

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO, Respondent: MARK EDWARD BRENNAN.	Case Number: 08PDJ052
ORDER DENYING MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT	

This matter is before the Presiding Disciplinary Judge (“the Court”) on a “Motion to Dismiss or for Summary Judgment by Respondent for Lack of Due Process” and an “Amended Motion to Dismiss or for Summary Judgment by Respondent for Lack of Due Process – Forthwith Hearing Requested ” filed by Mark Edward Brennan (“Respondent”) on April 8, 2009 and April 13, 2009, respectively. Kim E. Ikeler, Office of Attorney Regulation Counsel (“the People”) filed responses on April 8, 2009 and April 15, 2009. The Court considered the arguments of the parties set forth in their respective pleadings, reviewed the attachments thereto, and now **FINDS** and **ORDERS** the following.

Background

Respondent represented William Cadorna in the trial of *Cadorna v. City and County of Denver*, Case Number 04-CV-1067-REB-CBS, in the United States District Court, District of Colorado. Judge Robert E. Blackburn presided over the trial. On November 28, 2006, the jury found in favor of the plaintiff and awarded him \$1,221,142.00. On December 11, 2006, the defendant filed a motion for a new trial based on the alleged misconduct of Respondent. Judge Blackburn granted the motion for new trial on September 27, 2007.

On May 29, 2008, the People filed a Complaint and alleged that Respondent violated Colo. RPC 3.5(c) (conduct intended to disrupt a tribunal) and Colo. RPC 8.4(d) (conduct prejudicial to the administration of justice) during the Cadorna trial. Respondent recently filed his second motion(s) to dismiss the Complaint in which he asserted a lack of due process in these proceedings.

Jury Trials in Disciplinary Proceedings

Respondent alleged the following in paragraph 3 (and the footnote) of his amended motion to dismiss:

That Respondent's nemesis is a federal judge, before whom member of the Ethics Committee, representatives of the State Courts or Government, and nearly everyone else who plays a role in this case (or their colleagues) may reasonably expect to appear one day, explains why this proceeding commenced despite Kim Ikeler's recommendation of dismissal for lack of evidence. It also casts doubt upon the probability this tribunal will exonerate Respondent. The injudicious *animus* displayed by Judge Blackburn in his new trial order should give great pause to anyone disinclined to give him what he wants. He is quite willing to abuse his enormous power to punish those who do not show him sufficient deference.

That is why Respondent's inability to have the allegations against him tried to a jury violates Respondent's constitutional rights (emphasis added).

In sum, Respondent argues that he cannot obtain a fair trial unless a jury hears his case. However, Respondent fails to cite any disciplinary authority in support of this argument.

The disciplinary process is *sui generis*; that is, it is one of a kind. It is neither civil nor criminal in nature. Furthermore, "[t]he Colorado Supreme Court, as part of its inherent and plenary powers, has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public." *Colorado Supreme Court Grievance Comm. v. District Court*, 850 P.2d 150, 152 (Colo.1993).

In exercising its authority, the Colorado Supreme Court promulgated Colo. RPC 251.18(b), which provides that "[a]ll hearings on complaints seeking disciplinary action against a respondent shall be conducted by a hearing board except as provided in subsection (b)(3)." In addition, it is well established that a respondent in the disciplinary process does not have due process rights equal to those of a defendant in the criminal process. In *People v. Morley*, 725 P.2d 510, 514-15 (Colo.1986), the Colorado Supreme Court stated as follows:

While a lawyer is entitled to procedural due process in [disciplinary proceedings], there is no requirement that he be afforded the same constitutional safeguards applicable to a criminal trial.¹

Accordingly, the Court rejects Respondent's argument that he will be denied procedural due process in these disciplinary proceedings for lack of a jury trial.

Inability to Call a Witness for a Disciplinary Hearing

Respondent also claims that he is denied due process if he is not allowed to depose and potentially call Judge Blackburn, his staff, and jurors from the Cardona case to testify in these proceedings. Again, the *Morley* court addressed this issue. While the right to call witnesses in one's defense is a basic tenet of due process, it is not absolute.

Due process does not vest a respondent in a disciplinary proceeding with a right to call any and all witnesses or elicit any testimony whatever; so long as the respondent is accorded a full and fair opportunity to present a defense to the charge, the tribunal hearing the case is entitled to exercise a sound discretion in limiting the type of evidence and the number of witnesses offered at the hearing.

People v. Morley, 725 P.2d 510, 518 (Colo.1986).

While the hearing board in *Morley* did not allow the respondent to call a witness, and in this case Respondent is precluded from calling certain witnesses based upon their refusal to testify or otherwise, the Colorado Supreme Court's rationale nevertheless applies here. Respondent's due process rights are not violated in the event he cannot call certain witnesses or depose them, as long as he is given a full and fair opportunity to present a defense.

Here, Respondent may present his own testimony on the Cadorna proceedings and/or he may present the testimony of the juror he has deposed, Ms. Dillingham. Under these circumstances, Respondent has not been denied an opportunity to defend himself, albeit with fewer witnesses than he would otherwise depose or call during the hearing.

¹ See *People v. Harfmann*, 638 P.2d 745, 747 (Colo. 1981); *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *Emslie v. State Board of California*, 11 Cal.3d 210, 520 P.2d 991, 113 Cal.Rptr. 175 (1974).

