



FILED

Dec 20 2024

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

IN THE MATTER OF	§	
EARL S. NESBITT	§	CAUSE NO. 70374
STATE BAR CARD NO. 14916900	§	

**ANSWER TO THE ORDER TO SHOW CAUSE ON
PETITION FOR RECIPROCAL DISCIPLINE**

TO THE HONORABLE BOARD:

Respondent Earl S. Nesbitt (“Respondent”) files this Answer to the Order to Show Cause on Petition for Reciprocal Discipline issued by the Board of Disciplinary Appeals on December 9, 2024.

BACKGROUND OF UNDERLYING SANCTION

On or about August 30, 2024, Judge Jane Boyle, United States District Judge for the Northern District of Texas, Dallas Division, issued an Order in the matter styled *Vargas v. Panini America, Inc.*, Civil Action No. 3:23-CV-02689-B (the “Vargas Case”), reprimanding Respondent and another attorney from his firm (referred to collectively as “Respondents”)¹ for conduct the Court determined violated Federal Rule of Civil Procedure 11(b). Respondents were serving as local counsel for Plaintiff Nora Vargas in the Vargas Case and participated in editing a brief (the “Response Brief”) in response to a motion to dismiss filed by Defendant Panini America, Inc. (“Defendant Panini”). That Response Brief was primarily drafted by New York counsel; Respondents’ only role was to provide edits for clarity and coordinate filing. The undisputed testimony before the Federal District Court was that Respondents did not review all of the cases cited in the Response Brief by New York counsel. Order, p. 3. Instead, Respondents relied on

¹ The other attorney, Lane Webster, is the Respondent in another reciprocal discipline case, Cause No. 70375.

New York counsel and assumed New York counsel had adequately researched and briefed the legal issues and correctly cited relevant and applicable case law. That reliance proved to be misplaced, as the Response Brief contained several errors and incorrect citations.

After a hearing, the Court concluded the Response Brief was drafted using artificial intelligence, which Respondents neither participated in nor knew about, as reflected in the Court's statement at the hearing: ***"I probably wouldn't have done a public reprimand if you-all had just agreed that this is an AI brief, but maybe you don't know. Maybe you don't know. Maybe you do know, I don't know."*** In contrast to the Court's statements regarding Respondents, the Court explicitly held in relation to the New York counsel who primarily drafted the Response Brief: ***"Mr. Pham knows*** and it was bad faith to file this brief and then to come back and defend it." To be clear, after the attorneys for Defendant Panini raised the possibility of artificial intelligence having been used in the Response Brief, Respondents contacted New York counsel and asked point blank whether artificial intelligence had been used in drafting the brief. New York counsel assured Respondents that artificial intelligence had not been used in drafting the brief. After receiving those assurances, Respondents required all of the New York attorneys involved in drafting the Response Brief to sign a declaration confirming that artificial intelligence was not used in drafting the Response Brief, which declarations were promptly submitted to the District Court, along with a letter from Respondents confirming that none of them had used artificial intelligence in connection with the brief.

Ultimately, the Court found that both New York counsel and Respondents violated Rule 11 by failing to make a reasonable inquiry to ensure that the legal contentions in the brief were warranted by existing law.

Although the Court considered possible violations of Texas Disciplinary Rule of Professional Conduct 3.03, *it made no finding regarding any violation of the Disciplinary Rules*. The Court likewise made no finding that Respondent knowingly made any misstatement of law or lacked a reasonable basis to believe the legal assertions in the brief were accurate. As acknowledged in the comments to the Disciplinary Rules, the duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure *exceed* those set out in the Disciplinary Rules. Disc. R. 3.01, cmt. 4. A reprimand based on a single violation of Rule 11, therefore, does not give rise to reciprocal discipline.

RESPONDENT'S DEFENSES

In accordance with Rule 9.04 of the Texas Rules of Disciplinary Procedure, imposition of discipline identical to the discipline imposed on Respondent by the United States District Court for the Northern District of Texas, Dallas Division, is not warranted because Respondent can and will establish, by clear and convincing evidence, the following defenses:

- The misconduct for which Respondent was disciplined in the other jurisdiction does not constitute Professional Misconduct in this state (Rule 9.04(E)).
- The misconduct established in the other jurisdiction warrants substantially different discipline in this state (Rule 9.04(D)).
- The imposition by the Board of Disciplinary Appeals of discipline identical, to the extent practicable, with that imposed by the other jurisdiction would result in grave injustice (Rule 9.04(C)).

WHEREFORE, Respondent Earl S. Nesbitt respectfully prays that upon trial of this matter the Board find that he established one or more of the foregoing defenses by clear and convincing evidence, that the Board deny the Petition for Reciprocal Discipline, and that the Board grant Respondent such further relief to which he is entitled.

Respectfully submitted,

/s/ Kelli M. Hinson

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading has been served via email on Amanda M. Kates, Assistant Disciplinary Counsel, Office of the Chief Disciplinary Counsel, on this 20th day of December, 2024.

/s/ Kelli M. Hinson

KELLI M. HINSON