



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 17, 2017

Via e-mail to: datkinson@osbar.org

Mr. Daniel Atkinson
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SUBJECT: Overview in regard to Bar Complaint by Christian Wolff, et. al.
CAO File No. DPA 1601876, 1601877, 1601878, 160879, 160880

Dear Mr. Atkinson:

This responds to your December 7, 2016 letter,¹ in which the Oregon State Bar Client Assistance Office (“CAO”) asks Karen Berry, Warren Foote, Carolyn Alexander, Hon. Ellen Rosenblum, and Anna Joyce to provide their account and an “explanation of each lawyer’s role and involvement in the underlying matter” identified in a letter submitted by Christian Wolff, dated November 29, 2016, that speculates that attorneys from the Department of Justice (“DOJ”) and Karen Berry, an investigator for the Board of Psychologists Examiners (with an inactive license as an attorney), may have violated various laws or the Oregon Rules of Professional Conduct (“RPC”) (Tab B). These allegations are without basis in fact, and should be dismissed.

1. Overview. Christian Wolff is a psychologist associate licensed by the Board of Psychologist Examiners (“OBPE” or “Board”). He has been the subject of two board disciplinary actions,² both of which were referred to the Office of Administrative Hearings for hearing. The first case was resolved via a Motion of Summary Determination that was granted by the administrative law judge (“ALJ”) (Tab C). That case is pending before the Oregon Court of Appeals. The second case resulted in a proposed order by the ALJ and Final Order that adopted the ALJ’s findings and conclusions (Tab D).

The other lead complainant is Eric Dover, MD. He was the subject of a Medical Board disciplinary action based upon allegations of unprofessional or dishonorable conduct, gross or

¹ See Tab A.

² The first action proposed to suspend Wolff’s license to practice and to impose a \$10,000 civil penalty for representing himself to the public as a licensed psychologist and referring to himself with the initials “Psy.A.” Mr. Wolff is a licensed psychologist associate, which requires a Master’s degree in psychology. The ALJ granted the Board’s Motion for Summary Determination. The Board issued a Final Order, in which Wolff’s license was suspended for 1 year (with a stay provision) and a \$10,000 civil penalty. This case is pending before the Court of Appeals. The second action by the Board proposed to assess a \$200 civil penalty and require Wolff to make up continuing education (“CE”) credits for failure to complete 19 hours of qualifying CE credits. This case also went to contested case hearing. The ALJ found, and the Board affirmed in the Final Order, that Mr. Wolff must complete 19 hours of qualifying CE credits. Wolff did not file an appeal.

repeated acts of negligence, and violating a board order. The case went to a contested case hearing, culminating in the revocation of his medical license.³ (Tab E). Dover did not appeal the final order, but filed a 42 USC §1983 action in federal court alleging his constitutional rights were violated when his medical license was revoked. The 9th Circuit Court of Appeals affirmed the decision of the federal district court that dismissed his claims (Tab F).

2. Identity of the Complainants. Without belaboring the point, we note that with only two exceptions,⁴ the list of complainants comprises various licensees that have been disciplined by either the Oregon Medical Board (“OMB”), the OBPE, or the Oregon Board of Licensed Professional Counselors and Therapists (“OBLPCT”). The common thread appears to be that Warren Foote, Sr. AAG, served as legal counsel for all three health licensing boards, and was the attorney of record for these disciplinary cases, including the cases against Wolff and Dover. Two of the individuals (Dover and Whittaker) have each previously filed a complaint with the Bar alleging professional misconduct against Warren Foote in connection with the Board disciplinary action taken against them. The CAO informed the complainants that it “cannot find sufficient evidence to support a reasonable belief” that Warren Foote had engaged in professional misconduct (Tab I). The list of other disciplined licensees, with their corresponding records of board discipline, follows.

