGMENT EVIDENCE

Exhibit 1: Complaint and Information – False Report to Peace Officer

Exhibit 2: Arrest Warrant – False Report to Peace Officer

Exhibit 3: Amended Information, including State's Motion to Amend Information and Order Granting said motion

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<sup>4</sup> *The State of Texas v. Jason Lee Van Dyke*, in the County Criminal Court #5, Denton County, Texas, Case No. CR-2018-07544-E; and *Ex Parte Jason Van Dyke*, in the County Criminal Court #5, Denton County, Texas, Case No. CR-2018-07544-E-WHC-1

Exhibit 4: Judgment of Deferred Adjudication

Exhibit 5: State's Motion Requesting Forfeiture By Wrongdoing

Exhibit 6: Hearing Transcript – State's Motion Requesting Forfeiture By Wrongdoing

Exhibit 7: Order of Forfeiture by Wrongdoing

Exhibit 8: Respondent's Application for Writ of Habeas Corpus

Exhibit 9: State's Answer to Respondent's Application for Writ of Habeas Corpus

Exhibit 10: Order Including Findings of Fact and Conclusions of Law re: Respondent's Application for Writ of Habeas Corpus

### III. COLLATERAL ESTOPPEL

#### 1. Elements and Background

Collateral estoppel, also known as issue or claim preclusion, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.<sup>5</sup> Unlike *res judicata*, which prevents relitigation of claims that were litigated in a previous suit, collateral estoppel prevents relitigation of *particular issues* that were litigated and decided in a previous lawsuit. The elements of collateral estoppel are: a) the facts sought to be litigated in the second action were fully and fairly litigated; b) those facts were essential to the judgment in the prior action; and c) the issue is identical to an issue in the prior action.<sup>6</sup>

The doctrine of collateral estoppel may be used by third parties in subsequent actions to bind a person who litigated an issue of fact and lost in a previous action.<sup>7</sup> When used in this manner,

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<sup>5</sup> *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649 (1979); *see also Neely v. Commission for Lawyer Discipline*, 976 S.W.2d 824, 827 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1998, no writ) (strict mutuality of parties is no longer required)

<sup>6</sup> *Goldstein v. Commission for Lawyer Discipline*, 109 S.W.3d 810, 813 (Tex. App.—Dallas 2003, pet. denied)

<sup>7</sup> *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971); *see Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1991)

the doctrine is referred to as “offensive collateral estoppel,” because it is used by a plaintiff “seeking to estop a defendant from relitigating an issue which the defendant previously litigated and lost in a suit involving another party.”<sup>8</sup>

A trial court has broad discretion in determining whether to allow a plaintiff to use collateral estoppel offensively.<sup>9</sup> A trial court abuses its discretion only when its action is arbitrary and unreasonable, without reference to guiding rules or principles.<sup>10</sup>

In *Parklane Hosiery*, the Supreme Court set forth two considerations for trial courts when determining whether to apply offensive collateral estoppel: (1) whether the plaintiff could easily have joined in the earlier action; and (2) potential unfairness to the defendant.<sup>11</sup>

The first consideration is aimed at promoting judicial economy and avoiding a “wait and see” attitude by plaintiffs who hope to benefit from a judgment in their favor against the defendant, but not be bound by such judgment if it is unfavorable. A determination on the first factor is straightforward: if the plaintiff could have joined the first lawsuit but chose not to, offensive collateral estoppel should not be applied in the second law suit.<sup>12</sup> If the plaintiff was unable to join the first lawsuit, there is no justification for prohibiting their use of offensive collateral estoppel.<sup>13</sup>

The second consideration is simply a weighing of whether it would be unfair under the particular circumstances of a case to apply collateral estoppel against the defendant.<sup>14</sup> For this determination, consideration is given to the defendant’s incentive in the first action to vigorously defend the suit, the foreseeability of future suits, and the availability of procedural safeguards in

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<sup>8</sup> *Johnston v. American Med. Int’l*, 36 S.W.3d 572, 577 (Tex. App.—Tyler 2000, pet. denied)

