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Chief Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STEPHEN KERR EUGSTER, Applicant for Leave	Case No.: 2:18-mc-66 RSM MOTION TO DISQUALIFY CHIEF JUDGE RICARDO S. MARTINEZ Hearing:

MOTION

APPLICANT moves the court to disqualify, Chief Judge Ricardo S. Martinez. This motion is based on the files and records herein and the Declaration of Stephen Kerr Eugster In Support of Motion to Disqualify Chief Judge Ricardo S. Martinez filed herewith.

GROUNDS

I. INTRODUCTION

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

As members of the profession of law, we know in our souls, that these fundamental principles are true. Our job in a proceeding of this kind as in every proceeding where a judicial decision must be made -- our job is to ensure that the decisions made are somewhat akin to Kant's "categorical imperative."

" 'Act in such a way that you treat humanity, whether in your own person or in that of another, always at the same time as an end and never merely as a means.' In our example, it is clear that by false promises I use the other as a means. I make him an instrument of my interest. Similarly want to commit suicide is immoral, because making an end of me means continuing to live and not to destroy me." THE-PHILOSOPHY.COM, *Kant, And The Categorical Imperative*. https://www.the-philosophy.com/kant-categorical-imperative, Retrieved March 31, 2020.

II. LAW

The issue before the court is whether Chief Judge Martinez is disqualified under 28 U.S.C. § 455. Section 455(a) provides: "Any justice, judge, or

magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In *Preston v. U.S.*, 923 F.2d 731, 734 (9th Cir. 1991), the court said, "[t]he standard for judging the appearance of partiality requiring recusal under 28 U.S.C. § 455 is an objective one and involves ascertaining 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.' *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983). *See also Herrington*, 834 F.2d at 1502; *Studley,* 783 F.2d at 939."

The court went on to say, "[h]owever, § 455 recusal is not unlimited - the source of any alleged bias must be extrajudicial. *Liteky v. United States*, 510 U.S. 540 (1994). Judicial bias or prejudice formed during current or prior proceedings is insufficient for recusal unless the judge's actions "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 541; *Pesnell,* 543 F.3d at 1044. Thus, judicial rulings will support a motion for recusal only "in the rarest of circumstances." *Liteky*, 510 U.S. at 555."

These standards were echoed in *U.S. v. Holland*, 519 F.3d 909, 913-14 (9th Cir. 2008).

> In general, the conscientious judge should also bear in mind that § 455(a) is limited by the "extra-judicial source" factor which generally requires as the basis for recusal something other than rulings, opinions formed or statements made by the judge during the course of trial. *Liteky v. United States*, 510 U.S. 540, 554-56, 114 S.Ct 1147, 127 L.Ed.2d 474 (1994). Put differently, the judge's

> conduct during the proceedings should not, except in the "rarest of circumstances" form the sole basis for recusal under § 455(a). *Id.* at 555, 114 S.Ct. 1147.

Section 455(b) provides judge "shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

In *U.S. v. Holland*, 519 F.3d 915 (9th Cir. 2008), the court said, ("[s]econd, the judge must apply the subjective standard articulated in section 455(b) to determine whether he can be truly impartial when trying the case. This is a test for actual bias. If the judge feels he cannot hear the case without bias, on account of the threat, then the judge has a duty to recuse himself irrespective of how it looks to the public. Section 455(b) of Title 28 requires recusal where the judge "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1); *see also* 28 U.S.C. § 144 (addressing recusal upon motion by a litigant); CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3 (2000) (imposing upon judges a duty to recuse themselves where, they are either impartial or when their impartiality may reasonably be questioned). This test is highly personal in nature and requires each judge in such a situation to set aside emotion and thoughtfully examine his ability to impartially "administer justice without respect to persons." 28 U.S.C. § 453. If it feels there is a risk of prejudice, it is incumbent on him to

recuse himself from the case; failure to do so would amount to an abdication of duty and be in clear derogation of the solemn promise he made when he took his oath of office.")