Name	Agency	Disciplinary Action	Tab
Eric Dover, MD	OMB	Final Order, 2/14/2011 (license revoked after a contested case hearing). Did not appeal the Order.	E
Eric Dover, MD	OMB	Filed 28 USC §1983 lawsuit in federal court against the OMB and its agents based upon the OMB disciplinary case (see above). The district court dismissed the claims, and the 9th Circuit affirmed.	F
David Bice, Ph.D.	OBPE	Final Order, 9/28/2012 (reprimand, 1 year of supervised practice).	G
David Bice	OBPE	Court of Appeals—reversed and remanded the final order. Pending Board decision on remand.	H
Kali Miller, Ph.D.	OBPE	Contested case hearing for Order of Emergency Suspension affirmed by ALJ. Action to revoke license on motion for summary determination granted on the same factual basis. Case pending before the Court of Appeals.	J
Daniel Carpenter, Psy. D.	OBPE	Stipulated Order, 12/12/2015 (surrendered license under investigation).	K

³ Final Order, January 14, 2011.

⁴ Nesbitt’s license was revoked by the OBLPCT. AAG Kelly Gabliks, (now retired), represented the Board at the contested case hearing. Cesareo Texidor, PA, is currently facing disciplinary action by the OMB.

Name	Agency	Disciplinary Action	Tab
Cesareo Texidor, PA	OMB	Notice of Proposed Discipline issued on 11/23/2016. Anticipate request for contested case hearing.	L
Naina Sachdev, MD	OMB	Final Order, 12/30/2014 (license revoked after a contested case hearing). Case pending before the Court of Appeals.	M
James Gallant, MD	OMB	Stipulated Order, 10/2/2014, 9/2/2016 (retired license under investigation).	N
Lynne Nesbitt	OBLPCT	Final Order, 1/23/2015 (license revoked after a contested case hearing). Case pending before the Court of Appeals.	O
Susan Haney, MD	OMB	Corrective Action Agreement, 7/30/2015 and an Interim Stipulated Order, 2/22/2012.	P
Kenneth Welker, MD	OMB	Default Final Order, 10/2/2014 (license revoked).	Q
Stephen Whittaker	OBLPCT	Final Order, 5/5/2015 (license revoked after a contested case hearing). Case affirmed without opinion, 9/8/2016.	R
Dan Kort, MD	OMB	Stipulated Order, 4/2/2015 (reprimanded, placed on probation, restricted from practice of aesthetic medicine, and other terms).	S

3. Explanation of the Bice Case. The case featured in Mr. Wolff's complaint to the Bar is that of David Bice, Ph.D., who had a hearing before an ALJ, culminating in a Final Order (Tab G) that modified the ALJ's findings of fact and conclusions of law as allowed by ORS 183.650⁵, and imposed terms of discipline. Bice filed an appeal.

⁵ 183.650 provides:

"(1) In any contested case hearing conducted by an administrative law judge assigned from the Office of Administrative Hearings, the administrative law judge shall prepare and serve on the agency and all parties to the hearing a form of order, including recommended findings of fact and conclusions of law. The administrative law judge shall also prepare and serve a proposed order in the manner provided by ORS 183.464 unless the agency or hearing is exempt from the requirements of ORS 183.464.

"(2) If the administrative law judge assigned from the office will not enter the final order in a contested case proceeding, and the agency modifies the form of order issued by the administrative law judge in any substantial manner, the agency must identify the modifications and provide an explanation to the parties to the hearing as to why the agency made the modifications.

"(3) An agency conducting a contested case hearing may modify a finding of historical fact made by the administrative law judge assigned from the Office of Administrative Hearings only if the agency determines that there is clear and convincing evidence in the record that the finding was wrong. For the purposes of this section, an administrative law judge makes a finding of historical fact if the administrative law judge determines that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.

"(4) Notwithstanding ORS 19.415 (3), if a party seeks judicial review of an agency's modification of a finding of historical fact under subsection (3) of this section, the court shall make an independent finding of the fact in dispute by conducting a review de novo of the record viewed as a whole. If the court decides that the agency erred in

Carolyn Alexander argued the *Bice* case on behalf of the Board before the Oregon Court of Appeals. On October 19, 2016, the Oregon Court of Appeals issued an opinion that reversed and remanded the Board's Final Order⁶ (Tab H). In his appeal, Bice challenged the Board's modifications of the ALJ's historical findings of fact and conclusions of law that Bice had violated multiple ethical standards.⁷

In its opinion, the Court conducted a *de novo* review because the Board had modified findings of historical fact. Based on that review, the Court rejected a number of the Board's modified findings of fact and remanded the case to the Board to determine whether the remaining findings of fact would support a conclusion that Bice's conduct constituted unprofessional conduct or violated any of the ethical standards identified in the Board's notice. The case now returns to the Board for review and deliberation on remand.

