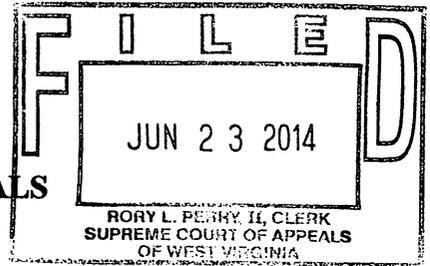


**BEFORE THE SUPREME COURT OF APPEALS  
OF THE STATE OF WEST VIRGINIA**



**LAWYER DISCIPLINARY BOARD,**

**Complaint,**

**v.**

**No. 13-0180**

**STEPHEN L. HALL,**

**Respondent.**

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**BRIEF OF STEPHEN L. HALL**

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## I. STATEMENT OF THE CASE

### A. Procedural History

This is a disciplinary proceeding initiated by the Lawyer Disciplinary Counsel (hereinafter "LDC") based on an anonymous complaint, filed in February of 2010, by Paul Sheridan and his colleague, attorneys for the Human Rights Commission (hereinafter "HRC"), as representatives of the Civil Rights Division of the Attorney General's Office, against opposing counsel, Stephen L. Hall (hereinafter "Respondent"), from a case before the HRC originally filed in the spring of 2004, as a result of a Statement of Charges issued on or about February 26, 2013. Respondent was served with the Statement of Charges on February 27, 2013, and filed a timely response thereto on or about March 25, 2013.

On September 26, 2013, this matter proceeded to hearing held at the Office of Lawyer Disciplinary Counsel. The Hearing Board Subcommittee (hereinafter "HPS") was comprised of Debra A. Kilgore, Esquire, Sean D. Fancisco, Esquire, and Dr. K. Edward Grose, layperson. Stephen L. Hall, Respondent, appeared *pro se*, and Renée N. Frymyer, Lawyer Disciplinary Counsel, appeared on behalf of her office. The HPS heard testimony from the Stephen L. Hall, Esquire, the Honorable Phyllis H. Carter and Paul Sheridan, Esquire. In addition, ODC Exhibits 1-15 and Respondent's Exhibits 1-11 were admitted into evidence.

On or about March 13, 2014, the HPS issued its decision in this matter and, on or about March 26, 2014, the Report and Recommendation of the HPS was filed with the Supreme Court of Appeals, with their finding that clear and convincing evidence had established the Respondent had violated Rule 8.2(a) and 8.4(d) of the West Virginia Rules of Professional Conduct. In a timely fashion, Respondent filed an objection pursuant to Rule 3.11 of the Rules of Lawyer

Disciplinary Procedures. By Order entered April 17, 2014, this Honorable Court ordered the parties to submit written briefs of their positions and submit the same for oral argument on the Rule 19 argument docket.

**B. Applicability of Rule 8.2(a) to an administrative law judge.**

In the present case, prior to discussing the heart of the matter, it is necessary to discuss two not unrelated preliminary questions which arise in the application of Rule 8.2 of the Rules of Professional Conduct to the present case. First, is an ALJ is properly a *judicial officer* under the language of the rule. And whether this rule was Respondent ant to apply to statements made within the context of a legal proceeding or rather Respondent ant to apply only to public statements.

Rule 8.2(a) reads as follows:

“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.”

“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.” *Comment*, West Virginia Code, Annotated, Rule 8.2. Judicial and legal officials.

The first item which stands out is that qualifying phrase of “candidate for election or appointment.” Clearly the writer of the comment to the rule in the annotations of the WV Code concurs with the view that Rule 8.2(a) is directed at criticism which is likely to impact or affect the legitimate employment opportunities of public office holders within the legal profession.

Those whose employment is contingent upon their public reputation through election or appointment are particularly vulnerable to unfair public statements against them.

Clearly a legal secretary's or a paralegal's employment is contingent upon the continued good graces of their employer, whether he is a lawyer or a judge, and is not connected to the general public's opinion of them. While no person should morally go about making knowingly false statements about people, the protection of Rule 8.2(a) against such nefarious lawyers does not extend to those people who work with and around those lawyers every day. The rule applies to certain officials but not others, for example an attorney general, a prosecuting attorney or a public defender, all of whom are either elected or appointed.

Does the protection of Rule 8.2(a) extend to an assistant public defender who is neither elected nor appointed but is rather hired as an employee by the public defender? Attorney general offices are often compared to a large law firm; as such, should Rule 8.2(a) protection extend throughout such law firm? If so, why would it not apply to attorneys at other law firms? The only rational distinction is not the nature of the work, but the nature of the employment itself, in whether or not the office is filled through appointment or election.

Only an appointed or elected person can properly be labelled a public *officer* for purposes of Rule 8.2(a). Certainly, we as a society loosely throw about the term officer, applying it to policemen or sheriff's deputy and calling every attorney an *officer of the court*. And clearly that is not the context to which this rule is Respondent ant to apply as there is a certain restrictive nature to the people included under this rule's protection.

The distinction, relevant to the current discussion, made under the term *adjudicatory officer* is to whom such an appellation properly applies. Employing the reasoning above it would seem simple enough that such persons as a justices of the peace, family law masters or

magistrates, being offices filled by appointment or election are properly adjudicatory officers which may not, in some jurisdictions, be equated with the term judge. This term would not apply to every person employed to serve in an adjudicatory capacity, as they may not properly be termed *officers*. For example, hearing examiners, sometimes called administrative law masters or administrative law judges, mediators and adjudicators act in an adjudicative capacity but are hired and employed by an agency or organization; their continued employment is not contingent upon public esteem but only upon the continuing good graces of their employers.

It needs to be noted that the West Virginia HRC is an executive agency, part of the executive branch of government and not judicial in nature.<sup>1</sup> While the West Virginia Human Rights Act authorizes the executive agency to exercise some *quasi-judicial* functions, the legislative branch has created the agency as a subdivision of the executive and not as a judicial subdivision. However, much one may disagree with this particular arrangement, the Court is bound to respect this distinction and should not lightly blur the separation of powers and usurp that authority for establishing the structure of government delegated to the Legislature.<sup>2</sup>

Further, every ALJ is hired and employed by the executive agency where they work. In the present case, ALJ Carter is an employee of the HRC. This is made clearer in that she was, subsequent to the underlying case, promoted to an administrative position within the agency.

Every 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. The only case which even mentions an attorney defending against Rule 8.2(a) claiming that his statements were made

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<sup>1</sup> Likewise, the Attorney General's Office, is part of the Executive Branch, even though the lawyers there employed are required to be attorneys and therefore subject to the supervision of the courts in that capacity.

<sup>2</sup> Respondent's personal opinion is that the Legislature should have created a judicial agency to create a pool of administrative law judges, under the auspices and oversight of the Supreme Court of Appeals, which would be both subject to both the appointment process and to judicial oversight, thus eliminating both of the problems which arise under current consideration.

against the judge's clerk, the court made certain to point out that the statements were really against the judge and not the judge's clerk. U.S. Dist. Court for E.D. of Wash. v. Sandlin, 12 F.3d 861, 866 (9<sup>th</sup> Cir. 1993). The lawyers traditional duty to defend judges and courts against unjust criticism does not extend to a duty to defend executive and legislative employees. The very purpose of the rule argues against extending the rule to cover every public employee.

Respondent can find only a single case where Rule 8.2(a) has been applied to statements about an anyone who was not, in fact, an appointed or elected judge, and that was is a recent unreported case from Kentucky.<sup>3</sup> Kentucky Bar Assn. v. Blum, 2012-SC-000825-KB (2012). The issue of Rule 8.2 applying to a hearing examiner was not contested in that case, and the claim of a violation of Rule 8.2(a) was a minor part of the case which involved a number of violations as well as an established history of ethical violations. The issue remains untested.