III. DISCUSSION

The plaintiff filed an application for leave to file once before under the prefiling order of Chief Judge Martinez. Dkt.# 87, 87-1 The prefiling order was a consequence the court's dismissal of an action which Eugster brought on behalf of Robert E. Caruso. Dkt. # 4 (Amended Complaint). The prefiling order was a product of the argumentum ad hominem, which was the basis for Judge Martinez's dismissal of the case. Dkt.# 16.

Eugster, on behalf of himself and his client Robert E. Caruso applied for leave to file motions to set aside the trial court decision under Fed. R. Civ. P 60. Dkt.# 87, 87-1 Judge Martinez issued a document he entitled "Order Granting Leave To File And Denying Motion For Relief Under Rule 60." Dkt.# 87-2

Summary of Argument

Order Granting Leave and Denying Motion ("Order") serves as the basis for the following conclusions:

- The Order serves as extrajudicial proof that Judge Martinez violated § 455(a).

- The Order, assuming it is not extrajudicial, it is in its totality that rare circumstance where extrajudicially is not required. *Liteky*, 510 U.S. at 555
- The Order establishes that judge Martinez had made the case his own in violation of §455((b)(1).
- The Order establishes that judge Martinez had made the case his own at the time of trial, thus participating in the perpetuation of the fraud on the court the Bar Association and its lawyers perpetrated in the trial court.
- The Order establishes that the judge Martinez extended his complicity in the perpetration of a fraud on the court by entering an order without jurisdiction and which brought the perpetration of the fraud into the appellate level directly.

Order is Extrajudicial

The Order establishes that Judge Marinez must be disqualified under 28 USC § 455 (a) and (b). The Order is extrajudicial for the reason that Judge Martinez lacked jurisdiction to render the order. In the Order Judge Martinez, says, "[t]he Court will grant Mr. Eugster leave to file the instant Rule 60 Motion, as it is not strictly subject to the bar order." Order line 18-19, page 1.

What is being said here? The bar order applies, but not here. If the bar order did not apply, where does the judge get the jurisdiction to decide the motion for which leave was sought under the bar order? The bar order was the basis for

him to review the motion for leave to file. If the bar order did not apply, Judge Martinez had nothing more to do.

He did not have the authority to decide the motion. He was acting extrajudicially. From his own statement, he did not have jurisdiction to act. The Order was extrajudicial.

Thus, it can be used to establish Judge Martinez's violation of § 455(a).

The Order Is A "Rarest Of Circumstances"

Assuming for the sake of argument, the Order is not extrajudicial; it is that "rare circumstance" where judicial statements can be used to establish a judge is disqualified. On April 10, 2020, I filed a Petition for Re-Hearing En Banc. It is part of my Declaration.

IV. CONCLUSION

Disqualification of Chief Judge Ricardo S. Martinez is most appropriate.

April 13, 2020

Respectfully,

s/ Stephen Kerr Eugster

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEPHEN KERR EUGSTER, APPLICANT FOR LEAVE	Case No.: 2:18 -mc-66 RSM DECLARATION OF STEPHEN KERR EUGSTER IN SUPPORT OF MOTION TO DISQUALIFY CHIEF JUDGE RICARDO S MARTINEZ

I, STEPHEN KERR EUGSTER under penalty of perjury under the laws of the state of Washington declare that the following is true and correct:

1. I am of legal age and competent to be a witness in the above-entitled court.

2. I make the statements herein based upon my own personal knowledge.

3. I have been a resident of the state of Washington since 1966.

4. I presently reside in the city of Spokane, Spokane County, Washington.

5. Terminology.

a. **Eugster**, From time to time, I shall refer to myself in the objective as "Eugster."

b. **Eugster II**, *Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (E.D. Wash. July 23, 2010).

c. **Eugster III**, *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).

d. **Eugster IV**, *Eugster v. Wash. State Bar Ass'n,* 198 Wash. App. 758 (2017).

e. **Eugster V**, *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**).

f. Caruso, *Caruso v. Wash. State Bar Ass'n*, No. C17-00003RSM (W.D. Wash. July 31, 2017)

***Eugster v. Washington State Bar Ass'n*,**
March 3, 2015
Eugster III

6. I first encountered the Association's Lawyers when I filed an action seeking to overturn *Lathrop v. Donohue*, 367 U.S. 820 (1961).[1] Jessica Anne Skelton contacted me more than once, claiming I 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**)).

