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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ROBERT B. SURRICK Misc. No. 00-086

Pollak, J.,joined by Judges Fullam, Newcomer, Green, O'Neill, Padova and Kauffman, dissenting.

On February 7, 2001, a panel of three judges of this court, of whom I was one, filed a Report and Recommendation in the above matter.(See Appendix A, annexed hereto). In the "Report" portion of the Report and Recommendation, the panel -- after examining the state disciplinary charges against Robert B. Surrick and analyzing the disposition of those charges in the extended state proceedings which culminated in a March 24, 2000 Opinion and Order of the Pennsylvania Supreme Court suspending Mr. Surrick from the practice of law for five years -- concluded, on the authority of *Ruffalo v. United States*, 390 U.S. 544, 552 (1968), "that Mr. Surrick has shown cause that discipline should not be imposed on him by this court." February 7, 2001 Report, p. 35. Accordingly, in the accompanying "Recommendation" the panel "recommended that discipline not be imposed on Robert B. Surrick." February 7, 2001 Recommendation.

On April 2, 2001, this court voted not to adopt the panel's February 7, 2001 Report and Recommendation. Pursuant to the April 2 vote, this court, as noted in an order entered by Chief Judge Giles on April 2, 2001, "determined that it will only give further consideration to the question of whether identical discipline to that imposed by the Pennsylvania Supreme Court through its Opinion and Order dated March 24, 2000 should be imposed by this Court." Thereafter, Chief Judge Giles appointed a three-judge Ad Hoc Committee to make a recommendation to the court as to the discipline that should be imposed on Mr. Surrick.

On June 7, 2001, the Ad Hoc Committee presented to the Chief Judge its Recommendation – namely, that Mr. Surrick be suspended from practice before this court for thirty months. On June 11, 2001, a majority of this court voted to adopt the Recommendation of the Ad Hoc Committee.

When this court, on April 2, 2001, voted not to adopt the panel's February 7 Report and Recommendation, it did not file an opinion or other written statement presenting its reasons for rejecting the panel's February 7 analysis and recommendation. Nor did this court, in conjunction with its vote of June 11, 2001, file an opinion or other written statement explaining its disagreement with the panel's February 7 submission.. Not having had the benefit of a recital by a majority of my colleagues of their reasons for concluding that the February 7 panel submission was flawed, I remain of the view that, pursuant to *Ruffalo,* this court, should not, on the record before it, impose discipline on Mr. Surrick. Accordingly, for the reasons presented in some detail in the panel's February 7 Report and Recommendation, I respectfully dissent.

June 11, 2001 Pollak, J.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| IN THE MATTER OF | : | MISCELLANEOUS |
| | : | NO. 00-086 |
| ROBERT B. SURRICK | : | |

**REPORT AND RECOMMENDATION**

**Pollak, Dalzell, and Padova, JJ.** **February 7, 2001**

**Introduction**

**A.**

On March 24, 2000, the Pennsylvania Supreme Court filed an opinion and accompanying order in a proceeding captioned *Office of Disciplinary Counsel v. Robert B. Surrick*, 749 A.2d 441 (Pa. 2000). The first paragraph of the court's opinion states the question addressed by the court and the court's resolution of it:

> This court is presented with the question of whether the evidence was sufficient to establish respondent's culpability on two charges that he violated Rule of Professional Conduct 8.4(c)[1.] (hereinafter RPC). The precise issue to be resolved is whether respondent acted with reckless disregard for the truth when he leveled accusations of case fixing against certain jurists in a pleading filed in the Superior Court of Pennsylvania. For the reasons set forth herein, we find that respondent did violate RPC 8.4(c) on both counts and that the appropriate discipline is a five year suspension from the practice of law.
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> [1.] RPC 8.4(c) states: It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

749 A.2d at 442.

Robert B. Surrick, the respondent in *Office of Disciplinary Counsel v. Robert B. Surrick*, is an attorney admitted to practice before this court.[1] Accordingly, pursuant to Rule II(B)(2) of this court's Rules of Disciplinary Enforcement (promulgated and codified under Rule 83.6 of this court's Local Rules of Civil Procedure), Chief Judge Giles, on May 10, 2000, issued an order to show cause which, taking note of the discipline imposed by the Pennsylvania Supreme Court, called upon respondent Surrick to (in the words of Rule II(B)(2)), "inform this court 30 days after service . . . of any claim . . . predicated upon the grounds set forth in [Rule II(D)] hereof that the imposition of the identical discipline by the court would be unwarranted and the reasons therefor."

Rule II(D) provides as follows:

> D. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of [II(B)] above, this court shall impose the identical discipline unless the respondent-attorney demonstrates, or this court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:
>
> > 1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
> >
> > 2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject; or
> >
> > 3. that the imposition of the same discipline by this court would result in grave injustice; or

[1]Mr. Surrick was admitted to the bar of this court on November 20, 1970.

> 4. that the misconduct established is deemed by this court to warrant substantially different discipline.
>
> Where this court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

On June 9, 2000, respondent Surrick, through counsel, filed his Answer to Order to Show Cause. In that Answer, respondent contends that three of "the grounds set forth in [RuleII(D)]" preclude "the imposition of . . . identical discipline":

> (1) "First", respondent contends that the Supreme Court of Pennsylvania, in imposing discipline in 2000 for action taken over seven years before, has invoked a more inculpatory substantive standard than was part of the governing disciplinary law of Pennsylvania in 1992, at the time of respondent's conduct, and has applied that standard through a more demanding procedural regime than was thought applicable in 1995, when the Disciplinary Board's Special Hearing Committee conducted the evidentiary hearing in respondent's case – a form of assertedly retroactive adjudication, both substantive and procedural, viewed by respondent as having "violated Mr. Surrick's federal due process rights."
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> (2) "Second, there is an infirmity of proof establishing the misconduct such that the Court should not accept as final the Supreme Court's conclusion on the subject . . . ."
>
> (3) "Finally, the imposition of the same discipline by the Court as the Supreme Court of Pennsylvania would result in grave injustice to Mr. Surrick. What is striking about the years since Mr. Surrick was appointed to the JIRB [the former Judicial Inquiry and Review Board] is that all the lawsuits and disciplinary proceedings initiated against Mr. Surrick have [been] based on speech . . . . To suspend Mr. Surrick's license for five years for that speech punishes what is at the heart of the First Amendment."

Further respondent notes, in his Answer to Order to Show Cause, that the sanction

of "Public Censure" recommended by the Disciplinary Board of the Pennsylvania Supreme Court ("Disciplinary Board" or "Board") was, "*sua sponte* and without briefing," changed by the Supreme Court into a five-year suspension of Mr. Surrick's license to practice law.

On August 8, 2000, this court, acting pursuant to Rule II(F) of the Rules of Disciplinary Enforcement, appointed the Office of Disciplinary Counsel – the law office which, in 1994, initiated disciplinary proceedings against respondent and carried the proceedings forward through the Supreme Court's opinion and order of March 24, 2000 – to serve as counsel prosecuting the proceedings in this court.

