

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
ELBERT A. WALTON, JR.,) **Supreme Court #SC86122**
)
Respondent.)

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Disciplinary History

Elbert Walton was admitted to Missouri's Bar in 1974. **App. 91, 96.** In 1989, Respondent accepted admonitions for two violations of Rule 4-1.1, two violations of Rule 4-1.3, and violation of Rule 4-1.4. **App. 91-92, 96, 105.** On May 15, 2001, the Court issued an order publicly reprimanding Mr. Walton for violation of Rules 4-1.1, 4-1.5, 4-5.3, 4-5.5, and 4-8.4. **App. 105.**

Disciplinary Case

A two-count amended information was mailed to Respondent on March 18, 2003. **App. 95.** Count I alleged that Respondent violated Rules 4-3.5(c) and 4-8.4(d) by his conduct at a hearing before Judge Smith on February 5, 2001. **App. 91-93.** Count II alleged violations of various Rules arising from a non-lawyer's referral to Respondent of a couple who wanted to file for bankruptcy. **App. 93-95.**

The disciplinary hearing was conducted over a two-day period on November 12 and 13, 2003. The Panel issued its decision on April 14, 2004, concluding Respondent violated Rules 4-3.5(c) and 4-8.4(d) as alleged in Count I. **App. 123.** The Panel found in favor of Respondent on Count II. **App. 125.** Informant is not briefing the Count II allegations.

The Panel recommended a "public admonition." **App. 125.** On May 11, 2004, the Panel issued a "Judgment Nunc Pro Tunc" containing the same findings and conclusions

as the April 14 decision, but with the recommendation that Respondent be “subject to a public reprimand.” **App. 127.** The parties did not file a written stipulation concurring in the decision, so the record was filed with the Court.

Count I

On January 5, 2001, Associate Circuit Judge Dennis Smith conducted a hearing on Phillip Washington’s motion to modify the terms of child custody in *Washington v. Washington*, #97FC-004617. **App. 4 (T. 9, 10, 12).** Ernestine Washington, the minors’ mother and Phillip Washington’s ex-wife, did not appear at the January 5 hearing. **App. 5 (T. 14).** Judge Smith modified custody of the daughters in favor of Phillip Washington. **App. 5 (T. 14).**

Leon Sutton, an attorney working in Mr. Walton’s office at the time, thereafter made a special entry of appearance on Ernestine Washington’s behalf for the purpose of filing a motion to set aside the January 5 modification order. **App. 4 (T. 12), 77 (T. 302).** Mr. Walton appeared for Ernestine Washington on February 5, 2001, to argue the motion to set aside. **App. 4 (T. 11-12), 77 (T. 302).** The February 5 hearing concerned the issue of whether Ms. Washington had received proper notice of the January 5 hearing, and if not, to set aside the order modifying custody. **App. 4 (T. 10), 4-5 (T. 12-14), 10 (T. 35).**

In addition to Judge Smith and his bailiff and clerk, Phillip Washington, his wife and his attorney, Barry Gubin, and Ernestine Washington and Respondent, a number of Ms. Washington’s family members were present in the courtroom on February 5. **App. 6 (T. 18), 28 (T. 107), 30 (T. 115), 35 (T. 133-134), 39 (T. 149).** Evidence had been

adduced from witnesses for about two hours on the issue of the notice to Ernestine Washington of the January 5 hearing, when Judge Smith announced that he would continue the hearing to a future date. **App. 4 (T. 11), 5 (T. 14)**. It had been a contentious hearing, but to that point no one had exceeded the bounds of advocacy. **App. 6 (T. 17)**.

Along with stating he would continue the hearing, Judge Smith advised that if he did set aside the January 5 modification order, he would proceed at that future hearing to hear the evidence on the underlying modification issue. **App. 5 (T. 14-15)**. Mr. Walton responded that if the Judge set aside the January 5 order, then he would not have authority to proceed because there would be no good service on Ernestine Washington at that point. **App. 5 (T. 15)**. Mr. Walton believed he was appearing pursuant to Mr. Sutton's special entry of appearance, thereby preserving for Ernestine Washington her ex-husband's obligation to provide her proper notice of hearing on his motion to modify custody. **App. 5 (T. 15), 80 (T. 312-313)**. In response, Judge Smith told Mr. Walton that he had made a general entry of appearance. **App. 5 (T. 15), 16 (T. 59)**. Judge Smith believed that Mr. Walton had entered a general appearance in the course of the two hour hearing already conducted that day by stating he wished to proceed in representing Ms. Washington. **App. 5 (T. 13), 10 (T. 36)**.

