APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30798
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
October 17, 2018
Lyle W. Cayce
Clerk

HERSY JONES, JR.,

Plaintiff – Appellant,

v.

LOUISIANA STATE SUPREME COURT; LOUISIANA ATTORNEY DISCIPLINARY BOARD; ROBERT S. KENNEDY, Individually and in his official capacity as Deputy Disciplinary Counsel; CHARLES B. PLATTSMIER, individually and in his official capacity as Chief Disciplinary Counsel,

Defendants – Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
No. 5:15-CV-2766

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Hersy Jones, Jr. appeals the district court's dismissal of his claims for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. *See Liedtke v. State Bar of Tex.*, 18 F.3d 315, 317 (5th Cir. 1994)

* Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

("[The *Rooker-Feldman*] doctrine directs that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments."). We find no reversible error in the district court's conclusion that the *Rooker-Feldman* doctrine deprived it of jurisdiction to hear Jones's claims.

Even if some of Jones's claims can somehow be characterized as a general, facial challenge to the constitutionality of the disciplinary scheme, he should have raised those issues during the state court proceeding. *See Musslewhite v. State Bar of Tex.*, 32 F.3d 942, 946 (5th Cir. 1994) ("[F]ederal jurisdiction does not lie for claims that were not presented first to the state court in the disciplinary proceeding.").

Accordingly, we AFFIRM.[1]

[1] We also determine that the district court did not abuse its discretion in denying the motion for recusal. *See Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 80 (5th Cir. 2011) ("We review a denial of a motion to recuse for abuse of discretion.").

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HERSY JONES, JR.	CIVIL DOCKET NO. 15-2766
VERSUS	JUDGE S. MAURICE HICKS, JR.
LOUISIANA STATE SUPREME COURT, ET AL.	MAGISTRATE JUDGE HORNSBY

MEMORANDUM RULING

Before the Court are Plaintiff Hersy Jones, Jr.'s (1) Motion for Reconsideration (Record Document 57) of the Court's previous Memorandum Ruling dismissing the instant action for lack of subject matter jurisdiction; and (2) Motion for Leave to File an Amended Complaint (Record Document 59). Defendants the Louisiana Supreme Court, Charles B. Plattsmier, Jr. ("Plattsmier"), Robert Kennedy ("Kennedy")[1], and the Louisiana Attorney Disciplinary Board ("the Board") (collectively "Defendants") oppose both Motions. See Record Documents 60 and 61. For the reasons contained in the instant Memorandum Ruling, both of Jones' Motions are **DENIED.**

I. Jones' Motion for Reconsideration

In the Court's previous Memorandum Ruling, the Court dismissed the instant action for lack of subject matter jurisdiction under the Rooker-Feldman doctrine. See Jones v. La. Supreme Court, 2017 U.S. Dist. LEXIS 46949 (W.D. La. 2017). As the Court explained in that Ruling:

> The Rooker-Feldman doctrine states that the United States Supreme Court's appellate jurisdiction under § 1257 "precludes a United States district court from exercising subject-matter jurisdiction in an action it would

[1] The Court notes for the purpose of clarity that Defendant Robert Kennedy is not the Robert Kennedy practicing law in Shreveport, Louisiana, but rather is an attorney in Baton Rouge, Louisiana, for the Louisiana Attorney Discipline Board.

> otherwise be empowered to adjudicate under" §§ 1331, 1332, and others. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005); see Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); see D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). This doctrine "recognizes that 28 U.S.C. § 1331 [among others] is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to" the United States Supreme Court alone under § 1257(a). Id. at 292, quoting Verizon Md. Inc. v. PSC, 535 U.S. 635, 645 n.3 (2002). Thus, a federal district court does not have subject matter jurisdiction over a case that "call[s] upon the District Court to overturn an injurious state-court judgment," as the United States Supreme Court has exclusive jurisdiction over such a case. Id.

Id. at *8-9. The Court then set forth many of the allegations that Jones made in his Original Complaint and concluded that because they attempted to overturn a state bar disciplinary decision in a particular attorney's case, the allegations fell squarely within the Rooker-Feldman doctrine such that the Court did not have subject matter jurisdiction over the action. See id. at *8-10. Finally, the Court also concluded that even if it did have subject matter jurisdiction over Jones' claims, Plattsmier and Kennedy would be protected from liability in their individual capacities by absolute immunity. See id. at *13-17.

In his Motion for Reconsideration, Jones makes several arguments that the Court's decision under the Rooker-Feldman doctrine was incorrect. See Record Document 57. The three chief arguments he makes are:

(1) the Court's decision is "inconsistent with the letter and spirit" of the Supreme Court's statements regarding the limited application of the Rooker-Feldman doctrine in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005);

(2) the Rooker-Feldman doctrine does not apply here because it "is only applicable to judgments issued pursuant to a state supreme court's adjudicative capacity, and during a judicial proceeding, not an attorney disciplinary matter;" and

(3) because the Original Complaint also "contains allegations which constitute a general challenge to the practice of the defendants," particularly allegations regarding the unequal treatment of African-

> American lawyers as compared to white lawyers, the Rooker-Feldman doctrine does not bar at least those claims.

Id. at 1-11.