Interestingly, most of the allegations brought against the attorney *Blum* revolved around either vexations repeated filing of frivolous motions or implied threats to employ the disciplinary process in violation of KY SCR 3.130-3.4(f), "A lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter."

### **C. Public as opposed to non-public statements by a lawyer.**

A more difficult question is whether Rule 8.2(a) can properly be applied to non-public statements particularly legal motions and appeals. This is not as clear cut as it may first appear as there is considerable overlap with other, often more appropriate, rules of professional conduct. The overwhelming majority of the cases researched regarding the applicability of this rule

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<sup>3</sup> Kentucky has established an administrative pool of hearing examiners, along with provisions for disqualifications and recusal of such hearing examiners, as well as a complaint system within the Division of Consumer Protection. However, the hearing examiners in Kentucky remain executive employees under the supervision of the Attorney General rather than the individual agencies.

involve public statements, whether to the press or on flyers or other communication to the non-legal public. This position seems in keeping with the general purpose of this rule and its predecessors in not unfairly undermining the public confidence in the administration of justice. Obviously, the public's confidence in the justice system would not, indeed cannot, be affected by statements, however disagreeable, which are strictly confined to the courts and the ordinary legal processes.

However, several cases apply, or appear to apply, this rule to legal documents and not just to public statements, which are worth the time to review in greater depth than I would normally be inclined to delve.

The first, and being a West Virginia case, the most relevant of these involves a case where an attorney “did not believe the circuit judge did such things as manufacture evidence – his client believed it, and the recusal motion was Respondent rely made on the basis of this belief.” Lawyer Disciplinary Bd. v. Turgeon, 575 S.E. 2d 235, 243 (W.Va. 2000). In *Turgeon*, the court upheld the findings of the HPS that the attorney had violated Rules 1.1, 1.2, 1.3, 3.3, 3.5, 8.1, and 8.2 without elaborating into the details of how the alleged offenses violated each of those rules. The Rule 8.2 violation was expressly mentioned as the lawyer's claim that he had discovered evidence “of proof of perjury of James C. Harless” but “could not identify this evidence.” The attorney subsequently employed this frivolous claim as a basis for a motion for recusal of that same judge. Seven different counts were thrown at Mr. Turgeon, of which the rule 8.2 was Respondent rely one of the ones mentioned. The case does not specifically address that distinction where the statement was made in a court motion and not in public.

But looking at the claim in *Turgeon*, it is not at all clear that 8.2 was the appropriate rule to cite for what was clearly an unprofessional statement. In the words of Justice Frank Cleckley,

“This case was decided correctly, but for the wrong reasons.” What were the proper grounds which should have been pursued? To answer that question, let’s raise another; would there have been a problem if the same claim was made about someone who was not a judge?

Clearly, to claim that you have evidence of perjury but do not produce such evidence is problematic to say the least. It is a direct violation of Rule 3.1, “A lawyer shall not . . . assert . . . an issue . . . unless there is a basis for doing so that is not frivolous.” But Rule 8.2 was invoked instead of the clear violation of Rule 3.1. Rule 3.1 was not even mentioned. To infer from this, the problem would seem to be that the frivolous claim was unprofessional only because it was the basis of the subsequent motion for recusal and only relevant because it involved the same judge.

But that is false, the violation of Rule 3.1 occurred when the frivolous claim was made. A subsequent violation of Rule 3.1 would have occurred in asserting a frivolous motion for recusal based upon that unsubstantiated claim. Suppose, for sake of argument, that the claim had been not against James Harless, but against a close relative, such as his wife. There would have then been no violation of Rule 8.2. Clearly, no one would say that there was not an ethics violation in such a case. Resort to Rule 8.2 was an unnecessary complication and confusion of the issues which should have properly been under Rule 3.1.

Rule 3.1 clearly and plainly sets out that it applies to those statements contained in legal motions and proceedings and makes no reference to public statements. As the proper rule which ought to have been applied in *Turgeon* was Rule 3.1 and not Rule 8.2, it does not follow that *Turgeon* stands for the principle that those statements subject to Rule 8.2 should include statements made within the context of legal proceedings which are already covered by Rule 3.1.

The law does not need two rules to cover the same misconduct and such application does not appear to make sense.

The other two cases involving violations of Rule 8.2(a) pertaining to statements made in the context of motions and filings before the court would in a very similar fashion constitute a violation of Rule 3.1 rather than Rule 8.2(a) were the statements made about anyone else.

In West Virginia, the Supreme Court of Appeals has implied that it maintains a certain concern with public statements rather than statements in a legal proceeding, when addressing statements which may be directed at judicial officials. See Committee on Legal Ethics v. Douglas, 370 S.E.2d 325 (W.Va. 1988).

#### **D. Presumption of Innocence and Burden of Proof.**

The nature of a disciplinary hearing stands somewhere between a civil and a criminal case and therefore bears marks of this status in the courts' view of the presumption of innocence and the burden of proof necessary to maintain a disciplinary action.

“The privilege of practicing law ‘is not ‘a matter of grace and favor’; on the contrary, as quite recently recorded, ‘be wave always viewed an attorney’s license to practice as a ‘right’ which cannot lightly or capriciously be taken from him’ We have, too, remained advertent to the Supreme Court’s admonition that the power to withdraw that right ‘ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney.’ And . . . disciplinary proceedings ‘are adversary proceedings of a quasi-criminal nature,’ and ‘[d]isbarment, designed to protect the public is a punishment or penalty imposed on the lawyer.’” Charleton v. F.T.C., 543 F.2d 903 (D.C. App. 1976).

Applying this quasi-criminal nature of a disciplinary proceeding, the attorney accused of violating the Rules of Professional Conduct is entitled to a presumption of innocence and all reasonable inferences in his favor. “Respondent . . . relies upon the principle that in a disbarment proceeding an accused is presumed to be innocent until proved guilty and that evidence should be resolved upon a theory of innocence where reasonably possible to do so. We agree with these principles and have previously so stated.” In Re. Agin, 256 N. E.2d 810 (Ill. 1970).

West Virginia is in agreement with these other courts’ assessments. “In order to sustain a disciplinary charge against an attorney the evidence must be full, preponderating and clear. It is also true that ‘all proper intendments are in favor of the attorney, and reasonable doubts or conflicts in the evidence should be resolved in his favor . . . .’” Committee on Legal Ethics v. Lewis, 197 S.E.2d 312, 316 (1973). Therefore any reasonable inference to be drawn from the evidence and the record must be resolved in favor of any inference that the statements were true or that the statement was not reckless.

This is what the Board failed to do, to resolve in Respondent’s favor any reasonable inference that the statements were true or not reckless. Instead, the Board presumed the statements to be false and made recklessly demanding that Respondent prove the truth of his statements and prove that the statement were not made recklessly.

“Two precepts are drawn . . . that are worthy of further consideration. The first is that an attorney is free to criticize the institution of the law in this country or the wisdom and efficacy of the rules of law which control the exercise of judicial power. Contrarily, criticism by an attorney amounting to an attack on the motivation, integrity or competence of a judge whose responsibility it is to administer the law may be under certain circumstances properly censurable.” State Ex Rel. Oklahoma Bar Assn. v. Porter, 766 P.2d 958, 965 (Okl. 1988). For a

clearer understanding, a couple of these cases should be examined more closely, that of *Porter* and *Yagman*.

In the *Porter* case, after an adverse ruling by a US District Judge, Porter made a couple public statement in response to news media questions, in particular: “He showed all the signs of being a racist during the trial. He never talked to Respondent . . . . He only talked to Respondent when he had to.” and “I’ve never tried a case before him that I felt I got an impartial trial out of him.”

The similarity to the present case is striking that Respondent made a virtually identical statement concerning ALJ Carter; and like Porter based that opinion on his personal observations and feelings of impartiality.