<sup>9</sup> *Goldstein*, 109 S.W.3d at 813

<sup>10</sup> *Id.*

<sup>11</sup> *Parklane*, 439 U.S. at 329-30, 99 S.Ct. at 650-51

<sup>12</sup> *Id.* at 331, 99 S.Ct. at 652

<sup>13</sup> *Id.* at 331-32, 99 S.Ct. at 652

<sup>14</sup> *Goldstein*, 109 S.W.3d at 813

the second suit that were not available in the first suit.<sup>15</sup>

## **2. Collateral Estoppel Applies to Attorney Disciplinary Matters**

Application of the doctrine of collateral estoppel is appropriate in disciplinary cases. In *Goldstein v. Commission for Lawyer Discipline*, a former client sued attorney Goldstein, alleging, among other things, Goldstein had charged an unconscionable fee.<sup>16</sup> Goldstein lost on this issue at trial.<sup>17</sup> The Commission later brought a disciplinary action against Goldstein based on facts arising out of the prior representation and alleged as one of its rule violations, the charging of an unconscionable fee.<sup>18</sup> The Commission moved for partial summary judgment urging that Goldstein was collaterally estopped from relitigating the unconscionable fee issue, and the trial court granted summary judgment in the Commission's favor.<sup>19</sup>

In upholding the judgment on appeal, the court of appeals noted that Goldstein had a strong incentive to defend on the relevant issues at the first trial and had been given “more than an adequate opportunity to litigate” the key issues.<sup>20</sup> Further, there was no danger of increasing the costs and burdens of litigation, because the Commission could not have joined the first action.<sup>21</sup> Accordingly, the trial court's application of collateral estoppel was affirmed.

## **3. Collateral Estoppel Applies to Prior Criminal Pleas**

The doctrine of collateral estoppel is applicable to prior criminal litigation as well as civil litigation.<sup>22</sup> A guilty or *nolo contendere* plea also estops an individual from relitigating his guilt because a ‘valid guilty plea’ serves as a full and fair litigation of the facts necessary to establish

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<sup>15</sup> *Id.*

<sup>16</sup> *Goldstein*, 109 S.W.3d at 811

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 812

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 813-14

<sup>21</sup> *Id.* at 813

<sup>22</sup> *Delese v. Albertson's Inc.*, 83 S.W.3d 827, 831 (Tex. App.—Texarkana 2002, no pet.)

the elements of the crime.<sup>23</sup> When the issue is identical to the issue in the criminal case, and because the determination of guilt was a critical and necessary part of the criminal judgment, the issue cannot be litigated again.<sup>24</sup>

In *Delese*, the court found that collateral estoppel applied since Delese not only stipulated to the pertinent facts during his criminal proceedings but also Delese had an opportunity to plead not guilty, to call witnesses, to cross-examine witnesses, and have all of the protections afforded a defendant in a criminal trial, including the requirement of evidence to prove his guilt beyond a reasonable doubt.<sup>25</sup> These circumstances provided Delese “the opportunity to fully and fairly litigate the facts in the [criminal] case.”<sup>26</sup> A defendant cannot then dispute in a subsequent civil case that which he stipulated in the criminal matter.<sup>27</sup> The court in *Delese*, affirmed the trial court’s granting of summary judgment as a matter of law and found that collateral estoppel barred Delese from relitigating the issue of his guilt.<sup>28</sup>

“Deeming a stipulation executed in a prior suit sufficient to give rise to collateral estoppel seems rather logical. It constitutes not only an agreement or concession made in a judicial proceeding by the parties, but also a judicial admission.”<sup>29</sup> Therefore, in the instant case, when the Court accepted Respondent’s plea and acceptance of deferred adjudication, “the stipulation becomes conclusive as to the fact conceded.”<sup>30</sup> Respondent should be estopped from questioning

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<sup>23</sup> *Id.*, citing *Johnston v. American Med. Int’l*, 36 S.W.3d 572 (Tex. App.—Tyler 2000, pet. denied); see also *Tex. Code Crim. Proc.* § 27.02(5) (A plea of nolo contendere has the same legal effect as a guilty plea)

<sup>24</sup> *Delese*, 83 S.W.3d at 832; citing (*Dover v. Baker, Brown, Sharman & Parker*, 859 S.W.2d 441, 447 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1993, no writ))

<sup>25</sup> *Delese*, 83 S.W.3d at 832

<sup>26</sup> *Id.*

<sup>27</sup> See *Id.*; see also *Bomar Oil and Gas, Inc. v. Loyd*, 381 S.W.3d 689, 692-93 (Tex. App.—Amarillo 2012, pet. denied)

