

IN THE TEXAS SUPREME COURT

CAUSE NO. _____

IN RE: NEWTON B. SCHWARTZ, SR.
Relator

Original Proceeding from the
157th Judicial District Court of Harris County, Texas
Trial Court Cause No. 2007-54957
Trial Court Cause No. 2009-11689

PETITION FOR WRIT OF INJUNCTION

ORAL ARGUMENT REQUESTED

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IDENTITY OF PARTIES AND COUNSEL

Relator certifies that the following is a complete list of the parties, the attorneys, and any other person who has an interest in the outcome of this matter.

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Respondent:
Honorable David Scott
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Honorable David Scott Brabham
Presiding Judge
Gregg County 188TH Judicial District
Court

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¹ Relator adopts by reference his previously filed (by permission of this Court's Clerk on June 16, 2010, Ms. Claudia Jenks) his Appendices, Statement of the case, Statement of Jurisdiction, Issues Presented, Introduction and Statement of the Facts filed in his May 27, 2010 for Writs for Mandamus, Prohibition and Injunction; and he adopts by reference his contemporaneously filed herewith Petition for Writ of Prohibition.

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ARGUMENT AND AUTHORITIES

I. BACKGROUND AND PROCEEDINGS IN THE TRIAL COURT

1. It is now six and a half years after this Court last amended, effective January 1, 2004 (per Orders, December 29, 2003), its Texas Rules of Disciplinary Procedure (RDP) (a) 3.02 and (b) 3.07, (c) 3.08B made mandatory by Rule (d) 15.05 among others. Relator now seeks their application of each of them dispositively herein.
2. Rules 3.07 and 3.08B incorporates Texas Rules of Civil Procedure (TRCP) 165a (1) and (2)) and this Court's Administrative Rule 61.

Applying the above Rules 3.02 and 3.07 et seq. they control the present disposition of all of these proceeding. They are each now ripe for first review and decision. Relator's accompanying Petition for Writ of Mandamus, which was denied on June 4, 2010, is subject to his pending Motion for Rehearing per Texas Rules of Appellate Procedure (TRAP) 52.9 filed June 15, 2010.

3. The underlying Commission for Lawyer Discipline (CLD) disciplinary cases (filed respectively in 2007 and 2009) have been mired at only the basic preliminary discovery stages for 2 ³/₄ years. This is since CLD originally filing its original Disciplinary Petition for Disbarment on September 10, 2007.

4. Unless Relator's Petitions for extraordinary injunctive relief and/or his related Petitions for Writs of Prohibition and/or for pending Mandamus relief are now granted, the parties below will spend many months preparing for and trying a jury trial; that ultimately may be unnecessary without the benefit of this Court's interpretation and immediate decisions, as to this Court's application of its above determinative mandatory Disciplinary Rules 3.02 and 3.07, ante. Both were timely raised at the onset of each case;
- a. Timely objections per Rule 3.02 were made to both of this Court's appointees. They lack authority and jurisdiction to act.
 - b1.(RDP) Rule 3.07 was timely raised upon the expiration of the first 180 day time period after his October 19, 2007 Answer. This required CLD's setting of its first 2007 case for trial, after the 180 days expired, or on or by April 19, 2008. CLD never requested any trial setting; and never filed or showed on the voluminous Record here, "good cause" as required.
 - b2. In the CLD's 2009 cases, Relator answered both on April 6, 2009; therefore on or before October 9, 2009, CLD was required to have set both of its cases for trial. They were not.
 - c. Therefore, both should have been dismissed, since neither was ever "set for trial" with 180 days and "no cause", much less required "good cause" was or could be shown, as to either of the above to meet the above

mandatory deadlines RDP 15.05. This Court's above Rules 3.07 and 3.08B and TRCP 165a(1) and (2) and this Court's Administrative Rule 61 are also implicated.

5. Without this Court's rulings now presented to this Court for the first time in six and a half years after their effective dates, the parties will spend another year or two or more in preparing and trying these two above consolidated cases only by totally disregarding the effect of this Court's above Rules 3.02 and 3.07 both made mandatory per Rule 15.05 (all effective January 1, 2004).
6. The entire 1,639 page Record and Appendices filed on May 27, 2010 and now before this Court² also raise State and Federal threshold constitutional issues. These are based on the two charges alleged of prohibited solicitation per Texas Rules of Professional Conduct (DR) Rule 7.03 (a)(b)(c) effective June 1, 2005. They were first invited sua sponte by this Court twenty-two years ago, but not known or found to be raised, presented or ruled on until now. *O'Quinn v. State Bar* 763 S.W.2d 397 (Tex. 1988) regarding impermissible selective prosecution and related constitutional issues.

