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	§	

IN THE MATTER OF	§	
LANE M. WEBSTER	§	**CAUSE NO. 70375**
STATE BAR CARD NO. 24089042	§	

RESPONDENTS' CONSOLIDATED REPLY TO PETITIONER'S RESPONSE REGARDING PETITIONS FOR RECIPROCAL DISCIPLINE

TO THE HONORABLE BOARD:

Respondents Earl S. Nesbitt and Lane M. Webster ("Respondents"), Respondents in the two above-styled matters, file this Consolidated Reply to Petitioner's Response Regarding Petitions for Reciprocal Discipline. Respondents respectfully show the Board as follows:

INTRODUCTION

In its Response, the Commission does not dispute Respondents' arguments that (1) the federal court made no finding that Respondents violated any Disciplinary Rule or engaged in any Professional Misconduct, or that (2) a violation of Federal Rule 11, standing alone, does not give rise to reciprocal discipline. Those two uncontested facts should be dispositive of this matter. The Commission argues the Respondents' violation of Federal Rule 11 was essentially an (un-adjudicated) violation of Texas Rule of Civil Procedure 13, and was, therefore, an (un-adjudicated) violation of Texas Disciplinary Rule 8.04(a)(12). But this tortured analysis is not supported by any authority, and it cannot support reciprocal discipline against the Respondents.

ARGUMENTS AND AUTHORITIES

A. The conduct for which Respondents were disciplined in the Federal Court does not constitute Professional Misconduct under the Texas Disciplinary Rules.

In its Response, the Commission argues that "the Federal Court sanction and finding of misconduct is conclusive." Response, p. 5. But this argument ignores the point discussed at length in Respondents' original brief that ***there was no finding of Professional Misconduct by the federal court***. Only a final adjudication in another jurisdiction that an attorney has "committed Professional Misconduct" is conclusive for the purposes of reciprocal discipline. TEX. R. DISC. PROC. 9.01. There was no such adjudication in this case.

The only Disciplinary Rule violation alleged by the Commission is Texas Disciplinary Rule of Professional Conduct 8.04(a)(12).[1] Response, p. 7. Rule 8.04(a)(12) provides that a "lawyer shall not violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law." The Commission argues that, by violating Federal Rule of Civil Procedure 11, which is similar to Texas Rule of Civil Procedure 13, Respondents violated "the laws of this state" and, therefore, violated Rule of Professional Conduct 8.04(a)(12). This argument fails for at least three reasons.

First, this is a reciprocal discipline case. The Commission cannot seek reciprocal discipline based on an alleged rule violation not considered or adjudicated in the original jurisdiction. In seeking reciprocal discipline, the Commission is bound by the findings of the other jurisdiction—in this case, the federal court. The Commission compounds this problem by relying on an alleged

[1] The Commission mistakenly refers to this as a Rule of Disciplinary Procedure, but the quoted text is from a Rule of Professional Conduct.

but un-adjudicated violation of Disciplinary Rule 8.04(a)(12) that is based only on an alleged but un-adjudicated violation of Texas Rule 13.

Second, Respondents did not violate Texas Rule 13. As an initial matter, Texas Rule 13 does not apply to pleadings filed in federal court. *Snapt, Inc. v. Ellipse Commc'ns Inc*., 2011 WL 13206110, at *3 (N.D. Tex. Nov. 8, 2011) (holding Texas Rule 13 did not apply to an amended complaint filed after removal to federal court). In addition, although Federal Rule 11 and Texas Rule 13 are similar, they are not "directly analogous" as the Commission claims. The two rules have different language and elements, and the Commission performs no analysis of whether the conduct described by the federal court would violate Texas Rule 13 if it occurred in a Texas court. *See, e.g., Tompkins v. Cyr*, 995 F. Supp. 689, 693 (N.D. Tex. 1998), *aff'd*, 202 F.3d 770 (5th Cir. 2000) (analyzing Federal Rule 11 and Texas Rule 13 separately and holding that Texas Rule 13 "establishes a two-prong test. The pleading must be both groundless and either brought in bad faith or for the purpose of harassment."); *see also, D&T Trading, Inc. v. Kin Properties, Inc*., 2015 WL 12732366, at *4 (N.D. Tex. Aug. 5, 2015), report and recommendation adopted, 2015 WL 5637521 (N.D. Tex. Sept. 23, 2015) (holding that, because the court did not "ascribe an improper motive to Plaintiff," and because the court held only that the Plaintiff ***should have discovered*** the true facts, sanctions were not warranted under Texas Rule 13) (emphasis added).