According to Judge Smith, Mr. Walton reacted to the judge's statement by rapidly approaching the bench, leaning across and, while waving his hand in a threatening manner within inches of Judge Smith's face, saying in a very loud voice, "You tricked

me, you tricked me.” **App. 5-6 (T. 15-17), 19 (T. 70-71), 21 (T. 78-79), 22 (T. 81).**¹ Judge Smith’s bailiff, Charles Cunningham, observed Mr. Walton becoming obviously agitated. **App. 40 (T. 152-153).** Bailiff Cunningham approached the bench, in the area where the clerk sits, upon observing Respondent’s demeanor as he stood at, and leaned over, the bench. **App. 5 (T. 15), 39-40 (T. 151-153).**

Mr. Walton’s behavior at the bench caused Judge Smith to fear for his own safety and that of others in the courtroom. **App. 6 (T. 19).** He feared the family members present, who the judge had observed talking contentiously amongst themselves, could create a substantial problem. **App. 6 (T. 18-19), 21 (T. 79).**

Judge Smith told the bailiff to take Respondent into custody. **App. 5 (T. 15).** The bailiff took Respondent by the arm and led him from the courtroom. **App. 40 (T. 154).** He directed Respondent to sit at a desk in the corridor. **App. 40 (T. 154-155).** Mr. Walton told the bailiff that he did not care “if he is the Judge.” **App. 40 (T. 154).** Mr. Cunningham returned to the courtroom to obtain a commitment order, but upon learning it was not ready, returned to Respondent and told him an apology would go a long way. **App. 6 (T. 20), 40 (T. 155), 77 (T. 301).** The bailiff thereafter escorted Respondent back into the courtroom, where Mr. Walton apologized. **App. 40-41 (T. 155-156).**

¹ Two cassette tapes bearing a recording of the February 5, 2001, hearing, and more particularly, the exchange between Respondent and the Judge, were played for the Disciplinary Hearing Panel and admitted to the record. The tapes are part of the record filed in this matter.

Respondent apologized for pointing his finger at Judge Smith. **App. 6 (T. 20).** Respondent contends that he denied pointing a finger at the Judge, but that that part is not on the tape. **App. 79 (T. 310-311).** Judge Smith accepted the apology and did not issue an order finding Respondent in contempt. **App. 6-7 (T. 20-21), 9 (T. 32), 15 (T. 56).** Although he accepted the apology, in Judge Smith's view the apology was inaccurate – Respondent's behavior involved more than just pointing a finger. **App. 6 (T. 20), 9 (T. 32), 106-107.**

Mr. Walton was amazed that Judge Smith thought he had pointed his finger at the Judge, because in Respondent's view it did not happen. **App. 79 (T. 308-309).** Respondent denies leaning across Judge Smith's bench. **App. 79 (T. 308-309), 85 (T. 334).** In Respondent's view, he did nothing to warrant the Judge's actions, beyond arguing his client's case zealously. **App. 79 (T. 309), 80 (T. 312), 86 (T. 336).** Mr. Walton acknowledges using the word "tricked" in reference to Judge Smith before he was escorted out of the courtroom. **App. 85 (T. 334-335).** He said "tricked" because he thought Judge Smith had tricked him on the issue of making a general appearance. **App. 85 (T. 334-335).** Respondent characterizes his apology as one for Judge Smith's perception of what Respondent did, and not for what Respondent says he actually did. **App. 81 (T. 317), 85 (T. 333).**

Ernestine Washington does not believe Respondent disturbed the courtroom. In her view, Respondent was just trying to get back the kids that were stolen from her. **App. 23 (T. 86-87).** Two of Ms. Washington's relatives who were present on February 5 likewise noticed no unusual behavior by Mr. Walton. **App. 30 (T. 113-114), 33 (T. 126-**

127). Mr. Washington's lawyer, Barry Gubin, testified that he was conferring with his client at the time, and does not recall much about the exchange between Judge Smith and Respondent, beyond, possibly, a raised voice. **App. 41-43 (T. 158-166).**

Judge Smith continued to February 28 the hearing on the motion to set aside the January 5 modification order. **App. 7 (T. 21), 80 (T. 314).** The Judge ultimately denied the motion. **App. 7 (T. 21-22), 77 (T. 303).**