None of these arguments have merit. The Supreme Court did emphasize the limitations of the Rooker-Feldman doctrine in Exxon Mobil Corp., stating that it only applies in "limited circumstances." 544 U.S. at 291. However, the Supreme Court simply restated the doctrine itself and concluded that in did not apply in that case. See id. at 284. The holding of Exxon Mobil is that "the Rooker-Feldman doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. This statement of the doctrine contains no inconsistencies with the Court's previous Memorandum Ruling, as the instant action fits this description perfectly.

Jones' second argument, that the Rooker-Feldman doctrine does not apply to an attorney discipline matter because attorney discipline matters do not constitute judicial proceedings, is also simply wrong. See Record Document 57 at 1-11. "Every federal appeals court has held that the Rooker-Feldman doctrine precludes an attorney from challenging the result of his or her state disciplinary hearing in a lower federal court, including attacking the process leading to the decision." Kline v. Biles, 2016 U.S. Dist. LEXIS 158229 at *15 (D. Kan. 2016) (collecting cases), aff'd, Kline v. Biles, 861 F.3d 1177 (10th Cir. 2017). The Fifth Circuit has affirmed dismissal of cases similar to the instant action many times. See, e.g., Musslewhite v. The State Bar, 32 F.3d 942 (5th Cir. 1994); Riley v. La. State Bar Ass'n, 402 Fed. Appx. 856 (5th Cir. 2010). Thus, Jones' second argument is incorrect.

Jones' third argument, though based on a correct legal principle, is also unavailing. As the Court explained in its previous Memorandum Ruling, while federal district courts do have subject matter jurisdiction over general challenges to state bar rules, they do not have subject matter jurisdiction over challenges to state bar disciplinary decisions in particular attorneys' cases. See Jones, 2017 U.S. Dist. LEXIS 46949 at *10-13. However, artfully pleading general challenges to state bar rules while simultaneously seeking to overturn a decision in a particular attorney discipline matter does not take the case outside of the bounds of the Rooker-Feldman doctrine. See Musselwhite, 32 F.3d at 946 ("a general constitutional attack that is nonetheless 'inextricably intertwined' with a state court judgment of reprimand cannot be properly heard in federal court"). Jones attempts to engage in such artful pleading of federal constitutional claims to get around dismissal of his case, both in his Original Complaint and his proposed 51-page Amended Complaint. See Record Document 1 at ¶¶ 29-30; see Record Document 59-1 at ¶¶ 158-172. However, he does so while still requesting "that Defendants be enjoined from prohibiting him from practicing law." Record Document 1 at 16. Thus, Jones' general challenges to the state bar's disciplinary rules and his request for relief from the state court judgment disbarring him are "inextricably intertwined," and his suit "cannot be properly heard in federal court." Musselwhite, 32 F.3d at 946.

Finally, Jones argues that the Court's conclusion that Plattsmier and Kennedy are protected by absolute immunity is incorrect. He argues that they are not entitled to any form of immunity at all, either qualified or absolute. See Record Document 57 at 11-16. This argument, like Jones' arguments on the Rooker-Feldman doctrine, is also incorrect. Under the "functional approach" for determining whether a prosecutor is entitled to

absolute immunity from suit in his individual capacity, the key question is "the nature of the function performed [by the official], not the identity of the actor who performed it." Kalina v. Fletcher, 522 U.S. 118, 127 (1997). As the Court pointed out in its previous Memorandum Ruling, Louisiana federal courts have afforded prosecutors for the Board absolute immunity in the past. See Jones, 2017 U.S. Dist. LEXIS 46949 at *13-17, citing Forman v. Ours, 804 F. Supp. 864, 868 (E.D. La. 1992), aff'd, Forman v. Ours, 996 F.2d 306 (5th Cir. 1993).

In Forman, that holding was based on the conclusion that, under the functional approach, the role of a prosecutor for the Board is sufficiently similar to that of an ordinary criminal prosecutor to afford absolute immunity to the Board's prosecutors. See 804 F. Supp. at 868. The Court finds that Jones' allegations against Plattsmier and Kennedy, taken as true for the purposes of this Motion, are allegations regarding actions they took in their prosecutorial capacities. Because these allegations relate to conduct that is "intimately associated with the judicial phase" of a process that is analogous to a criminal prosecution, Plattsmier and Kennedy are protected from suit on these allegations by absolute immunity. Imbler v. Pachtman, 424 U.S. 409, 429-30 (1976). Thus, the Court rejects all of Jones' arguments in his Motion for Reconsideration, and the Motion is **DENIED**.

II. Jones' Motion for Leave to File an Amended Complaint

Jones also seeks leave to file an Amended Complaint that, according to him, fixes any defects in his Original Complaint such that the Court will have subject matter jurisdiction over the instant action. See Record Document 59. Federal Rule of Civil Procedure 15 governs amended and supplemental pleadings. "The Court should freely

give leave [to amend a complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). Ultimately, however, the decision to grant leave to amend a complaint a second or successive time is at the discretion of the district court, and is subject to reversal only upon a finding of abuse of discretion. See Carroll v. Fort James Corp., 470 F.3d 1171, 1174 (5th Cir. 2006). A court may deny a movant's request for leave to amend for, *inter alia*, "futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962).

