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September 27, 2023

VIA E-MAIL (CAO@OSBAR.ORG)

Mr. Linn Davis
Assistant General Counsel and CAO Attorney
Oregon State Bar
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

Re: LDD 2301120
Michael Fuller (David Koenig)

Dear Mr. Davis:

I represent Michael Fuller with respect to the inquiry filed by David Koenig. Thank you for the opportunity to respond.

Mr. Koenig's inquiry focuses principally on his own lawyer (Marc Mohan) and whether Mr. Mohan had authority to agree to a Stipulated Protective Order ("SPO"), and further, whether Mr. Mohan disclosed the SPO to Mr. Koenig before it was submitted to and signed by the Court. Mr. Fuller did not represent Mr. Koenig or that Mr. Koenig had not agreed to the SPO.

The only allegation against Mr. Fuller appears to be that Mr. Fuller somehow "coerce[d] and intimidate[d]" Mr. Mohan "into wanting to withdraw from [his] case for false reasons." This is not true. Mr. Fuller represented an adverse party in litigation; he and Mr. Mohan stipulated to a protective order (as is common in litigation), and Mr. Fuller later shared information under the express terms of that protective order. Mr. Fuller did not coerce, threaten, or intimidate Mr. Mohan and, instead, Mr. Mohan's decision to withdraw appears to have been based on his ethical concerns

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and the lack of any merit to Mr. Koenig’s case. As a result, there can be no violation of the rules, and we respectfully request that this matter be promptly dismissed.¹

Brief Factual Background

Mr. Fuller represented Jennifer and Evans Clinchy (the “Clinchys”), two defendants in Multnomah County Circuit Court, Case No. 23CV15424 (the “Litigation”). Ms. Clinchy is a government lawyer, and Mr. Clinchy is a writer. They both live in Seattle, Washington.

Mr. Koenig was the plaintiff and, for a period of time, was represented by lawyer Marc Mohan. Plaintiff’s Second Amended Complaint alleged claims for defamation, civil conspiracy, intentional infliction of emotional distress, and intentional interference in economic relations against the Clinchys, as well as a third defendant.²

To summarize the Litigation: Mr. Koenig brought claims against the defendants for statements they made in a disciplinary proceeding with the North American Scrabble Players Association concerning Mr. Koenig’s threatening and harassing conduct. Since the beginning of this case, Mr. Fuller and the Clinchys believed that Mr. Koenig had not pleaded a valid theory in the Litigation, and that further, he has engaged in bad faith tactics. I have attached as Exhibit A, a copy of Evans Clinchy’s Special Motion to Strike so that you can understand the factual background as well as Mr. Koenig’s tactics in the Litigation.³

In order to facilitate the exchange of documents, Mr. Fuller and Mr. Mohan stipulated to entry of a protective order on or about May 16, 2023. The SPO specifically noted that “[t]he parties agree that good cause exists to protect the confidential nature of the information contained in documents ***.” Entering a protective order is not an unusual practice, and parties to litigation often enter stipulated protective orders. Mr. Fuller had no reason to question Mr. Mohan’s

¹ Mr. Fuller represents an adverse party to Mr. Koenig and is therefore mindful of his duty of confidentiality under RPC 1.6(a) to his own clients, particularly since the case is still pending. In order to respond to the allegations herein, Mr. Fuller plans to reveal some limited information relating to the representation of his clients pursuant to RPC 1.6(b)(4). See OSB Formal Op. 2005-105. If you need additional information, please let me know.

² The third defendant is represented by Ashley Vaughn of Dumas & Vaughn, LLC.

³ The Motion to Strike provides this example of frivolity: “the second amended complaint, which plaintiff still has not served, seeks to make defendant pay for plaintiff’s damaged vocal cords under the apparent theory that after learning of defendants’ statements, plaintiff screamed so loud that the police were allegedly called to his apartment.”

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authority to enter the SPO; and Mr. Fuller reasonably believed that Mr. Koenig had agreed to the terms of the SPO.⁴

On July 6, 2023, Mr. Fuller became aware of an email from Terry Kang Rau to the Clinchys, indicating that Mr. Koenig “flat-out lied about me and Stefan being on his side” and that “anytime we are mentioned, he literally made up things we never said.” The email was concerning and was consistent with other behavior allegedly demonstrated by Mr. Koenig; as a result, Mr. Fuller provided notice of the email, and of his concerns, to Mr. Mohan. Consistent with the express terms of the SPO, Mr. Fuller designated this email from Ms. Rau as attorneys-eyes only. If Mr. Mohan disagreed with the designation, he could have taken steps under paragraph 10 of the SPO to dispute the confidential status claimed.

Mr. Mohan thereafter withdrew from representing Mr. Koenig in the litigation. Mr. Koenig makes allegations in his declaration relating to the circumstances of Mr. Mohan’s withdrawal and communications they both had. Mr. Fuller represented the adverse party, however, and therefore has limited, if any, personal knowledge of those facts.

All of the defendants subsequently filed anti-SLAPP motions to strike Mr. Koenig’s operative complaint. Mr. Fuller filed his Special Motions to Strike on or about August 3, 2023, and the other defendant filed a similar motion. Mr. Koenig filed responses to the motions, including the August 10, 2023 Declaration that he filed with the Bar. After a hearing on August 16, 2023, in which all parties were given an opportunity to be heard, the Honorable Kelly Skye entered an Order Granting Defendants’ Special Motion to Strike and Dismissing Plaintiff’s Second Amended Complaint, on or about September 5, 2023.⁵ The Court wrote:

1. All of Plaintiffs’ claims (defamation, conspiracy, intentional infliction of emotional distress, and intentional interference with economic relations) alleged in the Second Amended Complaint arise from Defendants’ conduct and statements that are protected under ORS 31.150(2)(d). Such protected conduct and statements include the conduct and statements alleged in the Second Amended Complaint, as well as the conduct and statements

⁴ The SPO noted that the Litigation “concerns alleged reports of predatory behavior by plaintiff and allegations that plaintiff threatened violence against others.”