In its conclusion the Trial Panel “found the regulations governing the matter imposed upon respondent a duty to uphold respect for the law, and respondent’s actions were professionally indefensible whether or not he believed them to be supported by factual basis.” *Porter*, at p. 962. But the Supreme Court of Oklahoma disagreed, citing *Porter*’s First Amendment Rights. “The regulation sought to be upheld by this proceeding prohibits a certain class of citizens, attorneys, from speaking on certain subjects, criticism of the judiciary. This concern with limiting what subjects may be spoken to by which speakers is absolutely inimical to the principles of the First Amendment.” *Id.*, at p. 967.

“Foreclosing the right of an attorney to criticize the court is thus not only a burden on the speaker’s First Amendment right but also upon the public’s First Amendment right to hear what he has to say. . . . [T]he regulation would directly inhibit the public’s right to receive this information from those who under ordinary circumstances are most calculated to be intimately familiar with this aspect of the government process. . . . Thus , utilization of disciplinary rules

to sanction the speech here in question is a significant impairment of First Amendment rights.” Id., at p. 967.

However, in balancing the other precept, the court realized that the First Amendment does not protect speech which is knowingly false or fraudulent. “There is no First Amendment protection for false statements of fact. A statement shown to be false therefore subjects an attorney to disciplinary sanctions.” Id., at p. 969. However, such was not the case in *Porter*. “*The record is devoid of any attempt to show that the statements complained of are false.* In the absence of a showing of falsity the statement must be held to be speech on vital issues of self-government protected by the First Amendment.” (*emphasis added*) Id.

This present case presents the very same issue where the Board made no attempt to show that the statements of Respondent were false or that the facts asserted by the Respondent in support of those statements were false. Absent such a showing of falsity by the Board, the Respondent’s statements must be held to be speech on vital issues of self-government protected by the First Amendment.

With regard to the particular nature of the statements of Porter, and the similarity with statements now under consideration, this court should take note of another statement of the *Porter* court. “We view the remarks here examined to be extremely bad form while in the same breath we hold them to be protected.” Id., at p. 970.

When attorney Stephen Yagman moved to disqualify a judge on the grounds of bias arising out of a previous case, his motion was randomly assigned to Judge Keller who denied the motion and sanctioned Yagman. “A few days after Judge Keller’s sanctions order, Yagman was quoted as saying that Judge Keller ‘has a penchant for sanctioning Jewish lawyers . . . . I find this to be evidence of anti-semitism.’” Standing Committee v. Yagman, 55 F.3d 1430, 1434 (9<sup>th</sup>

Cir. 1995). “Yagman placed an advertisement . . . asking lawyers who had been sanctioned by Judge Keller to contact Yagman’s office.” Id. He explained to another attorney that the purpose of this was to get the judge to recuse himself in future cases.

Judge Keller complained to the Standing Committee stating that ““Mr. Yagman’s campaign of harassment and intimidation challenges the integrity of the judicial system. Moreover, there is clear evidence that Mr. Yagman’s attacks upon Respondent are motivated by his desire to create a basis for recusing Respondent in any future proceedings.”” Id., at 1435

The court, relying heavily on the *Sadlin* case, focused on the reasons Mr. Yagman had for making those statements. “The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made.” Yagman, at 1437, *citing*, Sadlin.

“Ethical rules that prohibit false statements impugning the integrity of judges, by contrast [to defamations actions], are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice.” Id. The court, citing *Porter*, reasoned that though “attorneys can play an important role in exposing problems with the judicial system, . . . false statements impugning the integrity of a judge erode public confidence without serving to publicize problems that justifiably deserve attention.” Id., at 1437-8.

Concluding that “attorneys may be sanctioned for impugning the integrity of a judge or the court *only if their statements are false*; truth is an absolute defense.” (*emphasis added*), Id., at p. 1438. “Moreover, *the disciplinary body bears the burden of proving falsity*.” (*emphasis added*), Id. However, even if the statement turns out to be false, the attorney still may not be in

breach of professional ethics. “Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.” Id.

The Board bears the burden of proving falsity, but they have made absolutely no attempt to prove those statements false. While Respondent has provided evidence supporting the truth of his statements, the burden of proof never shifts from the Board to prove those statements false.

Next, the court turned its attention to the very nature of the statements themselves as to what types of statements are to be considered. “It follows that statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they ‘imply a false assertion of fact.’” Id. “Thus, statements of ‘rhetorical hyperbole’ aren’t sanctionable, nor are statements that use language in a ‘loose, figurative sense.’” Id.

In this case, the court concluded that “Yagman’s . . . statement is best characterized as opinion; it conveys Yagman’s personal belief that Judge Keller is anti-Semitic.” Id. “Yagman disclosed the basis for his view that Judge Keller is anti-Semitic and has a penchant for sanctioning Jewish lawyers: that he, Kenner and Manes are all Jewish and had been sanctioned by Judge Keller. The statement did not imply the existence of additional, undisclosed facts; it was carefully phrased in terms of an inference drawn from the facts specified rather than a bald accusation of bias against Jews. Readers were ‘free to form another, perhaps contradictory opinion from the same facts,’ . . . as no doubt they did.” Id.

For the present case it is also important to look at the other statement made by Yagman as it relates directly to the burden of proof as well as helping to define what is or is not sanctionable. “Unlike Yagman’s remarks in his letter . . ., this statement implies actual facts that are capable of objective verification. For this reason, the statement isn’t protected . . .” Id., at

1441. ‘For Yagman’s ‘drunk on the bench’ allegation to serve as the basis for sanctions, however, the Standing Committee had to prove that the statement was false. . . . This it failed to do; indeed, the committee introduced no evidence at all on the point. While we share the district court’s inclination to presume, ‘[i]n the absence of supporting evidence,’ that the allegation is untrue . . . the fact remains that the Standing Committee bore the burden of proving Yagman had made a statement that falsely impugned the integrity of the court. By presuming falsity, the district court unconstitutionally relieved the Standing Committee of its duty to produce evidence on an element of its case. Without proof of falsity, Yagman’s ‘drunk on the bench’ allegation, . . . cannot support the imposition of sanctions for impugning the integrity of the court.” Id., at 1441, 1442.

The case law reinforced exactly what was maintained in the hearing that the correct standard of proof to be applied is: whether or not there exists a reasonable basis for the statement. The falsity of a statement is not at issue where “the respondent had a rational basis for having concluded that the remarks had a factual basis.” Porter, at 969.

Certainly, this articulation of the standard is not permission to say anything and everything an attorney wants, and no one would maintain such a libertine license, but provides proper balance between the interests of maintaining the prestige and standing of the court but allowing for expressions of criticism and correction, with some allowance for human emotional reactions. “A lawyer has every right to criticize court proceedings and the judges and court of this State after a case is concluded, so long as the criticisms are made in good faith with no intent or design to willfully or maliciously misrepresent those persons and institutions or bring them into disrepute.” Ramsey v. Bd. of Pro. Resp., 771 S.W.2d 116 (Tenn. 1989).

Courts have well defined the limits where the attorney maintained his “subjective belief that his statements . . . were appropriate and necessary . . . does not relieve him of the obligation to demonstrate a factual basis for his comments to the court.” In Re. Riordan, Wis. 2011AP984-D, (2012). This does not, in any manner, relieve the state from its burden to prove the falsity of the statements, but does require the attorney to articulate a factual basis for his statements which are necessarily of a factual nature. *Riordan* issued a number of statements which contained a mixture of opinion and assertions of facts but refused to provide the court evidence which would support those factual conclusions.

**E. Specific Information Regarding Attorney’s Statements.**

The Board lists thirteen statements from the 124 page Petition of Appeal, some of which by the nature of the structure of the document are not separate and distinct statements but Respondent rely a reiteration of a previous statement made elsewhere, often in the nature of a conclusion and ought not to be considered as separate and distinct from the context of those passages to which they relate. It will be easiest to address these statements out of their order of appearance, dealing with the simplest and most illustrative first.

