

No. _____

In The
Supreme Court of the United States

WILLIAM D. BONTRAGER

Petitioner pro se

v.

SUPREME COURT, STATE OF COLORADO:
THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
Respondent

*On Petition for a Writ of Certiorari to the
Supreme Court, State of Colorado:
The Office of Presiding Disciplinary Judge*

PETITION FOR A WRIT OF CERTIORARI

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Pro se Petitioner

QUESTIONS PRESENTED

Overview: This Petition flows from multiple fee-shifting judgments entered against Petitioner by trial and appellate courts for litigation conducted on behalf of clients. Two orders of the Office of Presiding Disciplinary Judge [herein, "PDJ"] of the Colorado Supreme Court [herein, "CSC"] present four issues for this Court, all based on the First Amendment Right to Access the Courts and Petition the Courts for Redress of Grievances, and the Fourteenth Amendment Equal Protection Clause:

ISSUE 1: Did the PDJ err in saying attorneys have no First Amendment protection against being disciplined for Petitioning activities on behalf of clients? [Appendix B, App. Pages 36-38.]

ISSUE 2: Did the Presiding Disciplinary Board [herein, "Board"] err in disciplining Petitioner for litigation conduct done on behalf of clients under Colorado Rules of Professional Conduct 1.1, 3.1, and 8.4(d), when the Board specifically found:

We do not find that Respondent's misconduct was fueled by selfish or dishonest motives. Rather, we find that he was guided by what he perceived to be a noble and just cause, and we give him some credit for this factor in mitigation. [Appendix C, App. Pages 131-132.]

ISSUE 3: If Petitioner had some First Amendment protection, what were the parameters of that protection?

ISSUE IV: If Petitioner had no First Amendment protection, was he thereby denied Equal Protection of the law when attorneys in some types of cases have been granted First Amendment protection by this Court?

PARTIES TO THE PROCEEDING

Petitioner is William D. Bontrager, Colorado attorney #035359. Respondent is the Office of the Presiding Disciplinary Judge of the Colorado Supreme Court.

RULE 229.6 STATEMENT

No Rule 229.6 entity is involved herein.

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ORDERS APPEALED FROM BELOW

Overview: There are three orders involved here [Appendixes B, C, and D]. They need to be reviewed in their order of entry, as the Colorado Supreme Court's [herein, "CSC"] single sentence Order [D] merely affirmed the two prior Orders [B & C] entered by the CSC's Office of Presiding Disciplinary Judge [herein, "PDJ"].

Because Appendix B denied Petitioner's C.R.C.P. 12(b)(5) Motion to Dismiss on First Amendment grounds for five of the six cases involved in the disciplinary charges against Petitioner, Petitioner is including the Motion as Appendix A.

Appendix A [App. Pages 4-21]:

Petitioner's 6/5/16, "C.R.C.P. 12(b)(5) Motion" to dismiss filed in PDJ case #16PDJ038. Because Colorado rules require the Motion, Answer, and Affirmative Defenses to be combined in one document; thus only the Motion is contained in Appendix A.

Appendix B [App. Pages 22-39]:

"Order Denying in Part Respondent's Motion to Dismiss Complaint and Directing the People to Make a Partial *Prima Facie* Showing Under *POME*", entered in Case #16PDJ038 on 8/15/15.

At App. Pages 36-38, that Order said the following:

... The right to petition is *personal* and does not extend to petitioning activity on behalf of others.

Here the people charge Respondent with violating Colo. RPC 3.1 and 8.4(d) in the Adams, Keith, Watson, Cugnini, and Martinez matters--all litigation where Respondent was representing clients rather than filing lawsuits on his own behalf. Respondent's right to petition does not extend to his filing lawsuits on behalf of these clients, the First Amendment and *POME* are not implicated, and the Court denies Respondent's Motion to dismiss as to these cases. [italics in original.]

Petitioner preserved his 12(b)(5) issues by:

a) filing a C.R.C.P. 59 Motion for Reconsideration on 8/22/16, which was denied by the PDJ on 8/31/16; and,

b) including the issues in his Opening Brief on Appeal to the CSC [#2017SA96] of its Disciplinary Board's Judgment of 4/20/17.

Appendix C [App. Pages 40-137]:

April 20, 2017, "Opinion and Decision Imposing Sanctions Under C.R.C.P. 251.19(b)," entered in PDJ #16PDJ038 by the Disciplinary Board [herein, "Board"]. The Order found Petitioner incompetent, frivolous, and having interfered with the administration of justice. The material portion of the Order for the purpose of this Petition reads as follows:

Mitigating Factors -- Absence of a Dishonest or Selfish Motive --

9.22(b): We do not find that Respondent's misconduct was fueled by selfish or dishonest motives. Rather, we find that he was guided by what he perceived to be a noble and just cause, and we give him some credit for this factor in mitigation.

[App. Pages 131-132.] The Order did not apportion the discipline penalties among the multiple violations as required. [See: *Foster, supra*, 253 P.3d at 1259].

Appendix D [App. Pg 138]

11/2/17, "Order of the [Colorado Supreme] Court" in #2017SA96, *In the Matter of William D. Bontrager*. The entire Order reads as follows:

Upon consideration of the Record on Appeal, together with the briefs filed by the parties, and now being sufficiently advised in the premises, IT IS ORDERED that the Order of the Hearing Board shall be and the same is hereby AFFIRMED WITHOUT OPINION.