² See fn. 1 at p. iii.

For these reasons, plus the Relator's total compliance with all of this Court's requirements for accepting hearing and granting of this Petition for Injunction are satisfied:

7. Relator faces irreparable harm for which he has no adequate remedy at law are fully satisfied.

In the event of a Final Judgment of either Disbarment or Order revoking probation of a suspension from the practice of law:

- a. Relator has no right to either (a) stay or (b) post a supersedeas bond (per RDP Rule 3.14 in effect since January 1, 2004) as in all other civil appeals; and
- b. Relator has faced thirty-three months of irreparable harm by published continuous public disparagements which include absolutely privileged republications of his above pending Disciplinary Disbarment Petitions and proceedings. Relator's publicly filed Answers and Responses showing proof of his innocence of the same do not at all mitigate the public disparagement and harm affecting by him and his relations with his clients who are exposed to this. He nonetheless continues to face a barrage of absolutely privileged publications; such will no doubt continue until final disposition of these cases. This, despite the fact that no client of Relator's, in 56 years has ever lost 1¢, etc.; and

c. No improper solicitation has been shown on the two cases in which it is alleged.

1. Mr. Charles Touchet, Relator's client is not the complainant in the Original September 10, 2007 Disciplinary Petition. He is again his client by his choice in his March 20, 2010 injury in his pending Jones Act case in Harris County, Texas³. His underlying 2006 case made the basis of CLD's first Petition herein was settled in federal court in the Eastern District of Louisiana, well more than a year ago. The complainant, Mr. J. Quentin Simon was the second and briefly retained prior Louisiana attorney. The first originally retained Louisiana attorney is not a complainant.
2. The other client complainant, Mr. Jay Watts, is represented by his instigating complainant attorney here, Mr. Robert O. Homes of Mississippi. It has been mired in the Fifth Circuit Court of Appeals for more than a year; *Superior Diving v. Jay Watts* Cause No. 08-30423 (2010 WL 1287035 (CA5(LA)) April 2, 2010 (not for publication). It has yet to be remanded to and set for a jury trial in the Eastern District of Louisiana, where Watts' above attorney filed a legal malpractice case against Relator and another Texas attorney

³ Cause No. 2010-29699; *Charles Touchet v. Phil Gilbeau Offshore, Inc.*, In the 61st Judicial District Court of Harris County, Texas.

more than two years ago in State Court in Mississippi. It is now remanded and transferred back to the original Eastern District of Louisiana⁴.

3. Such above constitutional issues, state and federal, are largely not contradicted in the 1,639 page Appendices and Exhibits, ante⁵.

d. Here, Relator seeks, in the alternative, in this, his Petition for Writ of Injunction enjoining Judge Brabham from proceeding herein as he has scheduled to do on July 6, 2010. Relator requests for relief are all based on both his standing and issue presentments and this Court's above Rules.

8. Rule 3.02 (RDP)

a. As relates to this Court's RDP Rule 3.02, Relator has timely objected to both of this Court's appointed judges. This was to both original Judge Bonnie Leggat Hagan in 2007 and Judge David Scott Brabham on April 6, 2009. Both were objected to timely per Rule 3.02 made mandatory by January 1, 2004 by Rule 15.05. (all effective on January 1, 2004). In current Judge Brabham's case, Honorable Olen Underwood, presiding Judge of the Second Administrative Judicial District Court (including

⁴ C.A. 05-0197; *Superior Diving v. Jay Watts*; In the Eastern District of Louisiana (New Orleans)

⁵ See fn. 1 at p. iii.

Harris County), after an evidentiary hearing held on June 18, 2009 (one year ago) abstained from ruling on Relator's presented Rule 3.02 objection⁶;

- b. In addition to this Court's above initial involvement which was on assumption of jurisdiction per its own Rule 3.02 above, acting through its Clerk per RDP 3.02, he was also required to and "...shall promptly forward the Disciplinary Petition(s) and a copy to the Supreme Court's appointing Order to the district clerk of the county of alleged venue...".

This was done.

9. Applicable Constitutional Statutory Rules Governing

9A. There can be no question of this Court's authority to enact RDP including 3.02, 3.07 and 3.08B and 15.05 above

- a. The Texas Legislature duly enacted:

"...The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant..." Government Code § 22.004—Rules of Civil Procedure effective May 11, 2007.

- b. The Texas Legislature in the past six and a half years and three intervening legislative sessions (2005, 2007 and 2009) has not

⁶ The Reporter's Record of such hearing June 18, 2010 and is a part of this Joint Record and Appendices.

disapproved of either Rules 3.02, 3.07, 3.08B or 15.05 (or any other Rule relevant here).

