People v. Gilbert. 10PDJ067. January 14, 2011. Attorney Regulation.
Following a hearing, a Hearing Board publicly censured Robert Edward Gilbert (Attorney Registration No. 13603), effective February 14, 2011. The Hearing Board could not find that Respondent's lack of civility to court staff, intemperate behavior during a hearing, or use of a repugnant gender-based epithet in the course of representing his client violated Colo. RPC 4.4(a), 3.5(d), or 8.4(d). However, Respondent violated the Colorado Rules of Professional Conduct by referring, in the course of negotiating a plea deal with prosecutors, to a female judge as a "c**t." Respondent's use of this slur violated Colo. RPC 8.4(g), which specifically proscribes a lawyer from engaging in conduct that exhibits bias or prejudice in the course of representing a client. His misconduct constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 8.4(g).

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** ROBERT EDWARD GILBERT	Case Number: **10PDJ067**
DECISION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19(b)	

On October 25 and 26, 2010, a Hearing Board composed of Terry F. Rogers and Boston H. Stanton, Jr., members of the Bar, and William R. Lucero, the Presiding Disciplinary Judge ("the PDJ"), held a hearing pursuant to C.R.C.P. 251.18. Elizabeth E. Krupa appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Frederick P. Bibik appeared on behalf of Robert Edward Gilbert ("Respondent"). The Hearing Board now issues the following "Decision and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19(b)."

I. ISSUE AND SUMMARY

This case requires us to consider whether Respondent's lack of civility to court staff, intemperate behavior during a hearing, or use of a repugnant gender-based epithet in the course of representing his client violate the Rules of Professional Conduct. While Respondent's rudeness and lack of common courtesy has, no doubt, contributed to tarnishing the image of the bar in the eyes of the public, the Hearing Board cannot find, under the facts presented at the hearing, that Respondent violated Colo. RPC 4.4(a) or 3.5(d).

Nor does the Hearing Board find that Respondent violated Colo. RPC 8.4(d) by referring, in the course of negotiating a plea deal with prosecutors, to a female judge as a "c**t;" Respondent's subjective opinion, however uncouth, did not prejudice the administration of justice. However, the Hearing Board does find that Respondent's use of this slur violated Colo. RPC 8.4(g), which specifically proscribes a lawyer from engaging in conduct that exhibits bias or prejudice in the course of representing a client.

II. PROCEDURAL HISTORY

On June 21, 2010, the People filed a complaint, and Respondent filed an answer on August 9, 2010. An at-issue conference was held on August 24, 2010. At the October 25-26, 2010, hearing, the Hearing Board heard testimony and the PDJ admitted the People's exhibits 1-4. At the request of Respondent, to which the People did not object, the PDJ also re-opened the evidence following the trial to allow the Hearing Board to consider an audio recording of Respondent's April 21, 2009, court appearance in Clear Creek County Court.

III. FINDINGS OF FACT AND RULE VIOLATIONS

The Hearing Board finds the following facts and rule violations have been established by clear and convincing evidence.

Jurisdiction

Respondent took the oath of admission and was admitted to the Bar of the Colorado Supreme Court on August 19, 1984. He is registered upon the official records, Attorney Registration No. 13603, and is thus subject to the jurisdiction of the Hearing Board in these disciplinary proceedings.[1] Respondent's registered business address is P.O. Box 740712, Arvada, Colorado 80006.

The Hearing of March 17, 2009

On the morning of March 17, 2009, Respondent, attorney of record for Eli Curry-Elrod, telephoned the Clear Creek County Court to advise the court of a resolution of the DUI case *People v. Eli Curry-Elrod,* Case No. 08T1524, and to further advise the court that the hearing scheduled for that afternoon could be vacated. Respondent spoke with Assistant Court Clerk Kimberly Devlin, who put Respondent on hold to confirm the court's procedures with Clerk of Court Kim Hill. Having conferred with Hill, Devlin resumed her conversation with Respondent, conveying to him that he was required to fax to the court a motion and a proposed order, with a fax charge of $1.00 per page. Respondent became agitated and responded, "Who the hell made that rule [governing fax charges], Judge Ruckriegle?" He also protested that every other court he had dealt with would vacate a motions hearing based on a verbal request. Devlin testified that it was clear Respondent was angry, and although she was bothered Respondent "would say something like he did about the judge," she was neither embarrassed nor upset by Respondent's behavior.

[1] *See* C.R.C.P. 251.1(b).

Following Devlin's instructions, Respondent drafted a cursory motion to vacate the hearing, which he faxed to the Clear Creek court at approximately 1:49 p.m. that afternoon[2]—forty minutes in advance of the scheduled 2:30 p.m. hearing. The Honorable Rachel J. Olguin-Fresquez quickly reviewed and denied the motion, commenting that "Def[endant] has given no reason to vacate the hearing."[3]

Assistant Court Clerk Debbie Dhyne then called Respondent prior to the scheduled hearing to alert him to the judge's basis for denial and to advise Respondent to submit a more detailed motion memorializing his verbal request to vacate. Respondent, who was practicing in another court, was not in a position to fax another pleading, and he demanded Dhyne transfer his call to Judge Olguin-Fresquez to discuss the matter. Dhyne demurred, since the judge was in trial and, in any event, court policy dictated that "calls don't go to the judge." Respondent became irate and impolite; his voice changed, becoming "curt, short, and louder," and his "tone was condescending and angry." He berated Dhyne for not understanding her job and not knowing proper procedure, after which he abruptly hung up. Dhyne testified that Respondent's conduct "made me feel belittled," and "his telephone call made me antsy for the rest of the day." Nevertheless, Dhyne said Respondent's insults did not prevent her from doing her job and, on the whole, merely caused her frustration.

