REVERSED AND REMANDED, Opinion Signed June 9, 2006.

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

No. 36059

CATHERINE M. SHELTON (State Bar Card No. 13902800)

v.

COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS

On Appeal from the Evidentiary Panel
of the District 06A Grievance Committee
of the State Bar of Texas
SBOT Cause No. D0120322949

OPINION AND ORDER

Submitted March 30, 2006

COUNSEL:

For Appellant Catherine M. Shelton, Lawrence B. Mitchell, Dallas

For Appellee, Commission for Lawyer Discipline of the State Bar of Texas, Linda A. Acevedo, First Assistant Disciplinary Counsel, Austin

OPINION:

Appellant Catherine M. Shelton appeals from a State Bar of Texas disciplinary judgment signed June 16, 2005 disbarring her from the practice of law.[1] After authorizing substituted service of the evidentiary petition, an evidentiary panel of the State Bar District 06A grievance committee granted a default judgment against Shelton, finding that she had violated three of the Texas Disciplinary Rules of Professional Conduct ("Professional Conduct Rules")[2]: failing to keep her client reasonably informed about the status of a matter and failing to comply promptly with reasonable requests for information, charging an illegal or an unconscionable fee, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Professional Conduct Rules 1.03(a), 1.04(a), and 8.04(a)(3), respectively. Shelton argues on appeal that the default judgment is void because the substituted service did not strictly comply with the requirements of the Texas Rules of Civil Procedure ("TRCP").

We hold that the affidavit in support of the Commission for Lawyer Discipline's Motion for Substituted Service was insufficient and that the default judgment of disbarment is therefore void because the grievance committee did not acquire personal jurisdiction over Shelton. Accordingly, we reverse the judgment and remand the case for a hearing on the merits.

---

[1] This disciplinary proceeding arose under the Texas Rules of Disciplinary Procedure in effect before January 1, 2004. *See*, TEX. R. OF DISCIPLINARY PROC. ("TRDP") 2.17 et seq., *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (prior TRDP 2.16).

[2] TEX. DISCIPLINARY R. OF PROF'L CONDUCT ("Professional Conduct Rules"), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A.

Underlying Grievance

Client Ruth Ann Morris hired Shelton to defend her in a felony theft case on October 15, 2003. Morris wired Shelton $2,500, and Shelton faxed Morris a copy of the criminal complaint. The following day, Morris tried to reach Shelton and was told by her office that she was in court. Morris stated that she tried to reach Shelton four more times before firing her on October 20. Morris asked for a refund of the retainer minus a "minimal amount" for the work performed. Morris said she was unable to resolve the matter and contacted the Dallas Bar Association fee dispute committee.[3] The committee sent a letter to Shelton November 4, 2003, offering to arbitrate the fee issue. Morris stated that she talked with someone at Shelton's office on November 10 who told her Shelton would send a refund, but needed until the 13th to do so. Morris filed a complaint with the State Bar on November 13, 2004, less than thirty days after hiring and firing Shelton.

The Dallas Bar Association sent Shelton two more letters dated November 21, 2003 and January 7, 2004. Apparently, Shelton did not respond. Morris filed a second complaint with the State Bar on January 20, 2004. Morris stated that she never received any money.

Shelton responded to the Morris grievance on March 5, 2004,[4] disputing the client's description of the events and that she had failed to return calls. Shelton also described the work she had done before being fired, which she estimated totaled eight to ten hours with an additional charge for the expense of an investigator she had hired to locate potential witnesses.

---

[3] Fee arbitration is provided through local bar associations; participation by the attorney is voluntary.

[4] There is no allegation that Shelton's reply was untimely.

On May 6, 2004, an investigatory panel of the grievance committee found just cause to believe that Shelton had violated Professional Conduct Rules 1.03(a), 1.04(a), and 8.04(a)(3). The parties were unable to negotiate a sanction. The State Bar Chief Disciplinary Counsel's office ("CDC") sent Shelton notice on June 28, 2004 that she had the option to proceed in district court if she affirmatively elected to do so.[5] All of the CDC's correspondence sent to Shelton between June and October 2004 was sent to 4516 Lovers Lane, Suite 135, Dallas, Texas, the office address reflected in the State Bar's membership records. Shelton did not affirmatively elect to have the matter heard in district court, and an evidentiary panel was assigned to hear the case.

