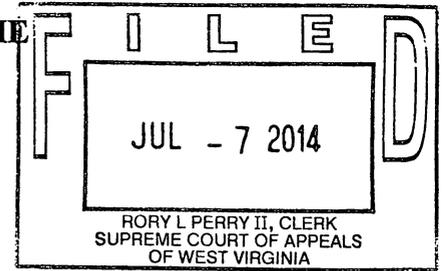


IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 13-0180

STEPHEN L. HALL,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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REPLY TO RESPONDENT'S BRIEF

The Hearing Panel Subcommittee (“HPS”) properly found that the evidence clearly and convincingly established that Respondent had no objectively reasonable basis in fact for making statements impugning the integrity of Administrative Law Judge Phyllis H. Carter and therefore engaged in unethical conduct that was in violation of Rule 8.2(a) [making statements about an adjudicatory officer with reckless disregard as to its truth or falsity] and Rule 8.4(d) [engaging in conduct prejudicial to the administration of justice]. The HPS has recommended to this Honorable Court that Respondent be suspended for three (3) months for his conduct in this matter; that Respondent be ordered to complete an additional three (3) hours of Continuing Legal Education during the 2014-2016 reporting period, specifically in the area of ethics; and that Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respondent now asks that this Honorable Court dismiss this case. He claims that Rule 8.2(a) should not apply to statements made about an Administrative Law Judge (“ALJ”) and that Rule 8.2(a) should be restricted to statements a lawyer has made in public only. Respondent also argues that the HPS improperly presumed the subject statements made by Respondent were false and required that Respondent prove the truth thereof, instead of resolving all reasonable inferences drawn from the record in Respondent’s favor and presuming that Respondent’s statements were true or that they were not reckless. Finally, Respondent resurrects the same untenable accusations he lodged against Judge Carter in the underlying proceedings. Respondent’s claims are not substantiated by the record or the law and must fail.

A. The applicability of Rule 8.2(a) to an Administrative Law Judge.

Respondent first argues that, based upon the Comment to Rule 8.2 of the Rules of Professional Conduct,¹ only an appointed or elected person can properly be labeled a judge, adjudicatory officer or public legal officer for purposes of Rule 8.2(a). Respondent goes on to assert, “[e]very ALJ is an executive employee, who is neither elected nor appointed to their position and Rule 8.2 does not apply to administrative law judges.” [Brief of Stephen L. Hall, p. 4.] Respondent opines that this Court should disregard the nature of the work an adjudicatory officer performs when examining a potential violation of Rule 8.2(a) and, instead, look to the nature of the employment itself. Agreeing with Respondent’s position would remove every individual who is not appointed or elected to their position from the scope of Rule 8.2(a), and would be improper.

Rule 8.2 seeks to preserve the integrity of all judicial and legal officials in order to maintain the public confidence in the administration of justice. The reference in the Comment to Rule 8.2 to the attorney general, prosecuting attorney and public defender indicates that the Rule should be broad in its application, not narrow. There is absolutely no harm that results from considering an ALJ an “adjudicatory officer” for the purposes of Rule 8.2(a). Indeed, such determination clearly furthers

¹ The Comment to Rule 8.2 states in full as follows:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

the sound public policy goals of the Rules of Professional Conduct of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994).

ALJs are an important part of our State's legal system and are appropriately bound by the Code of Conduct for State Administrative Law Judges which requires ALJs to, among other things, uphold the integrity of the law, be independent and impartial, not be compensated based on outcome, avoid both impropriety and the appearance of impropriety, maintain order in proceedings, avoid *ex parte* communications, and avoid conflicts of interest. See, Code of Conduct for Administrative Law Judges, 158 C.S.R. 13 (2005). Additionally, ALJs are relied upon to uphold the West Virginia Human Rights Act, and are authorized by statute to perform the judicial functions of conducting hearings, directing the scope of discovery including the consideration of motions to compel and motions for protective orders, determining all questions of law and fact, and rendering a final decision on the merits of a complaint. W.Va. Code §5-11-8(d)(3). Thus, the HPS was correct in its finding that in presiding over and adjudicating cases before the West Virginia Human Rights Commission, Judge Carter was an adjudicatory officer to which Rule 8.2(a) applied.