At 2:30 p.m., Respondent failed to appear for the scheduled motions hearing. Although Respondent had advised the court staff verbally that the matter was resolved, Judge Olguin-Fresquez nonetheless issued a bench warrant for Curry-Elrod's arrest, with execution of the warrant stayed until a court date of March 24, 2009.[4] Less than an hour later, at 3:20 p.m., Respondent faxed in a more thorough motion articulating his reasons for seeking to vacate the hearing.[5] By then, however, the time for the hearing had already passed.

Clerk of Court Kim Hill testified that she could not locate Respondent's fax number and thus decided to telephone Respondent soon thereafter to notify him of the bench warrant and the March 24, 2009, hearing date. When she reached Respondent, she requested his facsimile number so she could fax to him a copy of the order.[6] Respondent replied that Hill would have to pay him

---

[2] People's exhibit 3.

[3] *Id.*

[4] People's exhibit 4.

[5] *Id.*

[6] Testimony at the hearing created significant ambiguity as to which document Hill wished to fax Respondent. Hill initially testified she hoped to fax Judge Olguin-Fresquez's second order. On cross-examination, however, she acknowledged that she could not have possibly faxed the court's order ruling on Respondent's second motion on March 17, 2009, because it formally issued only two days later, on March 19, 2009. We have no choice but to conclude Hill sought

$5.00 to use his facsimile machine, so Hill asked Respondent whether she could instead read the order to him. Before she could deliver the substance of the order, Respondent hung up on her. Respondent acknowledged this was discourteous but explained he did so to avoid causing further harm: he testified, "I hung up before I said something I would regret."

Prior to leaving the court that evening, Judge Olguin-Fresquez telephoned Respondent directly to confront him about his behavior with the court clerks. She left a message for him, and he attempted to return her call that night, but the two never spoke with one another. Nonetheless, Respondent telephoned Dhyne the following day to apologize for his behavior, acknowledging he treated her unfairly. Also the next day, Judge Olguin-Fresquez wrote a letter to Respondent in which she instructed him to submit all subsequent communications to the court in writing and explicitly forbade him from initiating telephone contact with the court clerks.[7]

Two days later, on March 19, 2009, Judge Olguin-Fresquez formally denied Respondent's second more detailed motion to vacate, noting that "Matter is moot having been filed after B[ench]W[arrant] had issued. BW is stayed to court date on 3/24/09."[8] Hill testified that because she could not locate Respondent's fax number, she mailed the order on Friday, March 20, 2009. Respondent testified that he did not receive the order until the night of Tuesday, March 24, 2009, after the hearing had already taken place and during which Judge Olguin-Fresquez lifted the stay on the bench warrant for Curry-Elrod's arrest.[9]

---

to fax the court's order denying Respondent's *first* motion but are left to surmise, with no satisfactory explanation, why she would have done so, since Hill also testified that she was aware Dhyne had communicated to Respondent the court's disposition of that first motion.

[7] The Hearing Board makes these findings based only on Respondent's testimony that he had been contacted by Judge Olguin-Fresquez, since a copy of the judge's letter was not introduced into evidence.

[8] People's exhibit 4.

[9] Although not germane to the issues before us, we are nonplussed by Respondent's behavior following his receipt of the court's order denying his second motion. Respondent discovered via mail on March 24, 2009, that not only had his second motion to vacate been denied, but that he had also missed a hearing that same day, subjecting Curry-Elrod to possible arrest. Notwithstanding the court's order, Respondent failed entirely to inquire with the court about the status of his motion to vacate or attempt to rectify his failure to appear at the March 24, 2009, hearing. Even more curious, Respondent never alerted Curry-Elrod to the fact that a bench warrant had issued for his arrest, although Respondent had ample opportunity to do so, since Curry-Elrod was arrested on April 7, 2009—a full twelve days after the court's bench warrant issued. Had the People pled in their complaint Respondent's failure to notify Curry-Elrod of these developments—or his failure to otherwise take affirmative steps to avert Curry-Elrod's arrest—the Hearing Board would have had no trouble finding a violation of Colo. RPC 8.4(d). But we cannot infer these facts into the People's present Colo. RPC 8.4(d) claim, as Respondent was afforded no notice or opportunity to defend against them. *See In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 112, 20 L.Ed.2d 117 (1968) (stating due process requires disciplinary proceedings to afford notice of charges made and opportunity for explanation and defense).

The People contend Respondent's conduct violated Colo. RPC 4.4(a), which proscribes a lawyer, in the course of representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third party. Pointing to the asperity with which he treated court staff while representing Curry-Elrod, the People argue that Respondent's conduct served no purpose other than to embarrass, delay, or burden court personnel, and thus is sanctionable under the Rules of Professional Conduct. Respondent disagrees. He maintains that his calls with the court clerks were intended to vacate a needless hearing and, while he was "not on his best behavior that day," his conduct was not designed to embarrass, delay, or burden anyone.

Colo. RPC 4.4(a) focuses on the "substantial purpose" of a lawyer's actions and not on the effect that conduct might have upon a third person.[10] But the People failed to present clear and convincing evidence that Respondent's rude and indecorous remarks to court personnel were substantially fueled by his motive to embarrass, delay, or burden them. Rather, we credit Respondent's testimony that he was focused on vacating what he considered to be an unnecessary hearing, and although he was "feeling extreme frustration," his comments were primarily intended to communicate his view that the court's procedure was irregular and to encourage the staff to resolve the situation more to his liking. For this reason, we cannot find that Respondent violated Colo. RPC 4.4(a). But we hasten to add that we do not condone Respondent's ill-mannered treatment of the court's clerks; while such impolite behavior may not violate our ethical rules, it both corrodes the profession's reputation and potentially compromises clients' interests.

