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Brenda Rowe, District Clerk
Wise County, Texas
By: Loucrecia Biggerstaff

CAUSE NO. CV20-02-085

COMMISSION FOR LAWYER DISCIPLINE	§	**IN THE DISTRICT COURT OF**
	§	
v.	§	**WISE COUNTY, TEXAS**
	§	
JASON VAN DYKE	§	**271st JUDICIAL DISTRICT**
File No. 201807880	§	

PETITIONER'S OBJECTIONS TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT EVIDENCE AND MOTION TO STRIKE

TO THE HONORABLE JUDGE DENNISE GARCIA:

COMES NOW Petitioner, Commission for Lawyer Discipline, and hereby objects to Respondent's Motion for Summary Judgment evidence and respectfully requests the Court strike Respondent's below-specified exhibits, and portions thereof, on the grounds that the evidence is not competent summary judgment evidence, is inadmissible for any purpose, or is inadmissible under the Texas Rules of Evidence.

PROCEDURAL BACKGROUND

Petitioner brought this action alleging Respondent violated Rules 8.04(a)(2), 8.04(a)(3) and 8.04(a)(4) of the Texas Disciplinary Rules of Professional Responsibility. Petitioner's Motion for Discipline and Disclosure was filed on February 5, 2020. On February 25, 2020, Respondent filed a traditional Motion for Summary Judgment. Petitioner filed its Motion for Partial Summary Judgment on March 13, 2020. Respondent's Motion for Summary Judgment is set for consideration on April 3, 2020.

ADMISSIBLITY OF SUMMARY JUDGMENT EVIDENCE

The standard for determining the admissibility of evidence in a summary judgment proceeding is the same as at trial; summary judgment evidence must be admissible under the Texas Rules of Evidence to be considered by the trial or reviewing court.[1]

EVIDENTIARY OBJECTIONS

I. AFFIDAVITS (Exhibits A-D)

A. Authorities.

"Summary judgment affidavits 'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'"[2] An interested witness' affidavit which recites that the affiant "estimates," or "believes" certain facts to be true will not support summary judgment.[3] An affiant's *belief* about the facts is legally insufficient.[4]

In addition, an affidavit that contains "self-serving, conclusory statements without any underlying factual detail" is not competent summary judgment evidence.[5]

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[1] *Seim v. Allstate Texas Lloyds*, 551 S.W.3d 161, 163-64 (Tex. 2018)(citing *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997)(per curiam)); Tex.R. Civ. Pro. 166a(f)(affidavits must set forth facts that would be admissible in evidence).

[2] *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (quoting Tex.R. Civ. P. 166a(f)); *Humphreys v. Caldwell,* 888 S.W.2d 469, 470 (Tex. 1994)(affidavit lacking testimony that statements were unequivocally based on personal knowledge was legally insufficient); *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761-62 (Tex. 1988) (affidavit that did not show how witness became familiar with facts was inadequate for summary judgment due to lack of personal knowledge).

[3] *See Lightfoot v. Weissgarber,* 763 S.W.2d 624, 628 (Tex.App.—San Antonio 1989, writ denied) (holding testimony based on affiant's best knowledge and belief does not meet Rule 166a(e)'s strict requirements); *Ardila v. Saavedra,* 808 S.W.2d 645, 647 (Tex.App.—Corpus Christi 1991, no writ).

[4] *Kerlin*, 274 S.W.3d at 668 (citing *Ryland Group, Inc. v. Hood,* 924 S.W.2d 120, 122 (Tex. 1996); *Brownlee v. Brownlee,* 665 S.W.2d 111, 112 (Tex. 1984).

[5] *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex.App.—Texarkana 2000, no pet.); *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (citing *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (conclusory affidavits are not credible and are not susceptible to being readily controverted).

B. Argument.

Respondent submitted four (4) affidavits in support of his Motion for Summary Judgment ("Motion"), Exhibits A-D. Petitioner asserts that nearly every statement in each of Respondent's affidavits is not competent summary judgment evidence and the affidavits should be stricken almost in their entirety because they:

- are not relevant to the proceedings before this Court;
- lack basis of personal knowledge;
- contain hearsay, to include hearsay within hearsay;
- contain beliefs, which are legally insufficient; or
- are self-serving and conclusory.