Respondent fails to cite to any cases that support his position of such a limited construction of Rule 8.2(a) and avoids mention of The Florida Bar v. Ray, 797 So.2d 556 (Fla. 2001), in which a lawyer was disciplined for violating Florida RPC 4-8.2(a), which is identical to West Virginia RPC 8.2(a), for certain statements made regarding an administrative law judge in the United States Executive Office for Immigration Review. This Honorable Court has also previously referred to an Administrative Law Judge as a "judicial officer" in examining an evidentiary issue in an

administrative proceeding. See, State ex rel. Marshall County Com'n v. Carter, 225 W.Va. 68, 72, 689 S.E.2d 796, 802 (2010).

B. The applicability of Rule 8.2(a) to non-public statements.

Respondent also presents the argument that Rule 8.2(a) should be inapplicable to his conduct because he made the statements at issue in pleadings, and, “the public confidence in the justice system cannot be affected by statements which are strictly confined to the courts and the ordinary legal processes.” Again, Respondent does not cite to any holdings that are on point with his position.

Respondent’s position is misguided. Pleadings filed with a tribunal are not necessarily “strictly confined to the courts,” as Respondent contends, as most pleadings become permanent, public record. Some pleadings are newsworthy and reported upon by the media. Moreover, effective legal arguments do not include statements that are false or made with a reckless disregard as to its truth or falsity, and statements of that nature should not be afforded any special protection because they are made in a court-filed document. Based upon the analysis of the holding of this Honorable Court in Lawyer Disciplinary Board v. Turgeon, 210 W.Va. 181, 557 S.E.2d 235 (2000), as well as the numerous consistent holdings from other jurisdictions, the HPS properly concluded that Rule 8.2(a) of the Rules of Professional Conduct applies to statements made by lawyers in pleadings which impugn the integrity of a judge.

C. Standard of Proof

Respondent makes an extended argument regarding the burden of proof necessary to maintain a disciplinary action, and claims that he was entitled to the benefit of the doubt and all reasonable inferences under the presumption of innocence. However, the standard of proof has long been clear in disciplinary matters. Rule 3.7 of the Rules of Lawyer Disciplinary Procedure provides that, in

order to recommend the imposition of discipline of a lawyer, “the allegations of the formal charge must be proved by clear and convincing evidence.” See also, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

The findings contained in the Report of the HPS were well documented and supported by the evidence that was presented at the disciplinary hearing in this matter. The HPS carefully examined each of the previously excerpted statements from the Petition of Appeal filed by Respondent in light of conduct of a reasonable attorney in similar circumstances and concluded that the evidence was clear and convincing that there existed no reasonable basis for the statements, and that such conduct violated Rule 8.2(a) and Rule 8.4(d) of Rules of Professional Conduct. There is no indication whatsoever that Respondent was not given a fair hearing by the HPS or that the HPS failed to resolve reasonable inferences in Respondent’s favor.

D. There is no justification for Respondent’s statements regarding Judge Carter.

For the remainder of his brief, Respondent focuses on defending the statements he made concerning the late Judge Carter. Respondent again accuses Judge Carter of having “nefarious and malicious intent” [Brief of Stephen L. Hall, p.16]; of showing bias in the underlying matter [Id., p. 17]; of lying about her basis for determining witness credibility and making “plainly stupid,” “ridiculous,” and “absurd” findings [Id., pp. 18-19]; of having a “bizarre denial of reality” and making “a delusional display of tyrannical thinking” [Id., p. 25]. This ongoing pattern of behavior, and Respondent’s refusal to recognize the clear recklessness of his conduct, calls into question Respondent’s overall fitness to practice law.

