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Supreme Court No. 201,448-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceedings Against

BAKARY FANSU CONTEH

Lawyer (Bar No. 35098

RESPONDENT'S OPENING BRIEF

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CASES

In *re* McMullen, 127 Wn.2d 150,162, 896 **P.2d** 1281 (1995) 1

PROFESSIONAL CONDUCT CODES

ELC 11.3 (a) 4

ASSIGMENT OF ERROR & ISSUES

Assignment of Error #1: Did the Disciplinary Board erred by not finding that sua sponte review was required to "prevent substantial injustice or to correct a clear error"

STATEMENT OF THE CASE

Relevant Facts:

The Hearing Officer in his April 20th 2015 decision made certain findings of fact and drew conclusions from these facts which are contained in pages 3 to 16 of the said decision. These findings and conclusions drawn from them are very contradictory and erroneous for the most part. Respondent is constrained by what is the record for the purpose of this appeal to argue against the findings and conclusions as stated by the Hearing Officer. In this regard respondent beliefs that in order to make this appeal process meaningful this Court should order for the production of the full hearing transcript, Bar file documents and exhibits. This is the only way that he can be able to establish that the Disciplinary Board erred by not finding that sua sponte review was required to "prevent substantial injustice or to correct a clear error". This court reviews the entire record consistent with its ultimate responsibility over lawyer discipline matters. In ***re*** McMullen, 127 Wn.2d 150,162, 896 **P.2d** 1281 (1995).

Relevant Procedure

On August 6th 2015, respondent filed a Notice of Appeal before this Court seeking review of the Disciplinary Board order dated July 10th 2015 declining sua sponte review and adopting the Hearing Officer's decision of

May 26th 2015 which granted the ODC Motion to amend the Hearing Officer's decision of April 20th 2015 recommending a two-year suspension and ordering restitution of $11,324.41. The Hearing Officer's decision was made following a disciplinary hearing on January 14th and 15th 2015 on consolidated matter which charged the respondent by way of Formal Complaint dated December 23rd 2013 with 5 counts of violation of Rules of Professional Conduct (RPC). Counts 1- 2 involves the respondent's representation of Ms. Saffie Badjie in an immigration matter and counts 3-5 involve respondent's representation of Mr. John Muthaka in a personal injury matter. The Hearing Officer granted the ODC motion even though respondent had filed a response to the ODC motion and the ODC had not replied to the said response. The ODC motion to amend were not mere changes of language but were in effect rewriting of the Hearing Officer's decision. The respondent in his response to the ODC Motion to amend had argued that such amendment is tantamount to injustice as it allows the ODC to re-write the Hearing Officer's decision without having to take an appeal against aspects of the Hearing Officer's April 20th 2015 decision that they do not like. It is interesting to note that the said modifications sought by the ODC came from proposed finding of fact and conclusions of law which their counsel had made to the Hearing Officer. One of these modifications sought by the ODC and granted by the Hearing Officer was "Respondent fee was contingent upon the outcome of the matter". This modifies Finding of Fact #10. The second modification made by the Hearing Officer to his April 20th 2015 decision was to Section V, page 18 which tries to apply a "dishonest or selfish motive". These modifications were greatly unjust to the respondent and are basically afterthoughts of the ODC to ensure that respondent is nailed tightly and firmly to ensure crucifixion of the respondent. Interestingly even though the Hearing Officer does not seem to belief that this second modification was necessary he succumb to the demand of the ODC and abdicated his responsibility as an impartial adjudicator. Paragraph 2 of the Hearing Officer's May 26th 2015 decision.

On August 7th 2015, the ODC filed a Motion to Strike Respondent's Notice of Appeal arguing that the Order of the Disciplinary Board declining sua sponte review and adopting the Hearing Officer's decision is not an appealable order since the respondent did not first appeal the decision of the Hearing Officer to the Disciplinary Board and thereby waived further appellate review of the Hearing Officer's decision. The ODC contends "The Order entered by the Board from which Mr. Conteh attempts to appeal is an order declining sua sponte review under ELC 11.3(a), not a decision of the Board recommending suspension or disbarment under ELC 11.12 (e), and thus is not subject to appeal under ELC 12.3 (a) or (b)".

Respondent filed an answer to the ODC motion to strike and ODC replied. On August 31st 2015, the Clerk of this Court entered an order denying the ODC Motion to Strike. He held that the Disciplinary Board's order dated July 10th 2015 is an appealable decision pursuant to ELC 12. 3 (a).

