IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF JOSEPH MARIDON, JR., BAR NO. 8561

No. 85606

ORDER REJECTING RECOMMENDATION AND REMANDING

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation to publicly reprimand attorney Joseph Maridon, Jr., based on its findings that Maridon violated RPC 3.5 (impartiality and decorum of the tribunal), RPC 8.2 (false statements concerning the qualifications or integrity of a judge), and RPC 8.4(d) (conduct prejudicial to the administration of justice). Maridon filed briefs challenging the panel's recommendation, and the State Bar filed a brief in support of the recommendation.

Facts

In a justice court criminal traffic case, Maridon represented a defendant charged with a moving violation. At a status hearing, Maridon disagreed with Justice of the Peace Larry Shupe about the application of a federal regulation that prohibits states from masking a commercial driver's license holder's convictions for moving traffic violations. In that context, Maridon suggested that he could file a writ petition in district court to "get [Judge Shupe] some proper guidance on the issue." As the discussion progressed and Maridon continued to question the judge's reading and understanding of the law, the judge warned Maridon to be careful about

casting aspersions and questioning the judge's integrity, and thus crossing the boundaries of advocacy. Maridon continued to state that he believed that the judge misunderstood the law but qualified that his statements were not meant to reflect on the judge's honesty.

Later, the defendant filed an affidavit seeking Judge Shupe's disqualification. A different Justice of the Peace entered an order denying the request based on the defendant's affidavit and Judge Shupe's response thereto. After receiving the order, Maridon called the judge's judicial assistant questioning why the judge decided the matter without a hearing. Despite being informed otherwise, Maridon continued to insist that a hearing was required, and he used insulting language in questioning the judge's knowledge of the law before he abruptly ended the call.

At a second status hearing in the traffic case, the prosecuting attorney suggested that a waiver-of-appearance supporting the defendant's request to appear by video was not actually signed by the defendant, and was thus "effectively fraudulent and, beyond that, the basis for charges of perjury either for the defendant or by [Maridon] himself." Maridon responded that the defendant signed the waiver under penalty of perjury and stated that he would appeal the case on the defendant's behalf "if the State wins." After the prosecution again questioned the waiver and referenced the veracity of the disqualification affidavit, Maridon stated that the defendant sought disqualification because Judge Shupe "impose[s] illegal collection fees." When cautioned about disparaging the judge, Maridon asked why it was disparaging to state that the judge imposes fines or sentences that are not in accordance with governing statutes and are illegal. After being told he was verging on contempt, Maridon stated "[w]e can agree to disagree, judge."

After receiving a grievance, the State Bar filed a formal disciplinary complaint alleging that Maridon violated RPC 3.5 (impartiality and decorum of the tribunal), RPC 8.2 (false statements concerning the qualifications or integrity of a judge), and RPC 8.4(d) (conduct prejudicial to the administration of justice) based on his comments in the two hearings and phone call to the judicial assistant. After considering testimonial and documentary evidence at the disciplinary hearing, the disciplinary panel found that the State Bar met its burden to show that Maridon knowingly violated those three rules. Citing the limited scope of potential injury and Maridon's lack of disciplinary history as a mitigating factor, the panel recommends a public reprimand as a deviation from the baseline discipline of suspension.

Discussion

The State Bar has the burden of showing by clear and convincing evidence that the attorney committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). In reviewing a hearing panel's findings of fact, conclusions of law, and recommendation, we "determine de novo whether the factual findings establish an RPC violation." *In re Discipline of Colin*, 135 Nev. 325, 330, 448 P.3d 556, 560 (2019); *see* SCR 105(3)(b) (stating that de novo review applies to the panel's conclusions of law and recommended discipline).

RPC 3.5(d) does not proscribe the statements Maridon made at the hearings

The panel concluded that Maridon knowingly violated RPC 3.5(d) when he "disparaged the judge and threatened to appeal in the matter pending in Goodsprings Justice Court." Nevada Rule of Professional Conduct 3.5(d) provides that "[a] lawyer shall not engage in conduct intended to disrupt a tribunal." That rule tracks the language in the American Bar Association model rule. ABA Rules of Prof'l Conduct, R.

