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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 LEE VAN DYKE **File No. 201807880**	§	**271st JUDICIAL DISTRICT**

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

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

I. INTRODUCTION

Respondent's Motion for Summary Judgment should be denied for the following reasons:

- Respondent failed to meet his burden and is not entitled to the relief he seeks;
- Respondent's basis for summary judgment is precluded by the doctrine of collateral estoppel;
- Respondent's basis for summary judgment is precluded by the doctrine of judicial estoppel;
- Respondent's basis for summary judgment is an impermissible collateral attack; and,
- Respondent's affirmative defense of laches is barred by law.

Respondent, instead of filing a no evidence summary judgment motion which Respondent knows would not prevail, filed what looks like a traditional motion for summary judgment on Petitioner's claims. Respondent, although misguided in actual facts and reasoning, correctly states that there is no genuine issue of material fact. However, in an attempt to circumvent and controvert the undisputed material facts, Respondent, relies on irrelevant, incompetent, and inadmissible evidence. Therefore, this Court should deny Respondent's motion

for summary judgment because the evidence, including but not limited to, the affidavits attached to Respondent's motion for summary judgment are defective and do not present competent evidence.

II. EVIDENCE IN SUPPORT

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

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

Exhibit 11: Just Cause Letter in Disciplinary Matter

Exhibit 12: Respondent's District Court Election in Disciplinary Matter

Exhibit 13: Letter to Supreme Court Requesting Appointment of District Judge in Disciplinary Matter

Exhibit 14: Judge Appointment in Disciplinary Matter

Exhibit 15: File-Marked Disciplinary Petition and Request for Disclosure in Disciplinary Matter

Exhibit 16: Order re: Testimony in Respondent's Criminal Bond Hearing

Exhibit 17: Death Threat Made by Respondent (1)

Exhibit 18: State's Second Supplemental Answer to Respondent's Application for Writ of Habeas Corpus

Exhibit 19: Death Threat Made by Respondent (2)

III. TIMELINE

1. On December 14, 2018, Respondent was charged with False Report to a Peace Officer, Federal Special Investigator, Law Enforcement Employee, Corrections Officer, or Jailer ("False Report to a Police Officer"), in violation of Texas Penal Code 37.08.[1]

2. On January 11, 2019, Respondent, while incarcerated, had a phone call with his father, Daniel Van Dyke (Daniel). During this phone call, Respondent instructed Daniel to tell a potential witness in Respondent's criminal trial, Isaac Marquardt (Marquardt), to not answer the door and "make himself scarce."[2]

3. On January 28, 2019, The Honorable Coby Waddill, County Criminal Court No. 5, Denton County, Texas ("Criminal Court"), held a hearing on State's Motion Requesting Forfeiture by Wrongdoing concerning Isaac Marquardt's (Marquardt) unavailability to testify as a potential State's witness at Respondent's criminal trial. After considering the evidence and argument of counsel, the Criminal Court found that Respondent had wrongfully procured the unavailability of Marquardt and, therefore, forfeited his right to confrontation of Marquardt at trial.[3]

4. On February 6, 2019, Respondent pled *nolo contendere* to the charge of False Report to a Police Officer and the Criminal Court entered an order of deferred adjudication.[4]

5. On February 27, 2019, the Office of Chief Disciplinary Counsel ("OCDC")

[1] *See* Exhibits 1 and 2; *see also* Exhibit 3 (State amended the information on January 18, 2019); *see also* Texas Penal Code § 37.08 (a person commits this offense if, with intent to deceive, he knowingly, makes a false statement that is material to a criminal investigation and makes the statement to the peace officer)
[2] *See* Exhibit 6, p. 10-11; Exhibit 10, ¶ 37
[3] *See* Exhibits 5, 6, 7, and 10
[4] *See* Exhibits 2, 3, and 4

received information related to Respondent's plea and order of deferred adjudication.[5] The OCDC, in accordance with Texas Disciplinary Rules of Procedure, set Respondent's pending grievance for an Investigatory Hearing.[6]

6. On May 24, 2019, and in regard to the disciplinary matter, an Investigatory Hearing was held in front of Investigatory Panel District 14, Panel 14-2. The Investigatory Hearing Panel determined there was Just Cause that professional misconduct had occurred.[7]

