



IN THE
Indiana Supreme Court

Supreme Court Case No. 20S-DI-577

Jason M. Smith,
Respondent.

Decided: February 25, 2022

Attorney Discipline Action

Hearing Officer Roger L. Duvall

Per Curiam Opinion

Chief Justice Rush and Justices David, Massa, Slaughter, and Goff concur.

Per curiam.

We find that Respondent, Jason M. Smith, committed attorney misconduct by making several statements about a judge's qualifications or integrity, either knowing the statements were false or with reckless disregard for their truthfulness. For this misconduct, we conclude that Respondent should be suspended for 30 days with automatic reinstatement.

The matter is now before us on the report of the hearing officer appointed by this Court to hear evidence on the Indiana Supreme Court Disciplinary Commission's verified disciplinary complaint. Respondent's 2006 admission to this state's bar subjects him to this Court's disciplinary jurisdiction. *See* IND. CONST. art. 7, § 4.

Procedural Background and Facts

Respondent represented the defendant ("DuSablou") in a suit brought by DuSablou's former employer (Jackson County Bank, or "JCB"). The trial court granted preliminary and permanent injunctions in JCB's favor, found DuSablou in contempt for violating the preliminary injunction, and awarded attorney fees to JCB. DuSablou appealed. In the appellant's brief filed on DuSablou's behalf, Respondent made several intemperate and unfounded attacks on the integrity of Judge Bruce MacTavish, who had presided over most of the trial court proceedings. The Court of Appeals chastised Respondent in a footnote to its opinion and directed the Clerk to forward the case materials to the Commission. *DuSablou v. Jackson County Bank*, 132 N.E.3d 69, 71 n.2 (Ind. Ct. App. 2019).

In October 2020, the Commission filed a disciplinary complaint alleging Respondent violated Indiana Professional Conduct Rule 8.2(a), which provides:

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.

Final hearing was held in May 2021. Following the submission of proposed findings by the parties, the hearing officer issued a 47-page report finding that Respondent violated Rule 8.2(a) and recommending a short suspension with automatic reinstatement. Respondent has petitioned for review of that report, responsive briefs have been filed, and the matter is now ripe for our consideration.

Discussion and Discipline

The Commission carries the burden of proof to demonstrate attorney misconduct by clear and convincing evidence. *See* Ind. Admission and Discipline Rule 23(14)(g)(1). While our review process in disciplinary cases involves a *de novo* examination of all matters presented to the Court, the hearing officer's findings receive emphasis due to the unique opportunity for direct observation of witnesses. *See Matter of Wray*, 91 N.E.3d 578, 582 (Ind. 2018).

Respondent advances two overarching arguments in his petition for review. First, he raises a due process claim, arguing the Commission's failure to specifically identify all of the statements in his appellant's brief alleged to have violated Rule 8.2(a) deprived him of adequate notice of the charges. Second, he argues that in light of the broad protection for statements made in a legal proceeding on a client's behalf, the Commission failed to demonstrate the statements in the appellant's brief were made with knowing or reckless falsity.

The hearing officer's report found nine different statements in the appellant's brief in violation of Rule 8.2(a).¹ Of these nine statements, only

¹ The nine statements are quoted in full in pages 13–15 of the hearing officer's report, and we need not reproduce them in their entirety here. A representative sampling follows:

the first three were specifically quoted in the disciplinary complaint filed by the Commission. However, the complaint quoted in full the lengthy footnote in the Court of Appeals' opinion in *DuSablou* finding that "much of DuSablou's lead brief on appeal and reply brief are riddled with impertinent attacks on opposing counsel and the trial court." The next paragraph of the complaint alleged that "[m]any of [R]espondent's statements made in his brief and his reply brief about Judge MacTavish's qualifications or integrity as a judge were made by [R]espondent knowing they were false or [R]espondent's statements were made with reckless disregard as to their truth or falsity." Finally, the paragraph after that formally charged that "said statements" about Judge MacTavish's qualifications or integrity as a judge violated Rule 8.2(a). While the better practice for the Commission would have been to specifically recite in the complaint each and every statement alleged to have violated Rule 8.2(a), we believe under the circumstances of this case the complaint was sufficient to put Respondent on notice of the statements from his appellant's brief that would be at issue in this case.