3.5(d). Disciplinary action under Rule 3.5(d) is "reserved for conduct that is intended to, and presumably does, actually disrupt the proceedings or interfere with the orderly course of litigation." Geoffrey C. Hazard, Jr., William Hodes, & Peter R. Jarvis, *The Law of Lawyering*, § 34.08 at 34-14 (4th ed. 2020-22 Supp.). The "intended to disrupt a tribunal language," which is akin to the intent that must be shown to support an attorney's criminal contempt, is key to disciplinary action.[1] *Id.* Rule 3.5(d) thus includes an element of unethical intent, and while a lawyer who expresses strong disagreement with a judge on the law risks escalating the controversy to the point of disrupting the proceedings, pleasing a judge does not override the lawyer's role in protecting a client's rights, including "stand[ing] respectfully firm long enough to insist that a record be made for appellate scrutiny." *Id.*

Discipline under Rule 3.5(d) or analogous rules thus applies when the record supports a finding of intentionally disruptive conduct by the attorney. Such conduct includes a defense attorney threatening to walk out of a criminal hearing, refusing to sit down at counsel table after being directed to do so to avoid further disruption, continuing to refuse to be seated and loudly telling the judge "Fire me, God Damn it, fire me!," and having to be physically restrained by court personnel because of such conduct. *In re Ortiz*, 604 N.E. 2d 602, 603 (Ind. 1992). In contrast, when intent to disrupt the proceedings is not shown, discipline under Rule 3.5(d) is not appropriate. For example, a disciplinary hearing board declined to

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[1]Although a court's contempt powers are distinct from disciplinary processes, there are circumstances under which either could be imposed, and contempt cases are sometimes cited in disciplinary matters. *See, e.g., In re Snyder*, 734 F.2d 334, 337 n.6 (8th Cir. 1984), *overruled by In re Snyder*, 734 U.S. 334 (1985).

impose discipline on an attorney charged with violating Colorado RPC 3.5(c)[2] through improper closing arguments in a civil trial because the panel found that the Office of Attorney Regulation failed to present clear and convincing evidence that the attorney "*intended* to disrupt a tribunal" by making the improper arguments. *People v. Rosenfeld*, 180 P.3d 448, 456 (Colo. O.P.D.J. 2007) (emphasis in original). In claiming that the attorney intended to disrupt the proceedings, the Office of Attorney Regulation pointed to (1) the attorney's comment that "some rules simply need to be broken," which the trial court construed as inviting the jury to disregard the court's instructions, and (2) the attorney's reference to a chart, which the court viewed as an attempt to indirectly inform the jury of a matter that the court previously ruled inadmissible. *Id.* at 454. The disciplinary hearing board concluded that while the attorney's "conduct as a whole during final argument raised a valid concern on the part of the trial judge about [the attorney's] professionalism and ethics, the evidence falls short of clear and convincing that [the attorney's] principal objective in making the offending remarks was to disrupt the proceedings." *Id.* at 456. The hearing board observed that the intent element of the rule requires proof by clear and convincing evidence that the attorney had a "*conscious objective* to disrupt the tribunal." *Id.* (emphasis in original).

Caselaw supports that lawyer discipline is strictly confined to affirmative violations of the professional conduct rules, rather than to policing comments that may be lacking in civility. The U.S. Supreme Court, for example, unanimously reversed an Eighth Circuit decision suspending an attorney for "conduct unbecoming a lawyer" under FRAP 46 based on the

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[2]Colorado RPC 3.5(c) is the same as Nevada RPC 3.5(d).

attorney's refusal to apologize for a letter in which he criticized the court's administration of the Criminal Justice Act. *In re Snyder*, 472 U.S. 634, 646-47 (1985). Although the lower court "was concerned about the tone of the letter" and the lawyer conceded that its "harsh" tone could be read as ill-mannered, the Supreme Court concluded that "a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct" warranting discipline. *Id.* Moreover, applying discipline within such confines abides constitutional concerns, including First Amendment concerns, and permits the lawyer to function effectively and freely as an advocate in advancing justice for their client. For example, courts have pointed to the zealous advocacy expected of a criminal defense attorney in rejecting a finding of attorney misconduct in the form of intentional and contemptuous obstruction of court proceedings, noting that where the balance between vigorous advocacy and actual obstruction "defies strict delineation," doubts should be resolved in favor of advocacy. *In re Dellinger*, 461 F.2d 389, 398 (7th Cir. 1972); *see In re Holloway*, 995 F.2d 1080, 1098 (D.C. Cir. 1993) (Mikva, CJ, dissenting) (observing that appellate courts are reluctant to uphold contempt convictions where the evidence falls short of actual obstruction because a less restrictive standard would necessarily chill desirable advocacy that benefits the judicial system). In *Dellinger*, the court explained that "[a]ttorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf," and an attorney possesses the requisite intent to obstruct "only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating

the search for truth." 461 F.2d at 400; *cf. Stano v. Dugger*, 921 F.2d 1125, 1170-71 (11th Cir. 1991) (observing that lawyer's role as an effective advocate is derivative of the truth-seeking process on which the adversary system of criminal justice is premised).

