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### In Re: Discipline of James Colin, 135 Nev. Adv. Op. 43 (Sep. 19, 2019)

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BAR MATTER – DISCIPLINE

**Summary**

The court found James Colin made statements he knew were false or with reckless disregard as to their truth or falsity concerning the qualifications or integrity of a judge. Colin also engaged in conduct prejudicial to the administration of justice. The court suspended him for six months and one day.

**Background**

James Colin represented a condemned inmate named Charles Lee Randolph. On appeal, Nevada Supreme Court Chief Justice Gibbons and former Justices Chery and Douglas recused themselves from the case. The four remaining justices affirmed the district court’s judgement, and denied Randolph’s second postconviction petition for a writ of habeas corpus.<sup>2</sup> The misconduct in question occurred in the subsequent pleadings filed by Colin.

Colin filed a petition for rehearing along with a motion to disqualify the four signing justices of the *Randolph* disposition. In the petition, Colin issued unsupported remarks regarding the court and the justices. These included, but were not limited to:

[The Court had] the audacity to affirmatively “alter” the appellate record to conform to the Court’s dishonest actions and claims.

[T]he Justices are engaged in an ongoing conspiracy to circumvent the Nevada Constitution through bogus “service” on a bogus “Law Library Commission.”

On March 25, 2014, Chief Justice Gibbons denied the motion to disqualify the four justices on the grounds of being untimely. Colin motioned to strike this order and again motioned for the disqualification of the four signing judges, but also included Justice Gibbons and former Justices Chery and Douglas, claiming the seven named justices could not be fair and impartial. Colin included more unsupported remarks criticizing the court and the justices in his new motion to disqualify.

Both of Colin’s motions were denied on September 17, 2014, and the court referred Colin to the State Bar of Nevada for investigation into his unsubstantiated remarks and potential discipline. Colin motioned to strike the September 17 order on the grounds that Justice Gibbons had recused himself from the case and could therefore not resolve motions. In this motion, Colin again issued remarks directed at Justice Gibbons, alleging among other things “willful illegal behavior.”

The motion to strike the September 17 order and the motion to disqualify were related, leading the four signing justices of *Randolph* to recuse themselves. The Governor appointed three district court judges to decide the motion to strike and disqualify. The three judges granted both the March 25 and September 17 motions to strike because they agreed Justice Gibbons’ recusal

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<sup>1</sup> By Jose Tafoya.

<sup>2</sup> *Randolph v. State*, No. 57959 (Nev. Jan. 24, 2014).

prevented him from taking administrative action over the matters in question. The judges also denied the motions for disqualification.

### *Bar Proceedings*

The Nevada State Bar filed a disciplinary complaint against Colin for violating Rules of Professional Conduct (“RPC”) 3.5(d) for conduct intended to disrupt a tribunal, RPC 8.2(a) for making false statements regarding the qualifications or integrity of a judge, and RPC 8.4(d) for engaging in conduct prejudicial to the administration of justice.<sup>3</sup> Colin admitted filing the motions, but argued they had merit and were his honest opinions. Colin also argued the pleadings did not violate the RPC. Colin and the State Bar entered into a conditional guilty plea agreement which the hearing panel rejected.

After the rejection, there was a formal contested hearing on the matter. Colin failed to appear, and the State Bar again asserted Colin had violated RPC 3.5, 8.2, and 8.4 for his unfounded accusations aimed at the justices instead of pursuing proper legal remedies following the *Randolph* ruling.

The hearing panel agreed with the State Bar’s argument, and found Colin’s persistent conduct and unfounded attacks on the justices warranted discipline. The panel recommended a year-long suspension in which Colin would have to pass the Multistate Professional Responsibility Exam (“MPRE”) to seek reinstatement. The panel also recommended Colin be ordered to pay \$2500 for the disciplinary proceeding.

### **Discussion**

Due to his failure to appear to the hearing, the court only considered Colin’s argument that the State Bar lied to the hearing panel in order to have Colin disciplined. The court did not consider whether there were any procedural issues when the panel rejected the conditional guilty plea agreement because Colin did not preserve that argument.

The court established clear and convincing evidence as the standard of proof the State Bar had to meet to prove Colin committed the violations charged. This means that there “must be evidence of tangible facts from which a legitimate inference... may be drawn.”<sup>4</sup> The court also stated it would be deferential to the panel’s findings so long as they were supported by substantial evidence and not clearly erroneous. Finally, the court established that a *de novo* standard applied to determine if there was a RPC violation based on the factual findings.

#### *Colin did not violate RPC 3.5(d)*

RPC 3.5(d) prohibits a lawyer from engaging in conduct intended to disrupt a tribunal. The court relied on earlier precedent and held that in order to violate RPC 3.5(d), the lawyer’s alleged misconduct must be a physical or verbal disruption during a tribunal’s proceeding, and not actions outside the courtroom setting. As Colin’s conduct occurred through writing and not before a tribunal, the court found his conduct did not fit within the disruptions contemplated by RPC 3.5(d).

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<sup>3</sup> MODEL RULES OF PROF’L CONDUCT r. 3.5(d) (Am. Bar Ass’n 1983); MODEL RULES OF PROF’L CONDUCT r. 8.2(a) (Am. Bar Ass’n 1995); MODEL RULES OF PROF’L CONDUCT r. 8.4(d) (Am. Bar Ass’n 1998).