Third, even if the Commission could establish a violation of Texas Rule 13, Rule 8.04(a)(12) does not apply because the Respondents did not violate the "laws of this state."[2] The term "laws of this state" does not include the Texas Rules of Civil Procedure. The Texas Rules of

[2] The Texas Rules of Civil Procedure are not the "Disciplinary Rules of Professional Conduct." Accordingly, a single violation of Texas Rule 13 is no more valid a basis for reciprocal discipline than is a single violation of Federal Rule 11.

Civil Procedure are created by the Texas Supreme Court, whereas the "laws of this state" are passed by the Texas Legislature. The Texas Constitution acknowledges the distinction between these two types of enactments, stating that the Texas Supreme Court has the authority to create "***rules of civil procedure*** for all courts not inconsistent with ***the laws of this state***." TEX. CONST. art. V, §31(b) (emphasis added); *see also*, TEX. GOV'T CODE §22.004(c) (providing that a ***rule of civil procedure*** adopted by the Supreme Court repeals all conflicting ***laws governing practice and procedure*** in civil actions) (emphasis added).

Under the Commission's argument, any violation of the state or federal procedure rules—no matter how trivial—would subject an attorney to discipline. As a few extreme examples, an attorney's failure to include his email address in a filed document (TRCP 21(f)(2)), failure to plead that the damages sought are within the jurisdictional limits of the court (TRCP 47(b)), or failure to timely serve initial disclosures (TRCP 194.2) would constitute an ethics violation. But that has never been the case. *See, e.g., Commission for Lawyer Discipline v. Powell*, 689 S.W.3d 620, 632 (Tex. App.—Dallas 2024, no pet.) (noting the court was "troubled" by the Commission's suggestion that "imprecise pleadings and carelessly filed exhibits" should give rise to discipline); *In the Matter of Powell*, BODA Cause No. 6537, at 12 (Boatright, J., concur.) (noting that the *Powell* opinion gave rise to interrelated inferences, including that the Bar had "prosecuted Powell for conduct that did not violate a rule" and that the Bar's "theory of the case could expose every litigator in Texas to discipline").

Not only is such a result unpalatable, it is inconsistent with the language of the Disciplinary Rules. The Board should not construe Rule 8.04(a)(12) in a way that renders other parts of the Disciplinary Rules meaningless or superfluous. *Robles v. Rivera*, 2018 WL 3120858, at *2 (Tex. App.—Dallas June 26, 2018, pet. denied) (citing *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*,

430 S.W.3d 384, 390 (Tex. 2014)) ("We do not interpret a statute or rule in a manner that renders any part of it meaningless or superfluous."). Under the Commission's argument, any violation of the Rules of Civil Procedure would be an ethics violation under Disciplinary Rule 8.04(a)(12). But such a reading is inconsistent with and would render superfluous Disciplinary Rule 3.04(c)(1), which prohibits an attorney from "habitually" violating established rules of procedure or evidence. TEX. DISC. R. 3.04(c)(1); *see also*, cmt. 3 (reiterating that paragraph (c)(1) "subjects a lawyer to discipline only for habitual abuses of procedural or evidentiary rules"). If any single violation of a procedure rule was a violation of Rule 8.04(a)(12), there would be no need for Rule 3.04's prohibition of "habitual" violations.