In pleadings filed with the Circuit Court of Kanawha County and the Supreme Court of Appeals, Respondent made the following statement:

In an outlandish display of tyrannical inclination, ALJ Carter found that Respondents discriminated because they were unable to force other companies and trade groups to provide instruction and product knowledge at the Respondents' school . . . ALJ Carter basing her Decision upon the absence of such an outlandish forced coercion, as she obviously did, indicates not only that ALJ Carter is deluded into thinking that this is a Communist country where companies are forced to perform services for others, but is under the deluded impression that Respondents have the power and authority to compel others to do its bidding. For the foregoing reasons, Respondents recommend that ALJ Carter seek professional psychiatric help, or be required to attend a forced reeducation camp . . . oops . . . wrong country. [ODC Exhibit 2, Bates 80.]

In addition to the statement above, Respondent made eleven more of this nature in appeals that the HPS correctly found to be in violation of the Rules of Professional Conduct. Respondent points out that, "many of the assertions in the statements listed against Respondent were in the nature of opinion, and may have been a smidgen exaggerated for effect." [Brief of Stephen L. Hall, p.32.] However, using language of this type with respect to a judge can never be justified. A lawyer is considered to be an officer of the Court, is viewed by the public as having unique insights into the judicial system, and has a duty pursuant to the Rules of Professional Conduct to maintain the integrity of the legal system. The Preamble to the Rules of Professional Conduct states, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."

It is fully appropriate for lawyers to advance appellate arguments which include that the court below committed both legal and factual errors. Respondent took the additional step of claiming that the errors made by Judge Carter were intentional and the result of improper motives. Respondent also made a substantial amount of *ad hominem* attacks upon Judge Carter. In support of these accusations, Respondent offers nothing beyond general dissatisfaction with Judge Carter's findings.

Not only did there exist no reasonable basis for the statements made by Respondent, Disciplinary Counsel contends that a lawyer's use of such language is a *per se* violation of the Rules of Professional Conduct. The inappropriate, unprofessional, disrespectful, and reckless statements made by Respondent about a presiding judicial officer undermines the integrity and public confidence in the administration of justice. To condone or excuse such language would fail to further the goals of our system of justice.

E. This Honorable Court should adopt the recommendations of the Hearing Panel Subcommittee.

After applying the proper standard of whether there is an objective, reasonable factual basis for the statements made by Respondent, the HPS applied the facts to the law and correctly determined that the Office of Lawyer Disciplinary Counsel proved by clear and convincing evidence that Respondent had violated Rule 8.2(a) and Rule 8.4(d) of the Rules of Professional Conduct when he made numerous unsupported accusations attacking the integrity and qualifications of ALJ Carter. The Hearing Panel Subcommittee's recommendations are clearly supported by the evidence and are appropriate in light of Respondent's disturbing conduct.

In Kentucky Bar Ass'n v. Waller, an attorney was given a six-month suspension from the practice of law for calling a judge a "lying incompetent ass-hole," in court-filed papers because the Supreme Court of Kentucky found the respondent to be "utterly unrepentant and apparently intent on convincing this Court of the truth of his assertions." 929 S.W.2d 181, 183 (Ky. 1996). The Court also stated in that matter, "There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system." Id.

A lawyer's Massachusetts law license was suspended for a year and a day for making inflammatory comments about a judge's honesty, character, fitness and qualifications in letters and in eight motions to recuse he presented over the course of fifteen months. The respondent lawyer apparently characterized the judge as, among other things, a "pathological liar and a rat," and, to support his accusations, he was found to have made false statements about the record and misstated holdings of reported appellate cases. In re Daniel Joseph Harrington, No. BD-2011-010 (Mass. 2011)(only a summary of which has been published at <http://www.mass.gov/obcbbo/bd11-010.pdf>).

The full bench of the Massachusetts Supreme Judicial Court affirmed the disbarment of a respondent lawyer after making the finding that, "the respondent has demonstrated rather convincingly by his quick and ready disparagement of judges, his disdain for his fellow attorneys, and his lack of concern for and betrayal of his clients that he is utterly unfit to practice law." In re Cobb, 838 N.E.2d 1197 (Mass. 2005). In Cobb, the respondent lawyer was found to have converted funds in addition to filing frivolous actions in which he attacked the credibility of judges and other lawyers. The Court found that the respondent had "failed to acknowledge the nature, effects, and implication of his misconduct." Id., at 1219.

