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Hearing Officer

DBF 34
DISCIPLINARY BOARD
OF THE
HAWAII SUPREME COURT
RECEIVED
1 May 2015
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TIME: 2:40pm BY [illegible]

Before the
DISCIPLINARY BOARD
of the
HAWAIʻI SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,	ODC 13-006-9076
v.	HEARING OFFICER'S REPORT
DEXTER K. KAIAMA, Respondent.	

HEARING OFFICER'S REPORT

I. PROCEDURAL BACKGROUND

On August 23, 2013, Petitioner initiated formal proceedings against Dexter K. Kaiama, Esq. ("Respondent"), through the filing of the Petition alleging professional misconduct in a single disciplinary matter. Disciplinary Board File ("DBF") 1.

On October 4, 2013, Respondent, through his counsel, Richard N. Wurdeman, Esq., filed his Answer to Petitioner's Petition. DBF 2.

On January 3, 2014, Mei Nakamoto, Esq., was appointed as the Hearing Officer in this proceeding. DBF 4.

On January 28, 2014, the First Prehearing Conference was held

before Hearing Officer Nakamoto, who set formal hearing on this matter to commence on July 14, 2014. DBF 5.

On May 9, 2014, Respondent filed his Motion for Summary Judgment and/or Motion to Dismiss Petition. DBF 7.

On May 15, 2014, Petitioner filed its Opposition to Respondent's Motion for Summary Judgment and/or Motion to Dismiss Petition. DBF 8.

On May 21, 2014, Respondent filed his Reply to Petitioner's Opposition to Respondent's Motion for Summary Judgment and/or Motion to Dismiss Petition. DBF 10.

On May 23, 2014, Hearing Officer Nakamoto, filed her request to withdraw from further participation in the instant disciplinary proceeding. DBF 11.

On May 28, 2014, Hearing Officer Nakamoto's request to withdraw from further participation in the instant disciplinary proceeding was granted by the Hon. Clifford L. Nakea (Ret.), Chairperson of the Disciplinary Board of the Hawaiʻi Supreme Court. DBF 12.

On May 28, 2014, Chairperson Nakea vacated the formal hearing date of July 14, 2014 and all other dates attendant thereto. DBF 13.

On June 10, 2014, Daryl Y. Dobashi, Esq., was appointed as the new Hearing Officer in this proceeding. DBF 14.

On July 16, 2014, a Second Prehearing Conference was held

before Hearing Officer Dobashi, who reset the formal hearing on this matter for November 3, 2014. DBF 15.

On July 18, 2014, Respondent filed his Supplemental Declaration of Counsel Re: Respondent's Motion for Summary Judgment and/or Motion to Dismiss Petition. DBF 16.

On September 5, 2014, Hearing Officer Dobashi denied Respondent's Motion for Summary Judgment and/or Motion to Dismiss Petition. DBF 17.

On September 19, 2014, pursuant to the Second Prehearing Conference Order, Petitioner timely filed its Exhibit List (DBF 18) and Witness List. DBF 19.

On October 8, 2014, Hearing Officer Dobashi filed a Report requesting instruction from the Disciplinary Board regarding Respondent's request to pursue an interlocutory appeal of the denial of Respondent's Motion for Summary Judgment and/or Motion to Dismiss Petition. Hearing Officer Dobashi also inquired as to whether he could limit the presentation of witness testimony. DBF 20.

On October 14, 2014, Chairperson Nakea issued an Order informing Hearing Officer Dobashi that Rule 2 of the Rules of the Supreme Court of the State of Hawaiʻi ("RSCH") does not authorize interlocutory supreme court review. Chairperson Nakea further ordered that lay or expert opinion testimony on the subject of war crimes is not relevant to Respondent's assertion that a particular

judge is a war criminal. DBF 21.

On October 17, 2014, a Third Prehearing Conference was held before Hearing Officer Dobashi, who set formal hearing on this matter to commence on December 3, 2014. DBF 22.

On November 5, 2014, pursuant to the Third Prehearing Conference Order, Respondent timely filed his Witness List (DBF 23) and Exhibit List, including witness declarations attached thereto and marked as Exhibit "B" and "C." DBF 24.

On November 12, 2014, Petitioner filed its Objection to the Admission of Respondent's Exhibit "B" and Exhibit "C." DBF 25.

On November 12, 2014, Petitioner filed its Objection to the Proposed Expert Testimony of Williamson B. C. Chang and David Keanu Sai, Ph.D. DBF 26.