7. On August 21, 2019, OCDC received Respondent's election to have this disciplinary matter heard in District Court.[8]

8. On September 13, 2019, Respondent filed an Application for Writ of Habeas Corpus in the Criminal Court.[9] The State filed an Answer and Second Supplemental Answer to Respondent's Application for Writ of Habeas Corpus on September 27, 2019, and December 9, 2019, respectively.[10]

9. On October 18, 2019, OCDC sent its Disciplinary Petition to the Supreme Court requesting the Supreme Court to appoint an active District Court Judge to preside over the disciplinary matter.[11]

10. On January 10, 2020, Your Honor, Honorable Dennise Garcia, Judge of the 303rd District Court, Dallas County, Texas, was appointed to preside over this disciplinary matter.[12]

11. The Disciplinary Petition related to this disciplinary matter, was thereafter filed

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[5] *See* Respondent's Motion for Summary Judgment Exhibit "J", Complainant Retzlaff's Amendment to Complaint 201807800
[6] *See* Respondent's Motion for Summary Judgment Exhibit "K", Notice of Investigatory Hearing; *see also* Texas Rules of Disciplinary Procedure 2.12
[7] *See* Exhibit 11
[8] *See* Exhibit 12
[9] *See* Exhibit 8
[10] *See* Exhibits 9 and 18
[11] *See* Exhibit 13
[12] *See* Exhibit 14

with the 271st Judicial District Court, Wise County, Texas on February 5, 2020.[13]

12. On February 12, 2020, the Criminal Court, denied Respondent's Application for Writ of Habeas Corpus and executed its Order Including Findings of Fact and Conclusions of Law.[14]

IV. SUMMARY JUDGMENT STANDARD

Respondent filed a traditional summary judgment under TRCP 166a(c) in regard to Petitioner's claims against Respondent. Under a traditional summary judgment motion, the movant carries the burden of showing there is no genuine issue of material fact and he is entitled to judgment as a matter of law.[15] Petitioner agrees there is no genuine issue of material fact; however, the material facts support a summary judgment motion in the favor of Petitioner and Respondent is not entitled to a judgment as a matter of law. If Respondent wished to attack Petitioner's claims, Respondent should have filed a no evidence motion.[16] Further, Respondent is estopped from relitigating 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. Respondent's motion for summary judgment is, at its very essence, an improper request for this Court to not only interpret the Criminal Court's orders, but to also act as the reviewing court for the underlying criminal matter, over which this Court does not have jurisdiction.

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[13] *See* Exhibit 15
[14] *See* Exhibit 10
[15] *Crampton v. Commission for Lawyer Discipline*, 545 S.W.3d 593, 602 (Tex. App.—El Paso, 2016, no pet.)
[16] In addition, if Respondent were to file a no evidence summary judgment motion, Texas courts routinely hold that Respondent "must specially except before urging a motion for summary judgment that alleges a failure to state a claim, thereby giving the plaintiff an opportunity to amend deficient pleadings. *Toles v. Toles,* 113 S.W.3d 899, 909 (Tex.App.-Dallas 2003, no pet.); *accord Friesenhahn v. Ryan,* 960 S.W.2d 656, 658 (Tex.1998); *Salmon v. Miller,* 958 S.W.2d 424,429 (Tex.App.- Texarkana 1997, pet. denied); *San Saba Energy, L.P. v. McCord,* 167 S.W.3d 67,73 (Tex. App.-Waco 2005, pet. denied)

V. COLLATERAL ESTOPPEL

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.[17] 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.[18]

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.[19] When used in this manner, 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."[20]

A trial court has broad discretion in determining whether to allow a plaintiff to use collateral estoppel offensively.[21] A trial court abuses its discretion only when its action is arbitrary and unreasonable, without reference to guiding rules or principles.[22]