<sup>28</sup> *Delese*, 83 S.W.3d at 832

<sup>29</sup> *Bomar Oil and Gas, Inc.*, 381 S.W.3d at 693, (citing *Shepherd v. Ledford*, 962 S.W.2d 28, 33 (Tex. 1998))

<sup>30</sup> *Id.*; *Houston Lighting & Power Co. v. City of Wharton*, 101 S.W.3d 633, 641 (Tex. App.—Houston[1<sup>st</sup> Dist.] 2003, pet. denied)

the very same facts in the disciplinary action before this Court.

**4. Respondent is Collaterally Estopped from Relitigating Facts Related to Respondent's Criminal Action**

The first *Parklane* factor—whether the plaintiff could easily have joined the earlier action—clearly weighs in favor of application of collateral estoppel in this case. The Commission was unable to join the criminal action against Respondent. Accordingly, there is no danger in increasing the burdens and costs of litigation by applying collateral estoppel in the Commission's disciplinary case—quite the opposite in fact. If the Court applies collateral estoppel to prevent Respondent from relitigating key issues that are identical in both causes, it will actually decrease the costs and burdens of litigation and support the principle of judicial economy which is the purpose behind the collateral estoppel doctrine.

The second factor—fairness to the defendant—likewise supports application of the collateral estoppel doctrine in this case. Factors to consider when determining fairness to the defendant are: (1) whether the defendant had adequate incentive to defend in the first suit, particularly if future suits are not foreseeable; (2) whether the judgment relied on for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; and (3) whether the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.<sup>31</sup>

In the instant case, it is unquestionable that Respondent had an adequate incentive to defend himself in the criminal action. Respondent “had an opportunity to plead not guilty, to call witnesses, to cross-examine witnesses, and have all of the protections afforded a defendant in a criminal trial, including the requirement of evidence to prove his guilt beyond a reasonable

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<sup>31</sup> *Parklane Hosiery*, 439 U.S. at 330-31, 99 S.Ct. at 651

doubt.”<sup>32</sup> These circumstances provided Respondent “the opportunity to fully and fairly litigate the facts in the [criminal] case.”<sup>33</sup> Respondent cannot now dispute in this disciplinary matter that which he stipulated in the criminal matter.<sup>34</sup> In addition, as the Commission had already filed its lawsuit prior to Respondent’s plea, future suits were not only foreseeable but actually known to the Respondent at the time he pled and agreed to deferred adjudication. Further, Rule 8.02 of the Texas Rules of Disciplinary Procedure, provides that an “*order of deferred adjudication is conclusive evidence of the attorney’s guilt.*”<sup>35</sup> Respondent made his sworn plea, freely and voluntarily, and was aware of the consequences.<sup>36</sup>

In addition, Respondent had incentive and opportunity to defend himself during the hearing on the State’s Motion Requesting Forfeiture by Wrongdoing, as the Court’s ruling would prevent Respondent from confronting witness Marquardt or objecting to the admissibility of evidence or statements made by Marquardt.<sup>37</sup>

Finally, there are no procedural opportunities to which Respondent can avail himself in the present case that would lead to a different outcome on the relevant issues. Respondent was given a full and fair opportunity to litigate the relevant issues in the first action and Respondent chose to plead to the charge and accept deferred adjudication.<sup>38</sup>

Based on the above application of collateral estoppel is appropriate and warranted in this case.

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<sup>32</sup> See Exhibit 4; see also *Delese*, 83 S.W.3d at 832

<sup>33</sup> *Id.*

<sup>34</sup> See *Id.*; see also *Bomar Oil and Gas, Inc.*, 381 S.W.3d at 692-93; see also Exhibit 4

<sup>35</sup> Texas Rule of Disciplinary Procedure 8.02 (emphasis added)

<sup>36</sup> See Tex. R. Disc. Pro. 8.02 (although this rule falls under “compulsory discipline,” it follows the same principle that an order of deferred adjudication can be used as conclusive evidence of a Respondent’s guilt”; see also Exhibit 4