BY THE COURT, EN BANC, NOVEMBER 2, 2017.

JURISDICTION

Jurisdiction is based on Article III, Section 2(1) of the United States Constitution, 28 U.S.C. 1254(1), under 42 U.S.C. 1983, United States Supreme Court Rule 10(c), under the First Amendment Speech and Petition clauses, and under the Fourteenth Amendment Equal Protection clause.

The CSC, Office of the PDJ, Attorney General, and Office of Attorney Regulation Counsel [herein, "OARC"] are all being served with a copy of this Petition and its Appendixes.

This Petition for Certiorari is timely filed because Petitioner was granted an extension of time to April 2, 2018, by Order dated 1/24/18 in Application No. 17A783.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

(Emphasis added throughout.)

First Amendment:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and petition the government for a redress of grievances.

Fourteenth Amendment, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

United States Supreme Court Rule 10(c):

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court considers:

(c) a state court ... has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Colorado Rules of Professional Conduct [herein, Colo. RPC]:

Rule 1.1:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparations reasonably necessary for the representation.

Rule 1.4(a)(b): [Entire Rule at Appendix L, App. Page 209-210.]

(a) A lawyer shall: (1) promptly inform the client of any decision or circumstances with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these rules ... [Petitioner admitted this violation when first notified of it at the trial court level.]

Rule 3.1: [Entire Rule at Appendix M, App. Page 210.]

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, 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.**

Rule 8.4(d): [Entire Rule at Appendix N, App. Pages 210-211.]

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice.

Colorado Revised Statutes [herein, C.R.S.]:

C.R.S. 13-17-101:

Legislative declaration. The general assembly recognizes that courts of record of this state have become increasingly burdened by litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record where the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provision of this article to effectuate substantial justice and comply with the intent set forth in this section.

C.R.S. 13-17-102(4)(7): [Entire Rule at Appendix O, App. Pages 211-214.]

(4) The court shall assess attorney fees if, **upon the motion of any party or the court itself**, it finds that a party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or other improper conduct ...

(7) No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney in a **good faith attempt to establish a new theory of law in Colorado**.

C.R.S. 13-17-201:

In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action. This section shall not apply if a motion under rules 12(b) of the Colorado rules of civil procedure is treated as a motion for summary judgment and disposed of as provided in rule 56 of the Colorado rules of civil procedure.

Colorado Rules of Civil Procedure [herein, C.R.C.P.]

C.R.C.P. 11(a): [Entire Rule at Appendix H, App. Pages 206-207.]

... The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, **and that it is not interposed for any improper purpose ...**

Colorado Appellate Rules [herein, C.A.R.]:

C.A.R. 28(k): [Entire Rule at Appendix J, App. Page 208.]

For each issue raised on appeal, the party raising such issue must provide, under a separate heading placed before discussion of the issue: (1) a concise statement of the applicable standard of review with citation to authority; and, (2) a citation to the precise location in the record where the issue was raised and ruled upon, **if the issue involves** (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review. ...

C.A.R. 38(d): [Entire Rule at Appendix K, App. Page 209.]

(d) If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

A Factual Overview

This Petition raises the issue of the degree to which the First Amendment to the United States Constitution limits the police power of States to punish attorneys for conduct when petitioning the judicial branch of government on behalf of clients, for redress of the client's grievances against non-government entities. Such punishments directly impact the Right of the People to access the Courts.

Underlying this Petition are multiple fee-shifting judgments of trial and appellate courts, against Petitioner and his clients. The judgments were all based on Colorado statutes and rules, and totaled over \$400,000.

Two of the statutes [C.R.S. 13-17-101 *et seq* and C.R.S. 13-17-201, page 5, *supra*] have been declared by the CSC to be in derogation of the "American rule" [Crandall, *supra*, 238 P.3d at 662]. *Black's 9th* (at page 98), defines the rule as: "all litigants, even the prevailing one, must bear their own attorney fees." It appears to date from this Court's decision in *Arcambel v. Wiseman*, 3 U.S. 306 (1796).

Mr. Thomas P. Dugan, counsel for Defendant BP America Production Co. [herein "BP"], and Mr. Thomas Shipps, counsel for Defendant Southern Ute Indian Tribe [herein "Tribe"] referred Petitioner to the OARC for investigation. That resulted in the two orders brought to this court. [App. Pages 22-39, and 40-137.]

Petitioner filed five cases in the 6th Judicial District Court, La Plata County, Colorado. All were filed on behalf of owners of oil and gas minerals (a real property right in Colorado), and against producers of their minerals. All cases but one,

Adams, also involved Oil & Gas Leases (a contract right). The cases are known as: *Adams*, *Keith*, *Watson*, *Cugnini* and *Martinez* -- their chronological order of filing.

In a sixth case, *Parry*, Petitioner sought to intervene *pro se* in *Parry v. Amoco*, 1994CV105, 6th Judicial District Court of La Plata County. The PDJ granted Petitioner First Amendment protection as to that case [App. Pages 37-38], and the OARC then elected to dismiss that charge.

All cases were decided at the trial court level in favor of the producers on their Motions to Dismiss or for Summary Judgment.

All trial court fee-shifting judgments were entered under one or more of the following: C.R.C.P. 11(a); C.R.S. 13-17-101 *et seq*; and C.R.S. 13-17-201.

All of the Appellate Court fee shifting judgments were entered under C.A.R. 38(d), and the Opening Brief in *Adams* was also declared improper in form under C.A.R. 28(k).