“...The rules and amendments to rules remain in effect unless and until disapproved by the legislature...” Government Code § 22.004 Rules of Civil Procedure effective May 11, 2007.

“...So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court...” Government Code § 22.004 Rules of Civil Procedure effective May 11, 2007. By § 22.004(c) Acts of Legislature 80th deg. Effective May 11, 2007.

c. Both this Court and the Court of Appeals may issue injunctions in aid of their jurisdiction. Government Code § 22.221(a) (1995).

d. Likewise, the Texas Constitution Article 5 § 3 provides; inter alia, and as is relevant here:

“...Sec. 3 The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and *such other writs, as may be necessary to enforce its jurisdiction.* The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified...” (All emphases added throughout except as where indicated being in the original).

- e. Article 5, Section 3 of the Texas Constitution limits this Court's original injunction jurisdiction to those issued in aid of the Court's jurisdiction. This Court has held that this includes cases in which this Court's jurisdiction to issue a writ of mandamus has attached and injunctive relief is necessary to make the mandamus effective, *Lane v. Ross* 249 S.W.2d 591, 593 (Tex. 1952); *Love v. Wilcox* 28 S.W.2d 515, 521-522 (Tex. 1930).
- f. This Court's jurisdiction was originally invoked per its above Rule 3.02 by (a) its appointments of Judges Hagan and Brabham; and (b) by its other prescribed actions in Rule 3.02; and those of its Clerk per Rule 3.03; ante.

Relator's pending (on Rehearing) Petition for Writ of Mandamus may necessarily overlap his alternate Petitions for Writ of Injunction, presented here.

10. Here Judge Brabham is presently proceeding to exercise jurisdiction on July 6, 2010. This despite timely objections to him on April 6, 2009 per above mandatory RDP Rule 3.02, ante, in both CLD's above 2007 and 2009 cases.

- a. Judge Brabham should be now enjoined from acting per Rule 3.02; and/or
- b. Per RDP 3.07 to (a) enjoin him from exercising jurisdiction because such below and/or (b) mandatorily to dismiss the proceedings for: (a) lack of

timely prosecution and (b) noncompliance, with RDP 3.07 and 3.08B (incorporating TRCP 165a(1) and (2) and this Court's Administrative Rule 61). Unless Judge Brabham is so enjoined, such July 6, 2010 status conference, and pretrial scheduling will proceed followed by a lengthy jury trial both violative of this Court's above two mandatory preemptive Rules.

11. This Court is asked by Relator to (a) enjoin further proceedings, and/or (b) i.e., to dismiss the proceedings below because of:

- a. Total failure of CLD to ever set either for trial within 180 days after Relator's timely answers, as is required of its RDP Rule 3.07, (Rule 3.08B which includes (1) TRCP 165a (1) and (2) and
- b. Per this Court's Administrative Rule 61 per the 1,639 page Appendices and Record filed herein Rule 3.07 per mandatory Rule 3.07 says:

“...Disciplinary Actions *shall* be set for trial on a date not later than 180 days after the date the answer is filed, except for good cause shown...” (emphases added here above)

None has to date.

- c. Applying mandatory Rule 3.02, this Court failure to appoint a replacement judge after Relator's timely objections to both violates Rule 3.02; and

- d. In the 2007 case that time clearly expired on or about and not later than April 18, 2008 (2007 Original Disciplinary Petition); it again expired on or before October 6, 2009 (as to both (a) the First Amended Disciplinary Petition (2007) and (b) the second 2009 Original Disciplinary Petition). This Court should not refuse to enjoin both further proceedings, i.e., dismiss them. Both prior appointees, Judge Honorable Bonnie Leggat Hagan before him and (Judge Brabham) also has failed to do so.
- e. Judge Hagan's refusal speculating, may have been based upon timely objections as to her per Rule 3.02. None appears of record since she, and Judge Underwood both declined Relator's objections to her in 2007.

12. Controlling Legal Principles

- a. This Court could not have made its intentions clearer that it did in its excerpted attached Order of December 29, 2003 effective January 1, 2004 amending its above Rules 3.02, 307 and 15.05:

“...3.02 Assignment of Judge: Upon receipt of a Disciplinary Petition, the Clerk of the Supreme Court shall docket the same and promptly bring the Petition to the attention of the Supreme Court. The Supreme Court shall promptly appoint an active judge who does not reside in the Administrative Judicial ~~Region~~ District in which Respondent resides to preside in the case. Should the judge so appointed to be unable to fulfill the appointment, he or she shall immediately notify the Clerk of the Supreme Court, and the Supreme Court shall appoint a replacement judge. The judge appointed shall be subject to objection, recusal or disqualification as provided by law ~~under the Rules of Civil Procedure and objection, as provided by law, through.~~ The objection, motion seeking recusal or motion to

disqualify a motion must be filed by either party not later than sixty (60) days from the date the Respondent is served with the Supreme Court's order appointing the judge, provided that, In the event of objection, recusal or valid objection/disqualification, the Supreme Court shall appoint the a replacement judge within thirty (30) days of the order of recusal..." Supreme Court of Texas Misc. Docket No. 03-9209 Amendments to the Texas Rules of Disiplinary Procedure, December 29, 2003