The Court finds that permitting Jones to file his proposed Amended Complaint would be futile and would only unnecessarily prolong these proceedings. As explained in Section II, *supra*, Jones' proposed Amended Complaint does not fix the underlying problem in this suit: that the suit is an attempt to overturn Jones' 2007 disbarment by the Louisiana Supreme Court. The Court has reviewed the proposed Amended Complaint, and it finds that none of the allegations that it adds change the Court's conclusion that the Rooker-Feldman doctrine bars this Court's consideration of the instant action. Jones' Motion for Leave to File an Amended Complaint is therefore **DENIED.**

CONCLUSION

Plaintiff Hersy Jones, Jr.'s (1) Motion for Reconsideration (Record Document 57) and (2) Motion for Leave to File an Amended Complaint (Record Document 59) are hereby **DENIED.**

THUS DONE AND SIGNED, in Shreveport, Louisiana, this the 28th day of August, 2017.

S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HERSY JONES, JR.	CIVIL ACTION NO. 15-2766
VERSUS	JUDGE S. MAURICE HICKS, JR.
LOUISIANA SUPREME COURT, LOUISIANA ATTORNEY DISCIPLINARY BOARD, ROBERT KENNEDY, AND CHARLES PLATTSMIER	MAGISTRATE JUDGE HORNSBY

MEMORANDUM ORDER

Before the Court is a "Motion for Recusal" (Record Document 24) filed by Plaintiff Hersy Jones, Jr. ("Jones"). Jones is seeking the recusal of this Court "because he cannot be impartial" and "due to his past affiliation with the Louisiana Supreme Court as a Bar Examiner, his current membership with the Louisiana Law Institute on which a member of the Louisiana Supreme Court also sits." Id. For the reasons which follow, the Motion for Recusal is **DENIED**.

Background

Jones filed a complaint against the Louisiana Supreme Court, the Louisiana Disciplinary Board ("LADB"), attorney board member Robert Kennedy, and Charles Plattsmier, Chief Disciplinary Counsel of the LADB. The complaint alleges that the Louisiana Supreme Court issued an order disbarring Jones on or about March 30, 2007. See id. at ¶ 2. It was determined that Jones had violated Rules of Professional Conduct 1.4, 1.5 and 1.16. See id. at ¶ 11. Jones argues that his disbarment eight years ago violates his First Amendment right to association and freedom of speech, and constitutes a taking of his property without due process. Further, Jones alleges that his disbarment was based in whole or in part on the nature of his law practice, "namely representing African American families whose sons had been killed by white police officers." Id. at ¶ 64.

Law and Analysis

It is well established that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). In addition, "he shall also disqualify himself in the following circumstances: Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. §455(b)(1). It is noted that "each §455(a) case is extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence." Valley v. Rapides Parish School Board, 992 F.Supp. 848 (W.D. LA. 1997), citing U.S. v. Jordan, 49 F. 3d 152, 156 (5th Cir. 1995). A "judge abuses his discretion in denying recusal where a reasonable man, cognizant of the relevant circumstances surrounding [the] judge's failure to recuse, would harbor legitimate doubts about that judge's impartiality." Garcia v. City of Laredo, Tex., 702 F. 3d 788, 794 (5th Cir. 2012),citing Andrade v. Chojnacki, 338 F.3d 448, 454 (5th Cir.2003) (internal quotation marks omitted).

Jones argues that based on the undersigned's involvement with the Committee on Bar Admissions as a Bar Examiner, and the fact that he sat for two years as the designated Western District of Louisiana representative on the Louisiana State Law Institute with a member of the Louisiana Supreme Court, he is therefore biased. The Committee on Bar Admissions and the LADB are different entities. The LADB is solely concerned with the disciplinary process for Louisiana attorneys. The Committee on Bar Admissions is primarily tasked with administering the Louisiana Bar Examination and reviewing applications of those seeking admission. With regards to service as an ex officio member of the Louisiana

State Law Institute (La. R.S. 24:204(A), *et seq.*), while the undersigned is still a member of one of the many committees that make up the Law Institute, there is no Louisiana Supreme Court Justice sitting on that committee at this time. Jones implies a connection between this Court and the Defendants in this case, when in fact no connection exists. Based on the nature of the claims asserted by Jones, there is no evidence that the undersigned has any bias towards Jones.

The Fifth Circuit held in Harris v. Board of Supervisors of Louisiana State University, et al., 409 Fed Appx. 725 (5th Cir. 2010), that the District Judge's affiliation with the Board of Trustees of LSU Law Center was not enough to require recusal when one of the parties was another component of the LSU system, the LSU Health Science Center in Shreveport. Like Jones, Harris provided no information with respect to the affiliation beyond identifying the affiliation. In this instance, Jones merely states that the undersigned is affiliated with the Committee on Bar Admissions and the Louisiana State Law Institute, neither of which are named parties in this suit.

Conclusion

Based on the foregoing analysis, the Motion for Recusal (Record Document 24) is **DENIED**. Jones has presented nothing to demonstrate that the undersigned has personal bias, prejudice, and/or a lack of impartiality.

THUS DONE AND SIGNED, in Shreveport, Louisiana this 19th day of August, 2016.

S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

HERSY JONES, JR.

CV: 5:15-cv-2766

VERSUS

LOUISIANA SUPREME COURT
LOUISIANA ATTORNEY DISCIPLINARY BOARD
ROBERT S. KENNEDY, individually and in his official capacity as Deputy Disciplinary Counsel
CHARLES B. PLATTSMIER, individually and in his official capacity as Chief Disciplinary Counsel

COMPLAINT

PARTIES

Plaintiffs herein is: Hersy Jones, Jr. of majority age and residing in Shreveport Louisiana.