The Witnesses at the PDJ Board Trial

The people called six witnesses, other than Petitioner: (1) Thomas Dugan; (2) Thomas Shipps; (3) sitting Judge Wilson, trial judge in all cases but *Watson*, and judge of the fee-shifting hearing in *Cugnini*; (4) sitting Judge Dickinson, judge of the fee-shifting hearing in *Watson*; (5) Senior Judge Cole sitting by assignment, who entered the summary judgment order in *Watson*; and, (6) Senior Judge Lass sitting by assignment, who conducted the fee-shifting hearing in *Keith*. [There was no fee-shifting hearing in *Adams* as the Order came from the Court of Appeals, and

Petitioner reached a settlement with defense counsel in lieu of a hearing. In *Martinez*, Petitioner allowed the Court to rule on fee-shifting without a hearing

Both Mr. Dugan and Mr. Shipps were qualified by the PDJ as to their "years of experience in their respective areas of practice", which would cover, for both, Oil and Gas law (but not oil and gas operations). It would cover Mr. Shipps for Tribal Sovereign Immunity law. It would not cover either attorney for Class-action law.

The four judges limited their testimony to the issue of interference with the administration of justice. Judge Dickinson testified he believed he was an expert in oil and gas law, but not class-action or tribal sovereign immunity. None of the other judges claimed expertise on any of the specialty issues. [Class-action law was involved in all cases except *Adams*, while Tribal Sovereign Immunity was involved only in *Martinez*.]

Petitioner called Colorado Attorney and Geologist H.J. Ledbetter as expert on all matters of oil and gas law and operations. His Report is found at App. Pages 139-164.

Petitioner also called Colorado Attorney G. Robert Miller, counsel for class-representatives in *Parry*. His Offer of Proof, filed in the fee-shifting hearings in *Keith*, *Watson*, and *Cugnini*, is found at App. Pages 165-202. His Exhibit A at the Board Hearing is attached as App. Pages 203-205.

The Issue of "Good Faith" in the Statutes and Rules Involved

Of the ten statutes and rules relied on to shift fees and discipline Petitioner, three -- C.R.C.P. 11(a), C.R.S. 13-17-102(7) and Colo. RPC 3.1 -- have a "good faith

defense" against fee-shifting where a claim or defense is "a good faith argument for the extension, modification, or reversal of existing law, and is not interposed for any improper purpose ...". [C.R.C.P. 11(a) as exemplar.] The other seven have no stated defenses.

Therefore it is Petitioner's position that the two PDJ orders have effectively, but unconstitutionally, removed the *good faith in petitioning defense* from the Colorado statutes and rules.

The Disciplinary Process and its two Orders

On 5/26/16, Attorney Shipps sent a letter to the OARC asking it to review his attached information and consider if a formal investigation of Petitioner should be begun. The letter outlined the multiple fee-shifting judgments against Petitioner, referred to Colo. RPC 1.1, 3.1 and 8.4(d), and said Petitioner had filed bankruptcy, thus harming his clients who had been forced to pay portions of the fee-shifting judgments in spite never signing any pleadings in the cases.

On 6/16/15, BP America, by Attorney Dugan, having learned of the Shipps request (which by law was to be confidential) joined in the request, and sent some additional information to the OARC.

On 6/22/15, the OARC notified Petitioner of the investigation, attaching only the Shipps' materials. Petitioner was told to respond, asked for certain production, and given some preliminary questions. Petitioner complied with the requests, and filed a Response of some 75 pages of factual analysis of the cases, their procedures, and Petitioner's claims, defenses, and authorities -- all keyed by page reference to

the transcripts of the lower court proceedings, which Petitioner included on a CD. At that time, Petitioner also informed the OARC of Mr. Ledbetter and Mr. Miller, and furnished their contact information; the OARC never contacted either nor, so far as Petitioner is aware, submitted any of the underlying claims and defenses to independent expert(s) for analysis.

The OARC prepared a 21-page report for the Attorney Regulation Committee [herein, "ARC"], asking for permission to file charges against Petitioner. Petitioner was provided with a copy, and given 12-days to respond, with a five-page limit. He filed a response, and referred the ARC to the 75 pages of summaries. He was told by the OARC that his 75-pages were not given to the ARC. While the OARC said the ARC approved charges, it never supplied Petitioner with documents to show: (a) what information was given the ARC to review; (b) that the ARC met in review; (c) that anyone said anything during the review; (d) that a vote was taken; or (d) the result of the vote, including the specific charges authorized.

In 1968, this Court declared such a process to be "of a *quasi* criminal nature." [*Ruffalo, supra*, 390 U.S. at 551.] In 2000, in *In re Green, supra*, 11 P.3d at 1083-84, the CSC adopted this Court's *Ruffalo* position.

The OARC then filed charges under Colo. RPC 1.1, 1.4(a)(b), 3.1, and 8.4(d). [Petitioner had admitted the RPC 1.4(a)(b) charge in an affidavit at the trial court level, for he saw it not as a litigation activity with First Amendment protection, but as a breach of his duty to his clients.]

Petitioner filed a C.R.C.P. 12(b)(5) Motion to Dismiss for Failure to State a Claim under *POME, Foster, California Transport, and Noerr, supra*, arguing that his litigation actions were protected by the First Amendment. [Motion, App. Pages 4-21.] The PDJ entered an Order that attorneys representing clients in courts have no First Amendment protection. [App. Pages 36-38.]