Pending concurrently with the modification issue in the *Washington v. Washington* file was a motion for contempt filed on February 2, 2001, by Phillip Washington against Ernestine Washington. **App. 7 (T. 22), 10 (T. 34).** The contempt matter was set to be heard by Judge Smith on March 12, 2001. **App. 10 (T. 33), 11 (T. 40), 108.** On March 12, Ernestine Washington filed a complaint against Judge Smith with the Commission on Retirement, Removal, and Discipline. **App. 115.** Mr. Walton provided the Commission, at its request, a statement regarding Ms. Washington's complaint. **App. 114, 116.** The Commission ultimately closed the complaints filed against Judge Smith on findings of no probable cause of violations of the Code of Judicial Conduct. **App. 128-129.**

It is Respondent's belief that Judge Smith reported the February 5 courtroom incident to the Office of Chief Disciplinary Counsel in retaliation against Respondent for substantiating Ernestine Washington's complaint against Judge Smith. **App. 83 (T. 324, 326), 85 (T. 334).** Respondent alleges that Judge Smith's complaint is "false and fraudulent and knowingly, willfully, maliciously, purposefully and intentionally made by Judge Smith in his attempt to manufacture facts that would give rise to disciplinary action being taken against Respondent in retaliation for Respondent giving a statement to the

Commission.” **App. 97.** Respondent’s wife is in the Missouri Legislature, and Respondent could get her to file articles of impeachment against the Judge any time.

App. 86 (T. 338-339), 130-131.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HIS COURTROOM CONDUCT ON FEBRUARY 5, 2001, VIOLATED RULES 4-3.5(c) AND 4-8.4(d) IN THAT HE LEANED OVER THE JUDGE’S BENCH AND WAVED HIS HAND IN A THREATENING MANNER CLOSE TO THE JUDGE’S FACE WHILE ACCUSING THE JUDGE OF TRICKING HIM.

Rule 4-3.5(c)

Rule 4-8.4(d)

In re Coe, 903 S.W.2d 916 (Mo. banc 1995)

In re Elam, 211 S.W.2d 710 (Mo. banc 1948)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HIS COURTROOM CONDUCT ON FEBRUARY 5, 2001, VIOLATED RULES 4-3.5(c) AND 4-8.4(d) IN THAT HE LEANED OVER THE JUDGE'S BENCH AND WAVED HIS HAND IN A THREATENING MANNER CLOSE TO THE JUDGE'S FACE WHILE ACCUSING THE JUDGE OF TRICKING HIM.

Whether Mr. Walton is deserving of discipline for his conduct in Judge Smith's courtroom on February 5, 2001, turns on whether this Court, which reviews the evidence de novo, believes that Respondent leaned over Judge Smith's bench and, while waving his hand near the judge's face, accused the judge of tricking him. Respondent admits using the word "tricked," but denies leaning over the bench or any other behavior worthy of having the bailiff escort him from the courtroom. Judge Smith and his bailiff both testified that Respondent aggressively approached the bench and accused the judge, in a loud and angry voice, of tricking him.

The tape of the incident, though not a model of high technological clarity, is the best indicator of what actually happened. After the judge had indicated to Respondent that Respondent had entered his general appearance earlier in the hearing, Respondent's voice becomes noticeably angry, almost tremulous. Respondent tells the judge that the

judge does not need to play tricks on Respondent or his client, and that the judge knows that Respondent did not intend to make a general entry of appearance.

Judge Smith testified that he felt threatened by Respondent's actions, which were manifested by both words and physical movements. Judge Smith also testified that he was worried about what effect Respondent's conduct would have on the spectators in the courtroom. It should be remembered that this was a highly contentious, emotionally-charged, long-running domestic relations matter. The judge had observed fractious exchanges among family members in the courtroom. The last thing a lawyer should do in such a situation is anything that might inflame already volatile passions.

In what one hopes is a positive reflection of the historical civility of Missouri lawyers in the courtroom, only two cases were discovered in which Missouri lawyers were disciplined for their courtroom conduct. Respondent alluded in his cross-examination testimony to the more recent of the two cases, *In re Coe*, 903 S.W.2d 916 (Mo. banc 1995). In his cross-examination testimony, Mr. Walton asked rhetorically whether it is unethical for a lawyer "to argue zealously for your client?" **App. 86 (T. 336)**. According to Mr. Walton, that is all Carol Coe did, and all he was guilty of doing on February 5. In point of fact, this Court concluded to the contrary that Ms. Coe's conduct "intentionally disrupted the trial," and thereby violated Rule 4-3.5(c). The Court came to that conclusion notwithstanding Ms. Coe's protestations that her actions did not delay the trial, that she was baited by the trial judge, and that her reproaches against the trial judge were protected free speech. 903 S.W.2d at 917. Thus, Respondent's attempt

to consign Ms. Coe's behavior to the realm of protected zealous advocacy has already been examined and rejected by this Court.