Defendants herein are:

The Louisiana Supreme Court("Court"), 400 Royal St, New Orleans, LA 70130

The Louisiana Attorney Disciplinary Board("Board"), 2800 Veterans Boulevard, Suite 310, Metairie, Louisiana

Robert S. Kennedy("Kennedy"), individually and in his official capacity as Deputy Disciplinary, , 4000 S. Sherwood Forest Boulevard, Suite 607, Baton Rouge, Louisiana.

Counsel Charles Plattsmier"(Plattsmier"), individually and in his official capacity as Chief Disciplinary Counsel, 4000 S. Sherwood Forest Boulevard, Suite 607, Baton Rouge, Louisiana.

JURISDICTION:

This court has jurisdiction because this case arises due to a violation of plaintiff's 1st Amendment right to freedom of speech and association, his 5th Amendment right to not have his property taken without due process and compensation, and his 14th Amendment right to due process. Plaintiff seeks to enjoin Court from continuing to deny him the right to practice law, and to arbitrarily and capriciously apply its disciplinary process.

1.

As of March 30, 2007, Hersy Jones, Jr.,("Plaintiff") was a duly admitted member of the Louisiana Bar Association and in good standing, and was a duly admitted member of the New York State Bar Association.

2.

On or about March 30, 2007, the Louisiana Supreme Court ("Court') issued the following order:

> "Upon review of the findings and recommendations of the hearing committee and the disciplinary board, and considering the briefs and the record, it is ordered that Hersy Jones, Jr., Louisiana Bar Roll number 23664, be and he hereby is disbarred. His name shall be stricken from the roll of attorneys and his license to practice law in the State of Louisiana shall be revoked. Respondent is ordered to furnish complete accountings and full restitution of all unearned legal fees to his clients subject of the formal charges. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

3.

The Court's order was pursuant to and consistent with recommendation of the Board.

4.

The Board's recommendation was pursuant to hearings held in 04-DB-064 and 05-DB-065 in Shreveport Louisiana.

5.

The hearings held in 04-DB-064 and 05-DB-065 were pursuant to formal charges files by the Office of Disciplinary Counsel, and prosecuted by Kennedy.

6.

All formal charges were filed by and prosecuted at all times herein by Kennedy.

04-DB-064:

7.

Charges files in 04-DB-064 involved complaints filed by Maxine Burke and Avery Wafer and Celester Smith, two sisters.

8.

Burke, Wafer and Smith each alleged that, after paying Jones to perform legal services, and after some or all legal services had been performed, Jones ignored their demands that he return 100% of all fees paid.

9.

In the Burke matter, the ODC alleged that respondent violated Rules 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), 1.5 (failure to refund an unearned fee), and 1.16(failure to account for a fee and return a client's file) of the Rules of Professional Conduct.

10.

In the Wafer/Smith matter, the ODC alleged that respondent violated Rules 1.3, 1.4, 1.5, and 1.16 of the Rules of Professional Conduct.

11.

The Hearing Committee determined that "respondent violated Rules 1.4, 1.5, and 1.16 of the Rules of Professional Conduct with respect to the Burke matter and Rules 1.4, 1.5, and 1.16(d) with respect to the Wafer/Smith matter."

12.

Kennedy knowingly misled the Burke/Wafer Hearing committee as to the manner in which Rule 1.5(f)(6) is interpreted and applied, as it relates to a dispute concerning fees, instructing the Hearing Committee as follows: (1) when a client demands the return of fees paid, the attorney is obligated to recommend to the client that the client and attorney submit the matter to arbitration, (2) the submission to arbitration is the only manner in which an attorney can discharge his obligation, and (3) notwithstanding that the formal charge is failure to return an unearned fee, the Committee's duty was not to focus on whether the fee was earned but on the failure to resolve the dispute by recommending arbitration, and thus work actually performed by the attorney for the client which was clearly beneficial to the client was irrelevant, not admissible and thus should be disregarded by the committee

13.

Kennedy instructed the committee as follows:

> " .... And we never prosecute—we never—I've never prosecuted and don't know of uh anybody that has ever prosecuted anybody for failure to escrow. The problem comes up when you don't submit the matter to some kind of fee arbitration which is what you're required to do under the rule as well."(Tr. August 24, 2004, p.156.)

14:

Kennedy also stated:

> **"I'm not trying to tell him how much he's earned. I don't know if he hasn't earned the whole fee...That's not the violation he's charge.** He's not charged with—I mean, lawyers aren't charged with not paying back x dollars in fee. They are charged with not following the rules with regard to how to resolve fee disputes. When you have a fee dispute with a client, there is a provision for how you deal with that. You escrow the money and suggest to the client that you go to the arbitration or you can invoke a concursus proceeding." (Tr. August 24, 2004, p. 167.)(Emphasis added.)

15.

Kennedy also stated:

> "As I told the committee at the last hearing, our job here is not to try to compute how much money Mr. Jones earned, how many hours he worked, how much he was--how much of the fee he had addressed. Our job here today is to determine if he did what he was supposed to do in his professional obligation which was when he got to that point with his client , say to them I am obliged to advise you that we should go to fee dispute and get this resolved. And if the client says no, then he's done everything that he could be asked to do. He's simply required to make the offer and suggestion.(DB-04-DB-064, Sept. 14, 2004, p. 294)

16.

