

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE DISCIPLINE
OF JACOB HAFTER, ESQ.

No. 57298

FILED

MAR 07 2012

TRACEY L. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER DISAPPROVING PANEL RECOMMENDATION,
REMANDING FOR IMPOSITION OF PRIVATE REPRIMAND,
AND ASSESSING COSTS

This is an automatic review of a Northern Nevada Disciplinary Board hearing panel's recommendation that attorney Jacob Hafter receive a public reprimand for violating RPC 8.1(a) (false statement of material fact in connection with attorney admission or discipline process) and RPC 8.4(c) (misrepresentation). See SCR 105(3)(b). While we conclude that insufficient evidence supports the panel's conclusion that Hafter violated RPC 8.1(a), we conclude that sufficient evidence supports the panel's determination that Hafter violated RPC 8.4(c). We further conclude that Hafter's conduct warrants a private reprimand. We therefore disapprove the panel's recommendation of a public reprimand and remand for the panel to impose a private reprimand.

Facts

Hafter was a candidate for the office of Nevada Attorney General in 2010. Hafter believed that the incumbent to that office, Catherine Cortez Masto, violated attorney-client privilege by releasing to the media correspondence between the offices of the attorney general and the governor. Accordingly, Hafter called the Nevada State Bar and asked

whether anyone at the governor's office had reported this alleged misconduct to the Bar, and was told that no one had. Hafter then attempted to file an anonymous complaint against General Masto but was told that this was impossible.

Nevertheless, five days later Hafter issued a press release on his campaign letterhead entitled "Hafter Responds to Allegations Masto Violates Attorney Ethics Rules." In the release, Hafter stated that: "Mr. Hafter, who sits on the Southern Nevada Disciplinary board, was made aware of this issue on Friday, April 2, 2010. . . . Mr. Hafter called the Bar and confirmed that a report of Ms. Masto's violation was made to the State Bar." The same day, Hafter participated in a conference call hosted by the Nevada News Bureau. The author of the resulting news story reported that "Hafter said today he received confirmation from a reliable source inside the Nevada State Bar that a formal ethics complaint has been filed against the Attorney General for violations of attorney-client privilege."

The State Bar then filed a formal complaint alleging that Hafter's statements to the press amounted to a violation of RPC 8.1(a) for knowingly making a false statement of material fact in connection with a disciplinary matter, RPC 8.4(c) for conduct involving deceit and dishonesty, and RPC 8.4(d) for conduct prejudicing the administration of justice. After a hearing, a panel of the Northern Nevada Disciplinary Board found that Hafter's statements amounted to material misstatements in violation of RPC 8.1(a) and 8.4(c), but did not find a violation of RPC 8.4(d). The panel recommended that Hafter be publicly reprimanded and assessed the costs of the disciplinary proceeding.

Discussion

Although persuasive, the panel's findings and recommendations are not binding on this court, Matter of Discipline of Droz, 123 Nev. 163, 168, 160 P.3d 881, 884 (2007), and we will conduct an independent, de novo review to determine whether and what type of discipline is warranted, see In re Stuhff, 108 Nev. 629, 633, 837 P.2d 853, 855 (1992); In re Kenick, 100 Nev. 273, 275-76, 680 P.2d 972, 973-74 (1984).

Having reviewed the record of the proceedings before the board and the briefs filed in this court, we conclude that there is not clear and convincing evidence that Hafter violated RPC 8.1(a). In relevant part, RPC 8.1(a) states that "a lawyer . . . in connection with a disciplinary matter, shall not . . . [k]nowingly make a false statement of material fact." Hafter's statements to the press were certainly false statements, but we reject the State Bar's assertion that because the subject matter of the statements concerned a disciplinary matter, they were made "in connection with a disciplinary matter." Instead, we conclude that there must be clear and convincing evidence that Hafter's false statements were made to a disciplinary authority in order to sustain a charge that he violated RPC 8.1(a). See ABA Annotated Model Rules of Professional Conduct § 8.1 (2011) ("Rule 8.1(a) imposes a duty of candor in connection with all communications with admission authorities and disciplinary authorities." (emphasis added)); Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 62.3, at 62-5 (3d ed. Supp. 2008) ("Rule 8.1(a) states a simple rule: lawyers . . . may not deliberately lie to regulatory authorities about material facts."). Hafter did not make his false statements to any disciplinary authority and we therefore conclude that he did not violate RPC 8.1(a).