"...3.07 Trial Setting: The court shall set each Disciplinary Actions shall be set for to commence the trial on a date not later than 180 days after the date the answer Disciplinary Petition is filed with the district clerk, except for good cause shown. If the Respondent fails to answer, a default may be taken at any time appropriate under the Texas Rules of Civil Procedure. No motion for continuance, resetting, or agreed pass may be granted unless required by the interests of justice. Mandamus lies to enforce this rule upon the petition of the Chief Disciplinary Counsel or the Respondent. Supreme Court of Texas Misc. Docket No. 03-9209 Amendments to the Texas Rules of Disiplinary Procedure, December 29, 2003

"...15.057 Effect of Time Limitation: The time period provided in Sections-Rules 2.10, 2.12, 2.15, 2.17C, 2.17e, 2.17P, 2.25, 3.02, 2.09, 2.10, 2.15(B), 2.15(F), 2.19, 2.20, 3.04, - 4.05, 7.11, 8.06, 2.02, 9.03, 10.02, and 11.01, 11.08 and 12.06(d) are mandatory. All other time periods herein provided are directory only and the failure to comply with them does not result in the validation of an act or event by reason of the noncompliance with those time limits..." Supreme Court of Texas Misc. Docket No. 03-9209 Amendments to the Texas Rules of Disiplinary Procedure, December 29, 2003

b. Both Mandamus and Injunctive relief are available to correct a "clear abuse of discretion" when there is no adequate remedy by appeal.

Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).

A clear abuse of discretion occurs when a trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error

of law.” *Walker*, Id at 839 citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding);

- c. Judge Brabham’s decision to proceed after being timely objected to is arbitrary and unreasonable; it is contrary to this Court’s above legal principles incorporated in Rule 3.02 and 3.07. He has no discretion in determining what the law is or in applying it to the above facts.

Appellate review of a trial court’s determination of the legal principles controlling its ruling, i.e. proceeding herein per the above factual background however is much less deferential. Id.; *In re Ching*, 32 S.W.3d 306, 310 (Tex.App.--Amarillo 2000, orig. proceeding). Judge Brabham has no “discretion” in determining what the law is or in applying it to the facts; *Walker* Id. at 827 S.W.2d at 840; *Ching*, 32 S.W.3d at 310. A clear failure of the trial court to analyze or apply the law correctly constitutes an abuse of discretion that may result in the grant of an extraordinary writ. *Walker*, Id. at 827 S.W.2d at 839-40; *Ching*, 32 S.W.3d at 310.

It is respectfully submitted that one or more and/or all three Petitions for Writs of Injunction, Mandamus and Prohibition lie here and are both appropriate and mandate the above granting of Relator’s extraordinary relief.

CONCLUSION

WHEREFORE, for the foregoing reasons including in the interests of judicial economy and applying this Court's mandatory Rules 3.02, 3.07 and 3.08B, incorporating TRCP 165a (1) and (2) and this Court's Administrative Rule 61 Relator's Petition for Writ of Injunction (and one or both other) should be granted and;

1. Judge Brabham should be enjoined from proceeding on July 6, 2010 and thereafter, because he was timely objected to per RDP 3.02; and/or
2. Further proceedings herein should be enjoined because of the expiration on October 8, 2009 of the Rule 3.07 180 day mandatory deadlines for setting both above Disciplinary cases for trial; and as supplemented by this Court's:
 - a. RDP 3.08B and incorporating;
 - b. TRCP 165a (1) (2); and
 - c. This Court's Administrative Rule 61; and
 - d. Relator prays for all other appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on all known parties in accordance with Texas Rules of Appellate Procedure on this ____ day of June, 2010.

/s/ Newton B. Schwartz, Sr.
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STATE OF TEXAS

§

§

COUNTY OF HARRIS

§

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Newton B. Schwartz, Sr., who, after being duly sworn, states under oath that he is the Relator in this action; that he has read the above Petition for Writ of Injunction; and that every statement contained in his above Petition for Writ of Injunction is within his personal knowledge and are true and correct.

NEWTON B. SCHWARTZ, SR.

SUBSCRIBED AND SWORN TO BEFORE ME on _____ to
certify which witness my hand and official seal.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission expires: _____