<sup>4</sup> *In re Discipline of Schaefer*, 25 P.3d 191, 204 (Nev. 2001).

*Colin violated RPC 8.2(a)*

RPC 8.2(a) prohibits lawyers from making statements they know are “false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”<sup>5</sup> This rule only covers statements of fact that can be proven true or false, and not opinion. Excluding statements of opinion ensures the rule protects the integrity of the judicial system without broadly protecting judges from any unkind criticisms. The court addressed 8.2(a) by breaking it down into three elements.

First, there must be a statement of fact. Although most of Colin’s statements were opinions, the court found substantial evidence supported the panel’s findings that Colin made some statements of fact. The court provided various examples of Colin’s statements which included, among others, that the justices “affirmatively ‘alter[ed]’ the appellate record” and “affirmatively fabricated a lie, blatantly contrary to the record.”

Second, the statement of fact must impugn the integrity or qualifications of the judge. The court found substantial evidence to satisfy this element, which included the accusations of lying and altering records provided in the previous paragraph.

Lastly, the statement must be made with knowledge that it is false or with reckless disregard for its truth. The court pointed to Colin’s own admissions to satisfy this element. Particularly, Colin admitted that one of the accusations he raised *after* the Randolph case regarding the justices’ compensation for service on the library commission was an accusation he thought about raising years earlier through a motion to disqualify. He chose not to raise the accusations earlier because he decided to give the justices the benefit of the doubt. The court pointed to this decision to show Colin knew the compensation was legal and only raised the accusation when the *Randolph* decision disfavored his client.

The court found all three elements were met and the State Bar successfully established by clear and convincing evidence that Colin violated RPC 8.2(a).

*Colin violated RPC 8.4(d)*

RPC 8.4(d) prohibits an attorney from engaging in “conduct that is prejudicial to the administration of justice.” The court’s interpretation of this rule establishes that conduct is prejudicial to the administration of justice when it “intentionally interferes with the criminal justice and civil litigation processes.”<sup>6</sup> “Prejudice” in this rule requires “either repeated conduct causing substantial harm to the administration of justice or a single act causing substantial harm to the administration of justice.”<sup>7</sup> The court also stated that unlike RPC 3.5(d), RPC 8.4(d) can address conduct outside the courtroom so long as the conduct disrupts, or was intended to disrupt a tribunal.

The court viewed Colin’s repeated motions to disqualify the justices even after *Randolph* was decided on the merits as an effort to delay the proceedings. The court interpreted this as Colin’s attempt to manipulate the appellate process and have the case decided under a new panel of judges. Based on the court’s evidence and deference to the panel, the court held Colin violated RPC 8.4(d).

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<sup>5</sup> MODEL RULES OF PROF’L CONDUCT r. 8.2(a) (Am. Bar Ass’n 1995).

<sup>6</sup> In re Discipline of Stuhff, 108 Nev. 629, 633, 837 P.2d 853, 855 (Nev. 1992).

<sup>7</sup> *Id.* at 634, 837.

## *Discipline*

The court determined the appropriate discipline de novo. The court's four factors in determining the discipline were "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating factors."<sup>8</sup>

The court found Colin's false statements undermining the integrity of a judge and engaging in conduct prejudicial to the administration of justice was evidence of Colin violating his duty to the legal system. The court also classified Colin's mental state as knowing, given his efforts to delay the case through the motions to disqualify. Third, the injury was harm to the legal system and the public's perception towards the legal system. These three factors alone warranted suspension.

Finally, the court determined Colin's failure to acknowledge the wrongful nature of his conduct and his substantial experience practicing law were aggravating factors. Alternatively, the court also determined Colin's lack of a prior disciplinary record was a mitigating factor. The court did not consider his client Randolph a vulnerable victim, and therefore did not consider the panel's finding of a vulnerable-victim circumstance as an aggravating factor.

Considering all the factors, the court agreed a suspension was appropriate, but not for a year as recommended. Citing to the policy goals behind suspensions and to discipline in similar cases in the past, the court instead suspended Colin for six months and one day. Under Nevada law, Colin must apply for reinstatement into the Nevada Bar at the end of his suspension because the suspension is over six months. Colin must also pass the MPRE to be reinstated, and be required to pay the \$2500 cost for the disciplinary proceedings.

## **Conclusion**

The court agreed with the panel, and found James Colin violated RPC 8.2(a) and 8.4(d). His knowingly unsupported statements of fact aimed at the integrity and qualifications of the justices and the court were substantial enough to meet the elements of RPC 8.2(a). His repeated motions to disqualify justices that had already decided his client's case also met the factors necessary to find he was engaging in conduct that was prejudicial to the administration of justice under RPC 8.4(d). Colin did not violate RPC 3.5(d) because his misconduct did not occur in the courtroom.

## **Concur and Dissent**

Justice Schlegelmilch disagrees that the State Bar proved by clear and convincing evidence that Colin engaged in conduct prejudicial to the administration of justice. The dissenting opinion notes that even though the majority inferred Colin's repeated motions for disqualification were intended to manipulate the appellate process, delay the proceeding, and acquire new judges, the panel did not make the same inferences nor were the inferences supported by the record. The panel did not find a delay occurred and it was not possible to conclude Colin intended to cause a delay.

The dissenting justice concurred with the discipline based on the violations of Rule 8.2(a).

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<sup>8</sup> In re Discipline of Lerner, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (Nev. 2008).