To make matters more confusing, the Lawyer Disciplinary Counsel rearranges and re-labels the statements in different documents submitted, originally numbered and now lettered in the *Brief of the Lawyer Disciplinary Board*.

Statements labelled “a” and “d” specifically mentioned as concerning the Board refer to the same topic and should properly be addressed first as it provides the essential backdrop of all the other statements and provides context, something the Board has failed to provide in taking these statements out of context.

While the case was still awaiting hearing, but long after the one year time limit for such hearings imposed by the HRC Rules of Procedure and prior WV Supreme Court of Appeals cases, and the case was still assigned to ALJ Blair; ALJ Carter came to the school, Respondent's client, as a customer. **The main issue of this case** was the claim that the school assigned customers to students of the same race. ALJ Carter is black; but the student she was assigned to was white.

This is important for three reasons. First, it is a direct violation of the Code of Judicial Conduct, Canon 3, to preside in a case where the judge has direct knowledge of the issue of the case. Second, ALJ Carter knew from personal experience that customers were not assigned by race, yet ruled that they were. This, in spite of there being no evidence of a single time this had ever occurred. Without any other evidence, this alone is sufficient to establish that ALJ Carter exhibited clear bias against Respondent's clients. Third, ALJ Carter, in refusing to disclose her personal knowledge of the main issue in the case, implicates every other misstatement, factual or legal error she makes in the case imbuing it with the aura of a nefarious and malicious intent.

It is important to note here that the evidence of these facts is solid. ALJ Carter's signature is on the service card, along with the name of the student to whom the service was assigned. The claim that customers were assigned to students of the same race was made in all seven of the complaints and amendments. ALJ Carter even testified to having her hair done by one witness years before the hearing, therefore it is certain that she remembered having her hair done seven months prior to intervening in the case. The language of Canon 3 unambiguously covers this situation and the Rules of Procedure for the HRC plainly state that ALJs shall be guided by the Code of Judicial Conduct.

This is where the history of the case comes into play where a prior white complainant was discriminated against by the HRC; the witnesses were credible or not as their testimony helped the black complainants against the white respondents; witness claiming that black hair was structurally different called an expert while five witnesses with more expertise who testified that hair was not different were simply ignored; and testimony regarding products used on black hair in a predominately black school was simply ignored. Just this alone is sufficient to establish that the basis for the bias shown by ALJ Carter was racial in origin. Of course, the natural presumption when blatant bias is shown in a case involving racial discrimination, that alone would be a sufficient basis to justify the presumption that said bias was racial in origin.

All of the foregoing justifies the basis for those summations of the evidence in statements “a” and “d” listed by the Board. It is not necessary that the Board agrees with the conclusions of the statements. The Board states that they are not convinced. If the Board is not convinced by this evidence, I do not believe any amount of evidence could ever be sufficient to convince them. Obviously, this is why the standard to be Respondent t is whether there exists a reasonable basis for the statement, and the burden of proving that there is not a reasonable basis is placed on the Disciplinary Counsel.

The statement “f”, simply repeats where I observed that ALJ Carter had blamed the interminable delays in bringing this case to a hearing not on the HRC’s inefficiencies and violations of the timelines within their own rules of procedure, but had sought to blame Respondent , claiming that I would not accept service of process. This statement by ALJ Carter was knowingly baseless and untrue, a lie. I know this because I am the counsel and **I never refused to accept service of process.** The Board mentions this but does not address it.

It was the Disciplinary Counsel's duty to prove, by clear and convincing evidence, that this statement was recklessly made. The statement could not have been made *with reckless disregard as to its truth or falsity* because it is based upon certainty. By shifting the burden of proof, the Board demands the impossible.

This is extremely disturbing because of just how much the Board has abandoned logic and reason in this instance. The Board demands that I prove that I did not refuse service. How? Any student of logic knows you cannot prove a negative; no one can ever prove that they did not do something. Without reason, there can be no law. This position of the Board is irrational.

Next, in statement "k", it states that ALJ Carter only considers whether testimony is corroborated to be important if it favors the side she favored, let us look at the basis for that statement. ALJ Carter discounted the testimony of Ms. Doss, in favor of Respondent's clients, for the sole specific reason that it was not corroborated. But credited two self-serving uncorroborated statements by a Complainant, upon one of these statements the Complainant's entire retaliation claim hinged. Is corroboration important? Apparently, it depends on which outcome the ALJ favors. This conclusion relies solely upon those very **reasons explicitly stated by the ALJ**. Respondent's statement can only be false if the ALJ lied about her reasons for discounting Ms. Doss's credibility.

In statement "j", reasons for the ALJ's dismissal of the testimony of one witness are characterized as plainly stupid. What were those reasons? The Board doesn't bother to say. One reason was that the witness had come to testify on less than a week's notice. The other reason was that the witness had come to the attention of the school because she had come to the school seeking employment. Discrediting a witness solely because of fortuitous timing is a plainly stupid reason in anyone's book.

As to the second part of the statement that it reflects on ALJ Carter's bias, the ridiculous reasons for dismissing this witness is Respondent rely one more piece of circumstantial evidence indicating bias. It is not *with reckless disregard as to its truth or falsity* to point out why a statement is important and what relevance the statement has in the case. The facts were that her reasons were absurd; the importance is that tends to show bias.

The "h" statement makes reference to an alleged situation spoken of by one Complainant, uncorroborated, where a group of children came in to get their hair done for a birthday party. The group supposedly consisted of several white children and one child who was mixed, white and black, and the Complainant's class were assigned to the children. According to the Complainant's story, when the mixed child removed her cap revealing wild nappy hair, in her words, the Complainant was reassigned to work on that child. Also needed to understand the story is the fact that the Complainant had more experience than her classmates.

ALJ Carter repeated this newly fabricated story, which was never alleged in any complaint or any interrogatory, as evidence of a racial incident because "the only non-white party-goer" was assigned to the black student, Complainant. The ALJ infers that the child was assigned because of the child and the Complainant's races ignoring the alternative inference that the child with the wild hair was assigned to the most experienced student.

The accused was entitled to the benefit of the doubt and all reasonable inferences under the presumption of innocence. Given two possible and both reasonable explanations of an alleged event, the ALJ had a duty to Respondent's client which she denied. That is certainly further evidence of inappropriate bias on the part of the ALJ. Respondent has learned over the years is that when a person projects a bad motive on someone else, rather than looking at their actions, it is that person is projecting their own bad motives.

However, the statement refers to a designation by the ALJ of “the only non-white” is disturbing because the child was described as of mixed heritage. The ALJ denied the child’s white heritage in that statement. Why did the ALJ describe the child as *non-white* and not as *non-black*? Why not simply describe the child as mixed, as did the Complainant? This characterization by the ALJ points to a racial or racist perspective on the part of ALJ Carter.

Respondent’s statement correctly points out that ALJ Carter’s ascribing a racist motive to Respondent’s client in an ambiguous story, while phrasing her words so as to deny the child in the story their white heritage, “speaks more of the ALJ’s racism than” Respondent’s clients. This statement is not made *with reckless disregard as to its truth or falsity*, but is a correct assessment that the evidence points to the ALJ having improper bias, based in an evaluation of the ALJ’s own words and phrasing and chosen interpretation of an ambiguous story.

Turning to the statement labelled “e”, the statement that the ALJ’s Decision explicitly relied upon was a story concocted not about Respondent’s clients but about myself. As the individual lied about me, I know with certainty that the story was a fraudulent slander. It never happened. However, as stated the ALJ relied upon the lie, knowing it to be fraudulent and immaterial, the basis for this knowledge must be examined.

