BODA # 67514

IN THE BOARD OF DISCIPLINARY APPEALS

Curtis Lilly,

Appellant

vs.

Commission for Lawyer Discipline,

Appellee

On Appeal from the Chief Disciplinary Counsel

For the State Bar of Texas, Case No. 201905562

APPELLANT'S BRIEF

Attorney for Appellant

Curtis Lilly

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RECORD REFERENCES

The record in this cause consists of the Clerk's Record (1 volume), the and the Reporter's Record (D6P5-201905562-RR-Vol001 Master Index,) D6P5-201905562-RR-Vol002 Default Evidentiary Hearing 9-20-2022, D6P5- 201905562-RR-Vol003 Sanctions Hearing 12-20-2022 and D6P5-201905562-RR-Vol004 Exhibit Index) Volume 2 of the Reporter's Record will be referred to as "RRv2 ___." Volume 3 of the Reporter's Record will be referred to as "RRv3 ___." Volume 4 of the Reporter's Record will be referred to as "RRv4 ___."

STATEMENT OF THE CASE

Nature of the Case:	This case is about whether the District 6 Grievance Committee, Evidentiary Panel 6-5 abused its discretion by denying Appellant's Motion for New Trial, denying Appellant's Motion for Continuance, and whether the sanctions imposed on Appellant are appropriate given the circumstances.
Tribunal:	District 6 Grievance Committee, Evidentiary Panel 6-5
Trial Court Disposition:	The District 6 Grievance Committee, Evidentiary Panel 6-5, entered a Default Judgment of Active Suspension against Appellant, which, among other things, prohibits Appellant from practicing law for 18 months.

JURISDICTION

The Board of Disciplinary Appeals has jurisdiction over this matter pursuant to Rule 2.23 of the Texas Rules of Disciplinary Procedure because this is an appeal from a judgment entered by the District 6 Grievance Committee, Evidentiary Panel 6-5.

ISSUES PRESENTED

Issue 1: Whether the District 6 Grievance Committee, Evidentiary Panel 6-5 abused its discretion by denying Appellant's Motion for New Trial?

Issue 2: Whether the District 6 Grievance Committee, Evidentiary Panel 6-5 abused its discretion by granting Petitioner's Motion to Compel?

Issue 3: Whether there is legally and factually sufficient evidence to support the default judgment finding that Appellant violated the 2019 Judgment?

Issue 4: Are the sanctions imposed on Appellant appropriate?

To the Honorable Board of Disciplinary Appeals,

Comes now, Curtis Lilly, Appellant in the above-styled and numbered matter, and files her Appellant's Brief in this cause. In support of same, Appellant would respectfully show the Board as follows:

STATEMENT OF FACTS

On December 20, 2022, a judgment of partially probated suspension was entered in this matter. A Judgment of Partially Probated Suspension from the practice of law for a period of forty-eight (48) months, beginning January 23, 2023, and ending January 22, 2027. Appellant shall be actively suspended from the practice of law for a period of eighteen (18) months beginning January 23, 2023, and ending July 22, 2024.

Curtis Lilly, Appellant had represented Jason Sirovica in a federal criminal matter in the Eastern District of Texas for approximately 7 years. In 2019 the Defendant was arrested for probation violation, unbeknownst to the Appellant, the case was transferred to the Northern District of Texas. On January 15, 2019, the Appellant received a call from a public defender indicating the Defendant was in court and asking if the Appellant still represented Defendant. The Appellant was advised to come to court for a bond hearing. Although sick with the flu, and a Gout flare up, the Appellant appeared in court highly medicated with pain killers, anti-inflammatory medication and a Cain.

After a brief hearing, the Defendant was ordered released and a new date was set. The Appellant asked the clerk if she would email the new court date, Appellant confirmed his email address and went back to bed. Receiving the email was important so to advise other courts to reschedule hearings and trials. Because of the length of time this matter had gone on, s Appellant set up a rule in Microsoft Office to pull emails regarding the Defendant's case in the

Eastern District of Texas, not the Northern District of Texas. Do to illness, (strip throat), the Appellant had difficulty talking and was bed ridden for more than 2 weeks.