Considering that RPC 3.5(d) is narrowly drawn to proscribe only that conduct which is intended to disrupt a tribunal, the facts here, when considered in context, do not support the panel's conclusion that Maridon knowingly intended to disrupt the criminal traffic proceedings in violation of RPC 3.5(d). Maridon had a reasonable basis for questioning the judge's application of the federal regulation and Maridon threatened to appeal only if the State prevailed and only after the prosecutor claimed that Maridon and/or his client may have engaged in fraud and could be subject to perjury charges. The testimony and evidence here do not support that Maridon's statements, while ill-mannered in tone at times, were made with an intent to disrupt the proceedings. Maridon's advancement of a legal theory in his client's defense and in an effort to protect his client's rights, including making a record for appellate scrutiny and expressing intent to appeal in response to arguments made by opposing counsel, is within the boundaries of permissible advocacy. Accordingly, we conclude that the facts do not support the panel's conclusion that Maridon violated RPC 3.5(d). *Colin*, 135 Nev. at 329, 448 P.3d at 560 (applying de novo review in deciding whether the panel's findings support a RPC violation).

RPC 8.2 does not proscribe Maridon's statements questioning the judges' application of the law

The panel found that Maridon "knowingly violated RPC 8.2 (Judicial and Legal Officials) when he made disparaging statements, or statements with reckless disregard as to (i) the judge's integrity and/or knowledge of the law in the [traffic] proceeding and (ii) the judge's

knowledge of the law regarding the disqualification request." Nevada Rule of Professional Conduct 8.2(a) provides that "[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." In applying that rule, we have explained that "there are three elements to an RPC 8.2(a) violation: an attorney makes (1) a statement of fact that (2) impugns the judge's integrity or qualifications, (3) knowing the statement to be false or with a reckless disregard for the statement's truth." *Colin*, 135 Nev. at 331, 448 P.3d at 561. Thus, "[n]o matter the offensive or unkind nature of an attorney's statement, RPC 8.2(a) is limited to statements of fact as opposed to opinion because only statements of fact can be true or false, and RPC 8.2(a) is intended to protect the integrity of the judicial system and the public's confidence in it, instead of 'protect[ing] judges . . . from unkind or undeserved criticisms.'" *Id.* (quoting *Attorney Grievance Comm'n v. Frost*, 437 Md. 245, 85 A.3d 264, 274 (2014)).

The panel made no findings on whether Maridon's statements were opinions, which generally are not subject to discipline and are protected under the First Amendment, or whether Maridon made statements of fact that he knew to be false or with a reckless disregard for the truth, which may serve as a basis for discipline under RPC 8.2(a). *Colin*, 135 Nev. at 331, 448 P.3d at 561. In our view, however, Maridon's critical statements about how the judges applied the law do not present a falsity issue, and the State Bar, while suggesting that Maridon made spurious claims, did not attempt to show his statements were false or made in reckless disregard for the truth. *See In re Discipline of Drakulich*, 111 Nev. at 1566, 908 P.2d at 715 (stating the state's burden to prove a disciplinary violation); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438

(9th Cir. 1995) (stating that "the disciplinary body bears the burden of proving [the statements'] falsity"). Instead, the record shows that Maridon stated his opinions based on record facts. As courts have recognized, First Amendment protections apply to an attorney's opinion statements even when such statements are disrespectful or exhibit a lack of polish expected of the profession. *E.g.*, *In re Green*, 11 P.3d 1078, 1086 (Colo. 2000); *Ramsey v. Bd. of Prof'l Responsibility*, 771 S.W.2d 116, 121 (Tenn. 1989); *Okla. Bar Ass'n v. Porter*, 766 P.2d 958, 966 (Okla. 1988). While "[i]n the past, professional restrictions on lawyer criticism of judges were sometimes worded or applied broadly" on the justification that "too severe criticism could undermine public confidence in the judicial system," that application has since shifted, as "[n]either such broad restrictions nor such a justification can withstand scrutiny under the First Amendment." Hazard, Hodes, & Jarvis, *supra*, § 67.02 (noting that "Model Rule 8.2(a) incorporates the First Amendment standard for false criticism of public officials, as articulated by the United States Supreme Court in *New York Times v. Sullivan*[, 376 U.S. 254 (1964)] and its progeny").