Specifically:

i. Exhibit A to Respondent's Motion, Affidavit of Jason Lee Van Dyke.

Respondent's Exhibit A is Respondent's affidavit—an 8-page narrative asserting his personal views, beliefs, and opinions of the events leading up to, and following, his arrest. Throughout Respondent's Motion for Summary Judgment, he cites his own affidavit as evidence (84 times). Respondent cannot, however, rely on his own statements as evidence to support his summary judgment motion, because it is not competent evidence. Overwhelmingly, it is irrelevant, which is inadmissible per Rule 402 of the Texas Rules of Evidence. As such, Respondent's 8-page affidavit rehashing his view of events is not relevant, with the following exceptions:

- para. 1: "My name is Jason Lee Van Dyke. I am over 21 years of age, I am of sound mind. I am the respondent in the above-numbered and styled case. The facts stated in this affidavit are within my personal knowledge and are true and correct;"
- para. 2: "I presently reside in Wise County, Texas'"

- para. 26: "I contacted my father on a jail phone after the hearing and insisted that he remind Marquardt to not answer the door and to make himself scarce."
- para. 28: "[T]he Court granted the state's motion for forfeiture by wrongdoing…" and "I entered a plea of no contest on February 26, 2019;" and,
- para. 36: "Further affiant sayeth not."

With regard to the remainder of Respondent's Exhibit A, the following paragraphs and portions thereof should be stricken because they not only fail to satisfy the evidentiary requirements for admissibility as to relevance, but for the additional reasons noted:

- para. 1: "I have never been convicted of a felony or a crime of moral turpitude" **Relevance; self-serving**
- para. 2: "I am not presently employed and have been either unemployed or under-employed since March 1, 2019." **Relevance; self-serving**
- paras. 3-27, 30-35: **Relevance**
- paras. 7, 9-14, 17-20, 24, 25-33: **Hearsay**
- paras. 7, 9-17, 19-24, 26-35: **Lacks basis of personal knowledge, conclusory, and self-serving**
- paras. 6, 8, 11, 19, 21, 23, 26, 27, 28, 29, 34, 35: **Belief is legally insufficient**
- paras. 19-21: **Polygraph evidence inadmissible for any reason**

The uncontroverted evidence shows that: (1) on January 28, 2019, The Honorable Coby Waddill, County Criminal Court No. 5, Denton, Texas, ruled that Respondent secured the unavailability of a witness by wrongdoing,[6] and; (2) on February 26, 2019, Respondent pleaded *nolo contendere* to False Report to a Police Officer.[7] Those matters have already been litigated. Furthermore, the Criminal Court did not accept Respondent's invitation to reconsider its ruling on forfeiture by wrongdoing. Respondent attempts to inappropriately use the summary judgment process as an opportunity to relitigate the Criminal Court's unfavorable ruling against him and to discount the plea agreement he made with the State.

[6] *See* Exhibits 6 (Hearing Transcript, p. 20-21) and 7 (Order of Forfeiture by Wrongdoing), attached to Petitioner's Response to Respondent's Motion for Summary Judgment.
[7] *See* Exhibit 4 (Judgment of Deferred Adjudication), attached to Petitioner's Response to Respondent's Motions for Summary Judgment. Also, the full title of Texas Penal Code § 37.08 is: False Report to Peace Officer, Federal Special Investigator, Law Enforcement Employee, Corrections Officer, or Jailer.

COURT'S RULING, Exhibit A:

_____Sustained

_____Denied

ii. Exhibit B to Respondent's Motion, Affidavit of Isaac Marquardt.

This exhibit is wholly irrelevant to the proceedings before this Court. Mr. Marquardt's affidavit was executed on May 23, 2019—four (4) months **after** The Honorable Coby Waddill ruled that Respondent had secured Marquardt's unavailability by wrongdoing and three (3) months **after** Respondent pleaded *nolo contendere* to False Report to Police. The only purpose for this exhibit is to relitigate an issue which has already been ruled upon and over which this Court has no jurisdiction.