The story begins with the Complainant’s assertion that when the Complainant re-enrolled at the school students were still allowed to smoke in the basement, but no longer allowed to smoke in front of the building. The Kanawha-Charleston Health Department had issued a ban on smoking in, and in front of, public buildings prior to the Complainant’s reenrollment. Copies of this declaration, showing that it went into effect prior to Complainant’s reenrollment were provided to the ALJ. Therefore, ALJ Carter knew that the story was fraudulent.

The statement points out that ALJ Carter refused to follow the Rules of Procedure even-handedly, showing support for the Complainant by allowing such testimony. The Rules of Procedure do not permit a new allegation to be made in the middle of the hearing without notice. This was just one of many such new allegations permitted against Respondent's clients. Allowing such testimony was obviously unfair to Respondent's clients and obviously against the Rules of Procedure.

This allegation was never against Respondent's clients and should have never been permitted, let alone included as a basis for judgment. The law is crystal clear that unless an employer is made aware of an alleged racial incident, they cannot be held liable for it. The Complainant specifically testified that she did not report any such allegation. This spurious fiction was immaterial, irrelevant even slanderous.

But it was not directed at Respondent's client, it was a personal assault against Respondent knowing that the Rules of Professional Conduct forbid an attorney from representing a client in a case where that attorney is a necessary witness. At first, the claim was that financial aid was disbursed unfairly, knowing that Respondent was also the financial aid officer. After it was discovered that others could testify about how financial aid was disbursed, the story, on the stand and without notice, magically transformed into this story about smoking. This was a blatant attempt to abuse the Rules of Professional Conduct as an attack against the attorney but hold it against the client. There is nothing more loathsome or despicable than fraudulently attacking a person under the pretense of ethics.

The Board ignored this viscous slander against Respondent for trying to represent his client, this wanton violation of the rules of procedure, the rules of evidence and the rules of ethics by the ALJ and the AG's representatives. This reprehensible slander is, in the Board's

own words, “patently unprofessional and has absolutely no place in our legal system.” The Board, far from denouncing this behavior, by issuing this whitewashing of the facts; approves, supports and applauds this slander.

On to the statement labelled “i”, although, I’m not quite certain why this statement is even listed amongst the others, it may be the only statement for which the Board has a modicum of justification. Obviously calling the ALJ’s determination of credibility as an absolute unquestionable power is a bit of hyperbole as it is not absolute or unquestionable as evidenced by the very fact that I was questioning it by appealing it. It must be recognized that appellate courts have expressed their reluctance to substitute their own judgment over the finders of fact in a trial or hearing in any issue regarding a witness’s credibility.

That ALJ Carter’s use of the term credible, or variations thereof, is ubiquitous in beyond question. I challenge the Court to count the number of times ALJ Carter uses the word in her *Final Decision*, or the AG’s representative in their *Proposed Findings of Fact and Law*. The number of times that witnesses were found to be contradicting themselves, or outright lying, in this case and still found to be credible is astounding.

On this point, it is worth taking the time to note some of the instances as the very act of finding these witnesses credible which follow the statement in question in the document. Regarding one witness, a Complainant: (1) testified to have overheard a conversation on a date when her timecard proved she was not present; (2) contradicted herself twice while allegedly quoting someone; (3) testified to overhearing statement on a day when the business was not opened; (4) filed fraudulent claims claiming to be an employee; (5) contracts herself on when she opened her station; (6) claimed that incident happened on Thursday May 18<sup>th</sup>, 2004, which was a Tuesday; (7) stated three different stories of how she obtained the same document; (8)

contradicted herself regarding to whom she called out; and (9) claimed she was only assigned black patrons and claimed that a teacher assigned her a white patron. This person was deemed so credible that on her testimony alone without any supporting objective evidence or corroboration, Respondent's clients were found to be liable on several of the claims.

So how about the credibility of the other Complainant: (1) states that he was not permitted to work on white clients, then recounts several occasions where he worked on white clients; (2) states that other black students were not permitted to work on white clients then cites examples of black students working on white clients; (3) claimed to have not been taught haircutting, contradicting two of Respondent's clients' witnesses and one of his own and contradicting the findings of the another state agency; (4) alleged no one would teach him then refused help stating that he already knew how to do it; and (5) claimed to have sent a letter to said agency when the original was still in his possession.

Other witnesses were deemed credible only when it suited the outcome in favor of the Complainants. Ms. Morgan's testimony contradicted that of each Complainant regarding two issues, so her testimony on those occasions was deemed not credible. But when her testimony contradicted witnesses for the other side she suddenly became credible again. One hairdresser was elevated to the level of an expert, hence credible, who *just happened* to be the only witness to testify in favor of Complainants on the issue, over five other witnesses with greater experience and teaching experience, including teaching in predominately ethnic beauty schools. Several witnesses opposing the claims of Complainants were said to be not credible simply because of their personal or business relationship to Respondent's client or because more than three years after the incident there were minor inconsistencies.

A witness on one side was deemed not credible solely because they had no corroboration, others deemed not credible in spite of just such corroboration, but on the other side were credible despite their having no corroboration.

This demonstrates how such *halo of credibility* is employed to mask and cover up ALJ Carter's bias in favor of one side and to simply discount any evidence in rebuttal. It also provides further support for that bias claimed in other statements questioned herein.

That the HRC and its employees routinely rely upon this practice can be seen in one of the most scathing rebukes I have ever read in the case of Cobb v. West Virginia Human Rights Comm'n, 619 S.E.2d 274, 288 (W.Va. 2005). In that case the court did question the ALJ's assertion that certain witnesses were credible given the circumstances of their testimony and even found that the ALJ in that case was even making up facts which were not in the record.

So it does not appear that this assessment is made *with reckless disregard as to its truth or falsity*, but made with one allowable hyperbole.

So, to statement "g", which was a response to ALJ Carter's own grandiose hyperbole, that the majority of the companies coming in to demonstrate their services were geared towards products and services typically performed on Caucasian hair and that the school should be responsible for the availability of these other companies' demonstrations. One person cannot force another person to offer a particular product or service; nor can one company force another. The very concept of Capitalism precludes even the government from the employment of such force and violence. The notion that a company is responsible not for their own actions but for the availability of services being offered by another defies all logic and reason.

ALJ Carter did exactly that, lambasting Respondent's clients because trade groups and companies were not available to provide demonstrations for ethnic hair in pages 21 and 22 of her

Decision, listed as her findings of fact. Delusion is essentially the belief that reality is something other than it is. Only in a communistic can the government compel people to provide services as the government orders. The fact that ALJ Carter found the unavailability of ethnically marketed shows and demonstrations from outside companies as grounds to support a claim of discrimination against Respondent's clients is, without question, a bizarre denial of reality.

If the Board one person may compel such offerings from other companies, then they must explicitly detail under what theory of law they think such a thing can be accomplished. If not, they must concede that this statement by the ALJ is a delusional display of tyrannical thinking. Thus, Respondent's statement pointing this incongruity is certainly not made *with reckless disregard as to its truth or falsity*, but is an expression of the importance of the rule of law pushing back against a reckless disregard to the realities of a free market. Anytime a Police Officer, Prosecutor, ALJ, Magistrate, Judge, or Justice is permitted to overstep the dictates of reason it "can undermine the integrity and public confidence in the administration of justice."

Statement labelled "1" is similar to "b" and "m"; but coming as it does at as a summary of the section following the statement, it easily follows that the basis for that statement is easily drawn from the recitation which follows the statement in the appeal. What facts support the conclusion that there are numerous misstatements which demonstrate a disdain, or carelessness, for the facts and otherwise indicate a lack of judicial temperament?