On November 26, 2014, pursuant to the Third Prehearing Conference Order, Petitioner timely filed its Prehearing Statement and Memorandum of Law. DBF 27.

On November 26, 2014, pursuant to the Third Prehearing Conference Order, Respondent timely filed his Prehearing Memorandum. DBF 28.

On December 3, 2014, Respondent and his counsel, Richard N. Wurdeman, Esq., appeared for formal hearing in this matter before Hearing Officer Dobashi. Mark L. Bradbury, Assistant Disciplinary Counsel, appeared on behalf of Petitioner.

II. **FINDINGS OF FACT**

Unless otherwise indicated below, the following facts have been proven by clear and convincing evidence:

1. In or about October 1986, Respondent became a member of the Hawai'i State Bar and has been an active member since. Hearing Transcript ("HT") p. 40, LL 15-25, p. 41, L 1.

2. On December 15, 2011, Deutsche Bank National Trust Company filed a judicial foreclosure action in the Third Circuit Court of the State of Hawai'i, Case No. 11-1-0590 ("the action"). The named defendants were Dianne Dee Gumapac and Kale Kepekaio Gumapac ("the Gumapacs"). DBF 1, ¶ 1 & DBF 3, ¶ 2.

3. On February 14, 2012, Respondent, on behalf of the Gumapacs, made a special appearance in the action to argue a motion to dismiss the case for lack of subject matter jurisdiction. HT p. 41, LL 19-25 & p. 42, LL 1-4.

4. On July 13, 2012, Respondent filed a pleading in the action entitled Notice of Written Protest And Demand Communicated With The U.S. Pacific Command; Declaration Of Counsel; Exhibits "1" & "2"; Certificate Of Service ("Notice of Protest"). Said filing was made on behalf of Kale Kepekaio Gumapac and stated it was to put the court on notice of Mr. Gumapac's filing of a Protest and Demand with the United States Navy alleging that the Honorable Greg K. Nakamura ("Judge Nakamura") is a war criminal. On July 13, 2012, the bench officer in the action was Judge Nakamura. DBF 3;

Petitioner's Exhibit ("PE") 1; HT p. 17 , LL 1-25.

5. Judge Nakamura, when asked about his response when he received the Notice of Protest, answered he thought it had no legal or practical merit and to that extent, would describe or define the Notice of Protest to be frivolous. PE 1; HT p. 18, LL 18-25 & p. 19, LL 1-9.

6. Judge Nakamura was not contacted by any branch of the U.S. military regarding the allegations in the Notice of Protest. PE 1; HT p. 19, LL 10-12.

7. Judge Nakamura never read anything from the International Criminal Court in connection with the allegations in the Notice of Protest. HT p. 27, LL 19-25.

8. Judge Nakamura was called a war criminal in the opening paragraph of Notice of Protest by inference and specifically on page 6 of Exhibit 2 attached to the Notice of Protest, which was the letter addressed to Admiral Samuel J. Locklear III, USN. PE 1; HT p. 24, LL 3-25 & p. 25, LL 1-17.

9. Judge Nakamura, as a consequence of Respondent's filing of the Notice of Protest, was concerned about the war criminal type accusation as it alleges a grave breach and that the penalty for a grave breach could include the death penalty. PE 1; HT p. 28, LL 16-25 & p. 29, LL 1-16.

10. Judge Nakamura always found Respondent to be polite and respectful. HT p. 28, LL 8-13.

11. Respondent has never been the subject of discipline by the Office of Disciplinary Counsel for over 28 years. HT p. 41, LL 2-5.

12. Respondent did not intend to embarrass or harass Judge Nakamura. HT p. 45, L 25 & p. 46, LL 1-2.

13. Respondent was never disruptive and it was never his intent to be disruptive. HT p. 45, LL 3-6.

14. Respondent, when asked if it was ever his intent to assert or make statements that he knew to be false or made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of Judge Nakamura, claimed he, the Respondent, did not think he ever made any knowingly false representations in any court proceeding. HT p. 53, LL 2-9.

15. Respondent, when asked about his intention when he filed the Notice of Protest, Respondent believed it was his obligation to his client and to also make a legal record of the events that had occurred as it had always been Respondent's clients' intent and instructions to eventually raise jurisdictional issues in connection with the Third Circuit Court before another tribunal or the International Criminal Court. PE 1; HT p. 46, LL 13-23.

16. Respondent testified it was in fulfillment of Respondent's obligations under federal law, which is Title 18, Section 4, which obligated Respondent to file the Notice of Protest otherwise it would make Respondent responsible for the same crimes.