The Commission's interpretation also runs afoul of the rule of statutory construction that more specific rules control over general ones. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (recognizing "traditional statutory construction principle that the more specific statute controls over the more general"). As discussed above, Disciplinary Rule 3.04 specifically addresses violations of the rules of civil procedure, and only prohibits "habitual" violations, which would control over any general language in Rule 8.04(a)(12) that could be read as treating a single violation of a procedural rule as misconduct. The comments to the Disciplinary Rules also specifically address violations of Federal Rule 11, noting that "***the duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure exceed those set out in [Rule 3.01]***." TEX. DISC. R. 3.01, cmt. 4 (emphasis added). The comments also state that a lawyer "may be subject to ***judicial sanctions***"—not State Bar discipline—for a "single intentional violation" of the procedural rules. TEX. DISC. R. 3.04, cmt. 3 (emphasis added). These comments would make no sense if the Board were to adopt the Commission's argument.

In short, there is nothing in the Disciplinary Rules suggesting that a single, unintentional violation of a federal procedural rule constitutes Professional Misconduct. And to the contrary, the language directly and specifically addressing procedural rules, which "subjects a lawyer to discipline only for habitual abuses," controls over the general reference in Rule 8.04(a)(12) to the "laws of this state."

B. **The conduct established in the federal court warrants substantially different discipline in this state**.

The Commission argues that a public reprimand is warranted even though the sanction was based on the filing of one brief without thorough review because the brief at issue contained multiple errors. Response, p. 8. The Commission argues that Respondents did not fulfill their duty "to fully review and proof the brief to which they signed their names." *Id*. Still, that is a singular error in judgment due to misplaced reliance on New York co-counsel. The Commission's argument that Respondents engaged in multiple acts of misconduct is belied by the record and is not persuasive.

The Commission also relies on an agreed order in a different case in which the parties to that case agreed to a public reprimand as reciprocal discipline for a reprimand issued by a federal court. Response, pp. 9-10 (quoting the Order of Agreed Public Reprimand from *In the Matter of William Timothy Ladyman*, BODA Cause No. 69412, Commission's Ex. 6). The Commission claims that the Board "endorsed a finding that a formal reprimand in Federal Court is analogous to a public reprimand." Response, p. 9. But signing off on an agreement between the parties is a far cry from a finding by the Board that a public reprimand of an attorney is always warranted where a federal court has issued a reprimand. Unlike the Respondents in this case, the respondent in the cited Order "waive[d] any and all defenses that could be asserted under Rule 9.04," including

the defense that the misconduct at issue warrants substantially different discipline in this state. Moreover, the cited Order makes clear that the parties are agreeing to the findings of fact, conclusions of law, and orders set forth therein "solely for the purposes of this proceeding which has not been fully adjudicated." Response, Exhibit 6. The parties' agreed resolution in that case has no effect on the rights and defenses of Respondents in this case and is wholly inapplicable.

The Commission also takes issue with the Respondents' position that a private reprimand is more appropriate than a public reprimand under the guidelines set out in Texas Rule of Disciplinary Procedure 15.05(A)(3) because the offending brief was promptly withdrawn before any Court intervention and no injury was done to any party or to the case. The Commission presumes that, "had Respondents done a better job proofing the Response to the Motion to Dismiss and provided accurate case law, the Motion may not have prevailed and Plaintiff would not have had to re-file and replead." Response, p. 10. But that is pure speculation. In fact, to the contrary, by the time the federal court conducted the hearing on the Plaintiff's motion, Respondents had already filed a corrected Response Brief on behalf of their client. And the court specifically stated that, in ruling on the merits of the motion to dismiss, it was "putting aside the erroneous case law cited in the [original] Response." Order, p. 6.

The Commission argues that a public reprimand is warranted to address the "injury to the profession." But it does not protect the profession to punish attorneys for an isolated and unintentional lapse of diligence that does not demonstrate a disrespect for our legal system. The New York lawyers have unequivocally confirmed that the issues with the wrong case citations in the brief were on them:

> "And at some point, Texas deferred to New York and said, We're not going to read the cases, we assume the New York guys got the cases right." Omid Zareh, Resp. Ex. J, p. 26.

> "I think Mr. Nesbitt had been on for half an hour on the case, …. Look, these cases, the vast majority of them came from our firm, it came from my watch. And whatever William [Pham] was going through at the time, it rests with me." *Id*., p. 29.
>
> "Every time we needed a citation for something, I asked William [Pham] to look it up, and he made an error and I didn't proof it. It's on my watch, and I take full responsibility." *Id*., p. 30.

Still, the Commission appears to want to make an example of Respondents so that Texas attorneys will "now be concerned that inadvertent and truly mistaken citations will get them sanctions for accused use of Artificial Intelligence." Response, p. 10. But our disciplinary system is not designed to punish attorneys for "inadvertent and truly mistaken citations." The comments to the Disciplinary Rules make clear that a lawyer who acts in good faith is generally not subject to discipline for an isolated inadvertent or unskilled act or omission, tactical error, or error of judgment. TEX. DISC. R. 1.01, cmt. 7.

To the extent the Commission or the Board wants to send a message to the Bar regarding the use of AI, this is just not the case given the Respondents' lack of involvement in using AI. Moreover, the Commission does not dispute the mitigating factors present in this case, including the Respondents' absence of any prior disciplinary record, absence of any dishonest or selfish motive, timely good faith effort to rectify the consequences of the misconduct, sincere regret for what occurred, immediate and voluntary disclosure of the sanction to the disciplinary authority, cooperative conduct during the proceedings, and the Respondents' character and reputations in this community. TEX. R. DISC. PROC. 15.09(C). Those mitigating factors should not and cannot be ignored.

C. The imposition by this Board of a public reprimand would result in grave injustice.

In response to Respondents' grave injustice argument, the Commission states that Respondents seem to have a misunderstanding about why they were sanctioned. As was hopefully made clear in Respondents' opening brief, however, Respondents fully understand the mistakes that they made that led to the federal court reprimand. They have profusely apologized for those mistakes and have taken care that they will never occur again. Respondents' point—which the Commission does not dispute—was that the court itself made clear it would not have sanctioned Respondents had they only "confessed" to using AI, even though the court acknowledged Respondents may not have known:

> I probably wouldn't have done a public reprimand if you-all – well***, I wouldn't have done one 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.

Respondents' Exhibit J, pp. 40-41. As soon as the issue of AI was raised by opposing counsel, Respondents immediately confronted their New York co-counsel who had taken the lead in preparing the problematic pleading and, after being assured that they had not used AI, requested those lawyers to prepare and submit a declaration confirming that they had not used AI. Because the Respondents themselves did not use AI, and the lawyers who did the drafting swore they did not use AI, Respondents could not agree with the court that this was "an AI brief" simply to avoid the reprimand.

Finally, the Commission's conclusory assertion that a public reprimand by this Board is "patently not more severe" than the reprimand issued by the federal court (Response, p. 11), ignores the arguments made by Respondents regarding the public nature and permanence of a public reprimand. And the fact that the parties in another case agreed to a public reprimand is not a "finding" by this Board as argued by the Commission.

CONCLUSION AND PRAYER

For all the reasons discussed above and in Respondents' opening brief, Respondents Earl S. Nesbitt and Lane M. Webster each respectfully pray that the Board DENY the Commission's petitions for reciprocal discipline completely or, in the alternative, impose private reprimands.[3]

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 26th day of March, 2025.

/s/ Kelli M. Hinson
KELLI M. HINSON

[3] If the Board determines that one or more of Respondents' defenses have been established, it may enter such orders as it deems necessary and appropriate. TEX. R. DISC. PROC. 9.04.