Evidentiary Proceedings

On December 21, 2004, the CDC transmitted unidentified "documents" to a private process server to be personally served on Shelton at 4401 Colgate, Dallas, Texas. According to the process server's affidavit, he unsuccessfully attempted to deliver the paperwork to Shelton at 4401 Colgate on December 23, 2004, December 24, 2004, December 28, 2004, and January 3, 2005. On January 6, 2005, the CDC signed and transmitted a Motion for Substituted Service with supporting affidavit and a proposed Order Granting Substituted Service to the evidentiary panel chair. The motion stated that attempts had been made as shown in the attached affidavit to serve Shelton personally at 4401 Colgate, Dallas, Texas, an address "believed to be" her last place of abode. The panel chair signed the order granting substituted service the same day.

---

[5] Current TRDP 2.15 (previously TRDP 2.14).

The CDC used the same substituted service process three times before the evidentiary hearing, serving each of the proposed hearing order and charge,[6] the notice of default, and the notice that the evidentiary hearing would be held on June 16, 2005.[7] Shelton did not appear on the latter date for the evidentiary hearing. The panel signed the Default Judgment of Disbarment that day. The CDC sent the default judgment to Shelton at both the Colgate and Lovers Lane addresses by certified mail, return receipt requested without restricted delivery. It also posted a copy of the default judgment on the door at the Colgate address.

On July 18, Shelton filed a motion for new hearing which was heard August 11, 2005.[8] During that hearing, Shelton testified that she had not lived at the 4401 Colgate address since May 26, 2005 when she had sold the house. Shelton also testified that she was frequently in contact with the State Bar due to other matters, and that the Bar had previously used her Lovers Lane address to serve her with pleadings related to those matters. Shelton argued that her participation in other disciplinary matters showed that she had not been avoiding service. The panel denied the motion for new trial, and Shelton appealed to BODA.

---

[6] In an evidentiary proceeding arising before January 1, 2004, the proposed hearing order and charge are the jurisdictional equivalents of an original petition in a civil case.

[7] The matter was originally set for hearing on April 21, 2004, then on May 27, 2004. The CDC was then granted a continuance of the May 27th hearing.

[8] A party who appears after a default judgment has been rendered submits herself to the court's jurisdiction but "does not breathe life into a voidable judgment." ***Frazier v. Dikovitsky***, 144 S.W.3d 146, 150 (Tex. App.—Texarkana 2004, no pet.) (absent the party's concession that he was duly served).

Strict Compliance Standard

Shelton argues that the default rendered against her is void because the affidavit used by the CDC to obtain an order from the evidentiary panel for substituted service did not strictly comply with TRCP 106(b). "Strict" means literal compliance. ***Union Pacific Corp. v. Legg***, 49 S.W.3d 72, 77 (Tex. App.—Austin 2001, no pet.). Because this is a legal question, the standard of review is *de novo*. ***Coronado v. Norman***, 111 S.W.3d 838, 841 (Tex. App.—Eastland 2003, pet. denied).

No presumptions of valid issuance, service, or return of citation exist when a defendant directly attacks a default judgment. ***Primate Construction, Inc. v. Silver***, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam); ***McKanna v. Edgar***, 388 S.W.2d 927, 929 (Tex. 1965). For a default judgment to withstand challenge, the face of the record must demonstrate strict compliance with the applicable rules for service of the petition. ***Primate Construction, Inc. v. Silver*** at 152; ***Wilson v. Dunn***, 800 S.W.2d 833, 836 (Tex. 1990). The tribunal will not review the record "as a whole" to establish proper service. ***Verlander Enterprises, Inc. v. Graham***, 932 S.W.2d 259, 261 (Tex. App.—El Paso 1996, no writ). "It is the responsibility of one requesting service, not the process server, to see that service is properly accomplished. This responsibility extends to seeing that service is properly reflected in the record." ***Primate Construction, Inc. v. Silver*** at 153; ***Benefit Planners, L.L.P. v. Rencare, Ltd.***, 81 S.W.3d 855, 860 (Tex. App.—San Antonio 2002, pet. denied). "Failure to affirmatively show strict compliance with the Rules of Civil Procedure renders the attempted service of process invalid and of no effect." TRCP 124; ***Uvalde Country Club v. Martin Linen Supply Co., Inc.***, 690 S.W.2d 884, 885 (Tex. 1985) (per curiam) (citing ***McKanna v. Edgar*** at 928).