In the paragraphs which follow that statement, the following errors were established as ALJ Carter's background misstatements: (1) mischaracterization that the case was stayed pending a decision as to whether Respondent could be counsel as he was also an employee of the school; when (a) ALJ Blair stated that she was disqualifying Respondent in direct contradiction to the HRC Rules of Procedure and clear and unequivocal WV Supreme Court of Appeals

precedent, and (b) the case was never stayed but proceeded apace forcing Respondent's clients to engage other counsel at additional unnecessary expense; (2) that Respondent had filed an ethics violation against Jamie Alley; and omitting Ellen Golden and ALJ Blair for their part in the illegal disqualification without any reasonable basis in fact or in law, being a direct violation of Rule 3.1 of the Rules of Professional Conduct<sup>4</sup>; (3) falsely claiming that the decision was delayed because (a) Respondent's clients had submitted a change of counsel request; which was untrue, ALJ Blair had illegally disqualified Respondent; and (b) that the Complaint had been amended three (3) times; when it had been amended five times, over a period of two and a half years, in direct violation of the HRC Rules of Procedure; and (4) that Respondent had refused service of process; as has been discussed previously.

ALJ Carter tries to whitewash one Complainant's previous actions falsely claiming (5) that her Complaint was erroneously docketed as an employment case, she then claimed that the error was then "corrected" and a public accommodations complaint issued. Actually, the public accommodation complaint (a) was filed nearly four months prior to the dismissal of the employment claim, and (b) the previous complaints were docketed as employment complaints because she fraudulently claimed to be an employee rather than a student.

ALJ Carter stated (6) that this Complainant was only assigned black clients contradicting the Complainant's own testimony, cited by ALJ Carter, that she was assigned a white male customer. ALJ Carter concludes (7) that the school failed to maintain enough products for black customers, though not a single instance of a lack of products was introduced into evidence. ALJ Carter also concludes (8) that Respondent's clients honored unlawful race-based customer preferences even though not a single instance of Respondent's clients assigning a client based on

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<sup>4</sup> If the LDC had actually bothered to pursue this prior issue, rather than dismissing it and sending the message that they need not worry about being unethical, then the subsequent problems, ethical, legal and factual in this case may never have arose and these statement of which the Board now complains may never have been necessary.

race was introduced into evidence. ALJ Carter concludes (9) that the education of Complainants was significantly compromised despite the evidence that the student graduated, tested, was licensed and found employment.

ALJ Carter, despite the five previous amendments to the Complaints, (10) permitted the Complainants to add allegations as they testified on the stand without notice to Respondent's clients and contrary to the rules of procedure that a racist note was placed upon his desk, not giving Respondent's clients an adequate opportunity to respond. Then she (11) refused to allow Respondent's clients to present a copy of said note in rebuttal to prove that it did not include anything racist at all.

ALJ Carter (12) blatantly misstates the language of the student's contract as to when the student's kit was covered. She (13) misrepresented evidence of hair color services produced to prove that the Complainant, contrary to his assertion, had worked on Caucasian hair to create a whole new issue they had not performed enough color services. Further, ALJ Carter (14) simply dismissed and discounted a witness's testimony that the Complainant was hoping to get a million dollars out of this case, because apparently a motive to lie is not relevant or material to a person's credibility.

In all, at least fourteen different misrepresentations by ALJ Carter come together to support the conclusions of Respondent's statement. The question as always is whether there exists a reasonable basis for the conclusions drawn, not whether the Board or even the Supreme Court of Appeals agrees with the conclusions. No one can reasonably maintain that the statement is baseless or made with reckless abandon. One or two misstatements may be simple error; but when the numbers enter into double digits, this is not accidental and indicates intent to misrepresent the facts.

As to those statements listed as statements “b” and “m” by the Board; the statements are Respondent rely summations of that evidence of misrepresentations presented elsewhere. As summaries, rather than independent assertions, the support for the truth of these statements has already been discussed above, and there is no need to be redundant.

Finally, we arrive at the last and most disturbing of the statements listed by the Disciplinary Counsel, statement “c”. The listing of this statement is most disturbing because, unlike the listing of the other statements which indicate a willful lack of understanding of the burden of proof and the standards of proof to apply, failings of an understanding of law, this listing shows a complete breakdown of the basic concepts of logic. I am, and always will be, at heart a mathematician, so that a failure of simple logic is more disturbing to Respondent than any Respondent re willful bias or even intentional misapplication of the law.

The context of the statement is that of a conditional conclusion. In simple logic terms the argument goes: If A then B. In this case, A represents the position that the HRC was dissolved by statute. The Board adopted the inverse, i.e.: If not A then not B. Then took the position that because they believe A was not true, B was a false statement and must have been made recklessly. That does not logically follow. The validity of an inverse statement must be proven independently as it does not follow from the original statement.

However, as a conditional statement, only if the condition is Respondent t can the truth of the statement be ascertained. In other words, the conditional statement can only be false if A is true and B is false. Respondent’s statement can only be false if you first assume that the legal position is true. More to the point, only if you begin with the assumption that the HRC was dissolved; and then you prove that Respondent’s conclusion, the conditional statement listed as the 3<sup>rd</sup> item, is false, would you then be able to show that Respondent’s statement was false.

Once upon a time, even fifth graders were taught this basic logic which seems to have so easily eluded the Board.

More to the legal point is the axiom A, which is a proposed position of legal interpretation, i.e. the HRC was dissolved by the sunset provision. Now this legal argument comes down to the overuse of the phrase “pursuant to” and its multiple meanings, and the traditional rule of statutory interpretation that if a set of statutes can be read in such a way as to not invalidate the statute, it must be so read. The merits of said legal argument are irrelevant here except to the extent that the argument was not frivolous. A frivolous argument would be a violation not of Rule 8.2, but that of Rule 3.1, of which there has been no claim.

In short, the conclusion of a conditional statement, concerning the potential criminality of actions of a commission, or its agents, which had been legally dissolved, was logically never made if the premise of the condition, that the commission had been dissolved, never occurred. The logical and legal effect is that this statement was never actually made. Therefore, it was entirely improper to include this statement in the list or base any opinion or discussion upon it.

## **II. ARGUMENT**

Applying the proper legal standards to the present allegations against Respondent, Respondent has provided numerous facts which formed a basis for the statements referred to by the HPS and in the present document. It is necessary for this Court to apply the proper standards set forth to the true facts of the present case.

The courts are divided on whether an attorney has a duty to provide and list those facts upon which he has based his statements and opinions, or whether it is incumbent upon the LDC to prove the falsity of those facts even if the attorney has not presented them. Nevertheless,

Respondent has provided a reasonable and sufficient, if not necessarily complete, rendition of those facts upon which he based assertions and opinions.

It is not at all clear that Rule 8.2(a) of the Rules of Professional Conduct actually apply to statements against an administrative law judge. Only one state of which Respondent is aware has applied the rule regarding a hearing examiner, but that specific issue was not addressed and there were a number of other violations. To apply the rule to the executive and legislative branches of government would not seem to advance the cause of maintaining the public's respect to the judiciary.

It is also not clear that Rule 8.2(a) ought properly to be applied to court documents such as motions and appeals, whereas other rules and other sanctions already cover potential misconduct in such documents, particularly Rule 3.3, the duty of candor to the court, and Rule 3.1, the prohibition of asserting claims without a reasonable basis in fact or law. The public's respect for the courts, cannot be impacted by those statements which are never made public.

“Generally, courts are in agreement that . . . a lawyer may, in a proper tone and through appropriate channels, attack the integrity or competence of a court or judge, or the propriety of any particular judicial act. . . .” Kansas v. Nelson, 504 P.2d 211, 216 (Kan. 1972). It cannot be denied that an appeal is the appropriate channel in which to call to the Court's attention to the acts an attorney perceives as misdeeds in a legal proceeding, but the LDC would have it so.

Most of the statements which are held up against Respondent are assertions that the ALJ was biased, in one form or another. The law provides that an administrative law judge shall not be biased or favor one side over another. “All hearings shall be conducted in an impartial manner.” WV Code §§29A-5-1(d). If a lawyer is not permitted to file an appeal stating that the judge was biased, how can any lawyer ever file an appeal against the impartiality of a judge? If

bias comes from racial animosity or evidence of bias is the judge's misstatements of fact, law or legal history, how may a lawyer appeal on those grounds if they are forbidden to actually state such conclusion?