The Hearing on April 21, 2009

On April 21, 2009, Respondent appeared at the Clear Creek County courthouse for a scheduled hearing. That morning, before his court appearance, Respondent met with Deputy District Attorney Michael W.V. Angel to discuss a possible plea agreement in Curry-Elrod's case. Respondent and Angel met in the jury deliberation room, a small chamber directly adjacent to Judge Olguin-Fresquez's courtroom, where Assistant District Attorney Scott W. Turner was also working.

In the course of negotiating a plea agreement, Respondent told Angel that he planned to file a motion seeking to recuse Judge Olguin-Fresquez from Curry-Elrod's case. Respondent listed his reasons for seeking her recusal, chief among them his belief that the judge was biased against him and his client, after which he launched into a discussion of his history with Judge Olguin-Fresquez. Respondent told the prosecutors the judge had appeared

[10] *Accord Idaho State Bar v. Warrick*, 44 P.3d 1141, 1145 (Idaho 2002).

before him as a district attorney when he sat as a magistrate, referring to her as an "idiot," and he recalled attending en banc meetings of the judiciary with Judge Olguin-Fresquez during which, he opined, she asked "stupid questions." Respondent went on to impugn Judge Olguin-Fresquez's legal acumen, challenge her intelligence, and derisively refer to her as a "c**t." Angel said he and Turner exchanged "shocked and incredulous" glances, but neither chose to "make an issue of it" with Respondent.[11] In the course of this diatribe, Respondent inquired whether the district attorney's office would object to a motion to recuse Judge Olguin-Fresquez, and Angel said he would have no objection. At the end of the discussion, Angel completed the paperwork necessary for the negotiated disposition and transferred the file to the court staff.

Immediately following Respondent's discussion with Angel, Respondent appeared before Judge Olguin-Fresquez in Curry-Elrod's case. Respondent immediately stated that he and Angel had resolved the matter but that he planned to file a motion to recuse the judge from the case. Judge Olguin-Fresquez inquired as to the grounds of Respondent's motion in order to determine whether or not she should even accept Curry-Elrod's plea. Because Respondent refused to provide grounds, the judge set the matter over for a plea and sentencing two weeks thereafter and attempted to conclude the hearing with, "All right, gentlemen, if you will proceed up to the front window, the clerks will give you setting slips, bond and all bond conditions will continue . . . ."[12]

Respondent then pressed Judge Olguin-Fresquez to vacate the bond, which she refused to do, and he complained that "never in 35 years" had he been required, as he had on March 17, 2009, "to file a motion to vacate a hearing for a motion to suppress." The hearing thereafter digressed; Judge Olguin-Fresquez upbraided Respondent for mistreating her clerks, while Respondent criticized the court's earlier failure to consult him when setting a date for jury trial in the matter. The exchange ended abruptly when Judge Olguin-Fresquez ordered Respondent out of her courtroom, saying, "Mr. Gilbert, go waste someone else's time," and "I'm frustrated with your arrogance to this court. Go get your assignment and go."[13]

Although the Hearing Board has reviewed the transcript of the April 21, 2009, hearing and listened to the audiotaped recording of the interaction,[14]

---

[11] Nor did either prosecutor feel compelled to report Respondent's behavior to his superiors.

[12] People's exhibit 2.

[13] *Id.*

[14] Videotape of the courtroom interaction was destroyed, per court procedure, shortly after Respondent's appearance, and the audio recording of the encounter is all but inaudible: both Respondent and the People declined to play the recording for the Hearing Board. However, the PDJ later granted Respondent's October 27, 2010, motion to re-open the evidence to submit the audio recording, to which the People did not object.

accounts nonetheless differ as to the tone, mood, and aspect of the colloquy between Respondent and Judge Olguin-Fresquez. While no one present during the hearing would characterize their dialogue as cordial, reactions otherwise run the gamut. Respondent contends he represented his client zealously by making a necessary record, even if his conduct may have been unpleasant. Clear Creek County Deputy Sheriff Reggie Wilson, who was supervising inmate detainees in the courtroom during the hearing, noted Respondent got "louder and louder" and his tone "escalated" while at the podium, but Wilson otherwise noted nothing unusual. Turner testified the exchange "got heated and loud on both sides," but he did not observe any safety concerns. Angel said Respondent was "extremely disrespectful to the court," which was "unexpected and out of the ordinary." And Hill asserted that the argument reached a "fever pitch" when Respondent allegedly made menaging gestures. Hill claimed—although the evidence presented indicates that no other person shared Hill's alarm—that Respondent grabbed his briefcase, placed it on the podium, aggressively thrust his hand into the briefcase, and left his hand inside the case for several minutes. Hill said Respondent's behavior "scared me to death" and she "feared for my life," since she "was afraid that [Respondent] was going to shoot the judge or me." In response, Hill remotely unlocked the judge's chambers to facilitate a "faster exit," and she gestured to another clerk to call for additional security coverage.

Sergeant Chris Bridges, of the Clear Creek County Sheriff's Office, responded to the call for assistance made at Hill's behest. As he approached the courtroom, Bridges passed within eighteen inches of two gentlemen rounding a corner in the otherwise empty hallway; he overheard the older of the two men, who was carrying a briefcase, say to the other, "She's such a f****** c**t."[15] Bridges conceded he could neither identify the speaker nor confirm the subject of the speaker's invective. By the time Bridges arrived in the courtroom, the hearing had concluded and Respondent had left the area. But Bridges checked in with Judge Olguin-Fresquez and court personnel, who assured him that everything was fine and that no safety issues were present.

The People first argue that Respondent's argumentative and, at least in Hill's eyes, threatening approach during the April 21, 2009, hearing violates Colo. RPC 3.5(d), which forbids attorneys from engaging in conduct intended to disrupt a tribunal. They postulate that Respondent's irritation with the court intensified following Judge Olguin-Fresquez's denial of his second motion to vacate, engendering in Respondent a desire to confront and berate the judge on April 21, 2009.