PE 1; HT p. 46, LL 24-25 & p. 47, LL 1-5.

17. Respondent refuses to acknowledge even the possible wrongful nature of his filing of the Notice of Protest alleging Judge Nakamura committed a war crime. PE 1; HT p. 57, LL 21-25 & p. 58, LL 1-20.

18. Respondent believes the United States has no lawful claim to Hawaiian territory and that the Kingdom of Hawai'i continues to exist and as such, a subject of international law. HT p. 58, LL 1-15.

19. Respondent claimed he has taken this legal position as far as the Kingdom of Hawai'i in over 50 arguments in the courts. HT p. 58, LL 15-17.

20. Petitioner did not show by clear and convincing evidence that the foreclosure action was disrupted by the filing of the Notice of Protest as summary judgment was granted and Respondent's clients were evicted. HT p. 57, LL 16-20.

III. CONCLUSIONS OF LAW RE: RULE VIOLATIONS

1. Respondent, by filing the Notice of Protest in the action on July 13, 2012, violated HRPC 3.5(b) because a lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity. Griev. Adm'r v. Fieger, 476 Mich. 231, 719 N.W.2d 123 (Mich. 2006).

No attorney licensed to practice in all the courts of the State of Hawai'i should ever refer to a State of Hawai'i judge as

a "war criminal," either directly or indirectly. Even if there may have been no intent to harass or embarrass a judge, the use of the words "war criminal" as noted in the Notice of Protest is embarrassing.

Respondent's contention that he did not intend to violate any Rules of Professional Conduct is totally credible. However, Respondent's contention that the alleged violations involved protected free is not applicable here. Petitioner correctly cited a number of relevant cases in this area allowing limits on the free speech of attorneys. A few are mentioned here.

Once a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms of judicial officers in accordance with professional standards of conduct. United States Dist. Ct. V. Sandlin, 12 F.3d 861, 866 (9th Cir. 1993). Moreover, where statements can be reasonably understood as imputing specific criminal or other wrongful acts they are not entitled to constitutional protection merely because they are phrased in the form of an opinion. Standing Comm. on Discipline of the United States Dist. Court v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995).

The Hawai'i Rules of Professional Conduct limits the free speech of all attorneys licensed to practice in the State of Hawai'i. While the violation in Office of Disciplinary Counsel v.

Hayden F. Burgess No. 12608 was HCPR DR 7-106(C)(6)[1], the Decision and Order of Public Censure filed August 3, 1988, provides guidance in connection with the Hawai'i Supreme Court's power to regulate licensed attorneys in this area of protected speech. Among other things, the court found:

> The power of this court to regulate licensed attorneys is necessarily and justifiable exclusive and extensive. In relevant part HRS sections 605-2 and -6 (1985) provide as follows:
>
> Attorneys; license required. Except as provided by the rules of court, no person shall be allowed to practice in any court of the State unless he has been duly licensed so to do by the supreme court[.]
>
> Rules. The supreme court may prescribe qualifications for admission to practice and rules for the government of practitioners. Id. at 12-13.

In his argument before the court, Hayden F. Burgess ("Burgess") contended that "so long as his undignified or discourteous conduct degrading to this court is peaceful and orderly symbolic speech, he (Burgess) is protected by the United States Constitution from any disciplinary action." Id. at 13. The court disagreed and instead, found the following:

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[1]HCPR ("Hawai'i Code of Professional Responsibility") DR 7-106(C)(6) provided that "in appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct." This is now covered under HRPC 3.5(c) which states "a lawyer shall not engage in conduct intended or reasonably likely to disrupt a tribunal."

> Unquestionably, DR 7-106(C)(6) limits the free speech of all licensed attorneys. However, as stated by the United States Supreme Court in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968),
>
> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. 391 U.S., at 377, 88 S.Ct. at 1679, 20 L.Ed. 2d at 680.
>
> In our view, the countervailing need for all licensed attorneys to exhibit basic respect for the legitimacy and authority of the courts in which they are licensed to practice adequately justifies DR 7-106(C)(6)'s limitation on the personal free speech right of all licensed attorneys. Annotation, 12 A.L.R.3d 1408 (1967), Annotation, 27 L.Ed. 2d 953 (1971). Id.

2. Respondent, by filing of the Notice of Protest in the action on July 13, 2012, violated HRPC 8.2 because a layer shall not make a statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. In re McClellan, 754 N.E.2d 500 (Ind. 2001).