As the dismissal of the case attempted by Respondent on behalf of his clients against the misdeeds of the agents of the HRC based on a granted immunity for government employees demonstrated, there is no other legal recourse for a wronged party but through the appeal process. To cut off litigants from asserting the very claim that an administrative law judge was biased or unethical or ignored rules of procedure, rules of evidence, legal precedent or evidence by threatening their attorney with ethical sanctions for criticizing such behavior in an appeal would be supremely unjust.

No judge, executive, legislator, agency or public official can be immunized from criticism. "After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any Respondent re criticism or animadversion thereon, no matter how severe or unjust. Kansas v. Nelson, citing In Re Pryor, 18 Kan. 72.

Paul Sheridan testified before the HPS that in his opinion the employment of the language used by Respondent directed at the decisions of the administrative law judge was detrimental to the practice of law; that it might bring the courts into disrepute and damage the esteem in which the courts are held.

Quite the contrary, what lowers the esteem of the public for the courts more than anything else ever could is to immunize tribunals from criticism particularly with regards to claims of biases, claims the law was not followed or the facts were misstated. Respondent's

clients walked away from these proceedings with a negative view of the ALJ Carter not because of the words I used secreted away in an appeal, and not because the case was ruled against them, but because they were left with the impression from the actions of the ALJ Carter that the rules did not matter, the law did not matter, and the facts did not matter, in essence that they were denied a fair hearing, their day in court.

There is nothing personally more disheartening as an attorney than the try to explain to your clients that even though the rules say one thing in plain language, the state agency isn't going to follow its own rules.

No words an attorney uses will ever have more of an effect on the reputation of any court than that court's own actions and behavior. An attorney's criticism of the behavior of a judge, or an ALJ, is only the second line of defense of the court in correcting, preserving and maintaining the esteem and reputation of our system of justice. The first is the behavior of those judges or ALJs themselves. To cut off or chill criticism of the court, is not Respondent rely a disservice to the attorney, it is a disservice to the public and even the court itself.

It must be pointed out, though it never should have been required, 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. That does not make them false.

"It follows that statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they 'imply as false assertion of fact.'" Yagman, at 1438. "Thus, statements of 'rhetorical hyperbole' aren't sanctionable, nor are statements that use language in a 'loose, figurative sense.'" Id. For example, in that case, "Yagman's . . . statement is best characterized as opinion; it conveys Yagman's personal belief that Judge Keller is Anti-Semitic." Id.

With regards to other adjectives, “[w]hen considered in context, however, Yagman’s statement cannot reasonably be interpreted as accusing Judge Keller of criminal misconduct. The term ‘dishonest’ was one in a string of colorful adjectives Yagman used to convey the low esteem in which he held Judge Keller. The other terms he used – ‘ignorant,’ ‘ill-tempered,’ ‘buffoon,’ ‘sub-standard human,’ ‘right-wing fanatic,’ ‘a bully,’ ‘one of the worst judges in the United States’ – all speak to competence and temperament rather than corruption; together they convey nothing more substantive than Yagman’s contempt for Judge Keller. . . . Yagman’s remarks are thus statements of rhetorical hyperbole, incapable of being proved true or false.”

Id.<sup>5</sup>

“An allegation that a judge is intellectually dishonest, however, cannot be proved true or false by reference to a ‘core of objective evidence.’ . . . ‘[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.’ . . . Because Yagman’s allegation of ‘dishonesty’ does not imply facts capable of objective verification, it is constitutionally immune from sanctions.” Id., at 1441.

Nothing presented in the hearing before the HPS in any manner contradicted those factual assertions elaborated in Respondent’s appeal to the HPS or contradicted in any manner the assertion that “the respondent had a rational basis for having concluded that the remarks had a factual basis.” Porter, at 969.

Before concluding this section, by rights the testimony of Paul Sheridan should be addressed, not for its Respondent rit, but for its lack of relevance and materiality. Mr. Sheridan spoke about how he thought Respondent’s comments reflected upon the legal profession and that it was over the top rhetoric which he felt was recklessly inappropriate. What he didn’t say, or

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<sup>5</sup> Somehow all of Respondent’s remarks and statements seem to pale in comparison to Mr. Yagman’s invective.

even attempt to allege, was that those statements were reckless with regards to the truth. As Mr. Sheridan was the person who filed the charges, the fact that he cannot point to a single falsehood in those statements speaks volumes of the quality of those accusations. Mr. Sheridan's testimony should be disregarded in its entirety.

As discussed previously, the standard of proof is whether there exists a rational, reasonable, plausible factual basis for having made those remarks which have been listed. The facts which formed the basis for Respondent's statements have been laid out above.

Remembering that the burden of proof begins with the LDC and there remains. "The record is devoid of any attempt to show that the statements complained of are false. In the absence of a showing of falsity the statement must be held to be speech on vital issues of self-government protected by the First Amendment." Id. And that is the proof of this case in a nutshell: the LDC has presented not one piece of evidence that the statements made in the Petition of Appeal were factually false, or that any fact upon which conclusions were based were false. She presented no evidence of falsehood but relied upon the inflammatory nature of the statements to substitute for evidence.

There appears to be one other item which needs to be addressed. After Respondent filed the appeal objecting to the proposed admonishment on the grounds that the Board had applied the incorrect legal standard, charges were added under Rule 8.4. The LDC has offered no explanation of what conduct or behavior on the part of Respondent violated rule 8.4 other than the statements already addressed under Rule 8.2(a). A statement is not conduct. Conduct requires a behavior or action, not speech or writings. Respondent cannot and will not make an answer to any charge, the grounds for which are unclear. Respondent will answer to no other

claims but the alleged violations of Rule 8.2(a) unless and until such time as any other claim is properly and clearly presented.

**Further considerations.**

One item Respondent did not address earlier because it leads in a different direction than the defense against the allegations, but still feel somehow relevant, are the actions or statements of ALJ Carter and the LDC.

ALJ Carter stated that one of the reasons the case against Respondent's clients took so long to come to a hearing was because Respondent had refused service. She did not specify when such refusal allegedly occurred, provided no documentation or proof that such refusal happened. Simply put, she lied; outright bald faced lied. I know this because I never refused service of anything in the case. One of the statements in this case is that statement that claims Ms. Carter lied. There is no recklessness possible in this statement regarding its truth or falsity, it is either knowingly true or knowingly false. There is no getting around this one, either ALJ Carter lied or Respondent lied; and Respondent knows for certain that he did not.

Renee Frymyer provided no proof or evidence of such a refusal of service. Rule 3.1 forbids an attorney from asserting a claim without a basis in fact or in law. Where is Ms. Frymyer's basis in fact for asserting this claim that I lied? There is no evidence that I lied about this, but the claim was asserted that this statement was false. This claim was asserted not only by Ms. Frymyer, but by the entire Investigative Panel. This claim was and is without basis in fact or law in direct violation of Rule 3.1.

This allegation having absolutely no basis in fact or law against Respondent is made more relevant by the actions of ALJ Carter and the presentation of evidence at the hearing.

At the hearing, ALJ Carter asserted that “The Respondents did file a lawsuit against the Human Rights Commission . . . saying that the Commission did not exist . . . .” Hearing Transcript, at p. 27. This was an affirmative, non-equivocal statement of fact by ALJ Carter. A copy of that lawsuit was presented as evidence in this case, which shows that it did not claim that the Commission did not exist. The lawsuit was filed in 2006. The provision of the WV Code, chapter 5, article 11, section 21 which claimed to terminate the HRC as of July 1<sup>st</sup>, 2007.