[15] Respondent, in contrast, testified that while standing twenty to thirty feet from the courtroom, he remarked to his client, "the judge is treating us like a c**t." However, he claimed that the expletive referred to *him and his client*, rather than the judge.

We do not interpret the transcript or the audiotape of the April 21, 2009, hearing in the same way, and we find the People failed to marshal clear and convincing evidence demonstrating Respondent intended to disrupt the tribunal in violation of Colo. RPC 3.5(d). While bystanders agree that Respondent disrespectfully raised his voice while at the podium, there is nothing in the transcript or the recording to reveal that Respondent's principal aim was to disrupt the proceedings. To the contrary, these sources suggest that Respondent was intent on *continuing* the hearing so that he might present his case and make a record for subsequent review, which he was entitled to do.[16]

We also cannot credit Hill's testimony that Respondent made threatening gestures while he stood at the podium. Rather, the balance of the evidence indicates that Respondent never made such gestures or caused anyone else in the courtroom to fear for their safety. Indeed, no other witness recalled Respondent reaching into his briefcase in a threatening manner. Thus, we cannot find that Respondent possessed the requisite conscious objective to interrupt or otherwise throw into disorder the April 21, 2009, hearing.[17]

The People next allege Respondent prejudiced the administration of justice in violation of Colo. RPC 8.4(d) by using gender-specific profanity in reference to Judge Olguin-Fresquez while in the courthouse, by treating the court clerks and Judge Olguin-Fresquez disrespectfully, and by failing to appear for hearings on March 17 and 24, 2009.

With respect to Respondent's treatment of the court clerks and his demeanor during the April 21, 2009, hearing, we have already found no violation of the Rules of Professional Conduct. Because these same operative facts do not lend themselves to sanctions under other, more specific, rules, the Hearing Board finds no cause to impose discipline under Colo. RPC 8.4(d). As regards Respondent's failure to appear at the March 17 and 24, 2009, hearings, the Hearing Board has not been persuaded by clear and convincing evidence that Respondent's absences impeded or subverted the process of resolving Curry-Elrod's case.[18] Further, we consider Respondent's failure to attend the second hearing understandable, if not excusable, when viewed in the context of his belated receipt of notice.

---

[16] Colo. RPC 3.5, cmt. 4 ("A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

[17] *See In re Attorney C*, 47 P.3d 1167, 1173 (Colo. 2002) (noting intent requires a conscious objective or purpose to accomplish a particular result).

[18] *See In re Friedman*, 23 P.3d 620, 628 (Alaska 2001) (finding the Alaska rule of professional conduct barring conduct prejudicial to the administration of justice "contemplates conduct which impedes or subverts the process of resolving disputes; it is conduct which frustrates the fair balance of interest or 'justice' essential to litigation or other proceedings").

Thus, the Hearing Board turns to a key issue in this matter: whether Respondent's use of a gender-specific profanity in reference to Judge Olguin-Fresquez while meeting with Angel[19] prejudiced the administration of justice. Respondent asserts his comment to the prosecutors is opinion expressed as rhetorical hyperbole, which constitutes free speech protected by the First Amendment.

The Hearing Board's analysis begins and ends with the Colorado Supreme Court's decision in *In re Green.*[20] In that case, Green, an African-American lawyer, filed a C.R.C.P. 97 motion to recuse a trial court judge, who was reconsidering the reasonableness of Green's attorney's fees following remand from appeal. In his motion, Green lambasted the judge "for bias and prejudice" and "callous indifference and impatience with [Green's] oral arguments as reflected in [the judge's] facial grimaces."[21] Over the course of the next several months, while the judge reconsidered Green's fee award, Green wrote three letters and an additional motion to recuse in which he insinuated the judge possessed a "bent of mind" that was not "free of all taint of bias and impartiality."[22] He also denounced the judge as "a racist and bigot for racially stereotyping me as unable to be an attorney because I was black."[23]

Disciplinary counsel charged Green with violating Colo. RPC 8.4(d) by engaging in conduct prejudicial to the administration of justice, but the Colorado Supreme Court dismissed the charge, premising its decision on "the accepted legal principle that if an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct."[24] The court determined that sanctioning an attorney for criticizing a judge is analogous to a defamation action by a public official for the purpose of a First Amendment analysis and therefore applied the *New York Times Co. v. Sullivan* test, which provides:

---

[19] The People have not presented clear and convincing evidence that Bridges's testimony establishes a Colo. RPC 8.4(d) violation. Bridges testified that an older man carrying a briefcase in the courtroom hallway referred to an unidentified woman as a "f****** c**t." Yet Bridges could not identify the speaker, and he acknowledges he did not know whom the speaker was referencing; as such, Bridges's testimony neither implicates Respondent nor confirms that Judge Olguin-Fresquez was being discussed by the man in the hallway. To the extent the People's Colo. RPC 8.4(d) and 8.4(g) claims are premised on Bridges's testimony, we must reject them.

[20] 11 P.3d 1078 (Colo. 2000).

[21] *Id.* at 1081.

[22] *Id.* at 1082.

[23] *Id.*

[24] *Id.* at 1083 (citing *In re Primus*, 436 U.S. 412, 432-33, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 355, 365, 384, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *State v. Porter*, 766 P.2d 958, 966-70 (Okla. 1988)).

> [The First Amendment] prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[25]

The court also noted, however, that a "crucial distinction exists between false statements of fact which receive no constitutional protection in defamation cases and ideas or opinions which by definition can never be false so as to constitute false statements which are unprotected."[26] On this basis, the court held that Green's allegations against the judge did not involve false statements of fact and instead were protected subjective opinions.[27]

In light of the holding in *Green*, Respondent argues that his remark was not a statement of fact, but rather an idea or an opinion that is incapable of being proved false.[28] The Hearing Board agrees with Respondent that his remark did not involve a statement of fact, since the profanity he used to describe Judge Olguin-Fresquez is, for all intents and purposes, void of real meaning and thus can be proved neither true nor false. Indeed, Respondent's slur was nothing more than emotive language designed to convey disgust, disdain, and loathing—the essence of subjective opinion.

