

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

**IN THE MATTER OF
JESSE JOE PONCE III
TEXAS BAR NO. 24014329**

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No. 62308



F I L E D

Feb. 24, 2020

THE BOARD of DISCIPLINARY APPEALS
Appointed by the Supreme Court of Texas

BRIEF FOR APPELLANT, JESSE JOE PONCE III

**Ed Stapleton
Stapleton & Stapleton
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Brownsville, Texas 78526**

ORAL ARGUMENT REQUESTED

PARTIES TO THE CASE

The Honorable Panel Chair of Evidentiary Panel 10-3 presided at the trial of this case.

Rachel Reuter

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BRIEF FOR APPELLANT, JESSE JOE PONCE II

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

Appellant, JESSE JOE PONCE III, by and through undersigned counsel, respectfully submits this, his brief, and seeks that the judgment of the District 10 Grievance Committee Evidentiary Panel 10-3 be reversed and remanded for a new trial.

REQUEST FOR ORAL ARGUMENT

Appellant, Jesse Joe Ponce, requests oral argument in this case pursuant to Rule 4.06 of the BODA Internal Procedural Rules.

STATEMENT OF THE CASE

On May 2, 2019, the District 10 Grievance Committee Evidentiary Panel 10-3 of the State Bar of Texas entered a Default Judgment against Mr. Ponce in file number 201705565. On May 15, 2019, the acting panel chair, Rachel Reuter, entered a Judgment of Partially Probated Suspension. On June 12, 2019, Mr. Ponce

filed a Motion to Stay Judgment of suspension and Motion for New Hearing, which was denied by the Evidentiary Panel on June 28, 2019. This appeal follows.

STATEMENT OF JURISDICTION

Pursuant to Texas Rules of Disciplinary Procedure 7.08(d) BODA has jurisdiction to “hear and determine appeals by the Respondent or Commission on the record from the judgment of an evidentiary panel”.

RESTATEMENT OF THE ISSUES

Point of Error Number One: Did the evidentiary panel err in failing vacate the default judgment pursuant to the factor test laid out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

STATEMENT OF FACTS

On September 12, 2017, Valerie Talamantes filed a grievance against Mr. Ponce. On February 1, 2018, Mr. Ponce filed a written response to Ms. Talamantes’ grievance. On March 22, 2018, the Office of the Chief Disciplinary Counsel found just cause to support Ms. Telamantes’ grievance. Mr. Ponce was served with the Evidentiary Petition on May 12, 2018 by a private process server. Mr. Ponce did not file a responsive pleading because he believed that his written response, filed on February 1, 2018, served as his answer to the Evidentiary Petition. On or about August 29, Mr. Ponce retained Wade B. Shelton to serve as his lawyer in this grievance proceeding. On May 2, 2019, the District 10 Grievance Committee Evidentiary Panel 10-3 of the State Bar of Texas entered a Default Judgment against

Mr. Ponce in file number 201705565. On May 15, 2019, the acting panel chair, Rachel Reuter, entered a Judgment of Partially Probated Suspension. On June 12, 2019, Mr. Ponce filed a Motion to Stay Judgment of suspension and Motion for New Hearing, which was denied by the Evidentiary Panel on June 28, 2019. This appeal follows.

SUMMARY OF THE ARGUMENT

Mr. Ponce's failure to file an answer in this cause was due to accident or mistake. He did not act with conscious indifference. Though affidavits and testimony presented at the proceedings below, Mr. Ponce has presented sufficient evidence to support a meritorious defense. Due process requires he have the ability to present a defense to the allegations and no undue delay would result. Therefore, the evidentiary panel abused its discretion in denying Mr. Ponce's request for a new trial. For these reasons, Mr. Ponce is requesting the judgment below be vacated and remanded for a new trial.