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

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[17] *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 [1st Dist.] 1998, no writ) (strict mutuality of parties is no longer required)
[18] *Goldstein v. Commission for Lawyer Discipline*. 109 S.W.3d 810, 813 (Tex. App.—Dallas 2003, pet. denied)
[19] *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)
[20] *Johnston v. American Med. Int'l*, 36 S.W.3d 572, 577 (Tex. App.—Tyler 2000, pet. denied)
[21] *Goldstein*, 109 S.W.3d at 813
[22] *Id.*

have joined in the earlier action; and (2) potential unfairness to the defendant.[23]

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.[24] 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.[25] If the plaintiff was unable to join the first lawsuit, there is no justification for prohibiting their use of offensive collateral estoppel.[26]

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.[27] 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 the second suit that were not available in the first suit.[28]

1. <u>Collateral Estoppel Applies to Attorney Disciplinary Matters</u>

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.[29] Goldstein lost on this issue at trial.[30] 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

[23] *Parklane*, 439 U.S. at 329-30, 99 S.Ct. at 650-51
[24] *Id.*
[25] *Id*. at 331, 99 S.Ct. at 652
[26] *Id*. at 331-32, 99 S.Ct. at 652
[27] *Goldstein*, 109 S.W.3d at 813
[28] *Id*.
[29] *Goldstein*, 109 S.W.3d at 811
[30] *Id*.

charging of an unconscionable fee.[31] 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.[32]

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.[33] Further, there was no danger of increasing the costs and burdens of litigation, because the Commission could not have joined the first action.[34] Accordingly, the trial court's application of collateral estoppel was affirmed.

2. <u>Collateral Estoppel Applies to Prior Criminal Pleas</u>

The doctrine of collateral estoppel is applicable to prior criminal litigation as well as civil litigation.[35] 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 the elements of the crime.[36] 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.[37]

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

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[31] *Id*. at 812
[32] *Id*.
[33] *Id*. at 813-14
[34] *Id*. at 813
[35] *Delese v. Albertson's Inc.,* 83 S.W.3d 827, 831 (Tex. App.—Texarkana 2002, no pet.)
[36] *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)
[37] *Delese*, 83 S.W.3d at 832; (citing *Dover v. Baker, Brown, Sharman & Parker*, 859 S.W.2d 441, 447 (Tex. App.—Houston [1st Dist.] 1993, no writ))

reasonable doubt.[38] These circumstances provided Delese "the opportunity to fully and fairly litigate the facts in the [criminal] case."[39] A defendant cannot then dispute in a subsequent civil case that which he stipulated in the criminal matter.[40] 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.[41]

"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."[42] Therefore, in the instant case, when the Criminal Court accepted Respondent's plea and acceptance of deferred adjudication, "the stipulation becomes conclusive as to the fact conceded."[43] Respondent should be estopped from questioning the very same facts in the disciplinary action before this Court.

3. 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

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[38] *Delese*, 83 S.W.3d at 832
[39] *Id*.
[40] *See Id*.; *see also Bomar Oil and Gas, Inc. v. Loyd*, 381 S.W.3d 689, 692-93 (Tex. App.—Amarillo 2012, pet. denied)
[41] *Delese*, 83 S.W.3d at 832
[42] *Bomar Oil and Gas, Inc.,* 381 S.W.3d at 693, (citing *Shepherd v. Ledford*, 962 S.W.2d 28, 33 (Tex. 1998))
[43] *Id*.; *Houston Lighting & Power Co. v. City of Wharton*, 101 S.W.3d 633, 641 (Tex. App.—Houston[1st Dist.] 2003, pet. denied)

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.[44]

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 doubt."[45] These circumstances provided Respondent "the opportunity to fully and fairly litigate the facts in the [criminal] case."[46] Respondent cannot now dispute in this disciplinary matter that which he stipulated in the criminal matter.[47] 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***."[48] Respondent made his sworn plea, freely and voluntarily, and was aware of the consequences.[49]

In addition, Respondent had incentive and opportunity to defend himself during the hearing on the State's Motion Requesting Forfeiture by Wrongdoing, as the Criminal Court's ruling

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[44] *Parklane Hosiery*, 439 U.S. at 330-31, 99 S.Ct. at 651
[45] *See* Exhibit 4; *see also Delese*, 83 S.W.3d at 832
[46] *Id*.
[47] *See Id.*; *see also Bomar Oil and Gas, Inc.*, 381 S.W.3d at 692-93; *see also* Exhibit 4
[48] Tex. R. Disc. Pro. 8.02 (emphasis added)
[49] *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

would prevent Respondent from confronting witness Marquardt or objecting to the admissibility of evidence or statements made by Marquardt.[50]