The contested case hearing at issue was conducted on November 14 - 17, 2011 before ALJ Rick Barber. In his proposed order, the ALJ concluded that Dr. Bice's conduct did not violate any of the Ethical Standards that were alleged and that the Board's Notice of Proposed Licensure Suspension and Restriction should be reversed. The Board did not agree with the ALJ in regard to client SM, but did accept the ALJ's conclusions in regard to client SC. As a result, the Board changed some of the ALJ's findings of fact and conclusions of law, and after issuing an Amended Proposed Final Order and considering Bice's exceptions, issued the Final Order.

In its opinion, the Court of Appeals concluded "...that several historical facts are not as found by the board, we must remand for the board to reconsider, under a correct understanding of the facts, its conclusions that [Bice] violated ORS 675.070(2)(d), (unprofessional conduct), Ethical Standard 2.01 (boundaries of competence), Ethical Standard 3.04 (avoiding harm), and Ethical Standard 10.01 (informed consent in his treatment of SM)."

4. Wolff's allegations. In his complaint to the Bar, armed only with the opinion of the Court of Appeals from which to speculate, Wolff alleges that the Board's Investigator (Karen Berry) presented perjured testimony, and that somehow the various identified DOJ attorneys were complicit in this misconduct. Wolff alleges that the opinion of the Court of Appeals "suggests that there may have been illegal behavior on the parts of agents of the state in their roles as agents of the state." He further alleges that the Court "appears to have found that Karen Berry, with the assistance of the Oregon Board of Psychologist Examiners ("OBPE") may have deliberately tampered with witnesses, tampered with records, and committed perjury during the investigation of allegations against psychologist David T. Bice, in preparation for Dr. Bice's contested case hearing, during Dr. Bice's contested case hearing, in preparation for Dr. Bice's appeal before the OCA, and during the OCA hearing itself." Wolff provides no evidence to support his speculative allegations.

modifying the finding of historical fact made by the administrative law judge, the court shall remand the matter to the agency for entry of an order consistent with the court's judgment."

⁶ The Board's Final Order issued on September 28, 2012.

⁷ ES 2.01, Boundaries of Competence; ES 3.04 Avoiding Harm; and ES 10.01 Informed Consent.

5. Inquiry by the OSB CAO. The Bar requests that the attorneys identified in the letter provide an account of the matter, with an explanation of “each named lawyer’s role and involvement in the underlying matter.” The list of the identified attorneys and their involvement in the Bice case is as follows:

- **Karen Berry** served as an Investigator for the OBPE. She is an inactive member of the Oregon State Bar. Her retirement as an employee of the Board of Psychologist Examiners was effective on December 31, 2016. Her sole involvement in this case was as an investigator, and she served in that capacity with the OBPE for over 13 years.
- **Warren Foote, Sr.** AAG, serves as the primary legal counsel for the Oregon Medical Board (OMB), the OBPE, and the OBLPCT. Mr. Foote represented the OBPE in the Bice contested case hearing, and served as board counsel in all the cases that correspond to the persons listed in Mr. Wolff’s submittal, with the exception of the Nesbitt case. He has served at DOJ in the Business Activities Section of the General Counsel Division since August of 1998.
- **Carolyn Alexander, Sr.** AAG (retired), served as appellate counsel that represented the OBPE in the Bice case before the Oregon Court of Appeals. She served at DOJ from May 1999 – August 2015. She is now serving on the Oregon State Bar Professional Responsibility Board, and on the State Board of Licensed Professional Counselors and Therapists.
- **Ellen Rosenblum**, the Attorney General, had no direct involvement with the Bice case or in any of the cases identified in Mr. Wolff’s complaint. Ms. Rosenblum has served as the Oregon Attorney General since June 29, 2012, and executes her duties as identified in ORS Chapter 180. The complaint against the Attorney General should be dismissed.
- **Anna Joyce** served as the Oregon Solicitor General during most of the time that Bice has been pending before the Oregon Court of Appeals. She had no direct involvement in the case on appeal. The complaint against Ms. Joyce should be dismissed.