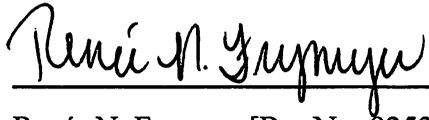
The Wisconsin Supreme Court publicly reprimanded a lawyer for violating the ethics rule of judicial criticism in In re Disciplinary Proceedings Against Riordan, 824 N.W.2d 441 (Wis. 2012). The Court ruled that the lawyer's harsh comments in pleadings, in court, and in the ensuing disciplinary investigation - accusing a judge of bias and misuse of power after the judge denied his petition to become guardian of a disabled veteran - were not grounded in any objectively reasonable factual basis, despite the lawyer's subjective belief that his statements were appropriate and necessary. The Idaho Supreme Court also issued a public reprimand in a matter where a lawyer, in

a motion to withdraw as counsel, called an analysis made by a Magistrate Judge “stunningly nonsensical,” and stated, “[w]ith all due respect to this Court, this statement makes no sense.” The sanctioned attorney concluded his motion by stating, in part, “The Court’s errors in this case were so inexplicable and so great in number that Counsel has formed the belief that this Court is: (a) lazy; (b) incompetent; c) biased; (d) prejudiced; or (e) all or some of the above.” Idaho State Bar v. Eric J. Scott, ISB No. FC-12-08 (October 4, 2012)(memorandum decision).

In In re Arnold, 56 P.3d 259 (Kan. 2002), a lawyer was publicly censured for engaging in conduct prejudicial to the administration of justice and for making false statements about the qualifications and integrity of a judge for sending a fax to the judge after a hearing suggesting that the judge remove himself from the bench which included the statement, “Your absurdly fastidious insistence on decorum and demeanor mask an underlying incompetence.” Finally, a lawyer was publicly censured by the Supreme Court of Tennessee’s Board of Professional Responsibility for his violation of various Tennessee Rules of Professional Conduct when he sent an *ex parte* letter to the presiding judge in which he made threatening and reckless statements questioning the judge’s integrity. In re Daniel M. Hurst, 33308-0-KB (April 27, 2011)(public censure order).

The repetitious nature of Respondent’s comments, the disturbing language he employed, Respondent’s refusal to acknowledge the wrongful nature of his conduct and his lack of remorse clearly aggravate Respondent’s conduct in this case. For the public and fellow members of the profession to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must receive a strong sanction. Accordingly, Disciplinary Counsel urges this Honorable Court to accept the recommendations of the Hearing Panel Subcommittee.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

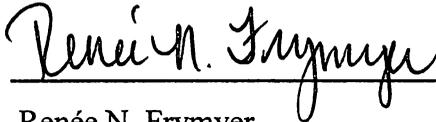


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CERTIFICATE OF SERVICE

This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 7th day of July, 2014, served a true copy of the foregoing **“Reply Brief of the Lawyer Disciplinary Board”** upon Respondent Stephen L. Hall, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Stephen L. Hall, Esquire
3215 Bradley Road
Huntington, West Virginia 25704



Renée N. Frymyer

IN RE: DANIEL JOSEPH HARRINGTON**NO. BD-2011-010****S.J.C. Order of Term Suspension entered by Justice Gants on March 9, 2011, with an effective date of April 8, 2011.¹****SUMMARY**²

A hearing committee found that, beginning in 2004 and while acting pro se in post-divorce proceedings, the respondent attempted to drive the presiding judge out of the case by using baseless accusations about the judge's honesty, character, fitness and qualifications. The respondent's inflammatory comments began after the judge issued a judgment adverse to the respondent on contempt complaints against him and on his complaint for modification of the divorce judgment. Among other things, the respondent characterized the judge as a pathological liar and a rat, "corrupt, dishonest and incompetent" (a phrase he repeated many times throughout the proceedings), her courtroom as a sewer, and her award of counsel fees to his ex-wife as a "wedding gift" for opposing counsel.