On September 20, 2000, oral argument was held before the panel of this court that Chief Judge Giles appointed.[2]

**B.**

In Part I of this opinion, we present the procedural history of the lengthy state disciplinary proceedings. We undertake to set forth this history in some detail, with a view to providing an understanding of the genesis of the issues that are now presented to this court. We begin by listing the original charges against respondent, as formulated by Disciplinary Counsel. We then summarize the sequential rulings of (1) the Special Hearing Committee appointed by the Disciplinary Board; (2) the Disciplinary Board; (3)

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[2]After Chief Judge Giles's May 10, 2000 Order, Mr. Surrick's brother, the Hon. R. Barclay Surrick, became a member of this court. As a result, we solicited the parties' views as to whether the Rule of Necessity required this panel to proceed, notwithstanding this development. Both parties agreed we should proceed. As there is no other tribunal that can interpret our Local Rules to determine who should be permitted to practice before this court, we share the parties' view on this point.

the Pennsylvania Supreme Court; (4) the Disciplinary Board, on remand from the Pennsylvania Supreme Court; and (5) the Pennsylvania Supreme Court.

In Part II of this opinion, we address the question whether, on the record made in the state disciplinary proceedings, this court should impose on respondent Surrick discipline identical to that which the Pennsylvania Supreme Court imposed.

**I.**

The Initial Charges Against Mr. Surrick

The conduct which gave rise to the Pennsylvania disciplinary proceedings against Mr. Surrick was his August 11, 1992 filing in the Pennsylvania Superior Court, of a "Motion for Recusal of Certain Superior Court Judges and Senior Judges Assigned to the Superior Court."

That motion, submitted in connection with the appeal of a case captioned *Leedom v. Spano* – an appeal in which Mr. Surrick was acting as counsel for one of the parties, and was himself a party in interest – was filed prior to announcement by the Superior Court of the composition of the three-judge panel which would hear the appeal.

On November 22, 1994, some two years after the filing by Mr. Surrick of the recusal motion, the Office of Disciplinary Counsel filed with the Disciplinary Board a Petition for Discipline of Mr. Surrick.

The Petition for Discipline contained five charges. The charges may be grouped in three categories. (1) Three of the charges addressed statements in the recusal motion – statements about Common Pleas Judge Harry J. Bradley and Superior Court Judges Peter

Paul Olszewski and Vincent Cirillo which were alleged to be false. (2) The fourth charge alleged that the motion for recusal was filed prematurely. (3) The fifth charge alleged that a reference in the recusal motion to disciplinary proceedings involving Arthur Levy, a former law partner of Mr. Surrick's, compromised the confidentiality of those proceedings.

The charged conduct, together with the rules said to have been violated, are as follows:

1. The statements about the three judges:

(i) The recusal motion contained the following statement about Judge Bradley:

> It is believed and averred by Movant Surrick that Judge Bradley was "fixed" by the Delaware County Republican Organization as a result of a deal between that organization and Justice Larsen whereby Justice Larsen would again exert his political influence on behalf of Judge McEwen who was again seeking to fill a vacant Supreme court seat and, in return, the Delaware County Republican Organization, through its control of the Delaware county Judges, would fix this case.

(ii) The recusal motion contained the following statement about Judge Olszewski:

> In litigation arising out of the termination of the Surrick/Levy law practice . . . Upon appeal to the superior court, judge Olszewski dismissed the appeal not on the basis of anything in the record *or any issue raised by opposing counsel* but on the basis of an alleged procedural defect in the record. Even the most cursory examination of the record will reflect that the alleged defect in the Record relied upon by Judge Olszewski does not and did not exist. It is the belief of Movant Surrick that the decision of Judge Olszewski was based upon outside intervention, as it could not have resulted

from any rational legal analysis of the Record.[3]

(iii) In the recusal motion, Mr. Surrick stated that Judge Cirillo had told him that "you are keeping me off the Supreme Court." (This remark was said by respondent to have taken place at a bar association luncheon).

Based on the alleged falsity of these statements, the Office of Disciplinary Counsel charged Mr. Surrick with violating the following Pennsylvania Rules of Professional Conduct ("RPC"):

> RPC 3.3(a)(1):
>
> (a) A lawyer shall not knowingly
> (1) make a false statement of material fact or law to a tribunal.
>
> RPC 8.2(b):
>
> A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officers.
>
> RPC 8.4(c):
>
> It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> RPC 8.4(d):
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> It is professional misconduct for a lawyer to engage in conduct which is prejudicial to the administration of justice.

2. The fourth charge was that the recusal motion was filed prematurely since, at the time it was filed, the Superior Court had not yet announced the composition of the

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[3]The quoted recusal motion excerpts are taken from the opinion of the Pennsylvania Supreme Court (749 A.2d at 442-43), which undertook to reproduce them verbatim, with italicization and upper-and-lower case, from the recusal motion as filed.

panel that was to hear the appeal of which the recusal motion was the subject. Based on the alleged prematurity of the recusal motion, Disciplinary Counsel charged Mr. Surrick with violating RPC 3.1, which provides as follows:

> A lawyer should not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. 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.

3. The final charge against Mr. Surrick was that the reference in the recusal motion to Mr. Levy's disciplinary proceedings contravened Rule 402(a) of the Pennsylvania Rules of Disciplinary Enforcement, which provides that:

> All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential until or unless . . . (2) the respondent attorney requests that the matter be public, or waives confidentiality for a particular purpose specified in writing.

Special Hearing Committee

A Special Hearing Committee ("Committee") of the Disciplinary Board conducted hearings on July 26, 27 and 28, 1995. The hearings were held in open court in the Montgomery County Courthouse, Mr. Surrick having waived confidentiality. On January 17, 1997, the Committee filed its Report and Recommendation. The findings and conclusions of the Committee were, in summary, as follows:

1. The statements about the three judges

The Committee found that "Judge Bradley was not influenced in his

decision [in *Leedom v. Spano*] by any outside intervention," that there had been "no evidence presented by Respondent [Mr. Surrick] that Judge Olszewski based his decision upon any outside intervention:" and that "Judge Cirillo testified that he did not remember the incident."

Noting that RPC 3.3(a)(1) proscribes "*knowingly* mak[ing] a false statement of material fact to a tribunal" and that RPC 8.2(b) proscribes "*knowingly* mak[ing] false accusations against a judge", the Committee determined that under Pennsylvania law "the offending statements must be knowingly false" and [t]here was no evidence presented that respondent *knew* that the accusations made were false" [emphasis added in Committee opinion].[4]

2. <u>The prematurity of the recusal motion</u>

> . . . [R]easonable minds may indeed agree that the Motion was filed before it was ripe for decision by the Court. However, the evidence suggests that Respondent's timing was motivated by a desire to avoid the difficult and ticklish situation occasioned by the presentation of Motion to Recuse at the last minute when the panel was announced. In any event, it seems incomprehensible that a lawyer could be

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[4]The Committee did not separately analyze RPC 8.4(c) ("engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation") or RPC 8.4(d) ("engag[ing] in conduct which is prejudicial to the administration of justice"). It is a plausible inference that the Committee, by implication, imported into RPC 8.4(c) the "knowing" standard of RPC 3.3(a)(1) and RPC 8.2(b) when the act alleged to constitute "dishonesty, fraud, deceit or misrepresentation" is a "statement . . . to a tribunal" (Rule 3.3(a)(1)) or is an "accusation . . . against a Judge" (Rule 8.2(b)). Whether the Committee, by implication, adopted a similar construction of a "statement to a tribunal" or an "accusation . . . against a Judge" which is said to constitute "conduct prejudicial to the administration of justice" within the meaning of Rule 8.4(d) is less clear. Perhaps the Committee found – but did not record the finding – that the recusal motion did not have any detrimental impact on "the administration of justice."

