No. 19-35970

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. CARUSO,

Appellant,

STEPHEN KERR EUGSTER,

Appellant, *sub nom*

v.

WASHINGTON STATE BAR ASSOCIATION ET AL.,

Appellees.

An Appeal from the United States District Court
for the Western District of Washington
No. 2: l 7-cv-00003-RSM
Hon. Chief Judge Ricardo S. Martinez

PETITION FOR REHEARING EN BANC

Stephen Kerr Eugster
EUGSTER LAW OFFICE PSC
2418 West Pacific Avenue
Spokane, Washington 99201
Attorney for Appellants Robert Caruso
and Stephen Kerr Eugster, pro se
Eugster@eugsterlaw.com

I. INTRODUCTION

"What shall I do if the law is against me?" The older man said, "Come out strong on the facts." "What shall I do if the facts are against me?" "Come out strong on the law." "Then, what shall I do if both are against me?" "Abuse the other fellow's attorney."[1]

The Washington State Bar Association, WSBA,[2] did more than abuse the other fellow's lawyer, they made him the scapegoat of the entire proceedings. The Association, devoted unquestionably to its executive director, Paula Littlewood, caused the Association's Lawyers [3] to pursue a strategy of "Argumentum Ad Hominem"[4] focused on Plaintiffs' lawyer, Stephen Eugster.[5]

The plan was exceedingly successful. Eugster's reputation ruined, over $125,000.00 in attorney fees individually imposed on him; every judge he came before was anxious to bring him down and to rule against him, and in this case, his clients Robert E. Caruso and Sandra L. Ferguson.

The Association, it's Executive Director, herself a Washington lawyer, and the lawyers hired by the Association at the direction of the Executive Director made "a bargain with the

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[1] Quote Investigator, https://quoteinvestigator.com/2010/07/04/legal-adage/ retrieved 4/7/20.

[2] Washington State Bar Association or WSBA, State Bar Act ,Wash. Sess. 1933, c 94 § 1 (RCW 2.48.010) (hereinafter "Associaton.")

[3] Paul J. Lawrence, Jessica Anne Skelton, and Taki J Flevaris Pacifica Law Group (herein "Association Lawyers or Lawyer")

[4] Defined in Black's Law Dictionary "[Latin "argument to the man"] An argument based on disparagement or praise of another in a way that obscures the real issue." (herein "Argumentum Ad Hominem").

[5] Stephen Kerr Eugster, WSBA # 2003 (herein "Stephen Eugster" or "Eugster").

devil." They sacrificed Stephen Eugster, making him their scapegoat. In so doing, they defeated the claims of Robert E. Caruso and Sandra L. Ferguson.[6]

The allegations against the Association, Executive Director, and Lawyers were of real constitutional significance. They were unconstitutionally infringing the on rights of Mr. Caruso and Ms. Ferguson under the First and Fourteenth Amendments (rights of freedom of non-association, freedom of expression and non-expression), and their rights of procedural due process, as distinct from a due process, under the Fifth and Fourteenth Amendments. Dkt. # 4, Amended Complaint.

II. FRAP 35 (B)(1)(B)

This proceeding involves two questions of exceptional importance. First, whether the Foundational Principles of Professional Conduct of the Association can be abandoned to win its case against Plaintiffs' Caruso and Ferguson:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

WASHINGTON RULES OF PROFESSIONAL CONDUCT, *Fundamental Principles of Professional Conduct* (2020).

[6] Plaintiffs are members of the Association. Ms. Ferguson began representing herself on June 8, 2017. Dkt. # 41.

The second is whether a judge in the 9th Circuit Court of Appeals can join with the Executive Director, Association Lawyer in Argumentum Ad Hominem, and thus act as their champion. Or, stated another way, can a judge "make the case her own?" --*Nemo judex in causa sua*.

III. DISCUSSION

A. Mr. Eugster's First Encounter with the Association's Lawyers (Sometimes known in these proceedings as Eugster III).

Stephen Kerr Eugster, WSBA #2003, first encountered the Association's Lawyers when he filed an action seeking to overturn *Lathrop v. Donohue*, 367 U.S. 820 (1961).[7] Jessica Anne Skelton contacted Mr. Eugster more than once, claiming he should dismiss the case on the grounds of res judicata. The case on which she was relying was *Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (E.D. Wash. July 23, 2010 (in these proceedings **Eugster II**)). Mr. Eugster declined, the issue before the court, in that case, **Eugster II**, was not the same as the issue in the case he had just filed, **Eugster III**, the "nexus of facts" were not the same. An action pursuing whether the Association's disciplinary rules violate procedural due process is not the same as an action seeking a right not to be compelled to be a member of the Association.