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.[51]

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

VI. 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."[52] The doctrine is predicated upon the rationale that parties should not misuse the judicial system by taking inconsistent positions under oath in different proceedings.[53] The purpose of judicial estoppel is "to ***uphold the sanctity of the oath*** and to prevent abuse of the judicial process."[54] The doctrine "arises from positive rules of procedure based on justice and sound public policy."[55] Judicial estoppel is sometimes referred to as estoppel by record.[56]

The doctrine of judicial estoppel applies if the following elements are present: "(1) a sworn,

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[50] *See* Exhibits 5, 6, and 7
[51] *See* Exhibits 1, 2, 3, and 4
[52] *Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956)
[53] *See Id.; see also, Vendig v. Traylor*, 604 S.W.2d 424, 429 (Tex. 1980)
[54] *See Dallas Sales Co., Inc. v. Carlisle Silver Co., Inc.*, 134 S.W.3d 928, 930 (Tex. 2004) (emphasis added)
[55] *Long*, 291 SW.2d at 295
[56] *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)

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."[57] Further, it is not necessary that the party invoking the doctrine have been a party to the former proceeding.[58]

2. <u>Respondent is Judicially Estopped from Making Statements Inconsistent With His *Nolo Contendere* Plea</u>

In the instant case, Respondent pled *nolo contendere* to False Report to Police Officer, a Class B Misdemeanor.[59] A Class B Misdemeanor is punishable by up to 180 days in jail, a fine up to $2,000, or both.[60] 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.[61] Respondent did not receive any jail time.[62]

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.[63] He further swore or affirmed: "I understand this document completely" and "I am aware of the consequences of my plea.[64]" 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 Criminal Court found that "the evidence submitted ***substantiates the guilt*** of the Respondent.[65]" Respondent knew, understood and agreed to the terms of the plea when he stipulated to the

[57] *Galley v. Apollo Associated Servs., Ltd.*, 177 S.W.3d 523, 528-29 (Tex. App.—Houston [1st Dist.] 2005, no pet.)
[58] *Metroflight, Inc. v. Schaffer*, 581 S.W.2d 704, 709 (Tex. App.--Dallas 1979, writ ref'd n.r.e.)
[59] *See* Exhibits 1, 2, 3 and 4; *see also* Texas Penal Code § 37.08
[60] *See* Texas Penal Code § 12.22
[61] *See* Exhibit 4
[62] *Id*.
[63] *Id.*
[64] *Id.*
[65] *Id.*

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***. [66]"

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.

VII. 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."[67] A collateral attack is impermissible if it is instituted to interpret a prior judgment by another court.[68] A collateral attack may be used to set aside a judgment that is void or involves fundamental error.[69] 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."[70]

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.

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[66] *Id*. (emphasis added)
[67] *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 870 (Tex. App.—Houston [14th Dist.] 2000) (quoting Gus M. Hodges, *Collateral Attacks on Judgments*, 41 TEX. L. REV. 163, 163-64 (1962))
[68] *Id*. at 870-71.
[69] *In re A.G.G.*, 267 S.W.3d 165, 169 (Tex. App.—San Antonio 2008, pet. denied)
[70] *Id*.

Further, Respondent, in the underlying criminal matter, filed an Application for Writ of Habeas Corpus, in which Respondent claimed, among other things, actual innocence.[71] The Criminal Court, after reviewing Respondent's application, the State's response, and evidence before the Criminal Court, denied Respondent's application.[72]

VIII. 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 conclusively demonstrate violations of Rules 8.04(a)(2), 8.04(a)(3), and 8.04(a)(4) as set forth below.