> disciplined merely because he filed a motion before it was ripe for a decision by the Court. Accordingly, the panel recommends that the charge asserting a frivolous claim based upon the early filing of the motion be dismissed.
>
> 3. The confidentiality of the disciplinary proceedings involving Mr. Levy
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> We conclude that the partner's [Mr. Levy's] interest in the confidentiality of these proceedings was waived by his own conduct and that of his attorney in disclosing the proceedings and its outcome.

Based on these findings and conclusions, the Committee, in its January 17, 1997 Report and Recommendation, recommended to the Disciplinary Board "that all the charges brought against Respondent should be dismissed . . . "

The First Decision of the Disciplinary Board

The Office of Disciplinary Counsel filed exceptions to the Committee's Report and Recommendation and requested oral argument before the Disciplinary Board.

Argument was heard by a three-Member panel of the Board on April 18, 1997. On October 17, 1997, the Board filed an Order and accompanying Opinion. *Office of Disciplinary Counsel v. Robert B. Surrick*, No. 101 DB 94 (Oct. 17, 1997). The Board's findings and conclusions were, in summary, as follows:

1. The statements about the three judges

1. With respect to Mr. Surrick's statements about the three judges, the Board made the following findings of fact:

* * *

25. In its opinion filed on July 22, 1994, the

Superior Court vacated the judgment against the Surricks in the *Leedom v. Spano* lawsuit. (PE 6).

26. Petitioner [Disciplinary Counsel] proved that Respondent's allegation that Judge Bradley's decision to mold the verdict against the Surricks was the result of a "fix" or any "deal" involving the Delaware County Republican Organization, former Supreme Court Justice Rolf Larsen or Superior Court President Judge Stephen J. McEwen was untrue.

27. The Respondent submitted sufficient evidence to support his *belief* that the allegations set forth in his Motion for Recusal were not false.

28. Petitioner failed to prove, by a preponderance of evidence, that respondent has actual knowledge that the allegations concerning Judge Bradley as set forth in his Motion for Recusal were false.

* * *

34. Petitioner proved that Respondent's allegation that Judge Olszewski's decision in *Surrick v. Levy*, [the opinion for the Superior Court dismissing, on procedural grounds, Mr. Surrick's appeal in *Surrick v. Levy*] "was based upon outside intervention" was untrue.

35. Respondent submitted sufficient evidence to support his *belief* that the allegations set forth in his Motion for Recusal were not false. (T. 207-252) (RE 3, 4).

36. Petitioner failed to prove, by a preponderance of evidence, that Respondent had actual knowledge that the allegations concerning Judge Olszewski, as set forth in his Motion for Recusal were false.

* * *

39. Petitioner proved that Respondent's allegation that Judge Cirillo confronted him at a Philadelphia Bar reception and stated, "Surrick, you are keeping me off the Supreme Court" was untrue.

* * *

43. Respondent submitted sufficient evidence to support his belief that Judge Cirillo approached him at the Bar function and said, "Surrick, you are keeping me off the Supreme Court."

44. Petitioner failed to prove, by a preponderance of evidence, that Respondent had actual knowledge that the allegations concerning Judge Cirillo, as set forth in his Motion for Recusal were false.

In its conclusions of law, the Board held that proof of a violation of RPC 3.3(a)(1) requires a showing "by a preponderance of the evidence" that the accused lawyer "had actual knowledge of the falsity of the statement of material fact made to a tribunal." Similarly, the Board held that proof of a violation of RPC 8.2(b) requires a showing "by a preponderance of the evidence" that the accused lawyer "had actual knowledge of the falsity of the accusation against a judge or other adjudicating officer." In arriving at these conclusions of law, the Board rejected the Office of Disciplinary Counsel's "view, [that] an objective standard of reckless disregard of the truth of the statements should be applied." Such a construction, the Board held, could not be squared with "knowingly," the key word in both Rules, defined by the Terminology Section of the Rules of

Professional Conduct to signify "actual knowledge of the fact in question."[5]

Thus, the Board concluded that "[u]nder the Board's interpretations of Rule 3-3(a)(1) and 8.2(b), Petitioner's [Office of Disciplinary Counsel's] evidence was insufficient to support a finding of a violation of either of these rules."

In similar vein, the Board concluded that Disciplinary Counsel:

> failed to prove a violation of Rule of Professional Conduct 8.4(c). While Rule 8.4(c) does not specify the level of intent required for a violation to occur, the common meaning of the descriptive words within the Rule, "dishonesty, fraud, deceit and misrepresentation," necessitates that the prohibited conduct be intentional, and not merely negligent or careless. The Board recently considered this issue in *Office of Disciplinary Counsel v.* [*Anonymous Attorney A*], No. 28 DB 95 (Apr. 23, 1997), which involved a district attorney's failure to disclose reciprocal discovery material to the defendant, as well as, his alleged misrepresentations to the court and defense counsel that such disclosure had occurred. In that decision, the Board determined that negligent or careless conduct was not sufficient to constitute a violation of Rule 8.4(c). For the same reasons which support our [*Anonymous Attorney A*] decision, it is the Board's opinion that petitioner failed to prove, by a preponderance of the evidence, that Respondent's conduct was deliberate and intentional and not the result of negligence or carelessness

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[5]In footnote 1 of its opinion, the Board stated:

> Petitioner's reliance on the Model Rules of Professional Conduct is misplaced. While it is true that the Rules of Professional Conduct were derived from the Model Rules, they were not adopted in full. The Supreme Court rejected certain language contained in the Model Rules and inserted new language. In fact, the Supreme Court specifically rejected Rule 8.2 of the Model Rules' "reckless disregard of the truth" standard in favor of the "knowingly false" standard. In choosing "knowingly false" over "reckless disregard," the Supreme Court obviously intended for a stricter standard to apply. Bound by the Supreme Court's decision, we are unable and unwilling to adopt a standard specifically rejected by the Court.