Statements and instructions given by Kennedy deprived plaintiff of due process of law, a fair trial, sufficient notice of the alleged violations, an opportunity to defend against the charges and a taking of his law license without due process or compensation.

17.

Upon information and belief, Plattsmier and the Board were aware of Kennedy's statements prior to recommending that plaintiff be disbarred.

18.

Upon information and belief, the Court was aware of Kennedy's statements prior to issuing the order that plaintiff be disbarred.

19.

Upon information and belief, Plattsmier, the members of the Hearing Committee, the Board, and/or the members of the Court were aware of the falsity of Kennedy's statements prior to the disbarment of plaintiff, particularly that, when a fee dispute arises with a client, a lawyer is required to recommend to the client that the fee dispute be submitted to arbitration.

20.

Upon information and belief, neither prior to or after the disbarment of plaintiff, Plattsmier, none of the members of the Hearing Committees in DB-04-DB-064 and and 05-DB-065, the Board, and/or the members of the Court reported to the Office of Disciplinary Counsel the statements made by Kennedy.

21.

Upon information and belief, neither Kennedy or Plattsmier, or any other member of disciplinary counsel, since the disbarment of plaintiff has charged a lawyer admitted in Louisiana with failing to recommend to the client that a fee dispute be submitted to arbitration or file a concursus proceeding.

22.

In September, 2015 plaintiff conducted a survey of fee disputes cases handled by Kennedy and other members of Office of Disciplinary Counsel.

23.

As a result of this survey, plaintiff discovered Kennedy did not charge any of the lawyers with failing to recommend arbitration , and did not charge them with violating Rule 1.15 with respect to a fee dispute with a client, as he applied to plaintiff in DB-04-DB-064 and 05-DB-065.

24.

Plaintiff discovered that Kennedy filed formal charges in the following fee dispute cases but did not allege that the lawyers had committed an ethical violation by failing to submit the fee disputes to arbitration, namely Daryl Gold, a white lawyer practicing in Shreveport, John Cucci, a white lawyer practicing in Shreveport, and Barry Feazel, a white lawyer practicing in Shreveport.

25.

Kennedy prosecuted two cases involving Barry Feazel, a white lawyer practicing in Shreveport, both involving clients who demanded a return of fees paid after he failed to perform any services. In the first, The Office of Disciplinary Counsel received a complaint from Paula Paddie on December 13, 1996. Attorney Feazel failed to respond and was suspended for, inter alia, failure to refund an unearned fee. In the second case, Formal charges were filed against Respondent on May 17, 2000, alleging six (6) counts of misconduct in violation of the Rules of Professional Conduct, including multiple cases of failure to return an unearned fee. Feazel was not alleged to have violated an ethical rule due to his failure to recommend arbitration to his clients. Even though the committee found he had performed little work, he was not disbarred due to his repeated failure to return an unearned fee.

26.

Kennedy prosecuted the case of Daryl Gold, a white lawyer practicing in Shreveport, which involved multiple separate fee disputes, prior to filing formal charges but after receiving the complaint from the client apparently told Gold during his sworn statement given on March 18, 2005 to submit the dispute to arbitration, to which Gold agreed. However, Attorney Gold did not submit the disputes to arbitration, and thereafter formal charges were filed. After the filing of the formal charges, he submitted the cases to arbitration in 2008. Nevertheless, when the formal charges were brought, Kennedy did not allege he had violated his ethical duty by recommending that the client submit the fee dispute to arbitration, and moreover, did not allege that he violated Rule 1.15 by not escrowing the disputed fees. In each case, when the client called to request a return of the fees, the record clearly states that Gold refused to speak with the clients. Kennedy did not allege that Gold had violated Rule 1.5(f)(6) by not recommending arbitration to the client.

27.

Kennedy prosecuted the case of John Cucci, Jr., a white male also practicing in the Shreveport area, which involved multiple clients files charges, several of the charges involving fee disputes. The first complaint was filed in February 2007, involving a matter in which Attorney Cucci charged and collected fees in excess of $20,000.00 but failed to file the required motion in a timely manner. Another involved Cucci charging a client a $30,000 fixed fee for the representation, which sum the client authorized Cucci to deduct from a $36,000 insurance settlement he had collected. However, Cucci did not disburse the remaining $6,000 to his client, nor did he account for the funds. In one case Attorney Cucci took the position he was entitled to

a $2,500.00 fee for each of the cases that were set for trial, whether or not the cases actually went to trial. He was not charged with conversion nor with violating Rule 1.15(e). And he was not charged with failing to recommend arbitration to the clients.

28.

Chief Disciplinary Counsel Charles Plattsmier prosecuted the case of William Paul Polk, II, a lawyer practicing in Alexandria Louisiana, involving the failure to return an unearned fee. The Client sent Polk a letter stating "How about sending me my file and my $700.00 for doing nothing...?" Even though Polk was found to have violated Rule 1.5 by not returning an unearned fee, he was not charged with violating Rule 1.5, by failing to recommend arbitration to the client and further he was not charged with violating Rule 1.15 when the client made the initial demand.

29.

When investigating and disciplining lawyers practicing in the Shreveport Area, Kennedy and the Office of Disciplinary Counsel treats white lawyers differently from African American lawyers, applying the rules harsher against African American lawyers.

30.