<sup>37</sup> See Exhibits 5, 6, and 7

<sup>38</sup> See Exhibits 1, 2, 3, and 4

## IV. JUDICIAL ESTOPPEL

### 1. Elements and Background

“Under the doctrine of judicial estoppel, ... a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made.”<sup>39</sup> The doctrine is predicated upon the rationale that parties should not misuse the judicial system by taking inconsistent position under oath in different proceedings.<sup>40</sup> The purpose of judicial estoppel is “to *uphold the sanctity of the oath* and to prevent abuse of the judicial process.”<sup>41</sup> The doctrine “arises from positive rules of procedure based on justice and sound public policy.”<sup>42</sup> Judicial estoppel is sometimes referred to as estoppel by record.<sup>43</sup>

The doctrine of judicial estoppel applies if the following elements are present: “(1) a sworn, prior inconsistent statement made in a prior judicial proceeding; (2) the party making the statement gained some advantage by it; (3) the statement was not made inadvertently or because of mistake, fraud, or duress; and (4) the statement was deliberate, clear and unequivocal.”<sup>44</sup> Further, it is not necessary that the party invoking the doctrine have been a party to the former proceeding.<sup>45</sup>

### 2. Respondent is Judicially Estopped from Making Statements Inconsistent With His *Nolo Contendere* Plea

In the instant case, Respondent pled *nolo contendere* to False Report to Police Officer, a Class B Misdemeanor.<sup>46</sup> A Class B Misdemeanor is punishable by up to 180 days in jail, a fine up to

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<sup>39</sup> *Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956)

<sup>40</sup> *See Id.*; *see also, Vendig v. Traylor*, 604 S.W.2d 424, 429 (Tex. 1980)

<sup>41</sup> *See Dallas Sales Co., Inc. v. Carlisle Silver Co., Inc.*, 134 S.W.3d 928, 930 (Tex. 2004) (emphasis added)

<sup>42</sup> *Long*, 291 SW.2d at 295

<sup>43</sup> *See, e.g., Matter of Bills' Estate*, 542 S.W.2d 943, 946 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (A party may be estopped by the record to assert a position which is inconsistent with a position in a former proceeding)

<sup>44</sup> *Galley v. Apollo Associated Servs., Ltd.*, 177 S.W.3d 523, 528-29 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, no pet.)

<sup>45</sup> *Metroflight, Inc. v. Schaffer*, 581 S.W.2d 704, 709 (Tex. App.—Dallas 1979, writ refused n.r.e.)

<sup>46</sup> *See Exhibits 1, 2, 3 and 4; see also Texas Penal Code § 37.08*

\$2,000, or both.<sup>47</sup> In exchange for Respondent’s plea, Respondent received the benefit of deferred adjudication for a period of 24 months and a fine of only \$600.<sup>48</sup> Respondent did not receive any jail time.<sup>49</sup>

In accepting the deferred adjudication, Respondent swore or affirmed that he entered into his *nolo contendere* plea to “False Report to Police” freely and voluntarily.<sup>50</sup> He further swore or affirmed: “I understand this document completely” and “I am aware of the consequences of my plea.<sup>51</sup>” Not only did Respondent have retained counsel for his plea, but Respondent is himself an experienced attorney and knew or should have known the weight and effect of the statements he swore to or affirmed. In accordance with Respondent’s sworn/affirmed plea, the court found that “the evidence submitted *substantiates the guilt* of the Respondent.<sup>52</sup>” Respondent knew, understood and agreed to the terms of the plea when he stipulated to the evidence and judicial confession.

Respondent’s plea was not made inadvertently or because of mistake, fraud or duress. In fact, he also swore or affirmed that—in addition to entering into the plea freely and voluntarily—he entered into the plea “*without any coercion, distress or promise of benefit other than the plea-bargain agreement.*”<sup>53</sup>

Respondent is estopped from making an inconsistent statement or taking a position inconsistent with that of his voluntary *nolo contendere* plea; therefore, judicial estoppel is appropriate and warranted in this case.