7. I declined because the issue before the court, in that case, **Eugster II**, was not the same as the issue in the case I 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.

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1 *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.")

8. The Association reactivation a grievance already investigated and soon to be dismissed

9. The re-investigation resulted in two alleged ethical violations.

10. The Association threatened disciplinary action against Eugster.

11. 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**).

a. Whatever happened to Eugster IV?

b. The trial judge dismissed the case with prejudice

c. I appealed to the Court of Appeals Division III

d. The Panel reversed the trial court.

e. At this point, the case should have been remanded to the trial court. Instead, the panel said it had jurisdiction and affirmed the trial judge and then said the case was affirmed because I had relinquished my right when I failed to raise the constitutional issue in my Hearing before the Hearing Examiner (that she had no

jurisdiction to decide the issue if I had brought it up made no difference to the Panel).

f. There remains an issue concerning the hearing on my claim that the disciplinary action violated my right of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution.

12. Not long after filing Eugster IV, I 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**).

13. The district court judge, Thomas O. Rice, ignored the reasons advanced by the Association lawyers and took it upon himself to dismiss the case based on the superior court's dismissal. His action was void because such an order can only be used to determine an action on the same point in another court if the order was on the merits of the case. This is axiomatic under the Washington common law rules of **res judicata**.

CARUSO AND FERGUSON V. WSBA ET AL

14. Toward the end of December 2016 and the beginning of January 2017, I was retained by Robert E. Caruso and Sandra L. Ferguson to represent them in action against the Washington State Bar Association. Eugster III. It included a class action claim.

15. The complaint was amended, excluding the class action claim.

16. It is of interest to know how Caruso became assigned to Chief Judge Ricardo S. Martinez. Presumably, the Western District appoints judges at random. However, because Judge Martinez was a judge in two previous cases involving the Washington State Bar Association, one in 2016, and another in 2018 [2], the judge as Chief District Judge may have assigned the case to himself.

17. 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.

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[2] *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)

18. 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.

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

20. 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.

21. The Association filed a Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction. DKT. # 16.

22. 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). *Watson v. Weeks*, 436 F.3d 1152, 1157 (9th Cir. 2006) ("We review *de novo* the district court's decision to grant a motion to dismiss pursuant to FRCP 12(b)(6). *ASW v. Oregon,* 424 F.3d 970, 974 (9th Cir. 2005). We accept as true all well-pleaded facts in the complaint and construe them in the light most favorable to the nonmoving party. *Id.* A claim should be dismissed only if it appears beyond doubt that the plaintiff can establish no set of facts under which relief could be granted. *Pacheco v. United States,* 220 F.3d 1126, 1129 (9th Cir. 2000).") 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 a lengthy Argumentum Ad Hominem, which ran the first 8 pages of the 25 page motion. Dkt. # 16.

23. 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.

24. Mr. Eugster's response was devoted almost entirely to the Argumentum Ad Hominem in the first portion of the Association's Motion To Dismiss. ***See*** the critique of Judge Martinez's Order of Dismissal, Dkt. # 88, regarding Mr. Eugsters Application for Leave, Dkt. # 87.

ORDER ON MOTION FOR SUMMARY DISMISSAL UNDER CIRCUIT RULE 3-5 AND THE APPEAL THEREOF.

25. Attached hereto and incorporated by this reference, is the Petition for Rehearing En Banc in Case 19- 35970, Dkt. # 17-1.

26. The Petition describes in further detail the reasons why Eugster's motion to disqualify is appropriate.

Signed at Spokane, Washington, on April 13, 2020.

s/ Stephen Kerr Eugster

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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

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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].
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> 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

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 27 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT E. CARUSO,

Plaintiff-Appellant,

STEPHEN KERR EUGSTER,

Appellant,

and

SANDRA L. FERGUSON, Esquire,

Plaintiff,

v.

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

Defendants-Appellees.

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.