> and therefore, failed to meet its burden in establishing respondent's violation of Rule of Professional Conduct 8.4(c).
>
> The Board has adopted the Special Hearing Committee's general finding that the Respondent submitted sufficient evidence to support his belief that the allegations contained in his Motion for Recusal were not false. Therefore, absent evidence to rebut this belief, it cannot be found that Respondent engaged in deliberate and intentional deception when he submitted the Motion for Recusal.
>
> Petitioner argues that Rule 8.4(c) is violated when a lawyer acts in "careless disregard for the truth." Again, Petitioner's argument is not supported by the Rules. In petitioner's view, Respondent attacked members of the Pennsylvania judiciary without adequately verifying the accuracy of his statements. In doing so, Respondent acted with "careless disregard" and thereby violated Rule 8.4(c). To adopt such an interpretation would not only be contrary to the Rules, but also create uncertainty as to the amount of 'due diligence" necessary for "adequate verification." Therefore, it is the Board's opinion that a proper interpretation of the Rules requires rejection of Petitioner's argument consistent with our opinion in [*Anonymous Attorney A*].

Turning to Rule 8.4(d) ["conduct prejudicial to the administration of justice"], the Board held:

> Like Rule 8.4(c), Rule 8.4(d) does not specify the level of intent required to violate this Rule. It is the Board's opinion that conduct in violation of Rule 8.4(d) must likewise be intentional, and not merely negligent or careless. The Board further believes proof that the conduct was prejudicial to the administration of justice is required.
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> * * *
>
> In the instant case . . . it is the view of the Board that Petitioner failed to sustain its burden in proving Respondent's conduct violated Rule 8.4(d). First . . .the Respondent

> submitted some, albeit weak, evidence to support his belief that his allegations were not false. This evidence was largely unrebutted.
>
> More importantly, it is the Board's view that Petitioner failed to prove Respondent's conduct interfered significantly with the administration of justice. From the evidence submitted, it was clear that Respondent, by this time, had developed a reputation for making baseless and unsubstantial allegations against certain members of the judiciary. For the most part, he was and is ignored by everyone familiar with his predilection. Therefore, it is unclear, given his reputation, how his allegations interfered with the administration of justice.

Finally, the Board agreed with the Special Hearing Committee's rulings that the filing of the recusal motion was not "frivolous" (RPC 3.1) and that the reference to Mr. Levy's disciplinary proceeding was not a breach of confidentiality since Mr. Levy had already "waived his right to the confidentiality of the disciplinary proceeding when he referred to the case, by name, in a brief filed before the Pennsylvania Superior Court."

Accordingly, the Board, in *Office of Disciplinary Counsel v. Robert B. Surrick*, 101 DB 94 (1997), ordered the charges against Mr. Surrick dismissed.[6]

<u>The Pennsylvania Supreme Court remands the case to the Disciplinary Board</u>

On November 10, 1997, approximately three weeks after the Board's decision in Mr. Surrick's case, the Office of Disciplinary Counsel petitioned the Pennsylvania Supreme Court for Allowance of Appeal. "This court" – as the Pennsylvania Supreme Court subsequently explained – "remanded the matter to the Disciplinary Board on April

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[6]One Board Member filed a concurring opinion; two Board Members dissented, concluding that respondent had violated RPC 8.4(c); one Member recused herself; one Member abstained; one Member did not participate.

14, 1998, directing the Board to review the actions of respondent in accordance with this court's opinion in *Office of Disciplinary Counsel v. Anonymous Attorney A*, Pa. 223, 714 A.2d 402 (1998)."[7] *Surrick*, 749 A.2d at 443. In *Anonymous Attorney A*, the Pennsylvania Supreme Court reversed a decision of the Board – No. 28 DB 95 – on which the Board had relied in dismissing the RPC 8.4(c) charge against Mr. Surrick. The court held that a "*prima facie* violation of Rule 8.4(c)" is made out where a "misrepresentation is knowingly made, or where it is made with reckless ignorance of the truth or falsity thereof . . . . [N]o actual knowledge or intent to deceive . . . is necessary to establish a *prima facie* violation; the element of scienter is made out if Respondent's conduct was reckless, to the extent that he can be deemed to have knowingly made the misrepresentation." *Id*.

<u>On Remand: the Disciplinary Board's Report and Recommendation</u>

On June 12, 1998, the Chair of the Disciplinary Board entered an order directing that, in light of the Pennsylvania Supreme Court's order remanding the Surrick matter "for further proceedings," the "above matter shall be scheduled for Re-Argument before a Three Member Panel," with the parties "directed to be prepared to argue the specific facts of record relevant to the new standard established in the [*Anonymous Attorney A*] Opinion." The three-member panel heard argument on September 28, 1998.

On April 1, 1999, the Board filed its second opinion. The portions of the opinion

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[7]See footnote 12, *infra*.

that applied the *Anonymous Attorney A* construction of RPC 8.4(c) to the charges against Mr. Surrick are as follows:

> Petitioner contends that Respondent's basis for his beliefs were not reasonable, but were founded on exaggerations and mischaracterizations. Petitioner argues there is no evidence of record that Respondent undertook an investigation of his theories prior to making them, or even understood the consequences of his actions.
>
> In order to determine whether Respondent's allegations were made with reckless ignorance of the truth or falsity of the matter, and therefore violated 8.4(c), it is necessary briefly to review the basis for statements made by Respondent against each of three judges, and the facts available to the Respondent at the time he made these statements.
>
> Respondent's alleged basis for making the allegation that Judge Bradley was "fixed" centers on what he claims is a long-standing animosity in Delaware County against him, due to his adverse relations with Justice Rolf Larsen and Larsen's alliance with the Republicans. According to Respondent, Judge Bradley had a powerful Republican mentor in Delaware County and was thus influenced by this mentor and in turn by Larsen, who was known to interfere in lower court proceedings. Respondent was aware that he and his attorney, a respected member of the bar, were led to believe by Judge Bradley that he would grant the Motion for Directed Verdict and they were free to leave the courthouse, which they did. Respondent's attorney testified that he never would have left without assurance that the motion would be granted. Respondent was aware that he was not permitted to argue his post-trial motion in response to the molded verdict, nor was he given any explanation concerning the molded verdict. Respondent believes that based on these facts and his belief concerning Larsen's influence, there is no explanation for the molded verdict other than a "fix" on the case.
>
> These facts provide a basis, albeit a somewhat weak one, for Respondent's assertions. Respondent did not deliberately

close his eyes to facts which would have disproven his allegations but merely chose to view the available facts in the most negative fashion. In essence, the Respondent "views the world through dirty windows." For this reason, we find the Respondent's allegations regarding Judge Bradley in the Motion to Recuse, were not reckless within the meaning of *Office of Disciplinary Counsel v. Anonymous Attorney A*, 714 A.2d 402 (Pa. 1998).

In the Judge Cirillo matter, the Respondent points to several facts as the alleged basis for his allegations. First, Respondent and Judge Cirillo did attend a Bar function on March 23, 1993. Further, Respondent did criticize Judge Cirillo because the Judge allegedly appointed his campaign treasurer to a lucrative receivership. The Judge was, in fact, running for the Supreme Court at that time and Respondent's criticism was carried in major newspapers in Pennsylvania around the time of the bar function. Finally, immediately after the alleged confrontation, Respondent told other persons of his alleged confrontation with the Judge. Even though Judge Cirillo denies the confrontation, there are sufficient facts to preclude a determination that respondent's conduct was reckless.