Judge Nakamura is not a "war criminal." The words as used by Respondent affected both Judge Nakamura's qualification and integrity. A State of Hawai'i judge is not a "war criminal" under

the laws of the State of Hawai'i because such a person could not even sit as a State of Hawai'i judge. Therefore, an attorney licensed to practice in all the courts of the State of Hawai'i knows or should know reference cannot be made to a State of Hawai'i judge as a "war criminal," directly or indirectly. For reason as stated above, this is not protected speech.

The rest of the alleged violations of the Rules of Professional Conduct relate to the same deed as far as the reference to Judge Nakamura, directly and indirectly, as a "war criminal." The main reason for the initial written request from Judge Nakamura to Petitioner to commence a disciplinary investigation was the use of the term "war criminal" in reference to Judge Nakamura. The Petitioner has not met its burden of showing by clear and convincing evidence the other alleged violations are independently supportable to warrant finding additional violations of the Rules of Professional Conduct.

For example, Judge Nakamura may consider the Notice of Protest to be frivolous. However, given the form and content of the Notice of Protest and Judge Nakamura's assertion that Respondent has always been polite and respectful, but for the reference to "war criminal," it is doubtful if Judge Nakamura would have even written a request to the Petitioner in the first place. There is no telling how many documents filed in Judge Nakamura's court or in a number of other State of Hawai'i circuit courts where the circuit

court judge may have considered the documents to be frivolous, but would never entertain the thought of filing a request for Petitioner to commence an investigation. The misconduct shown was the use of term "war criminal." When deciding the fate of a colleague, common sense should trump technicalities.

Likewise, Petitioner has not met its burden of showing by clear and convincing evidence that HRPC 3.5(c) (A lawyer shall not engage in conduct intended or reasonably likely to disrupt a tribunal) was also violated independent of the violations of HRPC 3.5(b) and 8.2. In fact, the evidence did not show Respondent engaged in conduct intended or reasonably likely to disrupt a tribunal. Rather, Respondent filed the Notice of Protest based on his sincere belief that it was his obligation to his clients and to his own obligations under federal law and to also make a legal record of the events that had occurred to allow his clients to eventually raise jurisdictional issues later. Most importantly, the evidence showed summary judgement was granted and Respondent's clients were evicted. So for all intents and purposes, the foreclosure proceeding was not disrupted.

Similarly, the two alleged violations of HRPC 8.4 (Misconduct) are not warranted for the same reasons. Under HRPC 8.4(a), it is professional misconduct for a lawyer to attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another. Under HRPC

8.4(c), it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Once again, Petitioner did not meet its burden of showing by clear and convincing evidence that either one of these violations are independently supportable to require additional violations of the Rules of Professional Conduct. The essence of the misconduct was the use of the words "war criminal" in reference to Judge Nakamura.

IV. RESPONDENT'S STATE OF MIND

The ABA lists and defines the various mental states as follows:

> The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Std., at 7.

The evidence shows Respondent's mental state was not one of intentionally harming anyone. Respondent had no intent to harass or embarrass Judge Nakamura. Neither did Respondent have an intent to question the qualifications or integrity of Judge Nakamura. Therefore, the most culpable mental state which is that of intent

is not applicable.

Neither is the least culpable mental state which is negligence. To attribute Respondent's mental state as one of negligence in connection with his filing of the Notice of Protest would be disrespectful to Respondent, a colleague, and his attempt to zealously represent his clients. Respondent is an experienced attorney who believes the United States has no lawful claim to the Hawaiian territory and that the Kingdom of Hawai'i continues to exist and as such, a subject of international law. Also, the Notice of Protest is supported by Respondent's extensive legal research and not only Respondent's personal opinions. Finally, Respondent claims he has taken this legal position in over 50 arguments in the courts. Hence, the least culpable mental state which is that of negligence is not applicable either.

Consequently, it is the second most culpable mental state which is that of knowledge which is applicable here. As already stated, this is when the lawyer acts with conscious awareness of the nature or attendant circumstance of his conduct both without the conscious objective or purpose to accomplish a particular result. As also already mentioned, Respondent had no intent to harass or embarrass Judge Nakamura. Neither did Respondent have an intent to question the qualifications or integrity of Judge Nakamura. However, the Notice of Protest does refer to Judge Nakamura as a "war criminal" by inference and also directly. A

licensed attorney in the State of Hawai'i cannot do this.