Exhibit B is inadmissible and incompetent evidence for the following specific reasons:

- paras. 2 - 11: **Relevance**
- para. 5: **Lacks basis of personal knowledge**
- para. 10: **Conclusory statement**
- paras. 9 and 10: **Belief is legally insufficient**

Exhibit B should be stricken because it is incompetent evidence for summary judgment as it does not pass the evidentiary test for relevant evidence, the affiant lacks personal knowledge, it contains a conclusory statement, and affiant's beliefs are insufficient to support summary judgment.[8]

COURT'S RULING, Exhibit B:

_____Sustained

_____Denied

[8] Tex. R. Evid. 401, 402, and 602; Tex.R. Civ. P. 116a(f).

iii. Exhibit C to Respondent's Motion, Affidavit of Isaac Lee Marquardt.

The affiant in Exhibit C is the same affiant in Exhibit B. This exhibit was executed on August 22, 2019—seven (7) months **after** The Honorable Coby Waddill ruled that Respondent had secured Marquardt's unavailability by wrongdoing and six (6) months **after** Respondent pleaded *nolo contendere* to False Report to Police. It, too, is objectionable because it is another attempt by Respondent to relitigate his previous criminal proceedings and is wholly irrelevant to the proceedings before this Court. Moreover, affiant's statement in paragraph 2 casts doubt as to the credibility of both Exhibit B and Exhibit C. Specifically, affiant stated: "The purpose of this affidavit is **to correct or clarify certain statements I have previously made concerning these matters**…." The need to issue a correction to one's own sworn statements creates questions about which version, if any, is to be believed.

In addition to being of questionably credibility, Exhibit C is inadmissible and incompetent evidence for the following specific reasons:

- paras. 2-26, and 27b-e: **Relevance**
- paras. 3, 5-9, 24e, 26, and 27: **Lacks basis of personal knowledge**
- paras. 5 - 9, 23e, 26, and 27: **Conclusory statements**
- paras. 5, 7, 8, 13, 14, 21, 22, and 25: **Hearsay**
- paras. 6, 7, 9, 10, 16, 23a, 23b, 23d, 23e, 26, and 27: **Belief is legally insufficient**

Exhibit C should be stricken because it is incompetent evidence for summary judgment as it does not pass the evidentiary test for relevant evidence, the affiant lacks personal knowledge, it contains conclusory statements, it contains hearsay, and affiant's beliefs are insufficient to support summary judgment.[9]

[9] Tex. R. Evid. 401, 402, and 602; Tex.R. Civ. P. 116a(f).

COURT'S RULING, Exhibit C:

_____Sustained

_____Denied

iv. Exhibit D to Respondent's Motion, Affidavit of Daniel Lee Van Dyke.

Respondent's father is the affiant of Exhibit D. Respondent's father executed this affidavit on February 18, 2020—more than one (1) year **after** The Honorable Coby Waddill ruled that Respondent had secured Marquardt's unavailability by wrongdoing and nearly one (1) year **after** Respondent pleaded *nolo contendere* to False Report to Police. This exhibit is yet another attempt by Respondent to relitigate his previous criminal proceedings and is wholly irrelevant to the proceedings before this Court.

Exhibit D is inadmissible and incompetent evidence for the following specific reasons:

- paras. 1-15: **Relevance**
- paras. 2-5, 8: **Lacks basis of personal knowledge**
- paras. 2, 4, 5: **Conclusory statements**
- paras. 3, 5-10: **Hearsay**
- paras. 4, 5, 9: **Belief is legally insufficient**

Exhibit D should be stricken because it is incompetent evidence for summary judgment as it does not pass the evidentiary test for relevant evidence, the affiant lacks personal knowledge, it contains conclusory statements, it contains hearsay, and affiant's beliefs are insufficient to support summary judgment.[10]

COURT'S RULING, Exhibit D:

_____Sustained

_____Denied

[10] Tex. R. Evid. 401, 402, and 602; Tex.R. Civ.P. 116a(f).

II. POLYGRAPH (Exhibit N)

Authorities and Argument.

It is well-established law in Texas that the results of a polygraph test are not admissible for any purpose.[11] This is so because of the inherent unreliability and tendency of a polygraph examination to be unduly persuasive.[12] As such, admitting the results of a polygraph test usurps the responsibility and discretion of the fact-finder to determine credibility.[13]

It is improper to allow evidence that even implies that a polygraph test was taken because the intent and effect of it is to bolster one's case.[14]

This Court should strike Respondent's Exhibit N because it is not admissible for any purpose.