Petitioner argues that this judgment violates the First and Fourteenth Amendments.

Petitioner filed a Motion to Reconsider, which the PDJ denied. Petitioner then sought emergency review by the CSC, which was refused without comment.

Following 4-days of trial, the Board entered an Order disciplining Petitioner while saying that he had no selfish or dishonest motives in his petitioning actions. [App. Page 131-132.] The Board suspended Petitioner from the practice of law for 9-months, and ordered him to pay restitution of some \$200,000 to clients before he could apply for reinstatement. [App Pages 135-136.] The discipline was entered under Colo. RPC: 1.1; 1.4(a)(b) (admitted); 3.1; and 8.4(d). [App. Pages: 53-57; 68-74; 113-135.]

Petitioner asserts this judgment also violates the First and Fourteenth Amendments.

ARGUMENTS AMPLIFYING REASONS TO ALLOW THE WRIT

It is uncontested that Citizens petitioning the Courts for redress of grievances have a First Amendment right of access to the courts, and enjoy First Amendment Petitioning protection.

In 1941 in *Hull, supra*, a prison blocked an inmate's ability to "to apply to a federal court" [312 U.S. at 549]; this Court reversed based upon Art. I, Sec. 9(2) of the U.S. Constitution. In 1969 in *Johnson, supra*, a different prison regulation was held to have "denied or obstructed" an inmate's "[r]easonable access to the courts" [393 U.S. at 498; FN 2/24]. This Court reversed based upon the due process clause of the Fourteenth Amendment.

Then, in 1971, in *California Transport, supra* [404 U.S. at 510], this court, drawing upon the philosophy of *Noerr-Pennington*, said the following:

This same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition. [citing *Johnson* and *Hull*].

Thus a constitutional "right of access to the courts to petition the judicial branch of government for redress of grievances" was unequivocally set in place, based on the First Amendment and its due process jurisprudence, to protect citizens from state obstruction or denial of their fundamental rights.

This right is thus applicable to state actions by the Fourteenth Amendment, and is considered fundamental in nature [see, *NAACP, supra*, 371 U.S. at 453].

The nature of the protection enjoyed by a citizen has been described as:

[*Noerr-Pennington*] [i]mmunity thus applies only to what may fairly be described as petitions, not to litigation conduct generally. A complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs and defendants make representations and present arguments to support their request that the court do or not do something, can be described as petitions without doing violence to the concept. But discovery is merely communication between parties as an aid to litigation. It

is not in any sense a communication to the court and is therefore not a petition. Nevertheless, "conduct incidental to" a petition is protected by Noerr-Pennington if the petition itself is protected.

[*Freeman, supra*, 410 F.3d at ____; emphasis added.]

To Whom Does the Protection Apply?

We have seen that the right of access is for the citizen, but is it also for the attorney of the citizen in order to ensure the right of access of the citizen?

In *NAACP, supra*, the Virginia Supreme Court said certain sections of the American Bar Association's Canons of Ethics applied to "... the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their constitutionally guaranteed and other rights.", and, "... the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments ..." [371 U.S. at 428; emphasis added.]

NAACP does not address whether the immunity is for: (a) client and attorney individually; (b) a collective; or (c) the NAACP only, but flowing to its litigating attorneys. But what seems clear is that the client's attorney has it in all instances.

Petitioner submits that, because both client and attorney are doing the petitioning, it is immaterial how it is structured; both must have it or the right of access of the citizen is obstructed if not outright denied. [*Johnson, supra*.]

On June 14, 2005, the 9th Circuit in *Freeman, supra*, entered a decision in a case involving application of the Noerr-Pennington exception to the American rule

concerning fee-shifting. Drawing on the *Noerr-Pennington* philosophy, the *Freeman* court said the following [410 F.3d at ____]:

The district court used Noerr-Pennington immunity (among other grounds) to dismiss the complaint as to the attorney defendants only; the complaint was dismissed as to the other defendants on other theories. However, Noerr-Pennington immunity is not limited to lawyers: The First Amendment petition right belongs to the defendants in the original case, though their employees, lawfirms and lawyers, as their agents in that litigation, get to benefit as well. Indeed, a Noerr-Pennington case, such as Professional Real Estate Investors, need not involve claims against lawyers at all. Noerr-Pennington immunity is a sufficient ground to dismiss the complaint as to all defendants. [Emphasis added.]

This is the only case Petitioner has found which unequivocally says a litigating attorney representing clients in courts is entitled to a First Amendment immunity, albeit not in their own right but as agent for the client under the client's right.

[While other portions of this opinion have been cited by other courts, so far as Petitioner has been able to discover this particular portion has not been cited.]

As this issue is considered, we must remember that a courtroom is the battle ground of attorneys. For a citizen to go there alone might be acceptable in a spite-fence case in front of a JP, but not in a district court, in a technical field of law involving government regulation and complex leases, against BP America. Absent protection of the attorney, the client's right of access is clearly denied or obstructed.

Since the citizen can't take a lay-advocate into court, they will either go it alone (not a chance in a complex case), or give up and stay home. What the citizen needs to help protect his fundamental right of access to petition and his right to life, liberty, property and freedom of contract, is the very person the Judiciary of Colorado has now restrained -- the litigating attorney, herein your Petitioner.