In the Judge Olszewski matter, however, the record demonstrates that Respondent ignored facts which refuted his beliefs. Indeed, Respondent had no direct information that the Judge was influenced by outside forces as he alleged. In fact, when respondent was asked at the disciplinary hearing for the basis of his beliefs regarding Judge Olszewski, he stated that his beliefs were based on conjecture and theory. (N.T. 487). This alone establishes Respondent's recklessness.

Petitioner established the fact that the decision at issue was made by a three member panel of the Superior Court. Further, there was no evidence that Judge Olszewski improperly influenced his fellow panel members. Accordingly, we find that Respondent's allegation was reckless in that it was based on conjecture and ignored facts that demonstrated his assertions were baseless. Therefore, he violated Rule 8.4(c).

> As the Board finds a violation of rule 8.4(c), it is now appropriate to make a recommendation of discipline. At the reargument, Respondent did not make a recommendation of disciplinary sanction, as he argued that the charges should be dismissed against him. Petitioner made a recommendation of a minimum sanction of public censure.
>
> Respondent's allegation against Judge Olszewski that he was influenced in his decision making by outside intervention was baseless and unsubstantiated. This statement went to the heart of the Judge's professional integrity. This allegation was made in a public court document and discussed in detail at a hearing which was made public by Respondent's choice. Attorneys cannot expect to make such outrageous charges against members of the judiciary without adverse consequences. Respondent chose to make his statements in the forum of the public. The Board recommends that Respondent's sanction also be carried out in that same forum. The Board recommends that a public censure be imposed.[8]

The Decision of the Pennsylvania Supreme Court

Both Mr. Surrick and the Office of Disciplinary Counsel petitioned for review by the Pennsylvania Supreme Court. On July 19, 1999, that court directed that the matter be set down for argument and ordered "the parties . . . to address in their briefs the applicability *vel non* of Office of Disciplinary Counsel v. Neil Werner Price [*Office of Disciplinary Counsel v, Price*, 732 A. 2d 599 (1999)], No. 486 Disciplinary Docket No.

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[8]*Office of Disciplinary Counsel v. Robert B. Surrick*, No. 101 DB 1994 (Remand Report and Recommendations, April 1, 1999) 27-30, 35. The Board also rejected respondent Surrick's contention that the retroactive application of the Pennsylvania Supreme Court's *Anonymous Attorney A* construction of RPC 8.4(c) to actions taken years before worked a denial of due process. *Id*. at 30-35.

In a concurring and dissenting opinion, three Board Members concluded that respondent's statement about Judge Bradley also contravened RPC 8.4(c). One Board Member filed a dissenting opinion concluding that the charges should be dismissed. One Board Member recused herself. Two Board Members did not participate.

3 (filed June 24, 1999)." *Price* was a disciplinary proceeding that involved, *inter alia,* questions of burden of proof and standard of proof in the processing of charges arising under RPC 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal") and RPC 8.2(b) ("A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officers"). (It will be recalled that violations of those rules had been among the several violations initially charged against Mr. Surrick, and that they had been dismissed by the Board in its initial decision; those charges had not, however, been revived by the Pennsylvania Supreme Court's remand order, which only directed the Board to reconsider the RPC 8.4(c) charge). In *Price* the court ruled as follows:

> Thus, to establish a *prima facie* case of making false statements or accusations as set forth in Rules 3.3.(a)(1) and 8.2(b), the Office of Disciplinary Counsel bears the initial burden of establishing that an attorney, based upon his own knowledge, made false allegations in a court pleading. This can be accomplished by presenting documentary evidence or testimony from the victims of the allegations stating that the allegations are false. The burden then shifts to the respondent to establish that he had an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry.

732 A.2d at 604 (footnote omitted).

In directing the parties to address the applicability "*vel non*" of *Price* to Mr. Surrick's case, the Pennsylvania Supreme Court evidently was seeking guidance as to whether the procedures announced in *Price* as governing disciplinary proceedings under RPC 3.3(a)(1) and RPC 8.2(b) should also govern disciplinary proceedings under RPC

8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"), the single rule under which charges were still pending against Mr. Surrick.

Oral argument was heard by the Pennsylvania Supreme Court on November 16, 1999. On March 24, 2000 the court filed its opinion and order suspending for five years Mr. Surrick's license to practice law in Pennsylvania.

The opinion of the Pennsylvania Supreme Court may be summarized under six holdings:

*First*: The court ruled that the applicable burden of poof and standard of proof were those the court had announced the year before in *Price*.

*Second*: The court ruled that "[a] determination of misconduct in this case hinges upon whether respondent acted recklessly or with the support of a reasonable factual basis. Recklessness is shown by the 'deliberate closing of one's eyes to facts that one had a duty to see or stating as fact, things of which one was ignorant'. *Anonymous Attorney A.*, 714 A.2d at 406." *Surrick*, 749 A. 2d at 444.

*Third*: The court found no merit in respondent Surrick's contention that application of *Anonymous Attorney A*, decided in 1999, to conduct that had taken place in 1992 would constitute a denial of due process:[9]

> Retroactive application of a new rule of law is a matter of judicial discretion. *Cleveland v. Johns-Manville Corp.*, 547 Pa. 402, 690 A.2d 1146(1997). The threshold inquiry is

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[9]As noted in footnote 8, *supra*, this contention had also been urged, unsuccessfully, upon the Board.

> whether a new rule has been announced. *Id*. A new rule of law is established where an abrupt and fundamental shift from prior precedent, upon which litigants may have relied, has occurred. *Blackwell v. Com. State Ethics Comm.*, 527 Pa. 172, 589 A.2d 1094 (1991).
>
> Although numerous cases involving violations of RPC 8.4(c) have been resolved by this tribunal, none of those cases raised a question of the mental culpability element of RPC 8.4(c) prior to *Anonymous Attorney A*. Violations of RPC 8.4(c) had been sustained in earlier decisions of this court where the conduct was intentional as well as where the conduct was negligent. *See Office of Disciplinary Counsel v. Holston*, 533 Pa. 78, 619 A.2d 1054 (1993) (Respondent forged a court document and lied about it to a judicial authority); *Office of Disiplinary Counsel v. Geisler*, 532 Pa. 56, 614 A.2d 1134 (1992) (Respondent made statements to his clients without knowing the accuracy of those statements). No precedent had declared only intentional conduct would violate RPC 8.4(c). Nor was it unforeseeable that this court would interpret RPC 8.4(c) as applicable to misstatements made with reckless disregard for the truth or falsity thereof. *Anonymous Attorney A* did not create a new legal standard; it merely provided explicit clarification of existing law. Respondent's due process objection to consideration of his conduct under the recklessness standard is rejected.