1. Rules 8.04(a)(2) and 8.04(a)(3)

> (a)(2) "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."[73]
>
> (a)(3) "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[74]

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.[75] 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 criminal investigation and makes the statement to the peace officer.[76]

Any conduct involving fraud, dishonesty, deceit, or misrepresentation is prohibited by Rule

[71] *See* Exhibit 8
[72] *See* Exhibits 8, 9, and 10
[73] Tex. Disc. R. Prof. Conduct Rule 8.04(a)(2)
[74] Tex. Disc. R. Prof. Conduct Rule 8.04(a)(3)
[75] *See* Exhibit 4; *see also*, Texas Penal Code § 37.08
[76] Tex. Penal Code § 37.08

8.04(a)(3).[77] No specific scienter requirement is stated; however, even it were required, Respondent pled to and judicially confessed to a crime that required an intent to deceive.[78] When an attorney's actions lack probity, integrity, and straightforwardness, the attorney's actions are dishonest.[79] 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.[80] An attorney may undoubtedly act as a private citizen in a variety of situations.[81] Nonetheless, as a private citizen, he must "maintain the highest standards of ethical conduct" and "conform to the requirements of the law."[82]

Respondent knowingly, voluntarily, and freely pled to the crime described above and accepted punishment of 24 months deferred adjudication.[83] In accepting deferred adjudication, Respondent judicially confessed to the crime.[84]

"Honesty" is defined as "[t]he character or quality of being truthful and trustworthy."[85] The Criminal 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

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[77] *See* Tex. Disc. R. Prof. Conduct Rule 8.04(a)(3)
[78] *See* Exhibit 4; *see also* Tex. Penal Code § 37.08
[79] *Rosas v. Comm'n for Lawyer Discipline*, 335 S.W.3d 311, 319 (Tex. App.—San Antonio 2010); s*ee also, Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 680 (Tex. App.—San Antonio 1998, no pet.)
[80] *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 250 (Tex. App.—Houston [14th 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)
[81] *Id.* at 260
[82] Tex. Disc. R. Prof. Conduct—Preamble.
[83] *See* Exhibit 4
[84] *Id*.
[85] Black's Law Dictionary (11th ed. 2019)

statements to the police.[86] The Criminal 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.[87]

Respondent failed to mention that he already attempted this very same argument in the Criminal Court as Respondent continues his attempts to deceive and mislead this Court by relying on irrelevant and inadmissible evidence. All of the "facts" Respondent relies on in his motion for summary judgment are only supported by incompetent evidence – namely, self-serving affidavits.[88] Therefore, Respondent's motion for summary judgment should be denied. Further, it is not for this Court to interpret the crime that Respondent chose to plead to in the Criminal Court.

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 and would constitute a violation of Rules 8.04(a)(2) and 8.04(a)(3). The misconduct alleged by Petitioner arose out of the same events that caused the findings of the Criminal Court.[89] Therefore, Respondent should be estopped from relitigating 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.

2. <u>Rule 8.04(a)(4)</u>

"A lawyer shall not engage in conduct constituting obstruction of justice."[90]

"Obstruction of justice" is defined as the "[i]nterference with the orderly administration of

[86] *See* Exhibit 10, Findings of Fact, ¶ 15
[87] *Id*., Conclusions of Law, ¶ 5
[88] *See* Respondent's Motion for Summary Judgment, p. 12; *see also*, Petitioner's Objections to Respondent's Motion for Summary Judgment Evidence
[89] *See* Exhibits 4 and 10
[90] Tex. Disc. R. Prof. Conduct Rule 8.04(a)(4)

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."[91]

Respondent knowingly, voluntarily, and freely pled to the crime described above and accepted punishment of 24 months deferred adjudication.[92] In accepting deferred adjudication, Respondent judicially confessed to the crime.[93] The Criminal 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.[94] The Criminal 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.[95]

In addition, the Criminal Court, in granting the State's Motion Requesting Forfeiture by Wrongdoing, found that Respondent wrongfully procured the unavailability of a potential State witness, Marquardt.[96] The Criminal Court's orders conclusively establish that Respondent engaged in conduct constituting the obstruction of justice. Respondent argues that the Criminal Court erred because it did not conduct an analysis of Respondent's case under the *Giles* case; however, Respondent did not testify, present witnesses, or argue the *Giles* case at the hearing held on the State's motion.[97] Instead, Respondent improperly attempts to rely on self-serving

[91] Black's Law Dictionary (11th ed. 2019)
[92] *See* Exhibit 4
[93] *Id*.
[94] *See* Exhibit 10, Findings of Fact, ¶ 15
[95] *Id*., Conclusions of Law, ¶ 5
[96] *See* Exhibits 6 and 7
[97] *See* Exhibit 6

affidavits that were executed several months after the January 28, 2019, hearing.[98] Therefore, Respondent's entire *Giles* argument is irrelevant and not for this Court to decide.