If the *Noerr-Pennington* doctrine were considered herein, the following would be the analysis:

- a) BP as movant asked courts to fee-shift against Petitioner and his clients, and asked the OARC to bring disciplinary charges against Petitioner;
- b) Petitioner and clients were respondents being attacked for "acting in concert";
- c) Petitioner and clients were not competitors of BP, nor attempting to interfere with BP's business relationships with others; and
- d) it was the clients' contracts with BP, and BP's actions and inaction there under, which were at the heart of four of the five cases and the *Parry* class action case.

Therefore, it matters not whether the attorney's immunity is derivative or direct in nature; the essential fact is that it be declared to exist.

The Nature of the First Amendment Protection

The immunity, which of course is not absolute, comes via application of this Court's First Amendment jurisprudence on protection of civil rights. Access to courts for litigating grievances is thus a fundamental civil right [*NAACP, supra*, 371 U.S. at 453], which sets in place due process barriers to a state improperly interfering with the fundamental right.

The jurisprudence begins by presuming a statute or rule which interferes is unconstitutional. The court then applies a strict construction analysis, and places the burden on the State to: (a) show a compelling state interest for the interference; and, (b) that the State chose the least restrictive way for dealing with the problem which the state desired to regulate. Only after that has been done will is a court to even consider possibly allowing the interference.

Herein we are dealing with fee-shifting statutes and rules governing trial and appellate proceedings, and discipline of attorneys.

We find an example of a professed interest of the state at C.R.S. 13-17-101:

"... courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice."

Another common interest voiced by a state is to protect the unwary citizen from "bad" attorneys.

The mechanisms chosen by a State to meet its desire focuses on attorney acts of: (a) pre-filing investigation, i.e., competency [C.R.C.P. 11(a)]; (b) substantially frivolous, groundless, vexatious conduct [C.R.S. 13-17-102, C.A.R. 38(d), and Colo. RPC 3.1]; (d) interfering with the administration of justice [Colo. RPC 8.4(d)]; and, (c) special processing for specific types of cases, such as in C.R.S. 13-17-201.

Let us assume the concerns are legitimate, and focus on the seriousness of the consequence to the citizen which flows from the state's chosen method.

The consequence is the loss of an advocate in the courtroom, which is a *de facto* denial of access to the courtroom.

In *Illinois Bar, supra*, a Union employed a licensed attorney on a salary basis "to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Board." [389 U.S. at 218.] Here we have a pure case of "attorneys representing a citizen in petitioning the courts."

The trial court declared the Union was engaged in the unauthorized practice of law, and the Illinois Supreme Court affirmed. This Court, referring to *NAACP*, *supra*, said this [389 U.S. at 222-223]:

... We do not think our decisions in *Trainman* and *Button* can be so narrowly limited. We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. ... We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

.... it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can, in their actual operation, significantly impair the value of associational freedoms. Thus in *Button*, *supra* ... We held the dangers of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court.

[Emphasis added.] Herein, the "associational freedom" was Petitioner's clients right to associate with an attorney to petition the courts on their behalf. The crippling is the client facing BP alone while trying to vindicate his contract right.

The possibilities of a judge holding a proceeding was frivolous, groundless or poorly researched, or of an attorney being suspended from their livelihood and even

bankrupted, and punishing the Lessor by fee-shifting, is certainly "a broad and violent remedy".

Such consequences must be zealously guarded against under this Court's First Amendment jurisprudence.

The History of Fee-Shifting and Discipline of Attorneys

It is axiomatic that no right is absolute; all are subject to state regulation under its police power. Petitioner does not deny the State's right to regulate him.

The regulating is seen as the exclusive province of the judiciary of the state. It may be by canons of ethics, rules of professional conduct, fee-shifting and disciplinary statutes and rules, private malpractice actions, or contempt of court. But in every instance it is a judge -- ergo, the judicial branch -- who will make the decision affecting the professional life of an attorney.

Yet a litigating attorney is always arguing against a statute, a rule, or prior case decision. They are always seeking to broaden or narrow, extend or shorten, existing law, and thus are always in opposition to a state's desire to save the time and resources of the judicial branch "for weightier matters."

Yet it is the task of those same, allegedly overburdened judges to balance the state's desire against the constitutional right of access of the citizen. The desire must give way to the fundamental right except in the most extreme circumstances; otherwise, the right is made a nullity.

Originally, and possibly in recognition of the inherent conflict and absolute necessity for the help of an attorney to exercise the freedom of access to courts, the American Rule on fee-shifting simply prohibited fee-shifting; end of discussion.

However, a common-law exception developed for acts of "willful disobedience of a court order" or "when the losing party has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons' ..." [*Octane, supra*, 572 U.S. at ____.] It arose, at least in part, from the old "abuse of process" concept.

Over time, however, legislatures passed statutes awarding fees to successful plaintiffs in public interest cases, or to defendants assaulted by a government. And attorneys began inserting fee-shifting provisions in contracts, which courts honored due to the Contract Clause.

Then, in the 1980's, legislative and judicial branches began adopting statutes and rules aimed at frivolous, groundless, and poorly researched litigation, with provisions for fee-shifting on motion and hearing. About this same time judiciaries began exchanging "Canons of Ethics" for "Rules of Professional Conduct". A study of the underlying impetus for these changes would be valuable, and Petitioner believes it would show the mega-corporations at the forefront of the charge -- but now is not the time for academic research.