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- "[T]he Honorable Bruce MacTavish demonstrated extreme bias and prejudice against [DuSablou] by . . . intentionally orchestrating hearings so as to deprive DuSablou of opportunities to be heard[.]"
 - "Judge MacTavish's almost submissive interactions with JCB's counsel, followed by the granting [of] ex parte orders in JCB's favor, and various other methods of disregarding DuSablou's efforts to defend himself, tell a story of extreme partiality."
 - "Judge MacTavish's quick entry of ex parte orders, at JCB's request, creates the appearance that he is doing the bidding of JCB dutifully and without question."
 - "Judge MacTavish appeared to go beyond the mere summary granting of JCB's motions, to the point of proactively assisting in the elimination of DuSablou's due process."
 - "At worst, [Judge] MacTavish intentionally misled DuSablou's counsel[.]"
 - "Judge MacTavish's bias or prejudice seemed to become an open and obvious weapon designed to convince DuSablou that his search for impartial review was hopeless."
 - "[Judge] MacTavish cemented his subservience to JCB when he submitted a memorandum in his own court . . . authorizing [JCB 's counsel] to 'decide' the findings of fact and conclusions of law on both the Final Injunction Order and the Contempt Order."

Turning to those statements, we readily agree with the hearing officer that, viewed individually or *in toto*, they crossed the line into impermissible conduct. The hearing officer’s report comprehensively debunks the various factual assertions made by Respondent in the appellant’s brief with respect to Judge MacTavish; and applying our standard of review, we find ample evidence to support the hearing officer’s ultimate finding that Respondent knew these assertions were false or acted in reckless disregard of whether they were true or false.

Respondent counters by citing our recognition in *Matter of Dixon*, 994 N.E.2d 1129, 1138 (Ind. 2013), that “attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients.” But that “wide latitude” is not a blank check. *Dixon* also provides that “good faith professional advocacy” is a predicate for application of this “least restrictive” standard. *Id.*; see also *Matter of Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003) (“Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge’s integrity”). The hearing officer’s report and record in this case amply rebut any notion that the particular statements regarding Judge MacTavish’s integrity were made by Respondent in good faith—even assuming, *arguendo*, that the broader due process arguments were made in good faith.² Put simply, Respondent has not offered any support for his statements about Judge MacTavish’s integrity beyond assertions that are belied by the record.

In sum, we agree with the hearing officer and conclude that Respondent violated Rule 8.2(a). On the question of sanction, past cases involving similar misconduct have resulted in reprimands or short suspensions, differentiated at least in part by whether the violation

² We also note that Respondent did not file a grievance against Judge MacTavish with the Judicial Qualifications Commission. Professional Conduct Rule 8.3(b) requires an attorney who “knows” that a judge has violated the rules of judicial conduct in a manner raising a substantial question as to the judge’s fitness for office to inform the appropriate authority. Even short of such actual knowledge, a lawyer may still file a grievance if he has reason to believe a violation may have occurred. See *Matter of Becker*, 620 N.E.2d 691, 694 (Ind. 1993).

involved an isolated statement or repeated statements. *Compare Wilkins*, 782 N.E.2d at 987 (on rehearing, imposing a public reprimand for attorney’s violation of Rule 8.2(a) in a single footnote in a petition to transfer), *with Becker*, 620 N.E.2d at 694 (imposing a 30-day suspension with automatic reinstatement for repeated false statements in an appellate brief concerning the trial judge’s integrity). The hearing officer in this case recommended a short suspension, citing the number and scope of improper statements in the appellant’s brief filed by Respondent. We agree that a suspension is warranted for this reason and conclude Respondent should be suspended for 30 days with automatic reinstatement.

Conclusion

The Court concludes that Respondent violated Indiana Professional Conduct Rule 8.2(a). For Respondent’s professional misconduct, the Court suspends Respondent from the practice of law in this state for a period of 30 days, beginning April 8, 2022. Respondent shall not undertake any new legal matters between service of this opinion and the effective date of the suspension, and Respondent shall fulfill all the duties of a suspended attorney under Admission and Discipline Rule 23(26). At the conclusion of the period of suspension, provided there are no other suspensions then in effect, Respondent shall be automatically reinstated to the practice of law, subject to the conditions of Admission and Discipline Rule 23(18)(a). The costs of this proceeding are assessed against Respondent, and the hearing officer appointed in this case is discharged with the Court’s appreciation.

Rush, C.J., and David, Massa, Slaughter, and Goff, JJ., concur.

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