The People urge us to distinguish *Green*, arguing that the factual context here merits differentiation. They reason that insofar as *Green* involved a lawyer's obligation to provide a statement of pertinent facts to the trial judge in support of his motion to recuse, Green's accusations served some practical purpose. The People also contend that while Green's criticism was considered in the context of "the principal purpose of the First Amendment [which is] safeguarding public discussion of governmental affairs,"[29] Respondent's comment cannot be considered political speech and is thus not entitled to the full panoply of First Amendment protections.

We acknowledge that Respondent's statement occurred in a context radically different from that in *Green*. While Green was required to provide reasons for recusal, it is difficult to envision how Respondent's utterance to the district attorneys could have served any proper function in defending Curry-

---

[25] 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).
[26] *Green*, 11 P.3d at 1084 (citing *Bucher v, Roberts*, 198 Colo. 1, 3, 595 P.2d 239, 241 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)).
[27] *Id.* at 1086.
[28] Respondent relies on *Gertz,* 418 U.S. at 339-40 ("Under the First Amendment there is no such thing as a false idea.") and *U.S. Dist. Court for Cent. Dist. of Cal. v. Yagmin*, 55 F.3d 1430, 1438 (9th Cir. 1995) ("[S]tatements of 'rhetorical hyberbole' aren't sanctionable, nor are statements that use language in a loose, figurative sense.") (internal citations omitted).
[29] *Green*, 11 P.3d at 1085.

Elrod. We also recognize, as does Respondent, that his use of profanity in this instance does not constitute political speech.

Nevertheless, the People's efforts to distinguish *Green* fail to sway us, since the Colorado Supreme Court's decision in that case was founded on an element held in common with the one before us. Specifically, we are guided by the court's finding of a "somewhat less compelling government interest in disciplining Green than existed in other cases dealing with attorney discipline for criticism of judges, all of which involved disparaging comments about judges made to a public audience."[30] Because "Green's statements were directed to a limited audience—the judge in question and opposing counsel—and not to the general public," the court held that "the possible adverse effect on the administration of justice appears to have been minimal."[31] Likewise, in this case, Respondent's statement was restricted to Angel and Turner, thereby limiting the likelihood of real prejudice to the administration of justice.[32] Because we cannot materially distinguish the matter here from the Colorado Supreme Court's decision in *Green*, we are bound to follow that authority. Accordingly, we do not find Respondent violated Colo. RPC 8.4(d).

Finally, the Hearing Board turns to the People's fourth claim for relief—that Respondent's remark to the prosecutors violated Colo. RPC 8.4(g), which provides it is professional misconduct for a lawyer to:

> engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether the conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Comment 3 to Colo. RPC 8.4 explains that "[a] lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon . . . gender . . . violates paragraph (g)."

This is a matter of first impression; Colo. RPC 8.4(g) has not yet been interpreted by any Colorado tribunal, nor has its predecessor, Colo. RPC 1.2(f).[33] At first blush, Respondent's conduct appears to fit squarely within the parameters of the rule. Respondent's use of "c**t," a gender-based epithet, was made in reference to Judge Olguin-Fresquez, a female judge, during the course

---

[30] *Id.* at 1086.
[31] *Id.* at 1086-87.
[32] *Cf. In re Spivey*, 480 S.E.2d 693, (N.C. 1997) (finding district attorney, who loudly and repeatedly referred to an African-American as a "n****r" while at a bar, constituted conduct prejudicial to the administration of justice).
[33] Repealed 2007 and replaced with Colo. RPC 8.4(g), effective January 1, 2008.

of representing Curry-Elrod in a plea negotiation with Angel.[34] The only outstanding question is whether Respondent's use of this slur "exhibit[ed] or [was] intended to appeal to or engender bias" against Judge Olguin-Fresquez on account of her gender.

The evidence presented does not clearly and convincingly militate in favor of finding that Respondent "intended to appeal to or engender bias" in his audience. Although we can envision a scenario in which Respondent purposely referred to Judge Olguin-Fresquez as a "c**t" in order to create an atmosphere in which the male prosecutors might sympathize with him or provide him ammunition in his quest to recuse Judge Olguin-Fresquez, such conjecture is not solidly grounded in the People's evidence.

However, the People have shown by clear and convincing evidence that Respondent engaged in conduct that exhibited bias by "knowingly manifest[ing] by word"[35] gender prejudice against Judge Olguin-Fresquez. The only definition ascribable to "c**t"—"the female pudenda, or the female external genital organ"—inherently exhibits bias on the basis of gender and is "usually considered 'obscene.'"[36] One court has noted that "'c[**]t,' referring to a woman's vagina, is the essence of a gender-specific slur."[37] This highly pejorative, taboo term "is properly deemed more offensive to women than men by virtue of its intrinsically degrading nature to women."[38] The Hearing Board therefore concludes Respondent's conduct falls within the ambit of Colo. RPC 8.4(g).

---

[34] The authority available supports the conclusion that Respondent's statement was made while "representing" Curry-Elrod. "Representing a client" is generally read broadly to encompass any transaction in which an attorney is dealing with others on a client's behalf, whether or not the client approves of the attorney's action. *See, e.g.,* Colo. RPC 4.1, cmt. 1 (suggesting that "in the course of representing a client" equates to any interaction "dealing with others on a client's behalf"); *In re Aitken,* 787 N.W.2d 152, 160 (Minn. 2010) (finding that an attorney's forgery of a client's signature on a document submitted to district court was done in the course of representing the client). Here, Respondent called Judge Olguin-Fresquez a "c**t" in the midst of discussing a plea deal with Angel, his opponent, on behalf of his client. He did so in a small room adjacent to the courtroom in the Clear Creek County courthouse on the date set for his appearance before the court.