On January 26, 1956, when we had Canons, the CSC said this [*Canon 35, supra*, 296 P.2d at 473]:

No one could reasonably contend that for each deviation from the broad generalities expressed in the canons of ethics, which recently have been given strained construction or have been used for ulterior purposes, a person departing therefrom should be subjected to discipline or unwarranted

publicity when his conduct involves no element of inherent wrong, immorality or dishonesty.

If that were not plain enough, in 1958, in *COBAR, supra* [325 P.2d at 934] the CCS said this:

... it is quite clear that at the time of the order entered by this court January 26, 1956, it was settled law in this jurisdiction that a professional license could not be revoked nor disciplinary action taken merely for a violation of standards of ethics. To be actionable in disciplinary proceedings the conduct complained of must amount to a violation of law or it must involve "moral turpitude or dishonorable conduct." ...

Have we lost that in the process of the changes?

At the same time, this Court was carving out exceptions to congressional instances of fee-shifting -- most notably the *Noerr-Pennington* doctrine. In *Octane, supra* [572 U.S. at ____], this Court, taking its comments in what Petitioner sees to be their proper philosophical order, unanimously approved a four step analysis:

- 1) a necessity "to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances" as an overarching principle, enshrining the First Amendment to its proper position in all analytical instances;
- 2) the adoption of the American rule prohibition against "fee-shifting";
- 3) the adoption of the common-law exception allowing fee-shifting for "willful disobedience of a court order" or "when the losing party has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons' ..."; and,
- 4) adoption of the *Noerr-Pennington* sham litigation carve out from the American rule, just as the common-law rule was a carve-out.

Petitioner believes these steps govern the analysis of the issues herein, and are supported by *NAACP, Illinois Bar*, and *Freeman, supra*.

But Petitioner would argue for an additional term so that the implication of bad faith does not water down and gobble up the common-law exceptions.

In *NAACP, supra*, 365 U.S. at 439-440, 444 and 457, and *Professional Real Estate, supra*, 508 U.S. at 63, this Court used malice to describe attorney conduct. Petitioner asks that malice be added to the common-law carve-out lexicon allowing fee-shifting and attorney discipline for litigation conduct under Colo. RPC 1.1, 3.1, and 8.4(d). Malice will not harm the state, for the Colo. RPC has nine Rules with 345 provisions. Petitioner only challenges three of them.

Bad Faith versus Good Faith in Fee-Shifting and Discipline

Octane, supra, described *Noerr-Pennington* as follows [572 U.S. at ____]:

... defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government. But under a "sham exception" to this doctrine, "activity 'ostensibly directed toward influencing governmental action' does not qualify for *Noerr* immunity if it "is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor." ... In *PRE*, we held that to qualify as a "sham," a "lawsuit must be objectively baseless" and must "concea[l] 'an attempt to interfere directly with the business relationships of a competitor'" ... in an attempt to thwart competition (*i.e.*, in bad faith).

While bad faith appears in some of the fee shifting judgments here, and in Appendix C, none of the other *Octane* words [page 21 *supra*] appear, and that is a linguistic problem we must avoid. Addition of malice should help.

In *Copeland v. Martinez*, 603 F.2d 981, 991 (D.C. Cir. 1979), *cert denied*, 444 U.S. 1044 (1980) that court put it this way, without even referring to the First Amendment:

Thus we contemplate that courts will be appropriately circumspect in finding a party to have acted in bad faith. We doubt that such a finding may be

supported without some proof of malice entirely apart from inferences arising from the possibly frivolous character of a particular clam. Only in this manner would we assure a sensible distinction between the contents of the equitable and statutory exceptions to the American rule. [Emphasis added.]

Petitioner sees the problem as a failure to semantically locate the dividing line between good and bad faith. Put differently, the *Octane* and *Copeland* words are descriptive, while the real issue is what we used to call abuse of process.

Black's Law Dictionary 9th ed (West, 2009) says this about bad faith:

1. dishonesty of belief or purpose <the lawyer filed the pleadings in bad faith>. -- Also termed *mala fides* (mal-a-fi-deeze).

"A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain; lack of diligence and slacking off; willful rendering of imperfect performance; abuse of power to specify terms; and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts Sec. 205 cmt. d (1979).

In comparison, what do we have for good faith? The state's standard is that good faith is when one seeks "extension, modification or reversal of existing law" [C.R.C.P. 11(a); Colo. RPC 3.1], or "a good faith attempt to establish a new theory of law in Colorado". [C.R.S. 13-17-102(7)]. *Black's, supra*, puts good faith this way:

A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. -- also termed *bona fides*. CF. BAD FAITH.

Where do "[lack of] selfish or dishonest motives.", and "guided by what he perceived to be a noble and just cause ..." fit into these words? [see Appendix C, App. Pages 131-132.]

Petitioner would suggest that what can be easily overlooked by a court is the situation where an attorney is seeking "application of existing law to a unique set of facts." This is different than seeking "extension or modification", for it says that there is law on the general subject, but the facts of the case do not fit within the facts of the prior cases which have created the boundaries of the law. For example, there is law of the subject of Tribal Sovereign Immunity, but much of it is yellow-flagged due to peculiar facts, and the *Martinez* facts were unique and peculiar to the jurisprudence.

When the facts are peculiar, and the field of the law esoteric, a non-specialty court must take great care to recognize when claims, defenses and authorities of a party are valid because there is a hole in the Swiss cheese of the law. Some lawyers may seek to take advantage of the hole; and some will try to fill the hole with new law through logical argument backed by some available case language.