The Appellant did not see the email from the Northern District of Texas and did not appear at the next court date that was scheduled for January 28, 2019. The hearing was rescheduled and on February 1, 2019, Appellant filed a response with the Court stating that Appellant did not see the notice of the January 28, 2019, hearing date. The Judge in this case spoke to the Defendant, an Assistant United State Attorney and a Clerk and concluded that Appellant had acted in a manner unbecoming of a member of the bar, failed to comply with a court order, and acted unethically. The Court ordered Appellant to file a pleading to show cause why he should not be disciplined. On or about February 21, 2019, Appellant filed a response that the court alleged contained false statements. On or about March 22, 2019, a hearing was conducted in regard to Appellant's failure to appear at the January 28, 2019, hearing. Appellant allegedly made false statements at the March hearing. Unbeknownst to the Appellant, on or about April 2, 2019, the Court suspended Appellant's membership in the bar of the Northern District of Texas for a period of four (4) years.

SUMMARY OF THE ARGUMENTS

The sanctions imposed on Appellant, Curtis Lilly, are severe and inconsistent with the stated purpose of the attorney discipline process. Moreover, such sanctions are not appropriate, given the facts of this case. In addition, Appellant’s Motion for New Trial clearly satisfies the Craddock test established by the Supreme Court of Texas. Craddock v. Sunshine Bus. Lines, Inc., 133 S.W.2d 124, 126 (Tex. 1939). First, Appellant’s failure to failure to appear at the

September 20, 2022 hearing was neither intentional nor the result of Appellant's conscious indifference.

Second, Appellant established a meritorious defense to Appellee's allegations of professional misconduct by demonstrating he was sick with Strip throat and gout. Further, the proceeding in the federal court are not consistent with the American Bar Associations Model Rules for Lawyer Disciplinary Enforcement. Rule 4 provides that he court shall appoint a lawyer admitted to practice in the state to serve as disciplinary counsel. Not as in this case, the judge in the case interviewed witnesses who provided unverified statements and a defendant that was scared to go to jail as a basis for making it conclusions.

Finally, granting a new trial and allowing Appellant the opportunity to present his case would not have caused delay or injury to Appellee. Accordingly, Appellant is entitled to a full new trial, and the Evidentiary Panel's decision to deny Appellant's Motion for New Trial was a clear abuse of its discretion.

ARGUMENT AND AUTHORITIES

I. The Evidentiary Panel abused its discretion by denying Appellant's Motion for New Trial.

Rule 2.21 of the Texas Rules of Disciplinary Procedure provides the following instructions for post-judgment motions: "Any motion for new hearing or motion to modify the judgment must comport with the provisions of the applicable Texas Rules of Civil Procedure pertaining to motions for new trial or to motions to modify judgments." TEX. R. DISCIPLINARY P. 2.21. Rule 320 of the Texas Rules of Civil Procedure states that "New trials may be granted, and judgment set aside for good cause, on motion or on the court's own motion

on such terms as the court shall direct." TEX. R. CIV. P. 320. Further, Rule 324(b) provides that "a point in a motion for new trial is a prerequisite to the following complaints on appeal: (1) A complaint on which evidence must be heard such as…. failure to set aside a judgment by default." Id. at 324(b)(1).

While Appellant filed an answer before the Default Judgment Hearing began, the Evidentiary Panel proceeded with the Default Judgment Hearing, treating the matter as a no-answer default judgment. See generally RRv1. To overturn a no answer default judgment, the Supreme Court of Texas established a three-factor test known as the Craddock test. Craddock v. Sunshine Bus. Lines, Inc., 133 S.W.2d 124, 126 (Tex. 1939). "A motion under Craddock does not attempt to show an error in the judgment; rather, it seeks to excuse the defaulting party's failure to answer by showing the Craddock elements." See In re Marriage of Williams, 646 S.W.3d 542, 5445 (Tex. 2022). Under the Craddock test, a no-answer default judgment should be vacated, and a new trial granted when the defaulting party establishes the following:

(1) the failure to answer or to appear was not intentional or the result of conscious indifference but rather was due to a mistake or an accident; (2) the motion for new trial sets up a meritorious defense, and; (3) granting a new trial will not cause delay or other injury to the prevailing party. In re R.R., 209 S.W.3d 112, 115 (Tex. 2006); see also Craddock, 133 S.W.2d at 126. When the defaulting party satisfies all three elements of the Craddock test, a trial court abuses its discretion if it fails to grant a new trial. Old Republic Ins. Co. v. Scott, 873 S.W.2d 381, 382 (Tex. 1994). Here, the Evidentiary Panel abused its discretion by denying Appellant's Motion for New Trial because Appellant satisfied the requirements of the Craddock test. Id. a. Appellant's failure to file a timely answer was due to an accident or mistake.