Because neither the Attorney General nor Ms. Joyce had any direct involvement with the Bice matter, responses to specific allegations that follow are limited to those applying to Ms. Berry, Mr. Foote, and Ms. Alexander.

6. Response to Allegations of Violations of Particular RPCs

Karen Berry. Mr. Wolff speculates that, based on the opinion of the Court of Appeals, that Ms. Berry may have committed misconduct during her investigation of Dr. Bice, by somehow eliciting false testimony in violation of RPCs 3.4(b) or 4.1.⁸ Wolff provides no additional independent evidence to support his allegations.

⁸ RPC 3.4(b) provides:

A lawyer shall not:

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of

In the case of Ms. Berry, we need not conduct a lengthy analysis, because contrary to Mr. Wolff's assertion, the Court addressed the allegation of misconduct by the Board's investigator in the beginning of its opinion as follows: "***We first reject without discussion petitioner's challenge to the denial of his motion to dismiss based on investigatory misconduct.*** In his remaining assignments of error, petitioner principally argues that the board erred in modifying key findings of historical fact made by the administrative law judge." (*Italics and bold added.*) *Bice v. Board of Psychologist Examiners*, 281 Or. App. 623, 624 (2016). The complaint against Ms. Berry should be dismissed.

Warren Foote: Although it is not at all clear from Wolff's complaint, it appears he is alleging that Mr. Foote may have violated RPC's 3.1, 4.1, and 8.4.⁹ RPC 3.1 provides that a lawyer may

the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or
- (3) a reasonable fee for the professional services of an expert witness.

RPC 4.1 provides:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

⁹ RPC 3.1 provides:

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 8.4 provides:

(a) It is professional misconduct for a lawyer to:

- (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
- (4) engage in conduct that is prejudicial to the administration of justice; or
- (5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law, or
- (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- (7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of

not “knowingly bring or defend a proceeding, assert a position therein...or take other action on behalf of a client, unless there is a basis in law or fact for doing so that is not frivolous.” Oregon RPC 3.1. RPC 1.0(h) defines *knowingly*, *known*, or *knows* as “actual knowledge of the fact in question.” Under this rule, knowledge may be inferred from the circumstances. RPC 3.1 permits a lawyer to make a good-faith argument as he asserts the position of his client. A statement is not frivolous if it is “plausible.” *In re Marandas*, 351 Or 521, 533, 270 P3d 231 (2012) (no violation occurred when the accused’s conduct was based on a plausible interpretation of a statute).

In the case in question, at least one of Dr. Bice’s clients indicated that she felt uncomfortable after sessions with him because of his conduct. The Board is mandated to investigate conduct that might be a violation of ethical standards; it is Mr. Foote’s job to advise the Board and to advance its position in administrative hearings. The Board’s position that Dr. Bice might have violated his ethical standards was plausible because there was adequate evidence to support it. If Wolff’s argument is that the claim against Dr. Bice was somehow frivolous because the investigator committed misconduct during the investigation to obtain the evidence on which the Board action was based—a notion squarely struck down by the Court of Appeals—Mr. Foote would have had to have actually known of the misconduct, and the evidence or testimony obtained as a result of the misconduct would have to have been the only piece of evidence on which the Board was basing its action. That was not the case here, so Mr. Foote did not violate RPC 3.1.

Wolff might also assert that Mr. Foote violated RFP 4.1 in the course of representing his client in the context of the administrative hearing, though this assertion has no basis in fact. Oregon Rule of Professional Conduct (RPC) 4.1(a) provides that “[i]n the course of representing a client[,] a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.” As noted earlier, RPC 1.0(h) defines *knowingly*, *known*, or *knows* as “actual knowledge of the fact in question.” In the context of “others,” a third person would be anyone other than the lawyer. *See In re Smith*, 348 Or 535, 550, 236 P3d 137 (2010) (a lawyer violates Oregon RPC 4.1(a) by making a false statement of material fact in the course of representing a client). A third person would include a client, opposing counsel, the opposing party, a witness, a juror, an official of a tribunal, and a mediator.