All of Petitioner's cases were of this nature, and Petitioner is a hole-seer and hole-filler by nature. Seeing people hurt by another makes Petitioner look to the law to help them. When the law seems unavailable or unclear, Petitioner is willing to go to the courts, for clients, in an effort to clarify the law. Petitioner will give a brief analysis of his cases in a moment.

As related to this Petition, *Noerr-Pennington* inserts a subjectively improper motive as a requirement to shift fees. If that is a proper approach, and Petitioner believes it is, then a "lack of a selfish or dishonest motive" equals good faith, and rules out bad faith for any consideration in either fee-shifting or discipline.

Therefore, the Board's declaration that Petitioner had no improper purpose should end the power of the State to shift fees or discipline Petitioner, and the two orders at issue herein should be reversed.

Equal Protection, NAACP, NOERR, and Illinois Bar

This Court has protected attorneys against actions of a state to regulate their ability to provide services to a racially discriminated citizen seeking their right to life, liberty, property and pursuit of happiness, as in *NAACP, supra*. It has done it for attorneys representing laborers seeking their livelihood and health against the state, as in *Illinois Bar, supra*. And it has done it for attorneys representing antitrust petitioners against the state, as in *Noerr, supra*.

Is this Court to deny that same protection to mineral owners trying to protect their property and contract rights against a behemoth? Yet that is exactly what the Colorado PDJ, its Board, and its supervisor, the Colorado Supreme Court, have done herein.

Petitioner's activities in his five cases all involved real property and contract rights of his clients. Since none of the leases had a provision concerning attorney fees, BP petitioned the judicial branch of Colorado, under state statutes and rules, to uphold a state "police power purpose aimed at regulating court dockets," and to shift attorney fees and punish Petitioner for his litigation conduct for his clients. Not satisfied with \$400,000 of judgments, BP set out to remove Petitioner's thorn in their side by successfully seeking the help of the State's OARC.

Therefore, the Equal Protection clause should be carefully considered herein lest Petitioner be denied equal protection of the law.

Petitioner did not raise the equal protection issue below, but believes it is appropriate for this Court to entertain the issue under *National Assc. supra*, 69 F.3d at 627-29. Petitioner also believes that it is irrational to protect clients but not their attorneys, and to protect attorneys in cases of life, livelihood and antitrust but not in matters of property and contract -- which are also in our Constitution.

Another Voice Heard From

Petitioner refers this Court to: *A First Amendment Theory for Protecting Attorney Speech, supra*. Professor Tarkington opened her work by saying this:

In this Article, I propose a new access-to-justice theory of the First Amendment to be used in examining the constitutionality of restrictions on attorney speech. The theory applies to all governing entities that restrict or punish attorney speech. ... The access-to-justice theory maintains that where attorney speech is key to providing or ensuring access to justice or the fair administration of the laws, it needs special protection under the Free Speech Clause of the First Amendment. This principle, thus, not only provides for a workable theory for evaluating restrictions on attorney speech, but more importantly, it also protects the role of the attorney in our system of justice.

In Part 1, I examine the nature of attorney speech and its relationship to the power of government. Attorneys are engaged in a special type of speech. Specifically, attorney speech is intended to invoke or avoid the power of government in the protection of individual life, liberty, and property.

[U.C. Davis, vol. 45 at page 35-36; emphasis added.]

Petitioner agrees with her analysis, and her "access-to-justice" philosophy.

THE 600 POUND GORILLA IN THE ROOM

In closing, something must be acknowledged: five trial judges said Petitioner engaged in misconduct. Acting under appellate court guidelines, 15 more judges agreed. Seven justices of the Colorado Supreme Court, exercising Certiorari standards, denied review without comment. And now a three-member Board has joined the chorus, but with a caveat of a lack of improper purpose.

Those facts are the 600 pound gorilla.

However, other facts must be considered in light of the Board's finding that Petitioner had no selfish or dishonest purpose in his litigating:

a) all trial and appellate court fee-shifting judgments were entered under the Preponderance of Evidence rule, and included findings of violation of C.R.C.P. 11(a) and C.R.S. 13-17-102, which contain good faith defenses [see pages 5-6, *supra*].

b) All appellate court findings included frivolous findings, but neither C.A.R. 28(k) nor C.A.R. 38(d)(e) have a good faith exception.

c) The Board found violations of Colo. 1.1, 1.4(a)(b), 3.1, and 8.4(d); 3.1 contains a good faith exception, and the others do not.

d) The Board's findings of violations were by clear and convincing evidence, but so was its finding of a lack of selfish or dishonest motive!

Therefore, we have two conflicts of the essence:

I. Does this Court's First Amendment jurisprudence make Colo. RPC 1.1, 8.4(d), C.R.S. 13-17-201, C.A.R. 28(k), and C.A.R. 38(d)(e) facially unconstitutional for lack of a good faith defense?

II. Did the Board's clear and convincing evidence finding of a lack of improper purpose establish the existence of good faith, prohibiting a finding of bad faith to be sufficient for punishing an attorney, and thereby make all the statute and rule judgments of the trial and appellate courts "unconstitutional as applied"?

Petitioner knows this Court is going to read the 4/20/17 Order, but fears it may be overwhelmed by the many words attributed to Dugan and Shipps, but miss the minimal references to Petitioner's experts, Miller and Ledbetter. Knowing that the facts behind the five cases are not an issue herein, but in hope of dispelling the 600 pound gorilla, Petitioner will take a moment to present the main issues in his cases.