However, Hafter's false statements to the press support the panel's conclusion that he violated RPC 8.4(c). That rule states: "It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving . . . misrepresentation." The evidence presented at the hearing clearly demonstrated that Hafter either intended to mislead in his press release or, at the least, acted in reckless disregard for the truth. See In re Surrick, 338 F.3d 224, 234 (3d Cir. 2003); In re Conduct of Huffman, 13 P.3d 994, 998 (Or. 2000) ("Misrepresentation' may include an affirmative misstatement, an intentional failure to disclose material facts that may or may not have been intended to deceive, or a combination of both.").

Hafter claims that his misrepresentations cannot constitute a violation of an ethical rule because they are protected political speech. Hafter errs. A lawyer who is a candidate for political office has a First Amendment right to discuss public issues and advocate his own election. Buckley v. Valeo, 424 U.S. 1, 52 (1976). However, Hafter did more than simply engage in the pugilistic rhetoric of a political campaign. First, he improperly cloaked himself in the authority of the Southern Nevada Disciplinary Board. Cf. Jenevein v. Willing, 493 F.3d 551, 560 (5th Cir. 2007) (reaffirming judge's First Amendment right to comment on matters of public concern, but upholding public censure for his "use of the trappings of judicial office to boost his message"). Then, after insinuating that he spoke with some degree of inside knowledge due to his membership on the disciplinary panel, he claimed that he confirmed with the State Bar that an ethical complaint had been filed against the attorney general when he knew no such thing had happened. He then repeated this statement to the media on a conference call. These misrepresentations are not protected political speech. "The guarantee of


freedom of speech will not protect [a lawyer in the context of a political campaign] from disciplinary action . . . if he is guilty of known falsehood intentionally used and published for the purpose of misleading the voters and gaining personal advantage for himself or his candidate.” State v. Russell, 610 P.2d 1122, 1127 (Kan. 1980); see also Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”). Thus, we conclude that Hafter’s actions constitute a violation of RPC 8.4(c).


The purpose of attorney discipline is to protect the public, the courts, and the legal profession, not to punish the attorney. State Bar of Nevada v. Claiborne, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988). In determining the appropriate discipline, this court has considered four factors to be weighed: “the duty violated, the lawyer’s mental state, the potential or actual injury caused by the lawyer’s misconduct, and the existence of aggravating or mitigating factors.” In re Lerner, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077-78 (2008). In considering the panel’s recommended discipline here, we note that Hafter has never been disciplined before, no clients were harmed, and the incident is an isolated one. In those circumstances, a private reprimand is appropriate. See ABA Standards for Imposing Lawyer Sanctions § 7.4 (stating that an admonition (the equivalent of a private reprimand) is generally the appropriate discipline when the violation is isolated and “causes little or no actual or potential injury to a client, the public, or the legal system”).

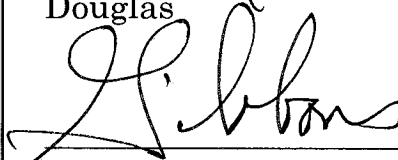
We agree that Hafter violated RPC 8.4(c), but we conclude that no RPC 8.1(a) violation was shown. We further conclude that no more than a private reprimand is appropriate. Accordingly, we remand

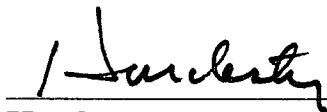
for the panel to impose a private reprimand of attorney Jacob Hafter for violating RPC 8.4(c). Also, Hafter shall pay the costs of the disciplinary proceeding.

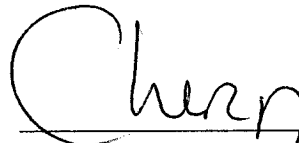
It is so ORDERED.

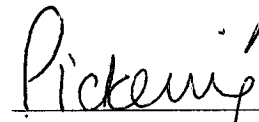
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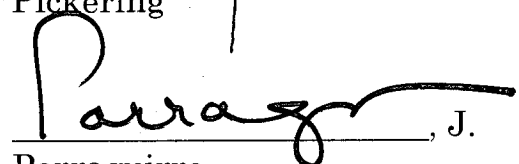
_____, J.
Douglas

_____, J.
Gibbons

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Hardesty

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Cherry

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Pickering

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Parraguirre

cc: Law Office of Jacob L. Hafter & Associates
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