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<sup>47</sup> See Texas Penal Code § 12.22

<sup>48</sup> See Exhibit 4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (emphasis added)

## V. COLLATERAL ATTACK

### 1. Respondent is Prohibited from Collaterally Attacking his Judgment of Deferred Adjudication

“A collateral attack is an attempt to avoid the effect of a judgment in a proceeding brought for some other purpose.”<sup>54</sup> A collateral attack is impermissible if it is instituted to interpret a prior judgment by another court.<sup>55</sup> A collateral attack may be used to set aside a judgment that is void or involves fundamental error.<sup>56</sup> The ability to collaterally attack a judgment is limited because “we presume the validity of the judgment under attack, and extrinsic evidence may not be used.”<sup>57</sup>

Therefore, in the instant case, Respondent is prohibited from instituting a collateral attack on the judgment of deferred adjudication he received as a result of the plea bargain agreement he entered into freely and voluntarily. Respondent is further prohibited from introducing extrinsic evidence to attack such judgment.

Further, Respondent, in the underlying criminal matter, filed an Application for Writ of Habeas Corpus, in which Respondent claimed, among other things, actual innocence.<sup>58</sup> The Court, after reviewing Respondent’s application, the State’s response, and evidence before the Court, denied Respondent’s application.<sup>59</sup>

## VI. SUMMARY JUDGMENT STANDARD

A party moving for summary judgment has the burden of proving there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.<sup>60</sup> A movant is entitled to summary judgment on its cause of action if it proves all essential elements of its claim as a

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<sup>54</sup> *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 870 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2000), (quoting Gus M. Hodges, *Collateral Attacks on Judgments*, 41 TEX. L. REV. 163, 163-64 (1962))

<sup>55</sup> *Id.* at 870-71.

<sup>56</sup> *In re A.G.G.*, 267 S.W.3d 165, 169 (Tex. App.—San Antonio 2008, pet. denied)

<sup>57</sup> *Id.*

<sup>58</sup> See Exhibit 8

<sup>59</sup> See Exhibits 8, 9, and 10

<sup>60</sup> Tex.R.Civ.P. 166a(c)

matter of law.<sup>61</sup> The court takes as true all evidence favorable to the non-movant, and indulges every reasonable inference and resolves any doubt in favor of the non-movant.<sup>62</sup> However, if the movant shows that there are no genuine issues of material fact, the movant is entitled to summary judgment as a matter of law.<sup>63</sup>

Petitioner moves for summary judgment on the issue of professional misconduct for violation of Rules 8.04(a)(2), 8.04(a)(3), and 8.04(a)(4) of the Texas Disciplinary Rules of Professional Conduct. Petitioner is entitled to a summary judgment because the evidence proves all elements of the aforementioned Rule violations, the evidence establishes that Respondent's conduct constitutes professional misconduct, and there are no genuine issues of material fact.

## VII. DISCUSSION

Respondent's plea, judgment of deferred adjudication, and the underlying criminal court's order including findings of fact and conclusions of law denying Respondent's application for writ of habeas corpus, eliminate any genuine issue of material fact and conclusively demonstrate violations of Rules 8.04(a)(2), 8.04(a)(3), and 8.04(a)(4) as set forth below.

### 1. Rule 8.04(a)(2) – Criminal Act

“A lawyer shall not commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>64</sup>

Respondent pled *nolo contendere* and received a judgment of deferred adjudication related to the crime entitled False Report to a Peace Officer, Federal Special Investigator, Law Enforcement Employee, Corrections Officer, or Jailer.<sup>65</sup> Texas Penal Code § 37.08 states that a person commits this offense if, with intent to deceive, he knowingly, makes a false statement that is material to a

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<sup>61</sup> *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986)

<sup>62</sup> *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003)

<sup>63</sup> Tex.R.Civ.P. 166a(c); *Provident Life & Acc. Ins. Co.* at 215-16

<sup>64</sup> Tex. Disc. R. Prof. Conduct Rule 8.04(a)(2)

<sup>65</sup> See Exhibit 4; see also, Texas Penal Code § 37.08

criminal investigation and makes the statement to the peace officer.<sup>66</sup>

Respondent knowingly, voluntarily, and freely pled to the crime described above and accepted punishment of 24 months deferred adjudication.<sup>67</sup> In accepting deferred adjudication, Respondent judicially confessed to the crime.<sup>68</sup>

“Honesty” is defined as “[t]he character or quality of being truthful and trustworthy.”<sup>69</sup> The Court’s judgment of deferred adjudication concerning a crime with the element of knowingly making a false statement conclusively demonstrates that Respondent committed a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer.