A material statement would be one that “would or could significantly influence the hearer’s decision-making process.” *In re Smith*, 348 Or at 550. *Cf. In re Marandas*, 351 Or 521, 530–33, 270 P3d 231 (2012). Similar to the previous analysis, Wolff has not made any specific assertion, nor shown anything specific about what false statement of material fact that he claims Mr. Foote may have made in the context of the Bice case. Wolff’s speculation alone that he did

civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.

"Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

is insufficient to support a reasonable belief that Mr. Foote violated RPC 4.1. Bar Rule of Procedure (BR) 2.5(b)(2). *Cf. In re Conduct of Groom*, 350 Or 113,121,249 P3d 976 (2011) (the Bar has the burden of establishing a violation by “clear and convincing evidence,” which is “evidence establishing that the truth of the facts asserted is highly probable” (quoting *In re Magar*, 335 Or 306, 308, 66P3d 1014 (2003))).

Finally, the Bar indicates that RPC 8.4 might be at issue here. Oregon RPC 8.4(a)(4) provides that it is “professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”

A violation of this rule requires proof that (1) the lawyer’s “action or inaction was improper,” (2) such conduct “occurred during the course of a judicial proceeding,” and (3) the conduct “did or could have had a prejudicial effect upon the administration of justice.” *In re Carini*, 354 Or 47, 54-55, 308 P3d 197 (2013). Prejudice occurs when the lawyer’s conduct “[h]armed [or had the potential to harm] the procedural functioning of the judicial system, either by disrupting or improperly influencing the court’s decision-making process or by creating unnecessary work or imposing a substantial burden on the court or the opposing party.” *Carini*, 354 Or at 55 (quoting *In re Lawrence*, 350 Or 480, 487, 256 P3d 1070 (2011)). In *Carini*, 54 Or at 55, the court held that the lawyer violated the rule by “fail[ing] on four occasions to appear for scheduled court hearings.” The court stated that “the question is not whether each of those acts caused ‘substantial harm, but rather whether, taken as a whole, those acts caused ‘some harm’” to the administration of justice. *Carini*, 354 Or at 55.

In his complaint, Wolff has pointed to no specific instances showing that any actions or inactions by Mr. Foote were improper, only speculating that “the nature of his position” and the fact that he represented the Board at Dr. Bice’s administrative hearing may have caused some harm to the administration of justice. Absent clear and convincing evidence, the complaint against Mr. Foote should be dismissed.

Carolyn Alexander. Ms. Alexander’s arguments at the Court of Appeals might implicate RPCs 3.1 and 8.4. (See footnote 9 for the text of the rules.) Without repeating the prior analyses, which are similar here, it should be sufficient to say that Ms. Alexander reviewed the Board’s order at Mr. Foote’s request, and represented the Board on appeal: specifically, she filed the brief, as well as the preliminary motions. She did not “lie” about the Board’s modification of the findings, as Wolff contends, or otherwise make a frivolous argument: she took a colorable legal position on appeal that was supported by the record, and the Court of Appeals disagreed. She conferred with her supervisor, Denise Fjordbeck, from the issuance of the Board’s order forward. Ms. Fjordbeck, the Attorney in Charge of the Defense of Agency Orders Section of the Appellate Division, agreed with the approach that Mr. Foote and Ms. Alexander took, both at the administrative hearing and appellate court levels. *See In re Marandas*, 351 Or 521, 533, 270 P3d 231 (2012). The complaint against Ms. Alexander should be dismissed.

7. Conclusion. Dismissal of a matter is appropriate if “probable cause does not exist to believe misconduct has occurred.” BR 2.6(c)(1)(A). Mr. Wolff fails to set forth any evidence to support his allegations. His assertion that the Oregon Court of Appeal’s decision in Bice “suggests” that

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there may have been “illegal” behavior on the part of agents of the state has no basis in fact. His complaint against Ms. Berry, Mr. Foote, Ms. Alexander, Ms. Joyce, and Attorney General Rosenblum should be dismissed.

Please do not hesitate to contact me if you have any questions or need further information.

Regards,



Stephanie A. Thompson
Senior Assistant Attorney General

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