The first element of the Craddock test requires the defaulting party to show that its failure to answer was due to a mistake or accident and not the result of conscious indifference. Craddock, 133 S.W.2d at 126. Failing to answer or appear intentionally or by conscious indifference means "the defendant knew it was sued but did not care." Fidelity & Guar. Inc. Co. v. Drewery Const. Co., Inc., 186 S.W.3d 571, 576 (Tex. 2006). "An excuse need not be a good one to suffice." Id. Here, Appellant's failure to timely answer the Petition was the result of accident or mistake.

b. Appellant has a meritorious defense.

The second element of the Craddock test requires the movant to set up a 'meritorious defense.' Craddock, 133 S.W.2d at 126. For the purposes of Appellant's Motion for New Trial, the Evidentiary Panel was required to accept as true Appellant's factual assertions regarding her meritorious defenses. Estate of Pollack v. McMurrey, 858 S.W.2d 388, 392 (Tex. 1993). Furthermore, Appellant's defenses are sufficient if at least a portion of the judgment would not be sustained upon retrial of the case. Gotcher v. Barnett, 757 S.W.2d 398, 401 (Tex. App. Houston [14th Dist.] 1988, no writ).

The TEXAS RULES OF DISCIPLINARY PROCEDURE provides:

> 9.04. Defenses: If the Respondent files an answer, he or she shall allege, and thereafter be required to prove, by clear and convincing evidence, to the Board of Disciplinary Appeals one or more of the following defenses to avoid the imposition of discipline identical, to the extent practicable, with that directed by the judgment of the other jurisdiction:
>
> > A. That the procedure followed in the other jurisdiction on the disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.
> >
> > B. That there was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the Board of

> Disciplinary Appeals, consistent with its duty, should not accept as final the conclusion on the evidence reached in the other jurisdiction.
>
> C. That the imposition by the Board of Disciplinary Appeals of discipline identical, to the extent practicable, with that imposed by the other jurisdiction would result in grave injustice.
>
> D. That the misconduct established in the other jurisdiction warrants substantially different discipline in this state.
>
> E. That the misconduct for which the attorney was disciplined in the other jurisdiction does not constitute Professional Misconduct in this state.

If the Board of Disciplinary Appeals determines that one or more of the foregoing defenses have been established, it shall enter such orders as it deems necessary and appropriate

In this case, it is clear that no procedure was followed, the judge ignored all safeguards that are designed to provide a far and consistent adjudication of these cases.

As stated in the Motion for New Trial, and contrary to the allegations in the Petition, but it also establishes a meritorious defense to the claims asserted in the Petition. Accordingly, Appellant has satisfied the second element of the Craddock test.

c. The granting of a new trial would not have resulted in any undue delay or any other injury to Appellee.

The third element of the Craddock test is intended to protect the responding party from "the sort of undue delay or injury which disadvantages him in presenting the merits of his case at a new trial, such as loss of witnesses or other valuable evidence upon retrial." Jackson v. Mares, 802 S.W.2d 48, 51 (Tex. App.—Corpus Christi 1990, writ denied). No such delay or injury exists for Appellee in this case.

First, Appellee's had no witness. If the Default Judgment against Appellant were set aside, nothing would prevent Appellee from offering the same testimony and evidence it presented to the Panel in obtaining the Default Judgment at a future hearing. In addition, in accordance with

the Default Judgment. Accordingly, based on the above, the third element of the Cradock test is satisfied because a new trial would not have caused undue delay to Appellee, nor would it have resulted in any other injury to Appellee.

II. The Evidentiary Panel abused its discretion granting Appellee's Motion to Compel striking Appellant's pleadings.

When imposing death penalty sanctions, which are rare, courts have shown that there are certain factors on which they will rely. In particular, these disputes must typically involve situations wherein the gravity of the action is extreme, the acts are intentional and the harm is so egregious that no other lesser sanction will adequately remedy the situation.

As shown in the cases of *alliantgroup vs. Mols* and *Pressel vs. Gibson*, the court followed a four-factor test set out by the U.S. Court of Appeals for the Fifth Circuit.[14] That test, established in *Moore v. Citgo Ref. & Chems. Co., L.P.*, requires that a court ensure these factors are present before entering death penalty sanctions:

1. The refusal to comply results from willfulness or bad faith and is accompanied by a clear record of delay or contumacious conduct;
2. The violation of the discovery order must be attributable to the client instead of the attorney;
3. The violating party's misconduct must substantially prejudice the opposing party; and
4. A less drastic sanction would not substantially achieve the desired deterrent effect.