Undaunted, the Association reactivated a grievance against Eugster, a grievance which had already been investigated. The Association threatened disciplinary action against him.

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7 *Eugster v. Washington State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, a (W.D. Wash. Sept. 3, 2015), aff'd, No. 15-35743, 2017 WL 1055620 (9th Cir. Mar. 21, 2017*), petition for cert. denied* 137 S.Ct. 2315 (2017) ("Eugster III"). A petition on writ of certiorari is now before the Supreme Court based on issues similar to Eugster's issues in his petition. *Jarchow v. Wisconsin State Bar Association*, Supreme Court Docket # 19-831 ("Whether *Lathrop and Keller* should be overruled and "integrated bar" arrangements like Wisconsin's invalidated under the First Amendment.")

Eugster, in defense of himself, filed a civil rights action in Spokane County Superior Court. *Eugster v. Wash. State Bar Ass'n,* 198 Wash. App. 758 (2017) (**Eugster IV**). Not long after that, he filed a concurrent action in the Eastern District of Washington. (*Eugster v. Littlewood*, No. 2:17-CV-0392-TOR (E.D. Wash. May 11, 2018), *aff'd, Eugster v. Littlewood*, No. 16-35542 (9th Cir. 2018) (**Eugster V**).

B. Caruso and Ferguson v. Washington State Bar Association.

1. Case assignment.

How this case was assigned to Chief Judge Martinez is unclear. Presumably, the Western District assigns judges at random. However, because Judge Martinez was a judge in two previous cases involving view Washington State Bar Association in 2016 and 2018 [8], he must have had a hand in selecting himself as the judge in the *Caruso Ferguson* case.

2. Amended Complaint and Meeting with Association Lawyers.

After the Plaintiffs filed their amended complaint Dkt # 4, the Plaintiffs' lawyer had a telephone conference with the lawyers for the Association. Paul J. Lawrence, Jessica Anne Skelton, and Taki V. Flevaris. Mr. Eugster explained the nature and bases of the plaintiff's complaint. He explained that since the Association had become an integrated association of lawyers, limited practice officers, and limited license legal technicians, new First Amendment and Fifth Amendment principles would be applied to the facts.

After he concluded, Paul J. Lawrence spoke. With the other lawyers on the phone, he told Mr. Eugster that if he proceeded, he and the other the Association lawyers would pursue

[8] *Block v. Wash. State Bar Ass'n,* No. C15-2018RSM (W.D. Wash. Apr. 13, 2016); *Scannell, Block v. Washington State Bar Ass'n,* C18-907 RSM, 2018 WL 3390466, (W.D. Wash. July 12, 2018); *Ferguson v. Waid,* No. C17-1685 RSM (W.D. Wash. Mar. 13, 2018*);aff'd* No. 18-36043 (9th Cir. Jan. 8, 2020)

sanctions against him personally, sanctions not against Mr. Eugster's clients, but personally against Mr. Eugster. Ms. Skelton and Mr. Flevaris joined in what Mr. Lawrence told Mr. Eugster.

3. Motions for Summary Judgment and Preliminary Injunction.

Soon after the telephone conference, plaintiffs next filed motions for summary judgment and preliminary injunction, along with supporting declarations. Respectively, DKT. # 8, DKT. # 15, and DKT. # 9, # 10, and #11.

4. Bar Association Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction.

The Association's Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction. Dkt. # 16, was extremely unusual. It was not based on anything in the record. The only thing on record which was denominated as true were the allegations characterized as such under FRCP 12(6). The Association did not support the motion with declarations or affidavits. Nor was any reference made to any document filed in the proceeding. It based its Motion To Dimiss on lenthy Argumentum Ad Hominem which ran the first 8 pges of the 25 page motion. Dkt. # 16.

5. Judge Martinez Order Granting Motion to Dismiss.

Chief Judge Martinez willingly embraced the Argumentum Ad Hominem and in it, what said about Mr. Eugster, and what said about the "facts" of the case. He said, ("the court will not address tangential facts and arguments raised by the parties and will focus instead on the key legal questions in defendants entirely dispositive motion to dismiss.") Dkt. # 28, page 4, lines 7-8. The "tangential facts and arguments" Judge Martinez was referring to were Mr. Eugster's Response to Defendants' Motion to Dismiss, Dkt. # 18 and Defendants' Reply to Response to Motion, Dkt. # 21.