Respondent, again, omits the Criminal Court's denial of Respondent's Application for Habeas Corpus, relies solely on incompetent summary judgment evidence, and improperly asks this Court to interpret or ignore prior orders executed in the Criminal Court.

IX. RESPONDENT'S AFFIRMATIVE DEFENSE OF LACHES IS BARRED BY LAW

Respondent's assertion of laches against Petitioner fails because Petitioner, the Commission for Lawyer Discipline, is a standing committee of the State Bar of Texas, which is, by statute, a public corporation and an administrative agency of the State's judicial department.[99] One of the Commission's roles is to "investigate and prosecute suits to enjoin members…of the state bar from the practice of law."[100]

Texas law is clear that the affirmative defense of laches does not apply to an administrative agency while that entity is performing a governmental function.[101] The rationale is to allow governmental entities the ability to enforce statutes intended to protect the general public.[102] Notably, protection of the public from unethical practitioners and attorney professionalism are top priorities of the State Bar of Texas and the Commission.[103] In asserting his inapplicable affirmative defense of laches, Respondent is attempting to bar Petitioner from fulfilling the very purpose for which it was created.

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[98] *See* Respondent's Motion for Summary Judgment, Exhibits "A", "B", and "C"
[99] Tex. Gov't Code § 81.011(a), 81.076(b)
[100] Tex. Gov't Code § 81.076(b); *see also Willie v. Comm'n for Lawyer Disc.*, No. 14-10-00900-CV, 2011 WL 3064158, at *4 (Tex. App.—Houston [14th Dist.] July 26, 2011, pet. denied)
[101] *See, Thomas v. State*, 226 S.W.3d 697, 710 (Tex. App.—Corpus Christi 2007, pet. dism'd); *see also Texas Lottery Commission v. Mars Convenience, Inc. d/b/a LaPorte Shell License No. 128769, Sard Enterprises, Inc., d/b/a La Porte Chevron License No. 134184*, 2008 WL 339217 at *4
[102] *Id*.
[103] *See* Tex. R. Disc. Pro. 15.01(A); https://www.texasbar.com/content/navigationmenu/forthepublic/problems withanattorney/ grievance ethics info1/officeofcdc.htm and https://www.texasbar.com/AM/Template.cfm? Section= Disciplinary_Process_Overview& Template=/CM/HTMLDisplay.cfm&ContentID=29473, accessed 3/19/2020

Respondent's assertion that the current allegations against him could have been "easily incorporated" into a prior case, does not take into account the procedural process of complaints and the attendant deadlines depending on where a complaint lies in that process. Respondent's misunderstanding of the procedural rules and the result of the application of those rules in this case do not justify the affirmative defense of laches, even if it was available to him.

In asserting his inapplicable affirmative defense of laches, Respondent also claims the OCDC "botched" his investigatory hearing.[104] An investigatory hearing is held before a local Grievance Committee panel, with the purpose of potentially resolving grievances, by agreement, prior to litigation. The hearing is a component of the investigation of a disciplinary matter and it is a non-adversarial proceeding.[105] It is within the discretion of the OCDC whether a complaint proceeds to an investigatory hearing.[106]

Respondents and OCDC may subpoena witnesses for the hearing.[107] The investigatory panel chair administers oaths to any testifying witness and has discretion on how the hearing is to be conducted with regard to eliciting testimony and other evidence.[108] Respondents (or their counsel) have an opportunity to present witnesses or other evidence.[109] All witnesses may be questioned by any investigatory panel member, OCDC attorney, or Respondent/Respondent's attorney.[110]

At the conclusion of the investigatory hearing, the panel members deliberate and determine whether the evidence supports a finding of professional misconduct and, if so, the investigatory panel members make a recommendation on the rules that were violated, as well as