In both of these cases, the courts found the actions to be so egregious that a less drastic sanction wouldn't achieve the desired deterrent effect.

Though the actions taken in in the *Pinkstaff v. Black & Decker Inc.* arguably were serious, that court was not prepared to sustain the ultimate sanction. In these cases when death penalty sanctions were not awarded, the court seemed to believe that a less drastic sanction might suffice or remedy the situation with greater equity.

In Texas, courts must actually both consider *and test* the effectiveness of less severe sanctions before levying death penalty sanctions (unless, however, there are exceptional circumstances). According to relevant case law, the sanctions are only appropriate when a "party's conduct justifies a presumption that its claims or defenses lack merit," and trial courts actually have an obligation "to consider the availability of lesser sanctions before imposing death penalty sanctions."

In this case, Appellee sent out multiple different discovery request to different addresses in Dallas, Fort Worth and Houston. The request that where made where answered, but because of the size of the files, the responses had to be mailed. Even with the appellees acknowledgement of receipt of the discovery, the panel stuck the Appellants pleadings. There was not any willfulness or bad faith on the part of the Appellant, nor was it accompanied by a clear record of delay or contumacious conduct. The violating party's misconduct must substantially prejudice the opposing party, and in this case the Appellee was not prejudiced in any way. A less drastic sanction would not substantially achieve the desired deterrent effect, the order was complied with.

IV. The Evidentiary Panel's sanctions against Appellant are excessive and inappropriate based on the default alone.

TRDP 15.01.A provides that the "purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the profession." TEX. R. DISCIPLINARY P. 15.01.A. As it relates to the imposition of sanctions, TRDP 15.02 states that "[i]n imposing a sanction after a finding of Profession Misconduct, the disciplinary tribunal should consider the following factors: (a) the duty violated; (b) the Appellant's level of culpability; (c) the potential or actual injury caused by the Appellant's misconduct, and; (d) the existence of aggravating or mitigating factors. Id. at 15.02.

In cases involving prior disciplinary orders, absent aggravating or mitigating circumstances, and upon application of the factors set out in Rule 15.02, a suspension is generally appropriate when a "Appellant has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession." Id. at 15.08.2. However, a public reprimand is generally an appropriate sanction in cases involving disciplinary orders when a Appellant attorney "(a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession." Id. Further, mitigating circumstances may justify a reduction in the degree of discipline to be imposed. Pursuant to Rule 15.09.C.2, examples of mitigating factors include: personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; and character or reputation. Id. at 15.09.C.2(c), (d), and (g).

Here, the sanctions imposed on Appellant do not serve the purposes of the lawyer discipline process. TEX. R. DISCIPLINARY P. 15.01.A. First and foremost, the findings of Professional Misconduct against Appellant are based on a Judge's ex parte communication with the Defendant, Jason Sirovica, an Assistant United State Attorney and a clerk employed by the

Judge. Appellant's failure to appear at the January 28, 2019 hearing was because of illness which was the result of Appellant's accident or mistake, not Appellant's intentional conduct.

Additionally, in the years since this grievance was filed against Appellant, Appellant has continued practicing law and dutifully represented his clients. Appellant has taken cases to trial and received not guilty verdicts. At the time of his suspension, he was on the Dallas County First Degree Wheel and had more than 90 cases pending and multiple set for trial. Furthermore, there is no evidence to suggest that Appellant would not continue to properly discharge her professional duties to her clients, the public, the legal system, and the profession. Moreover, several mitigating circumstances must be considered in determining the appropriate sanction for Appellant. Based on the information outlined above, it is clear that prohibiting Appellant from practicing law for three years is an excessive sanction that is not appropriate under these circumstances. Depriving Appellant of her livelihood for three years is a severe punishment that is inconsistent with facts of this case and with the sanctioning instructions outlined in Chapter 15 of the Texas Rules of Disciplinary Procedure.

PRAYER

For all of these reasons, Appellant Curtis Lilly respectfully requests that the Board of Disciplinary Appeals reverse and remand the Evidentiary Panel's Default Judgment of Active Suspension and return this matter for further proceedings before the Evidentiary Panel, or in the alternative, that the Board of Disciplinary Appeals enter an order modifying the sanctions against Appellant, and grant such other and further relief at law or equity to which Appellant may be justly entitled.

Respectfully submitted,

/s/Curtis Lilly

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Curtis Lilly