The respondent made his accusations primarily in eight motions to recuse presented over the course of about fifteen months; they also appeared in four letters to the chief justice of the probate court and another to the first justice of the Middlesex probate court. In one such letter, he accused the presiding judge of acting "corruptly and dishonestly." (The respondent also falsely accused another judge of "conspiring" with the presiding judge and engaging in "criminal behavior" and attempting to "subvert the legal process"). To support his accusations, the respondent made false statements about the record, obfuscated facts and misstated the holding of reported appellate cases.

In February of 2008, the judge issued a memorandum and order, sanctioning the respondent for frivolous and bad-faith pleadings. The order required the respondent to pay a fine of \$500 by May of 2008, which the respondent refused to do.

The respondent continued his conduct of filing motions and pleadings, accusing the judge of being "corrupt, dishonest and incompetent." He also filed a civil action against the judge in which he repeated his allegations. He also threatened disciplinary action against the judge and opposing counsel.

¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

² Compiled by the Board of Bar Overseers based on the record filed with the Supreme Judicial Court.

At a hearing in June of 2008, the judge stated that a hearing would be held to determine if the respondent was in contempt. It was then postponed by the judge who sought the advice of the Committee on Judicial Ethics which, in a formal opinion dated October 6, 2008, advised that the judge was ethically required to report the respondent's conduct to the Board of Bar Overseers and that the judge was not automatically disqualified as a result of reporting the respondent.

A trial was held in November of 2008 on the post-divorce matters. After it was completed, the judge turned to the respondent's refusal to pay the \$500 fine (from which he did not appeal or seek a stay). After the respondent, who had declined the opportunity to have his own counsel, testified on his own behalf, the judge held the respondent in civil contempt for failure to pay the \$500 fine and ordered him jailed for ten days or until he paid the \$500 fine. The respondent refused to pay the fine and served the ten days in jail.

Throughout this time and afterwards, the respondent continued to make false and unsupported accusations attacking the integrity and qualifications of the judge.

The committee found that the respondent violated rules 3.1 (frivolous pleadings or issues) and 8.4(d) (conduct prejudicial to the administration of justice) and (h) (conduct otherwise reflecting adversely on fitness to practice). It also found that, in attacking the judge, the respondent violated Mass. R. Prof. C. 8.2 (knowingly false or reckless statements about the qualifications or integrity of a judge), and 8.4(d) and (h). It found that the respondent made reckless accusations, i.e., accusations that were without an objectively reasonable basis in fact and law.

As for the second count of the petition for discipline, the hearing committee found that the respondent made statements in his civil complaint against the judge that he knew to be false, or made with reckless disregard as to their truth or falsity, concerning the integrity or qualifications of a judge, in violation of rules 8.2, 8.4(d) and (h). The committee also found that the respondent engaged in the same type of conduct during the hearings.

In aggravation, the respondent had substantial experience in the practice of law at the time of his misconduct. *Matter of Luongo*, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993). His misconduct was repeated and extended for over a year, and his attacks on the judge escalated in tone and content even after warnings and sanctions. *Matter of Saab*, 406 Mass. 315, 326-327, 6 Mass. Att'y Disc. R. 278, 289-290 (1989); *Matter of Clooney*, 403 Mass. 654, 657, 5 Mass. Att'y Disc. R. 59, 67-68 (1988). He engaged in his conduct for personal motives; i.e., an effort to have his case assigned to a different judge after receiving unfavorable outcomes. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, § 9.22(d) (1992). In further aggravation, the respondent lacked any appreciation for the nature and

consequences of his misconduct. *Matter of Cobb*, 445 Mass. 452, 480, 21 Mass. Att'y Disc. 93, 125 (2005); *Matter of Kerlinsky*, 428 Mass. 656, 666, 15 Mass. Att'y Disc. R. 304, 315 (1999).

The board adopted the hearing committee's report and recommendation for a suspension of a year and a day. The Court so ordered on March 9, 2011.



**BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE**

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RELEASE OF INFORMATION
RE: DANIEL M. HURST, BPR# 22856
CONTACT: KEVIN BALKWILL
BOARD OF PROFESSIONAL RESPONSIBILITY
615-361-7500

May 2, 2011

ALABAMA LAWYER CENSURED

On April 27, 2011, Daniel M. Hurst, an attorney licensed to practice law in Tennessee, received a Public Censure from the Board of Professional Responsibility of the Tennessee Supreme Court.

Mr. Hurst was formerly licensed to practice law in Tennessee, but took Inactive Status on January 31, 2005. Because of this status, Mr. Hurst is not authorized to practice law in Tennessee. Mr. Hurst later became involved in assisting a relative in the litigation of a will contest action. He volunteered to draft pleadings for a legal services attorney if the attorney would represent the relative in her case. Mr. Hurst later prepared pleadings on behalf of his relative giving the appearance that the relative had filed the pleadings on her own. Mr. Hurst sent an *ex parte* letter to the presiding judge on two separate occasions in an attempt to sway the course of litigation in his relative's favor. In addition, he made threatening and reckless statements questioning the integrity of the presiding judge in the case, and refused to adequately respond to Disciplinary Counsel during the disciplinary investigation.

By the aforementioned acts, Daniel M. Hurst has violated Rules of Professional Conduct 1.2(d) (assisting a client in fraudulent conduct), 3.3 (candor toward the tribunal), 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), 3.5(b) (*ex parte* communication with a judge during a proceeding), 4.1(a) (knowingly making a false statement of material fact to a third person), 4.4(a) (using means that have no substantial purpose other than to delay or burden a third person), 5.5 (unauthorized practice of law), 8.1(b) (failure to respond to a demand for information by Disciplinary Counsel), 8.2(a) (making a false statement concerning the integrity of a judge), and 8.4(a) (violation of the Rules of Professional Conduct), (b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), (c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and (d) (conduct prejudicial to administration of justice) and is hereby Publicly Censured for these violations.

A Public Censure is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

Hurst 33308-0 rel.doc

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EXEC. SEC'Y

IN DISCIPLINARY DISTRICT 0
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE: DANIEL M. HURST, BPR NO. 22856

FILE NO. 33308-0-KB

Respondent, an attorney licensed
to practice law in Tennessee
(Jefferson County, Alabama)

PUBLIC CENSURE

The above complaint was filed against Daniel M. Hurst, an attorney licensed to practice law in Tennessee, alleging certain acts of misconduct. Pursuant to Supreme Court Rule 9, the Board of Professional Responsibility considered these matters at its meeting on March 11, 2011.

Respondent was formerly licensed to practice law in Tennessee, but took Inactive Status on January 31, 2005. Respondent retained his license to practice law in Alabama.

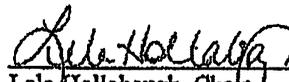
On April 5, 2010, Respondent sent an ex parte letter directly to the presiding judge in a will contest involving his family members. Respondent's letter commented on a potential conflict of interest which may have existed with respect to counsel adverse to his aunt, and the presiding judge's failure to address the matter in any order of the court. Respondent later sought to enlist the aid of a legal aid attorney to represent his aunt in her upcoming trial. In a series of e-mails between Respondent and the legal services attorney, Respondent discussed strategy of continuing the trial date so that the legal services attorney would have ample time to prepare himself for the case and stated that he could assist by drafting pleadings if necessary. Respondent's aunt filed several pleadings with the court purportedly *pro se*, but which were actually drafted by Respondent. On June 1, 2010, Respondent sent another ex parte letter to the

presiding judge expressing his anger at the court's order which insinuated that Respondent was providing behind the scenes legal representation of his aunt. Respondent expressed in his letter the potential for a defamation suit against the judge and complaint to the Court of the Judiciary. Respondent requested that the judge strike certain language from his prior order.