Mr. Eugster's response was devoted almost entirely to the Argumentum Ad Hominem in the first portion of the Association's Motion To Dismiss.

Further analysis of the judge's order granting Motion To Dismiss will be discussed below in conjunction with the Judge's order regarding Mr. Eugsters Application for Leave, see _____s.

C. Pre-filing Order against Stephen Kerr Eugster.

Before addressing the Association's Motion for for Pre-filing order is based on much of what was said in the Argumentum Ad Hominem. The Association simply extended the Argumentum Ad Hominem to give their go-to judge something to repeat himself with and rule on. And, to render his Pre-filing order.

When it came time to file a revised Pre-filing order, the court did not do anything more than to make the pre-filing broader than the one which was overturned. Compare Dkt. # 86, pages 2 and 3, with Dkt. # 68, pages 9 – 10.

D. Association's Motion For Summary Dismissal Under Circuit Rule 3-6.

The Association repeats what it said in the Motion for Pre-filing Order Dkt. # 68. Again the Association used the Argumentum Ad Hominem to get the 9th Circuit Panel to Order in favor of the Association. The Association has no shame.

The Association quotes from Judge Martinez' "summarily denied […] motion. Dkt. 8-1, page 4. ***See*** the critique of Judge Martinez's Order of Dismissal. Doc. # 88.

E. Application for Leave to File Motions.

In strict compliance with Judge Martinez's most recent Pre-filing order (Dkt. # 86), Mr. Eugster made Application for Leave. The application was for "leave to file." If Judge Martinez approved, he would convey that to the applicant. He would tell Mr. Eugster was given leave to file. Mr. Eugster did not ask the judge to file the motion. That was not his job.

Mr. Eugster only would file if he filed a motion for Judge Martinez to recuse himself. It must be evident Judge Martinez was making the case his own case. Also, he violated 42 U.S.C. § 455(a) and (b)(1).

What Judge Martinez did here, he had done when he signed and entered the Order to Granting Motion to Dismiss ("[t]he Court will not address tangential facts and arguments raised by the parties and will focus instead on the key legal questions in Defendants' entirely dispositive Motion to Dismiss.") Dkt. # 28, lines 7 and 8, page 4. The "tangential facts and arguments raised" referred to the Response to Defendants' Motion to Dismiss (Dkt. # 18) and Defendants' Reply in Support of Motion to Dismiss, Dkt. # 21.

The Response opened with this preliminary statement:

> WSBA Defendants' primary argument concerns Plaintiffs' counsel, Stephen Kerr Eugster. Their argument begins in the first paragraph of the Introduction to their Motion to Dismiss.
>
> "Introduction, First Paragraph:"
>
> "In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") [' has filed four prior prose lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage. This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments." [Footnotes omitted].
>
> Motion to Dismiss 1.
>
> Their argument is given significant attention the Motion to Dismiss. The discussion of the argument and facts alleged regarding the argument proceeds from page 1 to page 9 of the 24 page Motion to Dismiss, Dkt # 16. After a rather desultory discussion of other arguments, WSBA Defendants restate the argument in the Conclusion to the Motion to Dismiss. They say:

> "This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice."
>
> Motion to Dismiss 24.
>
> The argument is extraordinarily improper. Doubly so because of who is making it, the WSBA Defendants and their three lawyers at Pacifica Law Group, Seattle. The individual W SBA Defendants are state of Washington lawyers, members of the bar of the Washington Supreme Court. The argument is unethical and contrary to justice, equity, and law. Moreover, it based on false facts. With the argument, WSBA Defendants and their lawyers are engaging in conduct, which is antithetical to purposes of the organization and the ethical responsibilities of Washington lawyers.
>
> Further concerns about the argument and each one of WSBA Defendants' other assertions, will be discussed below starting at page 5.
>
> Dkt. # 18.

In part V, Mr. Eugster set forth a concise rebuttal of the Argumentum Ad Hominem. *Id.* Pages 6 – 18.

Defendants' Reply did not reply to what Mr. Eugster said. They talked about something else. Dkt. # 21.

F. Judge Martinez' Order of Dismissal.

Judge Martinez's order (Dkt. # 88) can be split into ten parts. Each part will be discussed below seriatim.