Not only did the lawsuit not claim “that the Commission did not exist,” it could not have done so. The lawsuit was filed the year before the termination date of the HRC. ALJ Carter flat out lied to the HPS. When confronted with this fact, ALJ Carter feigned a complete lack of understanding as to the implications of the relevant dates. Every lawyer, including ALJ Carter has a duty of candor to every tribunal, including the HPS, under Rule 3.3(a)(1): “A lawyer shall not knowingly make a false statement of material fact . . . to a tribunal.”

What Respondent finds most disturbing is that when presented with evidence of this flat out lie, the HPS didn’t seem the least bit concerned that they were openly and flagrantly being lied to by ALJ Carter. If the HPS actually cares about the ethical practices of attorneys who appear before it, they cannot so lightly ignore a flagrant proven violation of the Rules of Professional Conduct right in front of them.

Respondent would like to say this was unexpected, but that would be a lie. Early in the case before the HRC, opposing Respondent, upon discovering that in addition to being the attorney in the case, I worked for the respondents as the school’s financial aid officer, suddenly one complainant claimed that financial aid was disbursed in a discriminatory fashion; a sudden allegation which was a little too convenient for comfort. This was not a problem because being familiar with the Rules of Professional Conduct, I was aware that an attorney was only

disqualified if they were a *necessary* witness. As there were others who could testify as to how financial aid was disbursed, I was not a necessary witness and foresaw no problem.

However, Elizabeth Blair, who was at the time presiding as administrative law judge, and the other two attorneys involved seem to express some understandable reservations and held a telephone conference. I, of course, explained why there would be no conflict with the rule against an attorney testifying as a witness under Rule 3.7(a). During that conference, Ellen Golden, one of the other attorneys stated that she had worked for two years in the LDC. While nothing was overtly stated, I got the impression that this contained a subtle threatening implication that the disciplinary procedures might be used against Respondent if I continued.

Despite there being no conflict with Rule 3.7(a); and despite both the Rules of Procedure before the HRC and the cases decided by the West Virginia Supreme Court of Appeals which both clearly stated that an administrative law judge for the HRC did not have the authority to remove an attorney; ALJ Elizabeth Blair issued an order removing Respondent from the case. As a consequence, Respondent's clients were forced to seek outside Respondent at additional cost while this matter was appealed. Had this matter not been later overturned, the additional costs of litigation imposed by this unlawful order would have made defending their innocence prohibitively expensive.

Because this unlawful and baseless attack upon Respondent not only affected Respondent but Respondent's clients as well, I felt compelled to file an ethics complaint against those raising and asserting this issue in a clear and unequivocal violation of Rule 3.1 of the Rules of Professional Conduct, including the administrative law judge for the HRC and a Respondent member of the Attorney General's Office. It was with great reluctance that I did so, but I felt protecting the interests of Respondent's clients compelled Respondent .

Despite the clear and convincing, if not overwhelming, evidence of a violation of Rule 3.1 in asserting an issue of counsel being a necessary witness, the complaint was dismissed *on the grounds that it was an ongoing case*. It was not dismissed on the Respondent's merits of the case.

Perhaps if the LDC had actually cared about enforcing the Rules of Professional Conduct back then it may have discouraged the subsequent ALJ, Phyllis Carter, from intervening in a case where she had personal knowledge of facts contrary to the main contention of the case contrary to the Judicial Canon.

In contrast, when Paul Sheridan of the AG's Office filed this present complaint against Respondent, the ethics complaint was put on hold for over three years *despite the ongoing appeals in the case*. There is a certain level of hypocrisy in the disparate treatment of these ethics complaints which defies easy explanation. On the one hand, a case is dismissed because it involved an ongoing case, but on the other a case is held at bay even though it involved an ongoing case.

As stated previously, the LDC has offered no evidence or proof that the statements made by Respondent in non-public statements in his Petition of Appeal were false, but refused to pursue a complaint filed by Respondent where the evidence was clear and convincing. The entire basis for the present ethics complaint against Respondent seems to rest on the idea that harshly challenging and criticizing erroneous rulings by an administrative law judge will land the attorney in serious ethics trouble. The potential chilling effect to dissuade contention and challenge to the state by attorneys, not only on present Respondent but as a Respondent's message to other attorneys who would dare question the biases of quasi-judicial employees, judicial officers, judges or even justices, cannot lightly be ignored in this proceeding. Disciplinary proceedings should never be used as a Slapp Suit to discourage attorney candor to the court.

### III. CONCLUSION.

Viewed with the correct applicable standard of proof, the evidence does not support the conclusion that the statements made by Respondent were knowingly false or made with a reckless disregard to their truth or falsity. The law requires the LDC to present evidence of the falsity of the statements by clear and convincing evidence, but no evidence was even presented that the statements which were false<sup>6</sup>, or that Respondent asserted facts supporting those statements were false. Many of the phrases were assertions of opinion based upon Respondent's understanding of the law and the facts. A number of the statements were Respondent rely statements of opinion or rhetorical hyperbole thus protected under the First Amendment's guarantee of Freedom of Speech.

The right of free speech is broad enough to protect expressions and statements of attorneys, even concerning judges, which may be deemed by some to be disrespectful and in bad taste, provided that such expressions are not grounded in known falsehoods or stated with no plausible basis for factual assertions expressed. No Respondent re expression of opinion which cannot be proven true or false can violate Rule 8.2(a) regardless of how much one may disagree with the opinion.

It would further appear that statements made within the channels and processes of legal motions, memorandum, appeals and other court documents, being naturally subject to other ethical rules and considerations, are not proper fodder for Rule 8.2(a) sanctions which are aimed at public expressions outside the confines of the court; the purpose of Rule 8.2 being to protect the reputation and esteem of the judicial process.

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<sup>6</sup> In a list of fifteen (15) examples, Respondent did assert one mistaken claim that he had not sued ALJ Carter when in fact ALJ Carter in her capacity as Chief ALJ had been listed in an action for Mandamus. Respondent had not remembered so naming ALJ Carter having not met her at the time the Mandamus was filed. However, the point is moot as the original statement was that there were multiple misstatements and the elimination of one still left 14 examples to back up the statement.

Additionally, an administrative law judge, no matter how quasi-judicial his functions may be, is not a public judicial officer, being neither appointed nor elected, but being an executive employee is not dependent upon the public esteem and reputation. As such, Rule 8.2(a) is inapplicable to statements made by an attorney impugning the integrity of the administrative law judge or hearing examiner.

With regards to allegations that Respondent violated Rule 8.4, the LDC alludes to no actual conduct on the part of Respondent with which to violate the rule.

With regards to the presentation of facts which arguably should merit sanction for violations of the Rules of Professional Conduct by parties other than Respondent, I would ask and recommend that such parties receive no more nor no less than that sanction recommended against Respondent.

In summation, Respondent, Stephen L. Hall, Esq., is not guilty of offense under Rule 8.2(a) or 8.4 of the Rules of Professional Conduct, and has not been accused of a violation of any other rule thereof. This case should be accordingly dismissed.

*Respectfully submitted,*

Stephen L. Hall, Esq., *pro se*



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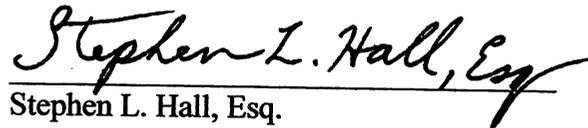
**CERTIFICATE OF SERVICE**

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This is to certify that I, Stephen L. Hall, *pro se* Attorney at Law, have this day the 20<sup>th</sup> day of June, 2014, served a true copy of the foregoing "Brief of Stephen L. Hall" upon Complainant Lawyer Disciplinary Board, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Renée N. Frymyer, Lawyer Disciplinary Counsel  
City Center East, Suite 1200C  
4700 MacCorkle Avenue SE  
Charleston, WV 25304

  
Stephen L. Hall, Esq.