STANDARD OF REVIEW AND ARGUMENT

Point of Error Number One: Did the evidentiary panel err in failing vacate the default judgment pursuant to the factor test laid out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

When a defendant does not file an answer because of a mistake or an accident, a court should set aside the default judgment and grant a new trial if the defendant

can meet the requirements of *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939). *Craddock* requires a defendant to do all of the following:

1. Demonstrate that the failure to file an answer was not intentional or the result of conscious indifference, but was a mistake or accident. *Sutherland v. Spencor*, 376 S.W.3d 752, 754-55 (Tex. 2012); *In re R.R.*, 209 S.W.3d 112, 114-115 (Tex. 2006); *Estate of Pollack V. McMurrey*, 858 S.W.2d 388, 391 (Tex. 1993); *Craddock*, 133 S.W.2d at 126.
2. Set up a meritorious defense. *In re R.R.*, 209 S.W.3d at 114-115; *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966); *Craddock*, 133 S.W.2d at 126. To set up a meritorious defense, the defendant must allege facts that constitute a defense to the plaintiff's cause of action and support the allegations with affidavits or other evidence. *Estate of Pollack*, 858 S.W.2d at 392; *Ivy*, 407 S.W.2d at 214.
3. Demonstrate that granting a new trial will not cause delay or otherwise injure the plaintiff. *In re R.R.*, 209 S.W.3d at 114-15; *Craddock*, 133, S.W.2d at 126.

1. Mr. Ponce Did Not Act with Conscious Indifference

This cause should be remanded for a new trial because Mr. Ponce's failure to answer was a mistake or accidental and not intentional or a result of conscious indifference. Specifically, Mr. Ponce operated under the impression his response on February 1, 2018 constituted an answer. Furthermore, as attested, he trusted his lawyer would handle his defense. Consciously indifferent conduct occurs when "the defendant knew he was sued but did not care." *Fidelity & Guar. Inc. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 (Tex. 2006) (per curiam). Mr. Ponce had notice

of the complaint and acted reasonably in responding to it by contacting his lawyer with regards on how to move forward with his defense.

2. Mr. Ponce Has A Meritorious Defense

The Court should grant a new trial because the Respondent has a meritorious defense. He testified under oath that he did not breach client confidence. There was no direct testimony supporting the contention that he breached client confidence. The Commission offered hearsay testimony over objection.

Additionally, he explained that though he did not provide an accounting as requested, his failure to do so was due to the threats of violence visited against him by his client's boyfriend, and other antagonistic conduct by his client's mother, and by his client. The record of the hearing is clear. The work performed and demonstrated by the court docket far exceeded the initial payment made by the client.

In support of his meritorious defense, the Motion for New Trial, filed by Mr. Ponce's lawyer, contained affidavits of Joe Ponce III, Wade B. Shelton and Andrew Ramon.

3. A New Hearing Will Not Cause Delay

The Panel should grant a new hearing because a new hearing will not cause delay or otherwise injure the Complainant or the Commission. Defendant is ready

for a new hearing and willing to reimburse the Commission for all reasonable expenses incurred in obtaining the default judgment.

PRAYER

Mr. Ponce requests the judgment of the Evidentiary Panel be reversed and vacated and this matter be returned to the Evidentiary Panel for rehearing with a full evidentiary hearing.

Respectfully submitted,

/s/ Ed Stapleton
ED STAPLETON
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2401 Wildflower Dr. Ste. C
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Telephone: (956) 504-0882
Fax: (956) 504-0814

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Brief has been electronically transmitted to:

HON. STEPHANIE STROLLE

sstrolle@texasbar.com

Assistant Disciplinary Counsel

Office of the Chief Disciplinary Counsel State Bar of Texas

711 Navarro, Suite 750

San Antonio, Texas 78205

/s/ Ed Stapleton

Ed Stapleton

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APPENDIX

**Ed Stapleton
Stapleton & Stapleton
2401 Wildflower
Brownsville, Texas 78526**

A. Judgment

**BEFORE THE DISTRICT 10 GRIEVANCE COMMITTEE
EVIDENTIARY PANEL 10-3
STATE BAR OF TEXAS**

**COMMISSION FOR LAWYER
DISCIPLINE,**
Petitioner

v.

JOE JESSE PONCE III,
Respondent

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FILE NO. 201705565

JUDGMENT OF PARTIALLY PROBATED SUSPENSION

Parties and Appearance

On May 2, 2019, came to be heard the above styled and numbered cause. Petitioner, Commission for Lawyer Discipline, appeared by and through its attorney of record and announced ready. Respondent, JOE JESSE PONCE, III, Texas Bar Number 24014329, appeared in person and by his attorney of record, Wade B. Shelton.

Jurisdiction and Venue

The Evidentiary Panel 10-3, having been duly appointed to hear this complaint by the chair of the Grievance Committee for State Bar of Texas District 10, finds that it has jurisdiction over the parties and the subject matter of this action and that venue is proper.

Default

The Evidentiary Panel finds Respondent was properly served with the Evidentiary Petition and that Respondent failed to timely file a responsive pleading to the Evidentiary Petition as required by Rule 2.17(B) of the Texas Rules of Disciplinary Procedure. Accordingly, the Evidentiary Panel finds Respondent in default and further finds that all facts alleged in the Evidentiary Petition are deemed true pursuant to Rule 2.17(C) of the Texas Rules of Disciplinary Procedure.



Professional Misconduct

The Evidentiary Panel, having deemed all facts as alleged in the Evidentiary Petition true, finds Respondent has committed Professional Misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.

Findings of Fact

The Evidentiary Panel, having considered the allegations as deemed true, the pleadings, evidence and argument of counsel, makes the following findings of fact and conclusions of law:

1. Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.
2. Respondent resides in and maintains his principal place of practice in Bexar County, Texas.
3. Valerie Talamantes hired Joe J. Ponce, III ("Respondent") on or about February 1, 2017 for representation in a child custody case. Ms. Talamantes terminated the representation on or about August 21, 2017 and asked Respondent to withdraw from the representation.
4. Respondent attended a business meeting with Amanda Melendez, a co-worker of Valerie Talamantes, on or about August 29, 2017. During the meeting, Respondent revealed to Amanda Melendez confidential information that Respondent had acquired during the course of and by reason of his representation of Ms. Talamantes.
5. Respondent failed to promptly render a full accounting for the funds paid to Respondent when Ms. Talamantes requested an accounting.
6. The Chief Disciplinary Counsel of the State Bar of Texas has incurred reasonable attorneys' fees and direct expenses associated with this Disciplinary Proceeding in the amount of Four Thousand Two Hundred Twenty-Eight and 50/100 Dollars (\$4,228.50).

Conclusions of Law

The Evidentiary Panel concludes that, based upon the foregoing findings of fact, the Respondent has violated Texas Disciplinary Rules of Professional Conduct 1.05(b)(1)(ii) and 1.14(b).

Sanction

The Evidentiary Panel, having found Respondent has committed Professional Misconduct, heard and considered additional evidence regarding the appropriate sanction to be imposed against Respondent. After hearing all evidence and argument and after having considered the factors in Rule 2.18 of the Texas Rule of Disciplinary Procedure, the Evidentiary Panel finds that the proper discipline of the Respondent for each act of Professional Misconduct is a Partially Probated Suspension.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Respondent be suspended from the practice of law for a period of three years, beginning June 1, 2019 and ending May 31, 2022. Respondent shall be actively suspended from the practice of law for a period of four months beginning June 1, 2019 and ending September 30, 2019. The thirty-two month period of probated suspension shall begin on October 1, 2019 and shall end on May 31, 2022.

Terms of Active Suspension

IT IS FURTHER ORDERED that during the term of active suspension ordered herein, or that may be imposed upon Respondent by the Board of Disciplinary Appeals as a result of a probation revocation proceeding, Respondent shall be prohibited from practicing law in Texas; holding himself out as an attorney at law; performing any legal services for others; accepting any fee directly or indirectly for legal services; appearing as counsel or in any representative capacity in any proceeding in any Texas or Federal court or before any administrative body; or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "attorney," "counselor at law," or "lawyer."

IT IS FURTHER ORDERED that, or before May 27, 2019, Respondent shall notify each of Respondent's current clients and opposing counsel in writing of this suspension.

In addition to such notification, IT IS FURTHER ORDERED that Respondent shall return any files, papers, unearned monies and other property belonging to current clients in Respondent's possession to the respective clients or to another attorney at the client's request.

IT IS FURTHER ORDERED that Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) on or before June 4, 2019, an affidavit stating all current clients and opposing counsel have been notified of Respondent's suspension and that all files, papers, monies and other property belonging to all current clients have been returned as ordered herein.

IT IS FURTHER ORDERED that Respondent shall, on or before May 27, 2019, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer and chief justice of each and every court or tribunal in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing.

IT IS FURTHER ORDERED that Respondent shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701), on or before June 4, 2019, an affidavit stating Respondent has notified in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court in which Respondent has any matter pending of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing in Court.

IT IS FURTHER ORDERED that, on or before May 31, 2019, Respondent shall surrender his law license and permanent State Bar Card to the State Bar of Texas, Chief Disciplinary Counsel's

Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701), to be forwarded to the Supreme Court of Texas.

Terms of Probation

IT IS FURTHER ORDERED that during all periods of suspension, Respondent shall be under the following terms and conditions:

1. Respondent shall not violate any term of this judgment.
2. Respondent shall not engage in professional misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.
3. Respondent shall not violate any state or federal criminal statutes.
4. Respondent shall keep State Bar of Texas membership department notified of his current mailing, residence and business addresses and telephone numbers.
5. Respondent shall comply with Minimum Continuing Legal Education requirements.
6. Respondent shall comply with Interest on Lawyers Trust Account (IOLTA) requirements.
7. Respondent shall promptly respond to any request for information from the Chief Disciplinary Counsel in connection with any investigation of any allegations of professional misconduct.
8. Respondent shall pay all reasonable and necessary attorney's fees and direct expenses to the State Bar of Texas in the amount of Four Thousand Two Hundred Twenty-Eight and 50/100 Dollars (\$4,228.50). The payment shall be due and payable on or before December 1, 2019, and shall be made by certified or cashier's check or money order. Respondent shall forward the funds, made payable to the State Bar of Texas, to the Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).
9. Respondent shall comply with all other conditions of the Agreed Judgment of Probation signed November 19, 2012 for File No. S0071125641, the Judgment of Probated Suspension signed November 25, 2013 for File No. 0071227508, and the Judgment of Partially Probated Suspension signed July 6, 2017 in cause no. 2015CI13669.
10. Respondent shall make contact with the Chief Disciplinary Counsel's Offices' Compliance Monitor at 877-953-5535, ext. 1334 and Special Programs Coordinator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

Probation Revocation

Upon information that Respondent has violated a term of this judgment, the Chief Disciplinary Counsel may, in addition to all other remedies available, file a motion to revoke probation pursuant to Rule 2.23 of the Texas Rules of Disciplinary Procedure with the Board of Disciplinary Appeals ("BODA") and serve a copy of the motion on Respondent pursuant to Tex.R.Civ.P. 21a.

BODA shall conduct an evidentiary hearing. At the hearing, BODA shall determine by a preponderance of the evidence whether Respondent has violated any term of this Judgment. If BODA finds grounds for revocation, BODA shall enter an order revoking probation and placing Respondent on active suspension from the date of such revocation order. Respondent shall not be given credit for any term of probation served prior to revocation.

IT IS FURTHER ORDERED that any conduct on the part of Respondent which serves as the basis for a motion to revoke probation may also be brought as independent grounds for discipline as allowed under the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure.

Attorney's Fees and Expenses

IT IS FURTHER ORDERED Respondent shall pay all reasonable and necessary attorney's fees and direct expenses to the State Bar of Texas in the amount of Four Thousand Two Hundred Twenty-Eight and 50/100 Dollars (\$4,228.50). The payment shall be due and payable on or before December 1, 2019 [due date], and shall be made by certified or cashier's check or money order. Respondent shall forward the funds, made payable to the State Bar of Texas, to the Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701).

IT IS FURTHER ORDERED that in the event of an unsuccessful appeal of this judgment by Respondent to the Board of Disciplinary Appeals (“BODA”), Respondent shall pay an additional Four Thousand and 00/100 Dollars (\$4,000.00) in attorney’s fees to the State Bar of Texas, due 30 days after the date of BODA’s decision. IT IS FURTHER ORDERED that in the event Petitioner is required to respond to an unsuccessful petition filed by Respondent for review by the Supreme Court of Texas, Respondent shall pay an additional Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) in attorney’s fees to the State Bar of Texas due upon the issuance of a mandate.

IT IS FURTHER ORDERED that all amounts ordered herein are due to the misconduct of Respondent, are assessed as a part of the sanction in accordance with Rule 1.06(Z) of the Texas Rules of Disciplinary Procedure. Any amount not paid shall accrue interest at the maximum legal rate per annum until paid and the State Bar of Texas shall have all writs and other post-judgment remedies against Respondent in order to collect all unpaid amounts.

Publication

This suspension shall be made a matter of record and appropriately published in accordance with the Texas Rules of Disciplinary Procedure.

Other Relief

All requested relief not expressly granted herein is expressly DENIED.

SIGNED this 15th day of May, 2014.

**EVIDENTIARY PANEL 10-3
DISTRICT NO. 10
STATE BAR OF TEXAS**



RACHEL REUTER
Acting Panel Chair