749 A.2d at 444-45 (footnote omitted).

*Fourth*: The court likewise found no merit in respondent Surrick's contention that the procedural regime announced in *Price* was not properly applicable to the litigation of charges arising under RPC 8.4(c):

> Respondent asserts that *Price* is inapplicable as the conduct at issue in that case involved violations of RPC 3.3(a) and 8.2(b), which prohibit a lawyer from knowingly making a false statement; thus, the element of scienter therein is intentional. Whereas, the charges at issue in the instant case relate to RPC 8.4(c), which prohibits a lawyer from knowingly or recklessly making a statement in ignorance of

> the truth or falsity thereof. By adding the element of recklessness, respondent argues that something less than intentional conduct is at issue, and thus, a lesser burden should be placed upon the attorney in supporting his basis for making the allegations. Respondent argues that a subjective standard is more appropriate to a determination of whether or not a lawyer acted in a reckless manner as it focuses on the actions of the individual charged rather than looking at the conduct through the eyes of an ordinary reasonable lawyer.
>
> To substitute a subjective approach merely because a different rule of professional conduct is at issue is not a valid basis for distinguishing *Price* from the case at issue. The measure of whether conduct was reckless can be ascertained by an objective analysis.

749 A.2d at 445.

*Fifth*: Having determined the substantive content – *Anonymous Attorney A* – and the appropriate procedural apparatus – *Price* – of RPC 8.4(c), the court then undertook to review the evidence. On the basis of this review the court concluded that the Board had been correct in determining that Mr. Surrick's statement about Judge Olszewski had violated RPC 8.4(c), but had erred in determining that Mr. Surrick's statement about Judge Bradley had not violated RPC 8.4(c). In the course of its discussion of the merits of the charges, the court noted that since 1983, when Mr. Surrick, as a member of the former Judicial Inquiry and Review Board, cast a minority vote to remove former Supreme Court Justice Rolf Larsen, the respondent has perceived himself as engaged in battle with Pennsylvania's judicial establishment. "Respondent believes that since his unsuccessful attempt to have Justice Larsen removed from office, and because of his well known views on the subject of judicial reform in Pennsylvania, he has created powerful

political and judicial enemies who have united in an effort to bring about his destruction.." *Id.* at 446. "Respondent uses his self-aggrandized role as the crusader for justice as a shield from any liability for his actions while simultaneously arguing that any judicial decision in contravention to his position proves that he is the victim of a judicial conspiracy. Respondent's personal views on judicial reform cannot excuse his reckless conduct in bringing unsubstantiated accusations against individual members of the judiciary." *Id.* at 447.

*Sixth* Finding that "[t]he conduct of respondent in this case merits a severe sanction," *id.* at 449, the court ordered that respondent Surrick be suspended from the practice of law for five years. The court did not address the fact that both the Office of Disciplinary Counsel and the Disciplinary Board had recommended "public censure" as the appropriate sanction.

**II.**

As noted at the outset of this opinion, respondent Surrick, in his Answer to Order to Show Cause, has advanced three arguments why this court should not impose punishment identical with that meted out by the Pennsylvania Supreme Court. One argument – essentially a challenge to the sufficiency of the evidence that respondent's statements about Judges Bradley and Olszewski were recklessly made – is that the Pennsylvania Supreme Court's adverse decision rested upon an "infirmity of proof." Mr. Surrick's other two arguments – that the adverse decision worked (1) a denial of due process and (2) abridged his free speech right to continue his longstanding criticism of

Pennsylvania's judicial establishment – are of constitutional dimension. We turn first to due process.

In addressing Mr. Surrick's due process claims, we note that, if this court were to agree with Mr. Surrick that the process resulting in his five-year suspension from the Pennsylvania bar was constitutionally flawed, such a ruling would not of its own force destabilize the decision of the Pennsylvania Supreme Court suspending for five years Mr. Surrick's status as a Pennsylvania practitioner. The Supreme Court of the United States is, of course, the only court that could have exercised authority to review that decision (*see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923)), and Mr. Surrick chose not to petition for certiorari.

As seen by Mr. Surrick, the due process problem has a double aspect – that both *Anonymous Attorney A*'s substantive construction of RPC 8.4(c) and *Price*'s burden of proof and standard of proof were (1) promulgated by the Pennsylvania Supreme Court (a) subsequent to Mr. Surrick's assertedly wrongful 1992 conduct and (b) subsequent to the 1995 evidentiary hearing before the Special Hearing Committee, and (2), as promulgated, represented major departures from the previously prevailing substantive al understanding and procedural framework of RPC 8.4(c).

We have noted that the Pennsylvania Supreme Court, in its *Surrick* opinion, dismissed Mr. Surrick's contention that *Anonymous Attorney A*'s 1998 construction of RPC 8.4(c) should not have been given retroactive application to respondent's 1992

conduct. "*Anonymous Attorney A* did not create a new legal standard; it merely provided explicit clarification of existing law." 749 A.2d at 445.[10] But this recital is (at a minimum) in some tension with what the court had said in deciding *Anonymous Attorney A*. There, after reviewing prior Pennsylvania cases, the court said that "[g]iven the absence of precedent in Pennsylvania on the issue *sub judice*, we have looked to case law from other jurisdictions for guidance." 714 A.2d at 406. And after surveying the case law of sister jurisdictions, the court concluded that "[w]e find the standard expressed by the Supreme Court of Colorado in *Rader* [*People v. Rader*, 822 P.2d 950 (Colo.1992)] to be most appropriate in interpreting our Rule 8.4(c)." *Id.* at 407. Moreover, when the Pennsylvania Supreme Court remanded *Surrick* for reconsideration by the Disciplinary Board in the light of *Anonymous Attorney A*, the Chair of the Board, in setting the matter

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[10]In its recent opinion in *Fiore v. White*, 757 A.2d 842 (2000), the Pennsylvania Supreme Court has had occasion to reiterate this characterization of *Surrick*:

> In *Surrick*, the appellant challenged the retroactive effect of another decision to his case. The appellant claimed that our decision in *Anonymous Attorney A*, 552 Pa. 223, 714 A.2d 402 (1998) announced a new scienter requirement for establishing attorney misrepresentation as a violation of Pennsylvania's Rule of Professional Conduct 8.4(c). Specifically, the appellant argued that *Anonymous Attorney A* added recklessness as a new element. We held that *Anonyymous Attorney A* did not create a new standard of law. *Surrick*, 749 A.2d at 445. Our rationale was that there was no precedent that restricted the scienter requirement to intentional acts, and, prior to *Anonymous Attorney A*, it had been foreseeable that we would find that the rule defined professional misconduct to include misstatements made with reckless disregard for the truth or falsity of the contents. *Id.*

757 A.2d at 847-48 (footnote omitted).

down for reargument before a Board panel, referred to the "new standard established in the [*Anonymous Attorney A*] opinion"[11] (although, to be sure, the Report and Recommendation filed by the Board, following reargument, rejected (as the Pennsylvania Supreme Court was later to do) respondent Surrick's contention that *Anonymous Attorney A* should not be given retroactive application[12]). In its recent discussion, in *Fiore v. White*, 757 A. 2d 842 (2000), of the difference between an opinion that constitutes a "new rule of law" and an opinion that "merely clarifie[s] existing law," *id.* at 847-48, the Pennsylvania Supreme Court expressly reaffirmed its assignment of *Surrick* to the latter category.[13] Nonetheless, the court's discussion also cited *Surrick*

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[11]*See* text, *supra*, p. 16.