Without a supported finding that Maridon made statements of fact that he either knew to be false or stated with reckless disregard for the truth, the panel's conclusion that Maridon violated RPC 8.2(a) cannot stand regardless of our disagreement with Maridon's tone and choice of words.[3]

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[3]Maridon's particularly intemperate and pejorative statements were directed to a limited audience—the judge's judicial assistant and the judge by way of the assistant conveying Maridon's message—rather than to the general public. Thus, the possible adverse effects on the public's confidence in the judicial system were minimal, as the panel found. *In re Green*, 11 P.3d at 1086-87; Hazard, Hodes, & Jarvis, *supra*, § 67.03 (noting that "Rule 8.2(a) does not differentiate between statements made in or out of court,"

Apropos here, as the Oklahoma Supreme Court stated in declining to impose discipline for an attorney's distasteful opinion statements, "[w]e view the remarks here examined to be extremely bad form while in the same breath we hold them to be protected." *Porter*, 766 P.2d at 970. Maridon criticized the judges' applications of the law and he had a reasonable basis for doing so, even if he was wrong. As the Ninth Circuit has observed, "Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken." *Yagman*, 55 F.3d at 1438. Because such criticisms do not fit within the falsehoods or statements recklessly disregarding the truth proscribed by RPC 8.2(a), we conclude that the facts here fail to establish an RPC 8.2(a) violation. *Colin*, 135 Nev. at 329, 448 P.3d at 560-61 (applying de novo review in deciding if the panel's findings support a RPC violation, and recognizing that a RPC 8.2(a) violation has three elements, which include the attorney making a statement of *fact* knowing the statement to be false or with reckless disregard for the statement's truth).

RPC 8.4(d) does not proscribe the statements Maridon made at the hearings

The panel concluded that Maridon knowingly violated RPC 8.4(d) (misconduct—conduct prejudicial to the administration of justice) "with his comments in the [traffic] proceeding in Goodsprings Justice Court." That rule provides that it is misconduct for an attorney to "[e]ngage in conduct that is prejudicial to the administration of justice." RPC 8.4(d). "For purposes of this rule, 'prejudice' requires either repeated conduct causing some harm to the administration of justice or a single act causing

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but that factor is "relevant to both the First Amendment analysis and to concerns about actual disruption or actual interference with the administration of justice").

substantial harm to the administration of justice." *Colin*, 135 Nev. at 332, 448 P.3d at 562 (internal quotation marks and citation omitted). "[M]ere criticism—even sharp criticism—of a judge or of the court system itself cannot constitutionally be deemed to be 'prejudicial to the administration of justice' under Model Rule 8.4(d)." Hazard, Hodes, & Jarvis, *supra*, § 69.11.

The panel made no findings to support that Maridon's statements at the hearing questioning Judge Shupe's application of the federal regulation and statutes governing the imposition of fines and sentences prejudiced the administration of criminal justice and thus violated RPC 8.4(d). In addressing what conduct amounts to a Rule 8.4(d) violation, the District of Columbia Court of Appeals explained that

> Bar Counsel must prove by clear and convincing evidence: (1) that the attorney acted improperly in that he either "[took] improper action or fail[ed] to take action when . . . he or she should [have] act[ed]"; (2) that the conduct involved 'bear[s] directly upon the judicial process (i.e., the 'administration of justice') with respect to an identifiable case or tribunal'; and (3) that the conduct "taint[ed] the judicial process in more than a *de minimis* way," meaning that it "at least potentially impact[ed] upon the process to a serious and adverse degree."

In re Owusu, 886 A.2d 536, 541 (D.C. 2005) (quoting *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996) (alterations in original)). When viewed in context, Maridon's statements do not support a finding that he intentionally interfered with the judicial process, causing harm to the administration of justice or that he took improper action that tainted the judicial process in a more than de minimis way. *Colin*, 135 Nev. at 332, 448 P.3d at 562 (observing that conduct that intentionally interferes with the criminal justice process generally is prejudicial to the administration of justice); *In*

re Owusu, 886 A.2d at 541 (D.C. 2005). Maridon's statements caused no meaningful delay in the traffic proceedings, especially since they pertained to the issues before the court, some of which were raised by the prosecuting attorney. Although the panel also found that Maridon violated RPC 8.4(d) by stating that he intended to appeal if the State prevailed and by "the lack of civility" in his interaction with the judges, we have already determined that Maridon's statements did not violate RPC 3.5(d), and the application of Rule 8.4(d) in this context is redundant of RPC 3.5(d). Hazard Hodes, & Jarvis, *supra*, § 69.08 (explaining the redundancy problem with Rule 8.4(d) when attorneys are also disciplined under other rules proscribing the same conduct). Accordingly, because Maridon's statements were not prejudicial to the administration of justice in an appreciable way, they do not fit within the conduct proscribed by RPC 8.4(d).

Conclusion

While at least some of Maridon's conduct was unprofessional and rude and it may have otherwise been offensive to the justice court judges, the State Bar fell short of presenting clear and convincing evidence that Maridon's conduct violated any of the three rules charged. Accordingly, we reject the panel's recommendation to impose discipline on all counts and remand for the panel to dismiss the complaint.

It is so ORDERED.

Cadish, J.
Cadish

Pickering, J.
Pickering

Bell, J.
Bell

cc: Chair, Southern Nevada Disciplinary Board
Mueller & Associates
Bar Counsel, State Bar of Nevada
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