Because the Office of Disciplinary Counsel treats white lawyers practicing in the Shreveport Area, differently from African American lawyers so practicing, applying the Rules of Professional Conduct in a manner which is harsher against African American lawyers than white lawyers, in violation of the guarantee of equal protection as provided by the 14th Amendment of the United States Constitution, plaintiff asks this court to enjoin the Office of Disciplinary Counsel from overseeing the discipline of lawyers, and particularly African American lawyers.

05-DB-065:

31.

Charges in 05-DB-065 involved complaints filed by Tisha Lensey and David and Lucy Frazier.

32.

Tisha Lensey alleged in her complaint, inter alia, that plaintiff cashed a check in the amount of the $9,106.24 which was made out to her and Jones, without her written permission and had not given her the proceeds.

33.

The formal charges in the Lensey matter alleged as follows:

"The respondent did not deposit the $9,000 check into his trust account, but instead endorsed the client's name to the check without authority or permission and converted the funds to his own use in violation of Rule 1.15. He has never refunded or accounted for these sums to the client."

34.

In the Lensey matter, the ODC alleged plaintiff violated Rule 1.5 by failing to deposit any of the advanced fee payments into his trust account and Rule 1.15 by failing to keep accurate records of Ms. Tensley's(sp) advanced payments and signing Ms. Tensley's(sp) name to one of the checks without authority and thus converting her funds.

35.

Hence, with respect to the check in the amount of $9,106.24, the only conduct of plaintiff referenced by the formal charges was the plaintiff signing the check without authority.

36.

The formal charges did not specify that plaintiff had failed to deposit the funds into his trust account, and did not reference the existence of a dispute between plaintiff and Lensey regarding the $9,106.24.

37.

In the Lensey matter, the Hearing Committee stated the following:

The evidence presented at the hearing showed that Mr. Jones entered into two separate "Retainer Agreements" with Tisha Tensley both arising out of claims that she was wrongfully terminated by the Shreveport Police Department. The only agreement extant was introduced as ODC#4. That agreement called for the payment of a retainer and hourly billing up to the amount of the retainer. The retainer was to be paid in three installments. Any fees in excess of the retainer agreement required written consent of Ms. Tensley. The second retainer agreement provided for a contingency fee. The other terms of that agreement were unknown as neither Ms. Tensley nor Mr. Jones were able to produce a copy. Mr. Jones filed into the record copies of agreements he has used in other cases (R. #18-19). **All agreements reflect identical terms allowing Mr. Jones to "receive, receipt for, disburse funds, retaining his fees, therefrom. Attorney (Mr. Jones) is hereby granted the special power of attorney to endorse in client's name any settlement drafts or checks issued in connection with this matter and to disburse the proceeds in accordance with this agreement." (Emphasis added.)**

38.

In the Lensey matter, the Hearing Committee made the following factual findings:

At the time Mr. Jones deposited the $9,000.00 into his operating account, he was aware there was a fee dispute with Ms. Tensley. Additionally, Mr. Jones was not entitled to the entire $9,000.00 based upon the terms of the contract with Ms. Tensley.

39.

In the Lensey matter, the Hearing Committee concluded that plaintiff violated the following rules:

> "At the time Mr. Jones deposited the interest payment check into his operating account, he was aware there was a dispute with Ms. Tensely regarding his entitlement to any of those funds. His failure to place those funds into his trust account is a violation of Rule 1.15 (a) and (e)."

40.

In the Lensey matter, the Hearing Committee did not conclude that plaintiff signed Lensey's name without her permission.

41.

Plaintiff alleged that he and Lensey entered into an agreement with respect to the $9,106.24, which was received pursuant to a judgment entered by the Second Circuit Court of Appeals ordering Lensey be reinstated and she be paid back pay, with interest, whereby he would keep the funds in exchange for resuming his representation of her in federal suit filed in federal district court.

42.

The court order of disbarment of plaintiff in the Lensey matter was based on the following:

> "When respondent's conversion is combined with his other fraudulent acts, such as falsely endorsing Ms. Lensey's name to the check, the baseline sanction is disbarment. *Louisiana State Bar Ass'n v. Hinrichs*, 486 So.2d 116 (La. 1986).

43.

In the Lensey matter, the Hearing Committee was precluded from determining if plaintiff had earned the entirety of the $9,106.24 as is required by Rule 1.5 due to comments made by Kennedy.

44.

In the Lensey matter, the Hearing Committee did not conclude that plaintiff had converted the funds of Lensey, and neither the plaintiff nor the ODC filed objections to the Lensey Hearing Committee Repor

45.

Kennedy told the Lenaey Hearing Committee that with respect to the $9,106.24 that plaintiff was being charged with not following the dictates of Rule 1.15 due to the existence of a dispute:

> "The enforceability of that contract, from my point of view, is secondary. The fact of the matter is there was a dispute, a legitimate dispute over who was entitled to the money. And that's the crux of what we're arguing. I don't want to get the Committee sidetracked on whether or not that contract provided this or that." (Tr. 186(10/4/05))
>
> "It is just a simple dispute that should have been resolved and our position is that 1.15 governs how you do that."(Tr. P. 186) ...
>
> "Mr. Chairman, let me just –can I respond briefly to that? The rules provide an alternative if there's legitimate dispute and there's no question there was a legitimate dispute." (Tr. 189.
>
> "I'm not arguing –I'm not contending that 1.5 applies in this situation..."(Tr. October 4, 2005, vol, 2, p. 194, lines 17-21)

46.