[35] Colo. RPC 8.4, cmt. 3.

[36] *Smith v. Exxon Mobil Corp.,* No. Civ.A. 02-4425, 2005 WL 1712023, *13 n.33 (D.N.J. July 19, 2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 554 (1993)).

[37] *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d. 798, 812 (11th Cir. 2010); *see also Gallagher v. C.H. Robinson Worldwide, Inc.,* 567 F.3d 263, 271 (6th Cir. 2009) (noting use of term "c**t" and other "patently degrading" terms "evinces anti-female animus"); *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 299 (1st Cir. 2007) (describing "c**t" and other words as "sexually degrading, gender-specific epithets").

[38] *Kendel v. Local 17A United Food & Commercial Workers*, --F.Supp.2d--, No. 5:09 CV 1999, 2010 WL 3665424, *5 (N.D. Ohio Sept. 16, 2010).

Although decided prior to enactment of our current Rules of Professional Conduct, the Hearing Board considers *People v. Sharpe*[39] as persuasive authority in support of our finding. In that case, Sharpe, a deputy district attorney in a death penalty case, conferred with the two defendants' counsel in a hallway outside the courtroom. During the conversation, Sharpe announced, "I don't believe either one of those chili-eating bastards," which was perceived as motivated by prejudice against Hispanics.[40] Sharpe stipulated, and the Colorado Supreme Court agreed, that his remark "was highly inappropriate, offensive, and brought disrepute upon the legal profession in general."[41] Sharpe was publicly censured for conduct adversely reflecting on his fitness to practice law.

Decisions of sister jurisdictions, based on similarly worded rules of professional conduct, also support the Hearing Board's finding. *In re Thomsen*,[42] decided by the Indiana Supreme Court, is instructive. There the court addressed application of Indiana Professional Conduct Rule 8.4(g), which prohibits a lawyer from engaging in a professional capacity in conduct that manifests by words or conduct bias or prejudice based on race or gender.[43] Thomsen, who represented a husband in an action for dissolution of marriage, filed a petition for custody that alleged the wife associated herself "in the presence of a black male, and such association is causing and is placing the children in harm's way."[44] At a bench trial, Thomsen continued to make disparaging remarks about "the black guy" and the "black man [the wife] had at [her] house."[45] The court found that Thomsen's comments did "not meet the standards for good manners and common courtesy, much less the professional behavior we expect from those admitted to the bar," concluding that such misconduct "serve[s] only to fester wounds caused by past discrimination and encourage future intolerance," which constitutes "a significant violation [that] cannot be taken lightly."[46]

---

[39] 781 P.2d 659 (Colo. 1989).
[40] *Id.* at 660.
[41] *Id.*
[42] 837 N.E.2d 1011 (Ind. 2005). *See also In re McCarthy*, --N.E.2d--, No. 41S00-0910-DI-4372010, WL 5178048 *1 (Ind. Dec. 21, 2010) (finding violation of Indiana Professional Conduct Rule 8.4(g), which prohibits engaging in conduct in a professional capacity that manifests bias or prejudice when, in course of representing a client, attorney chastised secretary of opposing counsel that he was not her "n****r"); *In re Kelley*, 925 N.E.2d 1279 (Ind. 2010) (finding violation of Indiana Professional Conduct Rule 8.4(g) when attorney gratuitously asked a company representative if he was "gay" or "sweet"); *In re Campiti*, 937 N.E.2d 340 (Ind. 2009) (finding violation of Indiana Professional Conduct Rule 8.4(g) when attorney, while representing father at child support modification hearing, made repeated disparaging references to fact that mother was not a citizen and was receiving free legal services).
[43] *Id.*
[44] *Id.*
[45] *Id.* at 1012.
[46] *Id.*

The Hearing Board also looks to *Idaho State Bar v. Warrick*,[47] a case that construes Idaho Rule of Professional Conduct 4.4(a), which proscribes conduct intended to appeal to or engender bias against a participant in court proceedings. In that case, Warrick visited a jail housing a defendant whom Warrick was prosecuting for felony trafficking of methamphetamine.[48] While there, Warrick wrote the words "waste of sperm" and "scumbag" next to the criminal defendant's name on the inmate control board.[49] The Idaho Supreme Court concluded Warrick's conduct was inappropriately aimed at a party he was prosecuting in a pending action.[50] The court also found that "[d]espite the fact that [the defendant] did not see the words, nor were the words conveyed to [the defendant], their purpose could only have been to demean [the defendant] in the eyes of others" and "had no substantial purpose other than to embarrass [the defendant] and was intended to engender bias in the local law enforcement personnel."[51] These decisions bolster our conclusion that Respondent's similar conduct violates Colo. RPC 8.4(g).

Respondent advances the argument that the First Amendment and *Green* preclude application of Colo. RPC 8.4(g). The Hearing Board, however, takes heed of its charge to make findings of fact and to reach a decision[52] in accordance with the Colorado Rules of Professional Conduct and the Colorado Rules of Civil Procedure.[53] We are vested with the limited responsibility of applying the facts, as we find them, to the framework established by these governing authorities. This framework includes Colo. RPC 8.4(g), which was drafted by the Colorado Supreme Court Committee on the Colorado Rules of Professional Conduct, reviewed through a public notice and comment period, and approved by the Colorado Supreme Court. As such, it is not within our purview, as Respondent urges, to find that Colo. RPC 8.4(g) is trumped by Respondent's First Amendment rights as articulated in *Green*: the Colorado Supreme Court alone "has the power to determine the law of this jurisdiction as applied in disciplinary proceedings,"[54] and it alone reserves plenary authority to regulate the practice of law.[55]