This "hyper-technical rule" is grounded in public policy, which favors an "increased opportunity for trial on the merits." ***Verlander Enterprises, Inc. v. Graham*** at 262. Substituted service

validly subjects the defendant to the tribunal's jurisdiction only if it is accomplished exactly in accord with the terms of the order authorizing same. ***Becker v. Russell***, 765 S.W.2d 899, 900 (Tex. App.—Austin 1989, no writ) (citing ***Broussard v. Davila***, 352 S.W.2d 753, 754 (Tex. Civ. App.—San Antonio 1961, no writ). "Any deviation from the express terms of the trial judge's order authorizing the substituted service of citation mandates the reversal of a default judgment based upon such service." ***Becker v. Russell*** at 901. Actual notice, without proper service, will not convey jurisdiction on the court to render a default judgment. ***Wilson v. Dunn*** at 836.

The Affidavit in Support of Substituted Service

"Substituted service may not issue on a motion supported by an affidavit that is conclusory or otherwise insufficient." ***Coronado v. Norman*** at 841 (citing ***Wilson v. Dunn*** at 836). TRCP 106(b), Method of Service, provides:

> (b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) [personal service] or (a)(2) [certified mail] at the location named in such affidavit but has not been successful, the court may authorize service
>
> > (1) by leaving a true and correct copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
> >
> > (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

The affidavit in question in support of the CDC's Motion for Substituted Service states verbatim:

D0120322949
Commission for Lawyer Discipline
v.
Catherine M. Shelton

Jack Tucker appeared in person before me today and stated under oath:
I am an individual residing in the state of Texas. I an not interested in the outcome of this case, nor will I become interested in the outcome of this case. I have never been convicted of a crime

involving moral turpitude. I am over the age of 18 years.

On December 22, 2004, I received paperwork to be delivered to Catherine M. Shelton to be delivered to 4401 Colgate, Dallas, Texas 75225

On 12-13, 2004 at 1:30pm I attempted to deliver said paperwork to Ms. Shelton. I spoke with her legal assistant who said she was not feeling well and could not receive the paperwork. The legal assistant said I should come back later. I left a card with the assistant for Ms. Shelton to call.

On 12-24, 2004 at 9:00 am I again attempted to deliver said paperwork. I knocked and rang bell but received no answer.

On December 28, 2004 at 10:15 am I again attempted to deliver said paperwork. I rang bell and a boy about the age of 9 or 10 answered the door. I asked him if Ms. Shelton was in. He told me to "wait a sec", and he never came back, nor did Ms. Shelton or anyone else answer the door. I rang the bell again and still no answer.

On January 3, 2004, at 7:15 pm I again attempted to deliver paperwork. I rang bell and knocked but received no answer.

I still have heard nothing from Ms. Shelton to this day. I have attempted several times. It is my opinion that delivering these documents to Ms. Shelton personally is impractical, Therefore, by several attempts and posting to the front door securely would be in order.

"I am qualified to deliver process in this case as required under rule 103, Texas Rules of Civil Procedure."

/s/ Jack Tucker Jan. 5, 2005
Affiant

Signed under oath before me on /s/ January 5, 2005
/s/ Sophia Loren Kaper
Notary Public, State of Texas

[Notary Seal]

[Format and grammar as in original]

Shelton urges that the affidavit attached to the motion for substituted service was defective because it did not state, as required by TRCP 106(b), that 4401 Colgate was "the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found," relying on ***Garrels v. Wales Transportation, Inc.,*** 706 S.W.2d 757 (Tex. App.—Dallas 1986, no writ). In reversing a default, the court in ***Garrels*** held that an affidavit supporting a motion for substituted service which stated the address at which personal service was

unsuccessfully attempted but did not state that the location was the defendant's usual place of business or abode was legally insufficient to support a default. Although the motion for substituted service in ***Garrels*** stated that the address was the defendant's home, the court noted that an unsworn motion was not probative evidence that the address was a location satisfying 106(b). ***Garrels v. Wales Transportation, Inc.*** at 759.