V. THE POTENTIAL OR ACTUAL INJURY RESPONDENT CAUSED

Respondent's action does not appear to have caused actual or potential harm to his clients. However, Respondent's action did harm Judge Nakamura who is vulnerable due to the constraints imposed by the Hawai'i Revised Code of Judicial Conduct.

VI. AGGRAVATING AND MITIGATING CIRCUMSTANCES

1. Factors in Aggravation

a. Under ABA Standard 9.22(g), refusal to acknowledge wrongful nature of conduct is listed as an aggravating factor. It should be self-evident why someone like Judge Nakamura is not a "war criminal" and no attorney licensed to practice in the courts of the State of Hawai'i should make such a reference, directly or indirectly. It is an aggravating circumstance when Respondent refuses to acknowledge even the possible wrongful nature of his choice of terms when filing of his Notice of Protest.

b. Under ABA Standard 9.22 (i), substantial experience in the practice of law is listed as another aggravating factor. It is an aggravating circumstance when Respondent has over 28 years of experience as a licensed attorney in the State of Hawai'i and yet not exercise prudence when referring to a State of Hawai'i Circuit Court Judge.

2. Factors in Mitigation

a. Under ABA Standard 9.32(a), absence of a prior

disciplinary record is listed as a mitigating factor. Respondent has no record with the Office of Disciplinary Council.

b. Under ABA Standard 9.32(b), absence of a dishonest or selfish motive is listed as a mitigating factor. Among other things, Respondent believed it was his obligation to his client in connection with making a legal record and in fulfillment of Respondent's obligations under federal law which caused Respondent to file the Notice of Protest. While it is impossible for a Hearing Officer to read Respondent's mind, Respondent's answers were credible and no dishonest or selfish motive can be attributed to Respondent.

c. Under ABA Standard 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings is listed as a mitigating factor. Respondent was fully cooperative in connection with the proceeding. This Hearing Officer agrees with Judge Nakamura that Respondent was always polite and respectful.

VII. RECOMMENDATIONS FOR DISCIPLINE

RSCH 2.3 addresses the types of discipline as follows:

> (a) Discipline may consist of:
> (1) Disbarment by the supreme court; or
> (2) Suspension by the supreme court for a period not exceeding five years; or
> (3) Public censure by the supreme court; or
> (4) Public reprimand by the Disciplinary Board with the consent of the respondent and Counsel; or
> (5) Private reprimand by the Disciplinary Board with the consent of the respondent and Counsel; or
> (6) Private informal admonition by Disciplinary Counsel or Disciplinary Board.

In Office of Disciplinary Counsel v. Hayden F. Burgess No. 12608, cited above, the Hawai'i Supreme Court noted that the Hearing Committee and the Board recommended Burgess be suspended from the practice of law for five years. The Supreme Court disagreed and decided Burgess be publicly censured instead. Id. at 15.

Only the Supreme Court can impose disbarment, suspension or public censure. All three would be too severe a punishment here!

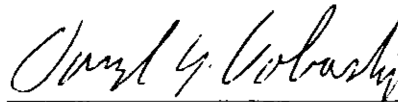
Both public and private reprimand by the Disciplinary Board requires the consent of the Respondent and Counsel. Respondent has made it clear by filing a number of objections that among other things, this proceeding deprived Respondent of his rights to due process and civil liberties. Therefore, this Hearing Officer is not naive enough to think Respondent would consent to either types of discipline since Respondent is expected to challenge the finding of any violation. However, regardless of the stated intention of Respondent noted on the record, this Hearing Officer has to make a recommendation.

A private informal admonition by the Disciplinary Counsel or Disciplinary Board supposedly signifies that the gravity of the misconduct is substantially offset by a clear and convincing showing of circumstances in mitigation. The mitigating factors here (and in particular, Respondent's honest, respectful and coop-

erative attitude) are outstanding. However, the gravity of the misconduct in connection with Judge Nakamura is too significant to be offset by the mitigating factors here for a recommendation of admonition. Therefore, the recommendation is for a private reprimand.

In the meantime, since the Notice of Protest is a document accessible to the public, why not a public reprimand? As already stated, this Hearing Officer expects Respondent to challenge this report so for all intents and purposes, trying to determine public or private is akin to trying to "split hairs." However, recommending a private reprimand is important to this Hearing Officer so that his recognition of the weight of the mitigating factors here can be duly noted.

Dated: Lihue, Hawai'i, April 29, 2015.



DARYL Y. DOBASHI

HEARING OFFICER