Furthermore, and regardless of Respondent’s plea, the underlying criminal court, in denying Respondent’s Application for habeas corpus, found that Respondent made inconsistent statements to the police.<sup>70</sup> The Court presumed the order of deferred adjudication is valid and found that a reasonable juror could have found Respondent guilty of making a false statement to a police officer.<sup>71</sup>

It is without question that a false statement to a peace officer would adversely reflect on a lawyer’s honesty, trustworthiness or fitness as a lawyer. The misconduct alleged by Petitioner arose out of the same events that caused the findings of the criminal court.<sup>72</sup> Therefore, Respondent should be estopped from re-litigating the issue, estopped from attacking the judgment of deferred adjudication, and estopped from taking a position inconsistent with his plea in which Respondent received the benefit of a plea bargain. The Petitioner is entitled to summary judgment on the issue of professional misconduct for violation of Rule 8.04(a)(2) because there is no genuine

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<sup>66</sup> Tex. Penal Code § 37.08

<sup>67</sup> See Exhibit 4

<sup>68</sup> *Id.*

<sup>69</sup> Black’s Law Dictionary (11<sup>th</sup> ed. 2019)

<sup>70</sup> See Exhibit 10 Findings of Fact, ¶ 15

<sup>71</sup> *Id.* Conclusions of Law, ¶ 5

<sup>72</sup> See Exhibits 4 and 10

issue of material fact and Respondent's actions constitute professional misconduct as a matter of law.

## **2. Rule 8.04(a)(3) – Dishonesty, Fraud, Deceit or Misrepresentation**

“A lawyer shall not engage in conduct involving dishonest, fraud, deceit or misrepresentation.”<sup>73</sup>

Any conduct involving fraud, dishonesty, deceit, or misrepresentation is prohibited by Rule 8.04(a)(3).<sup>74</sup> No specific scienter requirement is stated; however, even it were required Respondent plead to and judicially confessed to a crime that required an intent to deceive.<sup>75</sup> When an attorney's actions lack probity, integrity, and straightforwardness, the attorney's actions are dishonest.<sup>76</sup> Further, there is no requirement under subparagraph (a)(3) that an attorney's “dishonesty, deceit, or misrepresentation” be “material.”<sup>77</sup> Discipline is imposed even when an attorney's offense is not related to the practice of law; this is because the privilege to practice law is dependent on an attorney's ability to maintain a high moral character.<sup>78</sup> An attorney may undoubtedly act as a private citizen in a variety of situations.<sup>79</sup> Nonetheless, as a private citizen, he must “maintain the highest standards of ethical conduct” and “conform to the requirements of the law.”<sup>80</sup>

Respondent knowingly, voluntarily, and freely pled to the crime described above and accepted punishment of 24 months deferred adjudication.<sup>81</sup> In accepting deferred adjudication, Respondent

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<sup>73</sup> Tex. Disc. R. Prof. Conduct Rule 8.04(a)(3)

<sup>74</sup> See Tex. Disc. R. Prof. Conduct Rule 8.04(a)(3)

<sup>75</sup> See Exhibit 4; see also Tex. Penal Code § 37.08

<sup>76</sup> *Rosas v. Comm'n for Lawyer Discipline*, 335 S.W.3d 311, 319 (Tex. App.—San Antonio 2010); see also, *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 680 (Tex. App.—San Antonio 1998, no pet.)

<sup>77</sup> *Id.*

<sup>78</sup> *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 250 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999) (attorney's misrepresentation of the location of wife's residence, the date of their separation, and that the property division was just and equitable in divorce constituted conduct involving dishonesty, fraud, deceit, or misrepresentation)

<sup>79</sup> *Id.* at 260

<sup>80</sup> Tex. Disc. R. Prof. Conduct—Preamble.