Likewise, Respondent's conduct at Judge Smith's bench went well beyond zealous advocacy. As the Comment to Rule 4-3.5(c) explains, and as the Coe Court said, "Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge." 903 S.W.2d at 917. To that list should be added, "or lean across the bench, and in a loud and angry voice, accuse the judge of trickery." Ms. Coe's conduct was beyond zealous advocacy, and Mr. Walton's likewise crossed the line.

The other case touching on the issue of courtroom misbehavior pre-dates the modern Code or Rules. In the factually colorful case of *In re Elam*, 211 S.W.2d 710 (Mo. banc 1948), a 78-year old lawyer was disbarred for a litany of misconduct, including a disrespectful exchange with a trial judge who questioned Elam as to whether he had drafted a highly suspect deed. The judge suspected Mr. Elam had drawn up the deed for his law partner as part of a scheme to defraud two elderly sisters, one of whom was insane by way of a codeine addiction, and the elderly ladies' insane brother, from enjoying the benefits of the fair market partition sale of real estate owned in common by the aged and mentally-challenged siblings. To make matters worse, Mr. Elam also represented the sisters. The trial judge ultimately drafted a final decree disposing of the realty contrary to Mr. Elam's wishes, whereupon Mr. Elam filed motions referring to the judge's decree as an instrument "conceived in fraud and brought forth in iniquity and is not truthful in its statements and constitutes an actionable libel against its sponsors." 211

S.W.2d at 714. Mr. Elam also referred to his opposing counsel in the case as a snitch and liar. Mr. Elam's intemperate attacks are not unlike Mr. Walton's description, in his answer to the disciplinary information, of Judge Smith's complaint against Mr. Walton.

The Elam case involved a good deal more serious misconduct than Respondent's February 5 eruption. The case is nonetheless instructive, because even in the face of more serious misconduct, the Court cited Elam's courtroom behavior as a factor in its decision to disbar, i.e., "his attitude and conduct toward the trial court were flagrantly disrespectful." 211 S.W.2d at 718.

Respondent's intemperate language and inappropriate approach toward the judge on February 5, 2001, is a single act of misconduct deserving of a public reprimand. Further support for the recommended sanction is found in the presence in this case of the aggravating factors of multiple prior disciplinary offenses, and Respondent's refusal to acknowledge the wrongfulness of his conduct. Rules 7.3, 9.22(a)(g), ABA Standards for Imposing Lawyer Sanctions (1991 ed.). With regard to the aggravating factor of refusal to acknowledge the wrongfulness of misconduct, the Court should be aware that Mr. Walton characterized this Court's May 15, 2001, disciplinary order of public reprimand as a "request" that he go to a program on how to practice with paralegals. "[T]hey attempted to get me disbarred² . . . and the Supreme Court disagreed and said that, just go to a seminar on how to work with your paralegals," **App. 69 (T. 271)**. Upon being

² OCDC's recommendation in *In re Walton*, SC83341, was actually for a lengthy suspension, not disbarment.

shown a copy of the May 15 order, Respondent did finally agree that he had been reprimanded. Respondent's courtroom outburst and his physically menacing approach to the bench is deserving of, at least, another public reprimand for violation of Rules 4-3.5(c) and 4-8.4(d).

CONCLUSION

The tapes of Mr. Walton's February 5, 2001, courtroom outburst dispel Respondent's denial of what happened. And although he subsequently backpedaled from his apology, the tape reflects that Mr. Walton did apologize for getting emotional and for pointing his finger at the judge. Respondent's failure to refrain "from abusive or obstreperous conduct," constitutes a violation of Rules 4-3.5(c) (engage in conduct intended to disrupt a tribunal) and 4-8.4(d) (engage in conduct prejudicial to the administration of justice). The Court should publicly reprimand Respondent for his conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2004, two copies of
Informant's Brief have been sent via First Class mail to:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06b);
3. Contains 3,235 words, according to Microsoft Word, which is the word
processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that
it is virus free.

Sharon K. Weedin

APPENDIX