Adams:

In *Adams*, Petitioner argued that the Colorado Race-Notice statute was subject to the Colorado oil and gas regulatory scheme to "prevent waste while protecting correlative rights". Under those regulations, a 5th Amendment *taking* occurs, and the producer of a well becomes a "State Actor" [see: *Burton, supra*] to fulfill the purpose of the State. One part of a mineral owner's protection is that a producer **must** pay all owners of minerals in each state-declared drilling-spacing unit [herein, "*space*"].

Petitioner argued that *taking* plus payment requirement means a producer must check (or recheck) title just prior to making first payment from the first well to produce in each *space*. The trial court rejected the argument, as did the court of appeals -- but the court of appeals declared the argument frivolous. Petition for Certiorari was rejected without comment.

Keith and Watson

In *Keith and Watson*, Petitioner argued that the first of the implied covenants (to drill to explore) was a duty to, timely after starting the secondary term of an oil

and gas lease, **drill to explore** lower spaced formations when a higher spaced formation was put into production during the primary term. In La Plata County, four formations were *spaced*, but in many producing *spaces* the two lowest formations had not been explored. BP argued the "duty" was not a duty, and that it was subject to the reasonable prudent operator standard citing *Whitham Farms, supra*.

Whitham does not say that. In contrast, Petitioner cited *Clovis* and *Summers, supra*, yet his arguments were declared frivolous.

Martinez

In *Martinez*, Petitioner argued the Tribe had waived its immunity because: (a) it bought a share of a producing lease from a producer; (b) the lease was between non-Indians, for non-Indian lands and minerals, and the producer was non-Indian; (c) the Tribe would not be producing the wells; and, (d) in the acquisition agreement the Tribe agreed to be bound by the leases in which it was acquiring an interest. Petitioner cited *Kiowa* and *C & L Enterprise, supra*, yet his arguments were declared frivolous.

Cugnini

In *Cugnini* and *Martinez* for summary judgment and fee-shifting, and in *Keith, Watson, and Martinez* for fee-shifting, Petitioner argued that his clients' claims were not barred by a 2005, court-approved, class-action judgment *Parry v. Amoco, supra*. *Parry* had but one certified question, and Petitioner's clients' claims did not involve that issue. The four cases were filed over four years after the *Parry*

judgment, and the clients' claims re-accrued daily after the *Parry* judgment. The *Parry* Stipulation and Settlement Agreement [herein, "S&SA"] added over 50 additional claims which were not submitted to a modified Rule 23(a) four-part analysis, nor a Fairness Hearing evaluation for participation in income from settlement. Petitioner cited *National Super Spuds* and *Weinberger, supra*, arguing the *Parry* class-action court had no power, i.e, subject matter jurisdiction over claims not "certified", nor in *personam* jurisdiction over people with those claims but not included in the fairness hearing. All was declared frivolous at trial and appeal.

The Issue of the Conclusions of Petitioner's Experts:

In light of those brief recitations, Appendix E [App. Pages 139-164, at App. Pages 146, 147, 148, 158, and 159] shows Mr. Ledbetter did not find Respondent in breach of any of the RPC charges except the 1.4(a)(b) charge, which Petitioner had admitted.

Appendixes F, F-A and F-B [App. Pages 165-202, at App. Pages 167-175; 180-183; and 187-192] show Mr. Miller did not find Petitioner frivolous in defending against BP's *Parry* claim-preclusion claim.

For Petitioner, the positions of his experts raise the following question:

In light of the Constitutional issues addressed herein,
if two experts disagree on whether a matter was frivolous, poorly researched, etc, and the court accepts both as experts of good reputation, and
if the burden of proof is on the People by clear and convincing evidence
and the experts on the two sides disagree,
should it ever be possible to declare the actions they analyze as improper, not worthy of constitutional protection, or sufficient to punish an attorney by fee-shifting or disciplinary judgments?

Petitioner would ask this Court to consider reading his experts' conclusions.

CONCLUSION

Octane spoke in terms of a "chill" on the First Amendment right to access the judicial branch of government for redress of one's grievances. If we have no system, or we have a system which is inaccessible because those whose task it is to work the system towards justice are unwilling to take the risk for fear of fee-shifting and discipline, we will be left to the mercy of the wealthy, and the large corporations.

The real victim of the chill is not the attorney; it is the prospective client who loses their First Amendment right of access to the courts.

This Petition should be granted.

RELIEF SOUGHT BY PETITIONER

Petitioner asks this Court to:

a) declare that lawyers petitioning the courts for clients have some First Amendment protection, be it their own, or that of their client;

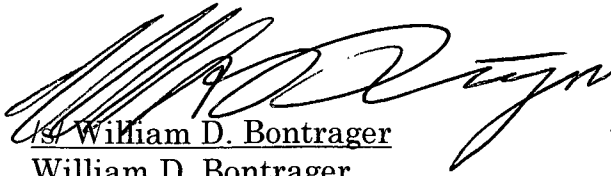
b) declare the parameters of that protection according to the First Amendment, the American rule and its common-law and *Noerr-Pennington* exceptions;

c) reverse the judgments of the Colorado Supreme Court, the Presiding Disciplinary Board, and the Presiding Disciplinary Judge; and,

d) remand for further proceedings.

While remand may subject Petitioner to further proceedings, that is immaterial; the litigating profession will know where it stands.

RESPECTFULLY SUBMITTED,



/s/ William D. Bontrager

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