<sup>81</sup> See Exhibit 4

judicially confessed to the crime.<sup>82</sup> The Court’s judgment of deferred adjudication conclusively demonstrates that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

Furthermore, and regardless of Respondent’s plea, the underlying criminal Court, in denying Respondent’s Application for habeas corpus, found that Respondent made inconsistent statements to the police.<sup>83</sup> The Court presumed the order of deferred adjudication is valid and found that a reasonable juror could have found Respondent guilty of making a false statement to a police officer.<sup>84</sup>

The misconduct alleged by Petitioner arose out of the same events that caused the findings of the criminal court.<sup>85</sup> Therefore, Respondent should be estopped from re-litigating the issue, estopped from attacking the judgment of deferred adjudication, and estopped from taking a position inconsistent with his plea in which Respondent received the benefit of a plea bargain. The Petitioner is entitled to summary judgment on the issue of professional misconduct for violation of Rule 8.04(a)(3) because there is no genuine issue of material fact and Respondent’s actions constitute professional misconduct as a matter of law.

### **3. Rule 8.04(a)(4) – Obstruction of Justice**

“A lawyer shall not engage in conduct constituting obstruction of justice.”<sup>86</sup>

“Obstruction of justice” is defined as the “[i]nterference with the orderly administration of law and justice, as by giving false information to or withholding evidence from a police officer or prosecutor, or by harming or intimidating a witness or juror.”<sup>87</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> See Exhibit 10 Findings of Fact, ¶ 15

<sup>84</sup> *Id.*

<sup>85</sup> See Exhibits 4 and 10

<sup>86</sup> Tex. Disc. R. Prof. Conduct Rule 8.04(a)(4)

<sup>87</sup> Black’s Law Dictionary (11<sup>th</sup> ed. 2019)

Respondent knowingly, voluntarily, and freely pled to the crime described above and accepted punishment of 24 months deferred adjudication.<sup>88</sup> In accepting deferred adjudication, Respondent judicially confessed to the crime.<sup>89</sup> The court's judgment of deferred adjudication conclusively demonstrates that Respondent engaged in conduct constituting the obstruction of justice.

Furthermore, and regardless of Respondent's plea, the underlying criminal court, in denying Respondent's Application for habeas corpus, found that Respondent made inconsistent statements to the police.<sup>90</sup> The court presumed the order of deferred adjudication is valid and found that a reasonable juror could have found Respondent guilty of making a false statement to a police officer.<sup>91</sup>

In addition, the court, in granting the State's Motion Requesting Forfeiture by Wrongdoing, found that Respondent wrongfully procured the unavailability of a potential State witness, Marquardt.<sup>92</sup> The court's orders conclusively establish that Respondent engaged in conduct constituting the obstruction of justice.

## VIII. PRAYER

WHEREFORE, premises considered, Petitioner prays this Honorable Court grant partial summary judgment that Respondent committed professional misconduct by violating Texas Rules of Professional Conduct Rules 8.04(a)(2), 8.04(a)(3), and 8.04(a)(4). Petitioner requests that this Honorable Court find that: the evidence sufficient to rule that no genuine issues of material fact exist with respect to the professional misconduct of Respondent related to Respondent's underlying criminal proceedings; Respondent is collaterally estopped from re-litigating the

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<sup>88</sup> See Exhibit 4

<sup>89</sup> *Id.*

<sup>90</sup> See Exhibit 10

<sup>91</sup> *Id.*

<sup>92</sup> See Exhibits 6 and 7

findings of misconduct already resolved in the Respondent's criminal proceedings; Respondent is judicially estopped from making statements or taking a position inconsistent with his *nolo contendere* plea and judgment of deferred adjudication; Respondent is prohibited from collaterally attacking the judgment of deferred adjudication, order granting the State's motion requesting forfeiture by wrongdoing, and order denying Respondent's application for writ of habeas corpus; Petitioner is entitled to judgment with respect to its claims as a matter of law; and, this Motion for Partial Summary Judgment be granted with only the issue of sanctions proceeding to trial. Petitioner further prays for such other and additional relief, general or specific, at law or in equity, to which it may show itself entitled.

Respectfully submitted,

Seana Willing  
**Chief Disciplinary Counsel**

Kristin V. Brady  
**Assistant Disciplinary Counsel**

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**Kristin V. Brady**  
State Bar No. 24082719

**ATTORNEYS FOR PETITIONER**

**CERTIFICATE OF SERVICE**

This is to certify that on this the 13th day of March, 2020, a true and correct copy of the foregoing has been sent to Respondent, Jason Lee Van Dyke, by and through his attorney of record, Alan K. Taggart, 2490 W. White Avenue, McKinney, Texas 75071, via e-mail at alan@taggartfirm.com.



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**Kristin V. Brady**