COURT'S RULING, Exhibit N:

_____Sustained

_____Denied

III. ADDITIONAL IRRELEVANT EXHIBITS

Respondent is accused of violating Rules 8.04(a)(2), 8.04(a)(3), and 8.04(a)(4) of the Texas Disciplinary Rules of Professional Conduct. Accordingly, Respondent's summary judgment evidence must be relevant to whether or not Respondent violated these rules. The below-listed exhibits (titled in accord with Respondent's Motion for Summary Judgment titles) fail to meet the requirements of Texas Rule of Evidence 401, Test for Relevant Evidence, which states:

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[11] *Nethery v. State*, 692 S.W. 2d 686, 700 (Tex.Crim.App. 1985), cert. denied, 474 U.S. 1110 (1986) (citing *Fernandez v. State,* 564 S.W.2d 771 (Tex.Crim.App. 1978); *Romero v. State,* 493 S.W.2d 206 (Tex.Crim.App. 1973)).
[12] *Sparks v. State*, 820 S.W.2d 924, 928 (Tex.App.—Austin 1991) (citing *Nethery*, 692 S.W.2d at 700; *Stewart v. State,* 705 S.W.2d 232, 234 (Tex.App.—Texarkana 1986, pet. ref'd).
[13] *Nichols v. State*, 378 S.W.2d 335, 338 (Tex.Crim.App. 1964).
[14] *Stewart*, 705 S.W.2d at 234.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

Irrelevant evidence is not admissible.[15]

A. Exhibit F: State Subpoena for Isaac Lee Marquardt.

The State's Application for Subpoena for two witnesses in Respondent's criminal proceeding is irrelevant to the case at bar. Respondent is attempting to have this Court consider evidence from his criminal proceeding concerning forfeiture by wrongdoing; this is improper. That matter has already been ruled upon in another jurisdiction and, further, the Criminal Court in that matter did not entertain Respondent's motion to reconsider its ruling that Respondent forfeited his right to confrontation by procuring the unavailability of Marquardt.[16]

COURT'S RULING, Exhibit F:

_____Sustained

_____Denied

B. Exhibit G: *Fort Worth Star Telegram* Article

Respondent relies on Exhibit G to highlight a prosecutor's statement to the press in Respondent's criminal case.[17] Respondent first claims this was consistent with his fears of adverse press coverage; this is irrelevant to these proceedings. Respondent then goes on to relay what the prosecutor said in the article regarding the witness [Marquardt], which is also irrelevant to these proceedings.

[15] Tex. R. Evid. 402.
[16] *See* Exhibit 7 (Order of Forfeiture by Wrongdoing), attached to Petitioner's Response to Respondent's Motion for Summary Judgment.
[17] *See* Respondent's Motion for Summary Judgment, p. 6 of 138.

Marquardt is not a witness to these proceedings. The fact that Respondent secured Marquardt's unavailability and, therefore, forfeited his [Respondent's] right to confrontation has already been ruled upon in another jurisdiction. Respondent's request to the Criminal Court to reconsider its ruling was denied more than one (1) year ago.[18]

COURT'S RULING, Exhibit G:

_____Sustained

_____Denied

C. Exhibits H, I and K: Retzlaff Inquiry No. 201805824, BODA Letter for Inquiry No. 201805824, and Investigatory Hearing Letter on 201807880, respectively

Respondent relies on these exhibits to support his affirmative defense of Laches.[19] Laches, however, is not an available remedy to Respondent in this matter.[20] Moreover, Respondent's discontent with the timing of the grievance process in Respondent's previous matters before the Office of the Chief Disciplinary are not relevant to whether Respondent violated Rules 8.04(a)(2), 8.04(a)(3), and 8.04(a)(4) of the Texas Disciplinary Rules of Professional Conduct in the case at bar.