[12]*See* footnote 8, *supra*. In its *Surrick* opinion, in the course of detailing the procedural history of the case, the Pennsylvania Supreme Court noted that it had "remanded the matter to the Disciplinary Board on April 14, 1998, directing the Board to review the actions of respondent in accordance with this court's opinion in [*Anonymous Attorney A*]." 749 A.2d at 443. It appears, however, that the court's decision in *Anonymous Attorney A* was not rendered until July 8, 1998, nearly three months after the remand order and almost a month after the Chair of the Disciplinary Board entered the order setting the matter down for reargument. Indeed, the court's remand order and the Board Chair's reargument order both refer to "further proceedings in accordance with *Office of Disciplinary Counsel v*. [*Anonymous Attorney A*] No. 28 DB 95" – *i.e.*, the opinion of the Disciplinary Board that was the subject of the Pennsylvania Supreme Court's review in *Anonymous Attorney A* – not to "further proceedings" in accordance with the opinion of the Pennsylvania Supreme Court.

[13]*See* footnote 10, *supra*. The Pennsylvania Supreme Court's opinion in *Fiore v. White* was a response to a question certified to the court by the United States Supreme Court, *Fiore v. White*, 528 U.S. 23, 29 (1999), in connection with its review of a federal habeas corpus case brought by a Pennsylvania prison inmate challenging a Pennsylvania conviction; on the basis of the Pennsylvania Supreme Court's response, the United States Supreme Court has completed its disposition of the habeas case. *Fiore v. White*, 69 U.S.L.W. 4066 (2001).

first in a string citation of cases supporting the following pronouncement:

> Not every opinion creates a new rule of law. Generally, where we have yet to rule explicitly on an unresolved legal issue, the first decision providing a definitive answer announces a new rule of law. . . . When this Court issues a ruling that overrules prior law, expresses a fundamental break from precedent, upon which litigants may have relied, or decides an issue of first impression not clearly foreshadowed by precedent, this Court announces a new rule of law.

757 A.2d at 847.

It appears to us that, given what the Pennsylvania Supreme Court in *Anonymous Attorney A* acknowledged to be "the absence of precedent in Pennsylvania," 714 A.2d at 406, it is hard to escape the conclusion that in *Anonymous Attorney A* the court – to employ the *Fiore v. White* formulation – "decide[d] an issue of first impression, not clearly foreshadowed by precedent," and hence "announce[d] a new rule of law."

We recognize, of course, that the Pennsylvania Supreme Court has held to the contrary. That is to say, its *Surrick* opinion expressly recites that "*Anonymous Attorney A* did not create a new legal standard." 749 A.2d 441. And that settles the issue as a matter of Pennsylvania law. But it does not settle for this court the federal due process question whether it was fundamentally unfair for the Commonwealth of Pennsylvania, through its highest court, in 2000, to suspend Mr. Surrick from the practice of law for five years because of actions taken at a time – nearly eight years before the court's decision – when there was an "absence of precedent in Pennsylvania" that his actions were sanctionable. On the criminal side of the docket, the *ex post facto* clause bars the imposition of punishment for conduct not denominated as criminal at the time the conduct took place.

On the civil side of the docket, by contrast, the developing common law not infrequently applies norms not readily anticipatable at the time of the transaction at issue; but if, on occasion, substantial reliance on earlier norms is demonstrable, due process may require the common law to stay its hand as to past events, claiming its dominion *in futuro*. To which category do attorney disciplinary proceedings belong? The answer is – neither, or both. "These are," we are authoritatively advised, "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1968). In short, the claim that Mr. Surrick's license to practice law cannot constitutionally be suspended for several years for conduct whose prohibited contours were not clearly demarcated at the time Mr. Surrick acted, is, in our view, not clearly established nor yet clearly refuted.

And so we look elsewhere for the factors that control our disposition of this matter. We look to the other facet of respondent's due process claim – namely, the contention that the application of *Price* to respondent's disciplinary proceeding violated procedural due process. *Price*, it will be recalled, established for RPC 3.3(a)(1) and RPC 8.2(b) a regime governing the burden of proof and the standard of proof more onerous for the accused attorney than had theretofore governed the litigation processes of the Disciplinary Board. In *Surrick*, the Pennsylvania Supreme Court concluded that the same procedural regime should govern the processing of charges under RPC 8.4(c) – the only charges that remained of the litany of charges (including charges under RPC 3.3(a)(1) and RPC 8.2(b)) originally deployed against respondent Surrick. We see no ground for questioning the court's judgment that the *Price* procedural regime was

properly transferable to RPC 8.4(c) proceedings. But, from a due process perspective, we find it gravely problematic that the court applied its new procedural regime ("The burden then shifts to respondent to establish that the allegations are true or that following a reasonably diligent inquiry, he had formed an objectively reasonable belief that the allegations were true." 749 A.2d at 444) to an evidentiary record developed on the understanding that it was up to the Office of Disciplinary Counsel to shoulder the burden of proof. The profundity of the problem is placed in sharp relief by the following colloquy between this panel and prosecuting counsel that took place at oral argument:

Judge PADOVA:

> . . .Well, doesn't due process require[,] under these circumstances, Mr. Surrick to have had the opportunity to present evidence under a newly-formed burden of proof? . . .

Mr. BURGOYNE:

> And our argument is, that at the time he addressed the applicability of *Price* was the time to raise those issues of remand, new hearing, providing the opportunity to address those issues. But the opportunity to be heard was on the issue of what to do about that.

Judge PADOVA:

> . . .The opportunity to be heard was an opportunity to be heard as to what the governing principles of law should be with respect to objective standards of proof. It wasn't an opportunity to . . . present evidence under a new burden of proof.

Mr. BURGOYNE:

> Not present evidence, but to present argument, why evidence should be heard at another hearing.

Judge PADOVA:

> So – well that's a waiver argument then.

Mr. BURGOYNE:

> It's – it's, essentially, a waiver argument.

Judge PADOVA:

> Because – I mean, you agree there was never any opportunity for Mr. Surrick in this case at any time to present evidence – to conduct his defense – under the burden – the new burden of proof – never an opportunity?

Mr. BURGOYNE:

> Since he did not have the hearing, I can't disagree with that.

Transcript of Proceedings
September 20, 2000, pp.38-39.