By the aforementioned acts, Daniel M. Hurst has violated Rules of Professional Conduct

1.2(d) (assisting a client in fraudulent conduct), 3.3 (candor toward the tribunal), 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), 3.5(b) (*ex parte* communication with a judge during a proceeding), 4.1(a) (knowingly making a false statement of material fact to a third person), 4.4(a) (using means that have no substantial purpose other than to delay or burden a third person), 5.5 (unauthorized practice of law), 8.1(b) (failure to respond to a demand for information by Disciplinary Counsel), 8.2(a) (making a false statement concerning the integrity of a judge), and 8.4(a) (violation of the Rules of Professional Conduct), (b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), (c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and (d) (conduct prejudicial to administration of justice) and is hereby Publicly Censured for these violations.

FOR THE BOARD OF
PROFESSIONAL RESPONSIBILITY


Lela Hollabaugh, Chair

April 17, 2011
Date

ERIC J. SCOTT
(Public Reprimand)

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Boise lawyer Eric J. Scott, based on professional misconduct. The Professional Conduct Board Order concluded a disciplinary proceeding that was initiated with a complaint filed on June 29, 2012. On September 24, 2012, a Hearing Committee of the Professional Conduct Board conducted a hearing on the Idaho State Bar's Motion to Deem Admissions for Failure to Answer and for Imposition of Sanction. Mr. Scott chose not to answer due to a parallel contempt case with criminal implications. Following that hearing, the Hearing Committee entered its Order. That Order concluded that Mr. Scott violated I.R.P.C. 8.2(a), by making a statement concerning the qualifications or integrity of a judge that a reasonable attorney, considered in light of all his professional functions, would not have made under the circumstances.

Mr. Scott represented a criminal defendant charged with possession of an open container and battery. Magistrate Judge Thomas Watkins was assigned to the case. Following Judge Watkins' decision denying defendant's pre-trial motions, Mr. Scott filed a motion to withdraw as defendant's counsel. In that motion, Mr. Scott argued that Judge Watkins erroneously applied a subjective test rather than an objective test in analyzing whether the defendant was in custody. Judge Watkins stated that the test for determining whether a suspect was in custody "is a subjective one and the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Mr. Scott described this statement of the test as "stunningly nonsensical" and stated that "[w]ith all due respect to this Court, this statement makes no sense."

Regarding the open container charge, Mr. Scott argued that Judge Watkins erroneously concluded that the defendant admitted to an officer that he had consumed alcohol in a public theater. Mr. Scott concluded that motion by stating, in part:

The Court's errors in this case were so inexplicable and so great in number that Counsel has formed the belief that this Court is:

- (a) lazy;
- (b) incompetent;
- (c) biased;
- (d) prejudiced; or
- [(e)] all or some of the above.

With all due respect, Counsel simply cannot escape this belief. There is no explanation for this Court's 'finding' of a 'fact' that did not exist. It would be understandable if this Court overlooked a fact, but this Court made up a fact. It just so happens that this Court made up facts to the advantage of his former employer, the Boise City Prosecutor's Office. Therefore, this Court is either biased toward them, prejudiced against Counsel, too lazy to actually listen to the recording of the relevant interview, or too incompetent to reach the correct conclusion from the facts. Therefore, Counsel lacks faith in this Court's ability to objectively and competently serve as a fact-finder in this case.

For the reasons set forth above, Counsel also has no faith in this Court's ability to competently and objectively interpret the law in this case. The Court's stunningly nonsensical statement of the 'test' for determining custody speaks for itself. . . .

Following a hearing, Judge Watkins denied the motion to withdraw and Mr. Scott was served with a written charge of contempt. Following a hearing, Mr. Scott was found guilty of contempt, a matter that is currently pending on appeal. The defendant in the underlying case was acquitted of the battery charge and the open container charge was dismissed after the state rested its case.

The public reprimand also includes that Mr. Scott be placed on probation on the condition that he complete a one-year mentoring program facilitated by the Idaho State Bar. Mr. Scott voluntarily began the mentoring program before the disciplinary case was filed.

The public reprimand does not limit Mr. Scott's eligibility to practice law.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.