⁵ Prior to the hearing, Mr. Koenig had sent a letter stating that he believed he was “under no legal obligation” to abide by the Court’s May 25th protective order, and he confirmed that he had already publicized a document designated as “Confidential” under the order on numerous occasions. At the hearing, the Court reaffirmed Mr. Koenig that he was in fact under a legal obligation to abide by the Court’s protective order, regardless of whether he had authorized his prior attorney to sign it or not.

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detailed in the Exhibits attached to the Second Amended Complaint. The Court's ruling encompasses the conduct and statements contained the Exhibits attached to the Second Amended Complaint.

2. Plaintiff failed to meet his burden under ORS 31.150(3) to establish a probability that he will prevail on every element of his claims for defamation, conspiracy, intentional infliction of emotional distress, intentional interference with economic relations, and for attorney's fees because he failed to meet his burden to present substantial evidence to support a prima facie case on every element of each claim.

The Court then granted the motions of both defendants, dismissed the Second Amended Complaint in its entirety, and granted the motions for reasonable attorney fees. (See Exhibit B.)

Legal Analysis

As a preliminary matter, the Oregon State Bar Client Assistance Office determines the manner and extent of review required to decide whether there is sufficient evidence to support a reasonable belief that lawyer misconduct may have occurred warranting a referral to Oregon State Bar Disciplinary Counsel for further consideration. *See* Bar Rule 2.5. Misconduct means a violation of the rules of professional conduct and applicable statutes that govern lawyer conduct in Oregon. *See In re Fulop*, 298 Or. 354, 360, 865 P.2d 414 (1984) (holding that opposing statements between equally credible witnesses does not amount to proof by clear and convincing evidence).

Your September 6, 2023 email to Mr. Fuller indicated that Mr. Koenig's concerns may implicate RPC 1.4(a) or (b), and RPC 8.4(a)(1). We disagree and ask you to consider the following:

First, with respect to RPC 1.4, Mr. Fuller did not represent Mr. Koenig and, therefore, he would have had no duty to communicate with Mr. Koenig under the RPCs regarding the status of the matter or to ensure that he had sufficient information to make informed decisions (that would have been Mr. Mohan). On that basis alone, this allegation must be dismissed. Moreover, there is no allegation that Mr. Fuller did not properly communicate with his own clients. Indeed, Mr. Fuller's clients have not filed complaints with the Bar and have not alleged any concerns that Mr. Fuller did not keep them reasonably informed about the status of the matter, did not respond to requests for information, or did not fully explain matters so that they could make informed decisions. Given Mr. Fuller's successful representation of his clients, including the dismissal of the Second Amended Complaint in its entirety, his clients are very pleased with his representation.

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Second, with respect to RPC 8.4(a)(1), it is unclear how that rule would apply here. To the extent that the rule suggests that Mr. Fuller “knowingly assist[ed] or induce[d]” Mr. Mohan to violate the rules, such an allegation has no merit. Mr. Fuller has, and had, no knowledge whether Mr. Mohan violated the Rules at any time; instead, Mr. Fuller represented his own clients and, at all times, acted properly in the Litigation.

Mr. Koenig suggests that Mr. Fuller somehow coerced or intimidated Mr. Mohan into withdrawing, but such an allegation is untrue. Mr. Fuller took a routine step in litigation (stipulating to an SPO with opposing counsel), and then properly designed a document under the SPO (which provides a mechanism for objection to the designation). As noted above, Mr. Fuller had no reason to question Mr. Mohan’s authority to enter the SPO; and Mr. Fuller reasonably believed that Mr. Koenig had agreed to the terms of the SPO.

The reality is that Mr. Koenig’s claims had no merit (as Judge Skye ultimately found), his unfounded litigation was filed in bad faith to harass the defendants, and, when Mr. Mohan received the document provided by Mr. Fuller, Mr. Mohan may have been concerned that Mr. Koenig had acted improperly, leading to his intent to withdraw. Though that does not appear to have mattered since Mr. Koenig’s own declaration confirms that he and Mr. Mohan discussed the matter further and both agreed that Mr. Mohan would withdraw without Mr. Koenig’s objection.⁶

Conclusion

Mr. Fuller successfully represented his clients and obtained a dismissal in the Litigation. Mr. Fuller communicated with Mr. Mohan about the case and did not have any reason to believe that Mr. Mohan either was not communicating with Mr. Koenig or was taking actions that had not been authorized.

Mr. Fuller takes his ethical obligations seriously and has no history of discipline. Mr. Koenig is an opposing party that casts blame at everyone but himself for the predicament in which he finds himself. Mr. Fuller did nothing wrong, there is no basis to Mr. Koenig’s inquiry, and we respectfully request that the matter be dismissed.

⁶ Mr. Mohan’s Notice of Withdrawal states that Mr. Koenig “does not object to the withdrawal and has consented to representation *pro se*.”

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Please let me know if you have any questions or need additional information.

Sincerely,
BUCHALTER
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A handwritten signature in black ink that reads "David J. Elkanich". The signature is written in a cursive style with a large, stylized initial "D".

David J. Elkanich
Shareholder

DJE:sr
Enclosures