> **[1] This matter comes before the Court on Mr. Eugster's Motion for Leave to file a Motion under Rules 60(b)(3), 60(b)(6), and 60(d)(3) seeking to vacate decisions and orders in this case, and the attached Rule 60 Motion. Dkts. #87 and #87-1. The Court will grant Mr. Eugster leave to file the instant Rule 60 Motion, as it is not strictly subject to the bar order. See Dkt. #86. However, the Court finds it can rule on this Motion without responsive briefing.**

See the discussion page 8.

[2] Mr. Eugster is seeking relief from orders and judgments that were decided over a year ago and have already been the subject of appeal, and that this Rule 60 Motion is procedurally deficient and untimely. On this basis alone the Court can deny the Motion.

Judge Martinez does not understand the jurisdiction of the court under the three FRCP 60 motions. The motions do not seek relief from the orders and judgments; they seek to have the court vacate the orders and judgments on the basis of the record to which the motions are to be applied.

The relief sought is not a reconsideration the orders and judgments. Reconsideration is based on FRCP 59**. (“**There is no motion for ‘reconsideration’ in the Federal Rules of Civil Procedure.” *Bass v. United States Dep’t of Agriculture,* 211 F.3d 959, 962 (5th Cir. 2000). Rather, if filed within ten days of the district court’s judgment, such a motion is construed as filed pursuant to Rule 59(e). *See Id*. Motions that are not timely under Rule 59 must be treated as motions filed under Rule 60(b). *See Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998).”)

Judge Martinez is attempting to mislead. The fact that the trial court decision has already been subject appeal makes no difference. The Rule 60 motions address the propriety of the trial court’s rulings themselves. The Court of Appeals cannot change things. It only has revisory jurisdiction. Whatever it did as a result of its revisory jurisdiction would be nullified were the court on basis of one or more of the motions vacate the orders.

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only has revisory jurisdiction. Whatever it did as a result of its revisory jurisdiction would be nullified were the court on basis of one or more of the motions vacate the orders.

> **[3] However the Court has also reviewed Mr. Eugster's substantive arguments. Mr. Eugster is attempting to relitigate this case. Mr. Eugster's Motion is based on the repeated assertion that Defendants made ad hominem arguments in briefing over two years ago. See Dkt. #87-1.**

Judge Martinez does not understand the issue of timing regarding FRCP 60 (b) motions. ("(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.")

The mandates issued in the two appeals tell us when the time period begins. See Dkt. # 75 (17-35410 and Dkt. # 78 (17-35529)

> **[4] By the Court's count, the phrase "ad hominem" appears 35 times. Finding some of an opponent's arguments to be ad hominem alone does not render the remainder of the briefing or the Court's Orders invalid. These are not magic words.**

The disingenuousness of Judge Martinez is palpable, as shown by Dkt. # 18, above.

He would have us believe that the phrase ad hominem appears 35 times. However, about 32 times the phrase was used was as part of "argumentum ad hominem" or were separately stated three or so times when discussing the scope of "argumentum ad hominem." Dkt. # 87-1.

> **[5] Although Mr. Eugster was not personally the subject of his clients' claims in this case, Defendants' references in briefing to Mr. Eugster's numerous prior filings addressed legal issues before the Court and were relevant.**

Mr. Eugster was not personally the subject of his clients claims. That is true. Eugster was not the subject in the claims being made by his clients. He was their attorney.

Judge Martinez knows that the legal issues addressed were not relevant to issues before the court and were. Judge Martinez makes this assertion because agreed with Defendants' Argumentum Ad Hominen. In it the defendants falsely stated that the issues were relevant by

saying the facts in the case at hand were the same as the facts in Eugster III. They could not be relevant because the issues in the prior filings concerned a Washington State Bar Association as an integrated Bar Association of lawyers. The *Caruso* case dealt with issues concerning the Bar Association after the Association became an integrated Association of lawyers, limited practice officers, and limited license legal technicians. What the Bar Association was before January 1, 2017 is not what the Bar Association was after January 1, 2017.

[6] Even if all of the references to Mr. Eugster were not relevant, such does not invalidate the Court's prior rulings, which were based on the entire record.

Judge Martinez continues to deceive. He concedes that even if Eugster's references were not relevant the irrelevancy does not invalidate the court's prior rulings because they were based on the "entire record." What does judge Martinez mean by the entire record. Surely, he's using the term in the context of the *Caruso* case. The facts of the case at the time of the motion to dismiss were the allegations of the plaintiff's Amended Complaint. FRCP 12(b)(6).