Furthermore, Exhibit K provided notice to Respondent about the rescheduling of an Investigatory Hearing. The Investigatory Hearing is a non-adversarial hearing, which provided Respondent with an opportunity to present witnesses, present his own testimony, and cross-examine the Complainant and any other witnesses identified. The purpose of an Investigatory Hearing is an attempt to resolve a matter by dismissal or a negotiated resolution prior to

[18] *See* Exhibit 7 (Order of Forfeiture by Wrongdoing), attached to Petitioner's Response to Respondent's Motion for Summary Judgment.
[19] *See* Respondent's Motion for Summary Judgment, pp. 20-21.
[20] *See* Petitioner's Response to Respondent's Motion for Summary Judgment, p. 18.

litigation. It is unclear how this pre-litigation opportunity provided to Respondent is relevant to the current proceedings.

COURT'S RULING, Exhibits H, I, and K:

_____Sustained

_____Denied

D. <u>Exhibit L and M: Written Statement to Oak Point Police Department and Written Correspondence to Oak Point Police Department and Denton County Sheriff (with receipts), respectively</u>

Respondent's statements and representations to police are not relevant to these proceedings. What is relevant to the proceedings before this Court is that Respondent pled *nolo contendere* to False Report to Police, a violation of Texas Penal Code § 37.08.

COURT'S RULING, Exhibits L and M:

_____Sustained

_____Denied

E. <u>Exhibits P, Q, and R: Corey Momot Charging Instrument, Corey Momot Amended Charging Instrument, and Corey Momot Plea Papers, respectively</u>

The criminal and civil proceedings against Corey Momot are not relevant to the disciplinary matter before this Court. Respondent persists in claiming actual innocence in his criminal matter based upon the pleadings in Momot's criminal case. This persistence totally disregards the Criminal Court's ruling contrary to Respondent's claim of innocence, as well as ignores evidence revealing the fictional basis of Respondent's claim.

Specifically, on February 12, 2020, The Honorable Coby Waddill, County Criminal Court No. 5, Denton County, Texas, issued his Order Including Findings of Facts and

Conclusions of Law, finding Defendant's [Respondent's] claim of actual innocence was denied.[21] Moreover, on December 9, 2019, the State filed three (3) affidavits concerning Corey Momot's charges and plea.[22] These affidavits reveal, in no uncertain terms, that Respondent's relentless reliance on the events in Momot's case as a basis to proclaim his innocence of the charge to which he pled is a distortion of the actual facts.

Respondent was aware of Judge Waddill's ruling and the statements of the three prosecutors prior to filing his Motion for Summary Judgment.

COURT'S RULING, Exhibits P, Q, and R:

_____Sustained

_____Denied

F. Exhibit S: Judgment – Van Dyke v. Momot

The fact that Respondent obtained a Default Judgment against Momot is irrelevant to these proceedings. Significantly, the judgment is not on the merits, as the presiding judge deliberately lined through the entirety of the findings of fact and conclusions of law proposed by Respondent, with one exception: the court made a finding that it had jurisdiction over the subject matter and the parties.

COURT'S RULING, Exhibit S:

_____Sustained

_____Denied

[21] *See* Exhibit 10 (Order Including Findings of Fact and Conclusions of Law, Conclusions of Law, ¶4), attached to Petitioner's Response to Respondent's Motion for Summary Judgment

[22] *See* Exhibit 18 (State's Second Supplemental Answer to Respondent's Application for Writ of Habeas Corpus), attached to Petitioner's Response to Respondent's Motion for Summary Judgment

SUMMARY

1. Exhibits A- D should be stricken as the statements contained within them are not relevant to these proceedings; lack basis of personal knowledge; contain conclusory and self-serving statements; contain hearsay; and, contain beliefs, which are legally insufficient.

2. Exhibit N should be stricken because it is polygraph evidence that is impermissible for any reason.

3. Exhibits F, G, H, I, K, L, M, P, Q, R, and S should be stricken as irrelevant.

Petitioner objects to the above-listed exhibits as they are inadmissible under the Texas Rules of Evidence on the specific grounds noted.

CONCLUSION

WHEREFORE Petitioner respectfully requests this Court strike Respondent's Exhibits A, B, C, D, F, G, H, I, K, L, M, N, P, Q, R, and S because the evidence is not competent summary judgment evidence, is inadmissible for any purpose, or is inadmissible under the Texas Rules of Evidence.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that on this the 25th 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.

Kristin V. Brady