The coda to this colloquy is supplied by the concluding words of the United States Supreme Court in its opinion in *In re Ruffalo*, 390 U.S. 544, 552 (1968), more than three decades ago, reversing a decision of a federal court of appeals removing an attorney from membership in its bar on the basis of a judgment of a state supreme court indefinitely suspending the attorney from practice: "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

Of course, in Mr. Surrick's case there is the possibility that the "waiver argument" relied on by prosecuting counsel in the quoted colloquy might – arguably – be deemed marginally adequate to shield the state proceedings, culminating in Mr. Surrick's five-year suspension from the bar, from due process challenge. Whether that could be the case we need not determine. That is to say, we find it unnecessary to determine whether – taking into account the slender reed of asserted 'waiver' – the state disciplinary proceedings were, taken in the aggregate, so fundamentally flawed as to yield the conclusion that "the [state] procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." Rule II(D)(1), Rules of Disciplinary Enforcement, United States District Court for the Eastern District of Pennsylvania. Even if Mr. Surrick could be found, as a matter of Pennsylvania law, to have 'waived' his due process rights, codified in Rule II(D)(1), to "notice" and "opportunity to be heard," Mr. Surrick has not waived his right to be treated fairly by this court. And it is clear to us that the processes of charge and proof that obtained in the state proceedings, even if constitutionally sufficient for the purposes of the Commonwealth, have not built a record and led to a judgment on which this court, in the performance of its independent responsibility to determine whether discipline should be imposed on a member of our bar, can confidently rely. We take as our guide in this respect Justice Harlan's concurring opinion in *Ruffalo*:

> I see no need to decide whether the notice given petitioner of the charge that formed the basis of his subsequent federal disbarment was adequate to afford him constitutional due process in the state proceedings. For I think that *Theard v.*

> *United States*, 354 U.S. 278, leaves us free to hold, as I would, that such notice should not be accepted as adequate for the purposes of disbarment from a federal court. On that basis, I concur in the judgment of the Court.

*Ruffalo*, 390 U.S. at 552.

Having determined that the state disciplinary proceedings resulting in the imposition of severe discipline upon respondent Surrick do not provide a proper basis for this court to impose discipline, we find it unnecessary to consider the other grounds he has urged for not conforming our judgment to that of the Pennsylvania Supreme Court – namely, the contention that the state proceedings were marked by an "infirmity of proof" and the contention that the imposition of discipline on Mr. Surrick was a constitutionally impermissible response to his exercise of his First Amendment right of free speech.[14]

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[14]Given our conclusion that the record made in the state proceedings does not provide a basis on which this court can properly impose discipline, we have no occasion to consider whether the severity of the sanction imposed on Mr. Surrick in the state proceedings was disproportionate to the offenses attributed to Mr. Surrick. But we note that, on oral argument, when Judge Dalzell inquired of prosecuting counsel, "In eighteen years [the period in which counsel had served in the Office of Disciplinary Counsel], can you cite me any other Pennsylvania case, where a lawyer, who filed a motion to recuse got a five-year suspension for doing that?", Mr. Burgoyne replied, "I can't cite you another case, no."

We would also note an additional problem which, in view of our disposition of this matter, need not be explored. The problem is presented by the fact that Mr. Surrick was found by the Disciplinary Board, and, ultimately, by the Pennsylvania Supreme Court, to have violated RPC 8.4(c), notwithstanding that charges arising under RPC 3.3(a)(1) and RPC 8.2(b), based on the same conduct (namely, the filing of the recusal motion), had been dismissed. Such a result appears to be in tension with guidance contained in the American Law Institute's recently adopted RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS. Appended to the black-letter **§5 [Professional Discipline]** there is an extended Comment; paragraph *c* of the Comment states, in pertinent part:

> *General provisions of lawyer codes*. Modern lawyer codes contain one or more provisions (sometimes referred to as "catch-all" provisions) stating general grounds for discipline, such as engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" (ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983)) or "in conduct that is prejudicial to the administration of justice" (*id*. Rule 8.4(d)). Such provisions are written broadly both to cover a wide array of offensive lawyer conduct and to prevent
>
> (Footnote 14 continued)
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> (Footnote 14 continued)
>
> attempted technical manipulation of a rule stated more narrowly. On the other hand, the breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent (see Comment *h*) and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the "appearance of impropriety" principle (stated generally as a canon in the 1969 ABA Model Code of Professional Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.
>
> No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule.

1 RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS (2000) 50.

The problem the American Law Institute describes is, of course, one of disciplinary policy, not of federal right. But fashioning disciplinary policy is a matter of

For the reasons given above, we conclude that Mr. Surrick has shown cause that discipline should not be imposed on him by this court.

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concern for federal courts as well as for state courts.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| IN THE MATTER OF | : | MISCELLANEOUS |
| ROBERT B. SURRICK | : | NO. 00-086 |
| | : | |

**RECOMMENDATION**

AND NOW, this 7th day of February, 2001, for the reasons stated in the accompanying Report, it is hereby recommended that discipline not be imposed on Robert B. Surrick.

_____
LOUIS H. POLLAK, J.

_____
STEWART DALZELL, J.

_____
JOHN R. PADOVA, J.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| IN THE MATTER OF | : | MISCELLANEOUS |
| | : | |
| ROBERT B. SURRICK | : | NO. 00-086 |

**Dalzell, J., Concurring** **February , 2001**

While I without reservation join in, and could not improve upon, Judge Pollak's opinion for our panel on the due process issue, I write separately to highlight another important constitutional concern this case implicates.

In two Delphic references in the text of Surrick's brief[1], his able lawyer raised the First Amendment as an issue but then elected not to press it. As a result, I do not dissent from our failure to consider the First Amendment in the panel's opinion.

Our taking of Surrick at his advocate's word on this point should not, however, be construed as representing a unanimous view that this concern is not at stake. Those interests are to me suggested in the Supreme Court's words in Times v. Sullivan, 376 U.S. at 279, 84 S.Ct. at 725:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to . . . 'self-censorship.' . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can

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[1]See page 6 referring to the First Amendment explicitly, and pages 24-25 alluding to “speech” but not the “First Amendment”, and one in footnote 9 on page 23 (citing, among other cases, New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964)).

> be proved in court or fear of the expense of having to do so.

See also NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338 (1963) ("First Amendment freedoms need breathing space to survive").

While a courtroom is, to be sure, not a free speech zone on the order of a public square or the Internet, neither is it an alien place to core First Amendment values, as this case illustrates. Judges are public figures and their impartiality and ethics are matters of profound public concern.[2] Lawyers are the sentries for the public when they detect judges' breaches of these minimal standards. In that role, lawyers must have some Times-like "breathing space". Here, where a lawyer's loss of a recusal motion has meant the loss of his job for five years -- an apparently unprecedented sanction on lawyer recusal speech in Pennsylvania -- that breathing space has disappeared for him and, through him, for all Pennsylvania lawyers. Surrick's professional catastrophe is thus of grave First Amendment moment for the bar and the public.

Although motions to recuse therefore can, in my view, implicate core First Amendment interests, I say no more on this subject because Surrick himself has not invited action from us based upon this crucial part of our Constitution.

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[2]See 22 Judicial Conduct Reporter 4, 6-7 (Summer, 2000), reporting that between 1980 and the end of 1999 no less than 266 state court judges had been removed from office as a result of discipline proceedings. Indeed, in 1999 alone, two of thirteen judges were removed because of ex parte communications. See Mississippi Commission on Judicial Performance v. Jenkins, 725 So.2d 162 (Miss. 1998); Mississippi Commission on Judicial Performance v. Spencer, 725 So.2d 171 (Miss. 1998). It is well past the time in Pennsylvania when one could reflexively attribute such improper communications to lawyers' hyperactive imaginations. See, e.g., Yohn v. Love, 887 F.Supp. 773 (E.D.Pa. 1995), aff'd in part 76 F.3d 508 (3d Cir. 1996).