However let's consider whether an argument ad hominem can be used as the basis for a fact which is said to be relevant to the issues before the court. It cannot, because it is a part of the Argumentum Ad Hominem, it is tainted. Also, the invalidity of Argumentum Ad Hominem is enhanced when the person making the argumentum ad hominem uses it as a vehicle to delude others as to what the facts truly are. For example, the Bar Association says with regard to Eugster's previous filings that the cases were dismissed at the pleadings stage. Only one case was dismissed at the pleading stage, and that was the case where Eugster attempted to get the court to overturn *Lathrop v. Donahue*. Judge Robards dismissed the case with prejudice. That dismissal was res judicata. The dismissals for other reasons were not res judicata.

[7] Such references do not constitute misrepresentation or misconduct under Rule 60(b)(3).

But they do.

> **[8] Mr. Eugster has presented no evidence of fraud on the Court under Rule 60(d)(3). He introduces no valid basis for the Court to question its prior rulings or those of the Ninth Circuit.**

He did.

> **[9] Notably, in the end, Mr. Eugster is left arguing the Court "must, of necessity, act on the basis of Fed. R. Civ. P. 60(b)(6)," with an argument section that states, in its entirety: "[w]hat the Bar Association and its lawyers have done is extraordinary, and cynical." This is assertion without proof-ipse dixit**.

FRCP 60(b)(6) is a product of the Argumentum Ad Hominem. It is not relevant evidence ER 401. Besides, it includes false "facts" on which Judge Martinez previously based decisions.

> **[10] Given all of the above, the Court finds and ORDERS that Mr. Eugster's Motion for Leave, Dkt. # 87, is GRANTED, and that Mr. Eugster's Motion under Rule 60. Dkt. #87-1, is DENIED. This case is CLOSED.**

Mr. Eugster's FRCP 60 motions had yet to be filed. Judge Martinez misbehaved in denying the Motion. The motion had yet to be filed. Undoubtedly, the Applicant still had a right to file or not file. Judge Martinez's effort is not to order; instead, it is to make apology for what he previously did when he used the Argumentum Ad Hominem to rule against Appellant Caruso and Appellant, *sub nom* Eugster.

G. The Panel, 9th Circuit Court of Appeals.

The Association and Judge Martinz have deceived the Panel. They have played the members of the by use, one way or another, of the Argumentum Ad Hominem.

IV. CONCLUSION

This Petition For Rehearing En Banc must be granted. The integrity of this Court and the District Court of Washington must be preserved. The integrity of the profession of lawyers in the

state of Washington must be preserved. The responsibility in these regards should not fall on the resources and perseverance of a solo practitioner.

The grant of the Petition For Rehearing En Banc should result in a decision by the Ninth Circuit to vacate the order granting the Bar Association's motion for summary disposition No. 19- 35970 Dkt. # 16. Upon doing so, the court, because it only has revisory jurisdiction, should and indeed must remand the case to the trial court in Case No 2:17 -cv- 00003 – and with the instruction that a District Court judge other than Chief Justice Ricardo S Martinez, be selected by the District Court to hear the motion.

April 10, 2020

Respectfully submitted,
EUGSTER LAW OFFICE PSC

s/ Stephen Kerr Eugster

Stephen Kerr Eugster WSBA # 200303
2418 W. Pacific Ave.
Spokane, WA 99201
Telephone (509) 990 – 9115
Email: eugster@eugsterlaw.com
Attorney for appellant Robert E Caruso and for
Stephen Kerr Eugster pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

ROBERT E. CARUSO,

Plaintiff-Appellant,

STEPHEN KERR EUGSTER,

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and

SANDRA L. FERGUSON, Esquire,

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WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); et al.,

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No. 19-35970

D.C. No. 2:17-cv-00003-RSM
Western District of Washington,
Seattle

ORDER

Before: TASHIMA, FRIEDLAND, and MILLER, Circuit Judges.

A review of the record and the opening brief received on February 12, 2020 indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See* 9th Cir. R. 3-6(a)(2); *see also United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

Accordingly, appellees' motion for summary disposition (Docket Entry

SM/MOATT

No. 8) is granted. We summarily affirm the district court's order denying appellants' post-judgment motion.

AFFIRMED.