Kennedy further told the Hearing Committee that plaintiff was not being charged with conversion with respect to the $9,106.24, stating:

> "There may be a reasonable basis for him to keep the money, **but he's not charged with stealing $9,000.00.**" (Vol. 2, p. 191) "[The Respondent's] **charged with not taking appropriate action to resolve the dispute between himself and a client**."(Emphasis added.)

47.

Notwithstanding that Kennedy told the Hearing Committee that "I'm not contending that 1.5 applies in this situation", the Court disbarred plaintiff based on the following statement:

> "Even accepting respondent's contention that there was some confusion as to whether the representation was on an hourly basis or contingent basis, the record establishes that respondent knew Ms. Lensey disputed the fee. ***Therefore, respondent had a clear duty to place the disputed funds in his trust account pursuant to Rule 1.5***" (Emphasis added.)

48.

Upon information and belief, it is not the policy of the Board to utilize Rule 1.15 with respect to fee disputes between a lawyer and a client.

49.

With respect to the Lensey Hearing Committee factual findings the Disciplinary Board made the following statement:

"Based upon the testimony of witnesses and Respondent and the documentary evidence presented, the Committees' findings of fact are supported by the record. There is nothing in the records to suggest that either Committees' findings are manifestly erroneous. The Board finds the facts are not manifestly erroneous and adopts same."

50.

Notwithstanding that the Hearing Committee did not find that plaintiff had signed Lensey's name without authority, and did not find that plaintiff converted her funds, the Disciplinary Board recommended disbarment and the Louisiana Supreme Court order of disbarment is based on plaintiff "fraudulently" signing Lensey's name and conversion.

51.

It is a violation of due process for a hearing committee, the Board, and the Court to find a respondent guilty, and punish him for a Rule violation that is not alleged in the formal charges. *In re Ruffalo*, 390 U.S. 544 (1968); *La. State Bar Ass'n v. Keys*, 88-2441 (La. 9/7/1990), 567 So. 588, 591

52.

The formal charges in the Lensey matter alleged as follows: "The respondent did not deposit the $9,000 check into his trust account, but instead endorsed the client's name to the check without authority or permission and converted the funds to his own use in violation of Rule 1.15. He has never refunded or accounted for these sums to the client."

53.

Even though the formal charges did not allege the existence of a dispute regarding the funds, the Hearing Committee found "[respondent] failed to place the disputed funds in trust until resolved in violation of Rule 1.15(a) and (e)."

54.

The disbarment, based on 1.15(e), was a violation of due process because the formal charges did not specify the existence of a dispute or the existence of competing claims. *See In Re Clifton*

*Spears, 72 So.819(La. S.Ct 9/2/11)(" **He did not violate Rule 1.15(e) because the formal charges did not allege that a dispute existed concerning property in his possession".)***

55.

Kennedy, lawyer members of the hearing committee, lawyer members of the Board, and the members of the Louisiana Supreme Court, knew or should have known that it was a violation of the constitutional and other rights of plaintiffs to disbar him based on charges that were not specified in the formal charges.

FRAZIER ISSUE- SOLICITIATION FOR PECUNIARY GAIN

56.

In April 2004, the Fraziers filed a complaint against respondent with the ODC alleging that plaintiff had not returned their file after they terminated him, and failed to communicate with them.

56.

The Fraziers did not allege that plaintiff had solicited them.

57.

However, the complaint filed by the Fraziers with the Office of Disciplinary Counsel contained the following:

> "A few days later, Frazier's parents, David and Lucy Frazier, were making funeral arrangements for their son at a Shreveport funeral home when they were approached by the respondent, HERSY JONES, and asked to meet with him the following day at his law office regarding ***"police killing our black men without cause."*"** (Emphasis in original.)

58.

The court's ruling of disbarment based on the plaintiff's contact with Frazier's was as follows:

> "Likewise, we consider respondent's actions in the Frazier matter to be serious in nature. The hearing committee made a finding of fact, which we determine is supported by the record, that respondent had no prior contact with the Frazier family prior to appearing at the funeral home. Thus, respondent's actions amount to solicitation."

59.

The Hearing Committee report stated the following:

"According to the testimony, he identified himself as an attorney and told the parents to contact him if they needed anything. He also told the parents they needed to take pictures of the decedent's body to verify that he was shot in the back. Emmanuel's funeral was held on Saturday, April 21, 2001. After the service but before the interment, the body was returned to the funeral home so that pictures could be taken. Mr. Jones appeared at the funeral home with a digital camera."

60.

Per the Office of Disciplinary Counsel, plaintiff's conduct which constituted solicitation was the following:

"A few days later, Frazier's parents, David and Lucy Frazier, were making funeral arrangements for their son at a Shreveport funeral home when they were approached by the respondent, HERSY JONES, and asked to meet with him the following day at his law office regarding "*police killing our black men without cause.*""

61.

The Hearing Committee stated the following:

"On Saturday, April 21, 2001, the day of the funeral, Mr. Jones entered into a "Retainer Agreement" with Lakendra Williams, the mother of Emmanuel's child, for representation in the claims arising out of Emmanuel's death. (R#2). The following Monday, Mr. Jones entered into a "General Power of Attorney' with Emmanuel's parents. This document purported to give Mr. Jones authority to do "all acts" on behalf of the Fraziers, including performing an investigation into the death of Emmanuel. (R#1). ***The mandate did not specifically allow Mr. Jones to file a lawsuit on behalf of the parents and did not contain any fee arrangement.*** The evidence presented by respondent was to the effect that the sole purpose of the Power of Attorney was to allow him to investigate the shooting."(Emphasis added.)