The Commission argues that the affidavit is sufficient according to ***Goshorn v. Brown***, 2003 Tex. App. LEXIS 8181 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (not designated for publication) which relied on other facts stated in the affidavit to conclude that the address where personal service was attempted was the usual place of abode. However, in ***Goshorn***, the affidavit also stated that the address where the service was attempted was the "defendant's address," as this affidavit did not. The court also conceded that "a higher degree of precision in an affidavit is preferable," which seems to acknowledge the strict compliance requirement but fails to apply it. ***Goshorn v. Brown*** at 6.

The other authority on which the Commission relies does not support the sufficiency of the affidavit. The court in ***Olympia Marble & Granite v. Mayes***, 12 S.W.3d 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.) reversed the default, finding insufficient an affidavit which, among other defects, failed to state the defendant's usual place of business or abode. ***Coronado v. Norman*** and ***Lewis v. Ramirez***, 49 S.W.3d 561 (Tex. App.—Corpus Christi 2001, no pet.), both reversing default judgments, involved the failure of an affidavit to detail the dates and times of attempted personal service. In ***Furst v. Smith***, 176 S.W.3d 864 (Tex. App.—Houston [1st Dist.] 2005, no pet.), the court reversed a default judgment because the return of service on file did not have a copy of the amended petition attached. The affidavit in ***Pao v. Brays Village East Homeowners Assoc., Inc.***, 905 S.W.2d

35 (Tex. App.—Houston [1st Dist.] 1995, no pet.), unlike the affidavit in this case, did state that the address where personal service was unsuccessfully attempted was the defendant's usual place of abode and place where he probably could be found. The issue was, instead, whether that statement was conclusory because the affidavit failed also to state the affiant's basis for the conclusion that the address was the defendant's usual place of abode. The court, holding the affidavit sufficient, found that TRCP 106(b) did not require any additional explanation.

We hold that, in light of the strict compliance standard for proof of service in a direct attack on a default judgment, the failure of the affidavit in support of the motion for substituted service to state that the address where personal service was attempted was the "location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found," as required by TRCP 106(b), is a fatal defect rendering the substituted service invalid.

Additional Affidavit Defects

Although the failure to strictly comply with TRCP 106(b) renders the affidavit insufficient, we also find additional fundamental defects in the affidavit, in that it fails to state that the facts recited therein are within the affiant's personal knowledge or that the statements contained therein are true and correct. An affidavit must unequivocally state facts upon which perjury can be assigned. ***Brownlee v. Brownlee***, 665 S.W.2d 111, 112 (Tex. 1984). "An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient." ***Humphreys v. Caldwell***, 888 S.W.2d 469, 470 (Tex. 1994) (orig. proceeding) (per curiam) (citing ***Brownlee v. Brownlee***). "For an affidavit to have probative value, an affiant must swear that the facts presented in the affidavit reflect his personal

knowledge." ***In re. E.I. DuPont De Nemours & Co.***, 136 S.W.3d 218, 224 (Tex. 2004) (orig. proceeding) (per curiam) (citing ***Humphreys v. Caldwell***).

Moreover, requiring that the affiant unequivocally swear that the facts are within his personal knowledge and are true and correct is consistent with the strict compliance standard for direct attacks on default judgments. ***See, Spiro v. State of Texas***, 2002 Tex. App. LEXIS 3460, 7 (Tex. App.—Austin 2000, no pet.) (not designated for publication) (affidavit in support of the return of service was fatally defective because, though verified, it failed to positively and unqualifiedly state that the facts were within the affiant's personal knowledge and were true and correct; "perjury, needing proof beyond a reasonable doubt, would not be supportable based on statements open to multiple interpretations.").

We hold that the affidavit and, consequently, the service accomplished in this case are insufficient to support a default judgment because the affidavit failed to comply strictly with the requirements for substituted service under TRCP 106(b) and failed to state unequivocally that the facts recited therein were within the affiant's personal knowledge and were true and correct. The default judgment is therefore void. Accordingly, we reverse the Default Judgment of Disbarment in Cause No. D0120322949 and remand the cause for further proceedings consistent with this opinion.

IT IS SO ORDERED.

James S. Frost, Chairman

Kathy J. Owen, Vice Chairman

William D. Greenhill

Robert Flowers

Karen L. Watkins

Paul D. Clote

Yolanda de León

Clement H. Osimetha

Jose I. Gonzalez-Falla

Thomas E. Pitts

Carol E. Prater

Alice A. Brown