---

[47] 44 P.3d 1141 (Idaho 2002).
[48] *Id.* at 1142-43.
[49] *Id.* at 1143.
[50] *Id.* at 1146.
[51] *Id.*
[52] C.R.C.P. 251.19(a).
[53] *See* C.R.C.P. 251.16(c); C.R.C.P. 251.17(a).
[54] *In re Roose*, 69 P.3d 43, 48 (Colo. 2003).
[55] The Hearing Board does, however, perceive a tension between Colo. RPC 8.4(g) and *Green*. In *Green,* the respondent was charged with violating: Colo. RPC 8.4(d) (1993 Version) (stating it is misconduct to engage in conduct that is prejudicial to the administration of justice); Colo. RPC 8.4(g) (1993 Version) (stating that it is misconduct to engage in conduct which violates accepted standards of legal ethics); and Colo. 8.4(h) (1993 Version) (stating that it is misconduct to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law). The Colorado Supreme Court ruled explicitly that "[t]he question we decide in this case is whether the First Amendment allows us to discipline Green for expressing a contrary conclusion. We believe it does not. We therefore dismiss the charges that Green

Accordingly, we apply the language of Colo. RPC 8.4(g) as written. When we do so, we conclude that Respondent's conduct while negotiating with the deputy district attorney was inappropriate in the courthouse setting and in the context of discussions with opposing counsel. His choice of words was gratuitous; it neither advanced his client's cause nor furthered his own ends. Simply put, his use of this insult served no purpose other than to demean and degrade Judge Olguin-Fresquez based upon her gender. We therefore conclude Respondent violated the plain language of Colo. RPC 8.4(g).

SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA *Standards*") and Colorado Supreme Court case law govern the selection and imposition of sanctions for lawyer misconduct. ABA *Standard* 3.0 mandates that, in selecting the appropriate sanction, the Hearing Board must consider the duty breached, Respondent's mental state, the injury or potential injury caused, and the aggravating and mitigating evidence.

ABA *Standard* 3.0 – Duty, Mental State, and Injury

Duty: Respondent violated his duty to the legal system and the legal profession, since he failed to "demonstrate respect for the legal system and for those who serve it."[56] By exhibiting bias against Judge Olguin-Fresquez on account of her gender while representing a client, Respondent neglected his duty to "scrupulously avoid statements as well as deeds that could be perceived as indicating that [his] actions are motivated to any extent by [gender] prejudice,"[57] thereby abandoning certain standards of conduct expected of all officers of the court.

Mental State: The Hearing Board concludes Respondent knowingly called Judge Olguin-Fresquez a "c**t" during his negotiations with the prosecutors.

---

violated Colo. RPC 8.4." 11 P.3d at 1087. Ultimately, the Colorado Supreme Court concluded that "the First Amendment prohibits disciplining Green on the basis of his communications with the judge because the communications did not make or imply statements of fact." *Id.* at 1080. *Green* thus appears to provide very broad protections for attorneys' criticism of judges unless the criticism is, or implies, a false statement of fact. The tension between *Green* and Colo. RPC 8.4(g) arises because the current language of Colo. RPC 8.4(g), which earlier was found in Colo. RPC 1.2(f) (1993 Version), was never addressed in *Green.* Following the *Green* decision, the Colorado Rules of Professional Conduct were re-enacted, effective January 1, 2008. The new rules moved the language at issue to Colo. RPC 8.4(g) without comment regarding how the ruling in *Green* might affect its application. Accordingly, Hearing Board members Stanton and Rogers resolve this tension by recognizing that Colo. RPC 8.4(g) was re-enacted subsequent to *Green* and by assuming that the Colorado Supreme Court must therefore have intended the rule to be an exception to its opinion in *Green.*

[56] Colo. RPC Preamble, ¶ 5.

[57] *Sharpe*, 761 P.2d at 661.

Respondent testified, "I did call her that word, and I regret it; I was extremely frustrated." We interpret this comment as evidencing Respondent's conscious awareness of the nature of his conduct. As discussed above, however, we cannot conclusively find that Respondent intended to engender bias in the prosecutors or otherwise possessed a conscious objective to accomplish any particular result.

Injury: The practice of law demands an elevated standard of conduct from its members, as it relies on mutual civility and respect to ensure the public's confidence and trust in our system of justice. Lawyers help to shape and mold public opinion of our courts, and their behavior reflects upon the quality, integrity, and evenhandedness of our adversarial system. Thus, Respondent's misconduct cast a pall on a fundamental value of the legal profession and the legal system—namely, that prejudice and bias have no place in a profession committed to justice and the rule of law.

ABA *Standard* 3.0 – Aggravating Factors

Aggravating circumstances are any factors that may justify an increase in the degree of discipline to be imposed. The Hearing Board considers evidence of the following aggravating circumstances in deciding the appropriate sanction.[58]

Prior Disciplinary Offenses – 9.22(a): Respondent was publicly censured in 2007 for conduct violative of the Colorado Code of Judicial Conduct while serving as a magistrate in Denver County Small Claims Court. In that case, Respondent made four ex parte telephone calls to a pro se litigant and then failed to consider her request that he recuse himself from her case.

Substantial Experience in the Practice of Law – 9.22(i): Respondent was admitted to the Bar of Colorado in 1984. As such, we consider in aggravation that Respondent has been licensed as an attorney in this jurisdiction for twenty-six years.

Sanctions Analysis Under ABA *Standards* and Case Law

Our sanctions analysis begins with the observation that no binding authority exists to guide our determination in this matter. The Colorado Supreme Court has never addressed sanctions for violations of Colo. RPC 8.4(g). Likewise, the ABA *Standards* contain no corollary to Colo. RPC 8.4(g) and thus do not prescribe presumptive sanctions for such misconduct. In the absence of governing guidelines, we look to comparable ABA *Standards* and analogous cases from this and other jurisdictions in imposing a sanction.