On September 23rd 2015 the ODC filed a new Motion to Modify the Clerk's ruling denying its Motion to Strike Respondent's Notice of Appeal. Respondent filed an answer on October 30th 2015 in which he not only contended that the Clerk's ruling is correct but further argued that this Court should have interest in allowing his Notice of Appeal as there is virtually no record of what the Review Board has done in reaching its decision not to grant sua sponte review and adopting the Hearing Officer's decision of May 26th 2015 which modified his April 20th 2015 decision. Respondent strongly argued that it took barely four days from the date the Hearing Officer's decision and materials were distributed to the Review Board (July 6th) and the Board's decision declining sua sponte review and adopting Hearing Officer's decision entered on July 10th 2015. It seems that the Review Board merely rubber stamped the Hearing Officer decision even in the face of the Respondent's challenged to the ODC motion to modify which was not replied to by the ODC. Respondent has further argued that the Hearing Officer's decision did not mentioned the many violations of his due process rights during the course of the hearing. He was not only denied the right to

present an effective defense but more importantly the ODC was allowed to make its witness (Ms. Badjie) present in the same room during the testimony of her attorney (Elizabeth Holmes) who was also an expert witness of the ODC. There was witness coaching which affected the fairness of the hearing. The respondent has indicated his fear of this problem when the ODC made motion for telephonic appearance but was over ruled by the Hearing Officer. These issues should have been of interest to the Review Board warranting sua sponte review. Instead they merely rubber stamped his decision.

On January 22nd 2016, this Court by majority decision held that the order denying sua sponte review and adopting Hearing Officer's Decision is an appealable order under ELC 12.3 (a) and confined respondent's appeal to ONLY the record and scope of the Disciplinary Board's review as required by ELC 11.3 (a). That is whether sua sponte review is required to "prevent substantial injustice or to correct a clear error" as required by ELC 11.3 (d).

This Court's January 22nd 2016 order also empowered the Clerk to set briefing schedule. The Respondent's Opening Brief was due February 22nd 2016 and the ODC Answering Brief due within 30 days after service of the respondent's opening brief and the respondent's reply brief due 20 days after service of answering brief.

On February 18th 2016, respondent filed a Motion seeking extension of the due date of the Opening brief. The said Motion was granted the same day setting April 4th 2016 as the new due date of the Respondent's Opening brief.

SUA SPONTE STANDARD OF REVIEW

ELC 11.3 (a) creates sua sponte review if neither party files a timely notice of Appeal from a decision recommending suspension or disbarment. The decision of the Hearing Officer shall be distributed to the Board members

for consideration of whether to order sua sponte review and the matter shall be scheduled for consideration by the Board. From the Board July 10th 2015 order declining sua sponte review and adopting the Hearing Officer's decision it is unclear if this procedure has been followed. What is clear is that it only took four days from the date of the Clerk's distribution of the Hearing Officer's decision and entry of the Board's decision. The Board's decision did not articulate when it has scheduled this matter for consideration and under what circumstances they made their votes and more importantly if any of the hearing records was considered by them.

ARGUMENT:

For this Court to be able to make a fair determination that the Disciplinary Board did not commit error in declining sua sponte review in this matter, it is necessary that it looks beyond what is the record so far. Respondent cannot articulate in any meaningful way that the Hearing Officer's decision contained factual error or wrong legal conclusions drawn from such fact without him referring beyond the present record (Hearing Officer's decision and the Order granting ODC Motion to amend) to include the hearing transcript, bar file papers and the hearing exhibits. Through these materials Respondent will establish the grave clear errors in the Hearing Officer's decision which should have warranted sua sponte review by the Disciplinary Board.

CONCLUSION:

For the forgoing reasons, respondent humbly request that this Court order for the production of the full record to enable him to proof that sua sponte review was justified in this case and the Disciplinary Board's July 10th 2015 order was made in error.

Date: This 4th day of April 2016.

Respectfully submitted,

S/s. Bakary F Conteh

Bakary Fansu Conteh WSBA 35098

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IN THE SUPREME COURTOF THE STATE OF WASHINGTON

In Re	)	Supreme Court No. 201,448-8
Bakary Fansu Conteh	)	DECLARATION OF
Lawyer (Bar No.35098	)	SERVICE BY MAIL
_____	)	

I Bakary F Conteh, the undersigned Petitioner declares that I have caused a copy of the Petitioner's Opening Brief, to be mailed by regular first class with postage prepaid on April 4th 2016, to:

Scott G Busby

Senior Disciplinary Counsel, Washington State Bar Association

1325 Fourth Avenue, Suite 600

Seattle, WA 98101 – 2539

Dated this 4th day of April 2016

The undersigned declares under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

04/04/2016: Everett, WA

Date and Place

S/s Bakary F Conteh

Bakary Fansu Conteh

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OFFICE RECEPTIONIST, CLERK

To: Bakary Conteh
Subject: RE: Respondent's Opening Brief

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From: Bakary Conteh [mailto:contehb@gmail.com]
Sent: Monday, April 04, 2016 9:51 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Respondent's Opening Brief

Please find enclosed for filing, respondent's opening brief

Sincerely,

Bakary F Conteh