62.

Plaintiff testified, without contradiction, that at the time he initially contacted the Fraziers, he had already been contacted by Ms. Lakendra Williams earlier that day, and agreed to represent her.

63.

Plaintiff's disbarment based on his conduct based on his contact with the Frazier family at the funeral home violates plaintiff's First Amendment right to association and freedom of speech, and constitutes a taking of his property without due process.

64.

Plaintiff's disbarment was based in whole or part on the nature of his law practice, namely representing African American families whose sons had been killed by white police officers.

65.

In Ohralik v. Ohio State Bar Association, 436 U.S. 447(1978), United States Supreme Court emphasized that a Bar Associations solicitation rule did not prohibit a lawyer giving unsolicited legal advice but rather prohibits the retention of employment pursuant to the unsolicited encounter, and moreover that it is the presence of a employment motive that justifies a State's regulation of the speech of attorneys. The United States Supreme Court also observed that the solicitation rule being upheld was not so broad as to prohibit all contact between an attorney and a nonclient .

66.

In NAACP v. Button, 371 U.S. 415, 442 (1963) the Supreme Court in rejecting the Virginia Bar Associations assertion that lawyers for the NAACP had violated its prohibition against solicitation recognized that litigation by minorities seeking redress was "a form of political expression", holding that "Chapter 33 as construed violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association."

67.

Comment 5 to ABA Rule 7.3 states :

" There is far less likelihood that a lawyer would engage in abusive practices... **in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain... Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations**...."(Emphasis added.)

68.

Black's Law Dictionary defines solicitation as:

> "To appeal for something; to apply to or obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty,

imploration, or supplication."

69.

David and Lucy Frazier testified that plaintiff did not ask to "be their attorney."

70.

The Frazier Hearing Committee made the following factual findings:

> "Mr. Jones came to Emmanuel's wake and spoke to the parents. According to the testimony, he identified himself as an attorney and told the parents to contact him if they needed anything. He also told the parents they needed to take pictures of the decedent's body to verify that he was shot in the back. "

71.

The Hearing Committee expressly noted that, although, plaintiff executed a Power of Attorney with David and Lucy Frazier, there was not any evidence that plaintiff entered into a retainer agreement with the Fraziers.

72.

Moreover, the Hearing Committee also noted that :

"The mandate did not specifically allow Mr. Jones to file a lawsuit on behalf of the parents and did not contain any fee arrangement.

73.

There was not any evidence presented to the Hearing Committee that plaintiff asked for or could receive pecuniary gain.

74.

Notwithstanding that defendants knew that plaintiff did not engage in solicitation for pecuniary gain, they engaged in concerted conduct with each other and others to deprive the plaintiff of the right to practice law in Louisiana and other states.

75.

Defendants individually and jointly knowingly engaged in conduct with each other and others designed to wrongfully deprive plaintiff of his right to practice law in Louisiana and other states.

76.

Participating on the Hearing Panel in 04-DB-064 and 05-DB-065, as well as the hearing panel of Daryl Gold was Joseph Woodley, a white attorney practicing in Shreveport, who law practice and that of his partners primarily includes defending the City of Shreveport in cases involving police misconduct

77.

At all times present herein, Kennedy and other defendants were aware of the nature of the practice of Woodley, and his personal interest in plaintiff being prohibited from practicing law.

78.

Upon information and belief, defendants have disciplined plaintiff, and other African American lawyers, in a manner harsher than similarly situated white lawyers, namely those who have committed similar ethical violations.

79.

The conduct of defendants, jointly and severally, has caused plaintiff pain and suffering, loss of reputation, loss of earnings, and other damages.

80.

Moreover, defendants' conduct in disbarring and causing the disbarment of plaintiff, is the direct cause of his disbarment by the State of New York Bar Association to which he continuously admitted from 1987 to 2008.

81.

Moreover, defendants' conduct in disbarring and causing the disbarment of plaintiff, is the direct cause of his disbarment/suspension by the United States Department of Treasury prohibiting him from representing clients before the Internal Revenue Service.

RELIEF:

PLAINTIFF PRAYS THAT DEFENDANTS BE ENJOINED FROM PROHIBITING HIM FROM PRACTICING LAW, AND BE ENJOINED FROM ARBITRARILY AND CAPRICIOUSLY APPLING IT'S DISCIPLINARY RULES AND PROCESS, AND THAT HE BE AWARDED DAMAGES.

Sincerely,

Hersy Jones, Jr.
461 Kemper Street
Shreveport, LA 71106
318-550-8159

42 U.S. Code § 1983.Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30798

HERSY JONES, JR.,

Plaintiff - Appellant

v.

LOUISIANA STATE SUPREME COURT; LOUISIANA ATTORNEY DISCIPLINARY BOARD; ROBERT S. KENNEDY, Individually and in his official capacity as Deputy Disciplinary Counsel; CHARLES B. PLATTSMIER, individually and in his official capacity as Chief Disciplinary Counsel,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING EN BANC

(Opinion 10/17/2018, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP.

P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE