United States Court of Appeals for the Federal Circuit

IN RE EDWARD R. REINES,
Respondent.

14-MA004 (14-4)

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and HUGHES *Circuit Judges.*

PER CURIAM.

O R D E R

Pursuant to Federal Rule of Appellate Procedure 46, it is hereby ordered, adjudged, and decreed that Edward R. Reines, a member of the bar of this court, is publicly reprimanded for his misconduct in disseminating an email to clients and prospective clients that he received from then-Chief Judge Rader.

I

Respondent is a member of the bar of this court, having been admitted to practice on October 1, 1993. At that time, he took an oath to "comport [himself] as an attorney and counselor of this court, uprightly and in accordance with the law . . . ." Respondent has appeared frequently before this court, and has served as the chair of the court's Advisory Council.

This matter had its genesis in oral argument held on March 4, 2014, in two companion cases: *Promega Corp. v.*

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Life Technologies Corp., 2013-1011 and *Promega Corp. v. Applied Biosystems, LLC*, 2013-1454. Respondent represented the appellants in both cases on appeal, and presented the oral arguments.

The next day, on March 5, 2014, at 3:24 p.m. EST, then-Chief Judge Rader sent a private email to the respondent.[1] In the email, then-Chief Judge Rader, who was

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[1] The email is included as Attachment A to this order. The subject line of the email was "Congratulations." The text of the email is as follows:

> Ed,
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> On Wednesday, as you know, the judges meet for a strictly social lunch. We usually discuss politics and pay raises. Today, in the midst of the general banter, one of my female colleagues interrupted and addressed herself to me. She said that she was vastly impressed with the advocacy of "my friend, Ed." She said that you had handled two very complex cases, back to back. In one case, you were opposed by Seth Waxman. She said Seth had a whole battery of assistants passing him notes and keeping him on track. You were alone and IMPRESSIVE in every way. In both cases, you knew the record cold and handled every question with confidence and grace. She said that she was really impressed with your performance. Two of my other colleagues immediately echoed her enthusiasm over your performance.
>
> I, of course, pointed out that I had taught you everything you know in our recent class at Berkeley together . . . NOT! I added the little enhancement that you can do the same thing with almost

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not a member of either panel, stated that judges on the *Promega* panels at a judges-only lunch had praised respondent's performance at the oral arguments. The email referred to a special friendship between Mr. Reines and then-Chief Judge Rader. In the email, then-Chief Judge Rader referred to Mr. Reines as "my friend" and said, "[i]n sum, I was really proud to be your friend today!" Then-Chief Judge Rader closed with "[y]our friend for life." The email also added an effusive endorsement by then-Chief Judge Rader himself and contained an invitation to share the email with others.

Respondent then circulated the email to no fewer than 35 existing and prospective clients, with accompanying comments soliciting their business based on the email. The majority of the more than 70 individuals who received it were lawyers, but some were non-lawyers. Respondent told some recipients that this type of feedback

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> any topic of policy: mastering the facts and law without the slightest hesitation or pause!
>
> In sum, I was really proud to be your friend today! You bring great credit on yourself and all associated with you!
>
> And actually I not only do not mind, but encourage you to let others see this message.
>
> Your friend for life, rrr

We note that the email contained certain inaccuracies, as then-Chief Judge Rader has himself noted. Letter from then-Chief Judge Randall Rader to Federal Circuit Judges (May 23, 2014) ("The email reported, with certain inaccuracies, a conversation I had with another member of the court . . . .").

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was "unusual" or "quite unusual." Reines Ex. 4; Ex. 8; Ex. 44; Ex. 45.

On June 5, 2014, we ordered that respondent show cause as to why his actions associated with the email did not warrant discipline by this court, *inter alia*, because they violated Rule 8.4(e) of the American Bar Association's Model Rules of Professional Conduct. The Show Cause order is included as Attachment B to this order. Model Rule 8.4(e) provides that it is professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." Model Rules of Prof'l Conduct R. 8.4(e) (2014).

Mr. Reines responded to the show cause order on July 7, 2014. Respondent acknowledged forwarding the email to clients and potential clients. Mr. Reines argued, *inter alia*, that he did not imply any improper influence under Model Rule of Professional Conduct 8.4(e); according to Mr. Reines, he forwarded the email "because information about [his] skill at oral advocacy is an appropriate consideration in the selection of counsel." Decl. of Edward R. Reines ¶ 19. Respondent also argued that ordering discipline would be unconstitutional under the First Amendment. Mr. Reines included statements of experts in legal ethics to support his arguments. Mr. Reines did not request a hearing in this matter pursuant to Federal Rule of Appellate Procedure 46(c) and Federal Circuit Attorney Discipline Rule 5(b).

Because of the importance of this matter, we determined to consider it en banc.

II

It is initially important to review the source of the court's authority. Federal Rule of Appellate Procedure 46 provides that a member of the bar of a court of appeals is

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subject to suspension or disbarment if he or she "is guilty of conduct unbecoming a member of the court's bar." Fed. R. App. P. 46(b)(1)(B). Similarly, any attorney who practices before the court may be subject to discipline "for conduct unbecoming a member of the bar." *Id.* 46(c). The Supreme Court has interpreted Rule 46 to "require[] members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice." *In re Snyder*, 472 U.S. 634, 644–45 (1985). This court and other circuits have imposed discipline under Federal Rule of Appellate Procedure 46.[2]

In determining whether an attorney's conduct constitutes "conduct unbecoming a member of the bar" under Rule 46, courts are to be guided "by case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." *Id.* at 645. These sources of guidance include the code of professional conduct promulgated by the attorney's home state bar. While state ethics rules "do[] not by [their] own terms apply to sanctions in the federal courts," a federal court "is entitled to rely on the attorney's knowledge of the state code of professional conduct . . . ." *Id.* at 645 n.6. Here, respondent is a member of the State Bar of California. We have also adopted Federal Circuit Attorney Discipline Rules, establishing procedures for attorney discipline, but not elaborating on the substantive standard for imposing discipline.

We conclude that with respect to the email dissemination we should look to the Model Rules of Professional Conduct rather than to the rules of any individual state. We note that other circuits have imposed discipline by

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[2] *See, e.g.*, *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1360–61 (Fed. Cir. 2011); *In re Girardi*, 611 F.3d 1027, 1035 (9th Cir. 2010); *In re Mann*, 311 F.3d 788, 790–91 (7th Cir. 2002).

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