[104] *See* Respondent's Motion for Summary Judgment, pp. 21-23
[105] Tex. R. Disc. Pro. 2.12(F)
[106] *Id.*
[107] Tex. R. Disc. Pro. 2.12(B)
[108] Tex. R. Disc. Pro. 2.12(F)
[109] *Id.*
[110] *Id.*

an appropriate sanction. The available range of sanctions is from a private reprimand to disbarment, although an attorney may also be referred to the Grievance Referral Program.[111] The OCDC attorney then attempts to negotiate an agreed judgment with Respondent.[112] If a sanction cannot be agreed upon, the matter proceeds to litigation and is ultimately heard by an evidentiary panel or district court.[113] Respondents have the choice of which body, either an evidentiary panel or district court, will preside over their matter;[114] in this case, Respondent chose district court. Due process is not implicated at the investigatory stage because the investigatory panel results have no finality.[115]

In his Motion for Summary Judgment, Respondent complains that the investigatory hearing was "conducted in a manner which clearly violated Rule 2.12 of the Texas Rules of Disciplinary Procedure."[116] He criticizes the evidence, stating "OCDC relied almost entirely on [Respondent's] jail telephone call with his father and the record in the criminal case."[117] Respondent's criticism is puzzling for two reasons: (1) Respondent's jail telephone call with his father was, in fact, evidence relevant to the conduct alleged; and, (2) Respondent had the opportunity to present rebuttal evidence at the investigatory hearing. He further complains in his Motion for Summary Judgment that "[n]o witnesses except Mr. Van Dyke himself, were present or testified."[118] Again, Respondent had the opportunity to call rebuttal witnesses, like his father, yet Respondent chose not to.

Respondent also cites Rules 2.12(A) and 5.02(C) of the Texas Rules of Disciplinary

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[111] The panel members may also make a recommendation for dismissal if they do not believe professional misconduct was committed. Tex. R. Disc. Pro. 1.06(FF), 2.12(G), 2.16(B), and 16.01
[112] Tex. R. Disc. Pro. 2.12(G)
[113] *Id.* at 2.14(D) and 2.15
[114] *Id.* at 2.15
[115] *Weiss v. Commission for Lawyer Discipline* (App. 4 Dist. 1998) 981 S.W.2d 8, rehearing overruled, review denied.
[116] *See* Respondent's Motion for Summary Judgment, p. 22, □1
[117] *Id.*
[118] *Id.*

Procedure, stating that only OCDC can make a Just Cause finding.

> Rule 2.12(A) states: "The Chief Disciplinary Counsel will investigate a Complaint to determine whether Just Cause exists."

As explained above, the Investigatory Hearing is part of the investigation process. Accordingly, the Just Cause determination is a part of that process.

Rule 5.02(C) confirms this and states that OCDC:

> "shall Investigate Complaints to ascertain whether Just Cause exists. The investigation may include the issuance of subpoenas, an investigatory hearing, and the entry of a negotiated judgment by the Investigatory Panel."

Respondent's Criminal Bond Hearing

In regard to the bond hearing that Assistant Disciplinary Counsel, Kristin Brady, was a witness, Respondent purposely omits from his own version of the "facts" that Ms. Brady was ordered by the judge to testify.[119] Respondent, in continuing his pattern of misrepresentation, also failed to inform this Court that Ms. Brady was called to testify regarding the authenticity of emails Respondent copied Ms. Brady on that contained death threats to Thomas Retzlaff, in which Respondent wrote, "I promise you this motherfucker: If my law career dies, you die with it"; and, "[i]f you think you're so tough, come to Dallas. It would be my pleasure to curb stomp your ass."[120]

X. CONCLUSION AND PRAYER

Respondent wholly fails to show how he is entitled to summary judgment as a matter of law. All arguments have been considered and litigated by the Criminal Court and Respondent is improperly asking this Court to ignore those orders and rule upon issues already resolved. For the reasons stated above, Petitioner prays this Court deny Respondent's Motion for Summary Judgment.

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[119] *See* Exhibit 16
[120] *See* Exhibits 17 and 19

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