[58] ABA *Standard* 3.0 also calls for consideration of factors that mitigate Respondent's conduct, but Respondent failed to present any evidence in mitigation, and the Hearing Board finds none.

ABA *Standard* 7.2 provides that suspension is generally appropriate when a lawyer *knowingly* engages in conduct that violates a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. ABA *Standard* 7.3 establishes reprimand, or public censure, as the appropriate sanction when a lawyer *negligently* engages in conduct that violates a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. And ABA *Standard* 7.4, calling for private admonition, applies when a lawyer engages in an *isolated instance of negligence* that violates a duty owed as a professional, but which causes little or no actual or potential injury to a client, the public, or the legal system.

The Hearing Board finds ABA *Standard* 7.2 the appropriate starting point in our analysis because Respondent *knowingly* referred to Judge Olguin-Fresquez as a "c**t" during the course of his negotiations with Angel. Nevertheless, the Hearing Board cannot conclude, in light of the sanctions levied in similar cases, that suspension is appropriate in this instance. In particular, the Colorado Supreme Court in *Sharpe,* which is most influential in our sanctions decision, imposed public censure when an attorney's utterance while representing his client gave rise to a perception he was motivated by racial prejudice.[59]

Likewise, the Indiana Supreme Court publicly reprimanded attorneys in *Thomsen*,[60] *Kelley*,[61] and *Campiti*[62] for engaging in conduct in a professional capacity that manifested bias or prejudice. Although a case could be made that the *McCarthy* decision, where the Indiana Supreme Court ordered suspension, is most on point here in light of Respondent's prior disciplinary history and the absence of mitigating factors,[63] we consider that case somewhat distinguishable insofar as Respondent has admitted his conduct. Given that distinction, as well as our desire to hew closely to available Colorado precedent, the Hearing Board finds it would be more appropriate to follow *Sharpe* and impose public censure. We are also swayed by the commentary to ABA *Standard* 7.3, which urges public reprimand as a method of helping to "educate the respondent lawyer and deter future violations," as well as to "inform[] both the public and other members of the profession that this behavior is improper."

---

[59] 781 P.2d at 661.
[60] 837 N.E.2d at 1012.
[61] 925 N.E.2d at 1279.
[62] 937 N.E.2d at 340.
[63] 2010 WL 5178048 at *1. In *McCarthy*, the Indiana Supreme Court rejected public reprimand and ordered a period of suspension, since McCarthy vehemently denied committing any misconduct, offered no apology or other indication or remorse, and had a prior disciplinary suspension; it contrasted that case with *Kelley* and *Campiti,* where the attorneys admitted their misconduct, consented to discipline, had no prior disciplinary history, and apologized to the aggrieved person.

We add that we cannot, in good conscience, conclude that private admonition is the most suitable sanction for Respondent's conduct, since no parallel cases support a private admonition.[64] Respondent's use of the slur was not an isolated instance of negligence, a slip of the tongue, or a phatic expression, but rather a knowing use of a charged term to demean Judge Olguin-Fresquez. Moreover, Respondent's conduct caused actual injury to the legal system; as discussed above, his obloquy sullied the public's perception of the profession and flouted the justice system's core values of fairness and respect for all participants in the system, untainted by bias or prejudice. Accordingly, the Hearing Board concludes public censure is most fitting in this case.

IV. CONCLUSION

Respondent's impolite treatment of court personnel and his discourteous behavior during a hearing do not rise to the level of violating the Rules of Professional Conduct, although his conduct falls woefully short of the standards to which we hope every lawyer in this jurisdiction aspires. Indeed, conduct such as Respondent's should be entirely foreign to any honorable profession and is worthy of our opprobrium.

We conclude that Respondent's use of a gender-based epithet to refer to Judge Olguin-Fresquez does not constitute conduct prejudicial to the administration of justice. But the Hearing Board finds his use of this insult exhibited bias or prejudice against Judge Olguin-Fresquez on the basis of her gender in violation of Colo. RPC 8.4(g). As such, we find it appropriate to publicly censure Respondent, underscoring for both the public and fellow members of the bar that our profession cannot tolerate, in the performance of an attorney's duties, expressions of bias or prejudice directed at participants in the legal process.

VI. ORDER

The Hearing Board therefore **ORDERS**:

1. **ROBERT EDWARD GILBERT**, Attorney Registration No. 13603, is hereby **PUBLICLY CENSURED.** The censure **SHALL** become public and effective thirty-one (31) days from the date of this order upon the issuance of an "Order and Notice of Public Censure" by the PDJ and in the absence of a stay pending appeal pursuant to C.R.C.P. 251.27(h). Respondent **SHALL** file any post-hearing motion or

[64] *See Warrick*, 44 P.3d at 1148 (rejecting board's recommendation of informal admonition for conduct intended to appeal to or engender bias and imposing thirty-day suspension for violations of Idaho Rules of Professional Conduct 4.4(a) and 3.3(a)(4)).

application for stay pending appeal **on or before Friday, January 28, 2011.** No extension of time will be granted.

2. Respondent **SHALL** pay the costs of these proceedings. The People shall submit a "Statement of Costs" within fifteen (15) days from the date of this order. Respondent shall have ten (10) days thereafter to submit a response.

DATED THIS 14TH DAY OF JANUARY, 2011.

Originally Signed

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

Originally Signed

TERRY F. ROGERS
HEARING BOARD MEMBER

Originally Signed

BOSTON H. STANTON, JR.
HEARING BOARD MEMBER

Copies to:

Elizabeth E. Krupa — Via Hand Delivery
Office of Attorney Regulation Counsel

Frederick P. Bibik — Via First Class Mail
Respondent's Counsel

Terry F. Rogers — Via First Class Mail
Boston H. Stanton, Jr. — Via First Class Mail
Hearing Board Members

Susan Festag — Via Hand Delivery
Colorado Supreme Court