UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

February 24, 2021

DAVE O'BRIAN TINGLING, Complainant, v. CITY OF RICHMOND, VA, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00009

ORDER DISCLOSING COMPLAINANT'S EX PARTE FILING

This case is before this Court pursuant to a complaint filed by Complainant, Dave O'Brian Tingling, alleging violations of 8 U.S.C. § 1324b by the City of Richmond. On November 18, 2020, this Court ordered the parties to file motions for summary decision on or before December 15, 2020, with replies due by January 8, 2021. Respondent timely filed its motion for summary decision with exhibits. Complainant filed a Motion for Extension of Time and a Motion to Admit Documents into the Record on December 15, 2020. He sought to file an ex parte motion regarding alleged due process violations. On December 28, 2020, Respondent filed its Opposition to Complainant's Motion for Extension of Time. The Court issued an Order on December 30, 2020 deferring Complainant's Motion for Extension of Time until after consideration of Complainant's motion alleging due process violations. The Court further directed that the submission be in writing, and preferably filed with the Court and sent to the Respondent. On January 8, 2021, Complainant filed his timely response to Respondent's Motion for Summary Decision. Additionally, he filed Complainant's Proposed Ex Parte Notice of Professional Conduct (Ex Parte Motion) without serving it upon Respondent.

To briefly summarize the ex parte submission, which is attached to this Order, Complainant alleges that during a prehearing conference regarding a motion to withdraw as Complainant's counsel, Complainant's former attorney misrepresented to the Court that Complainant had received his client files when Complainant had not yet received them. Ex Parte Mot. 3–4. Additionally, he argues that his former attorneys "extracted exorbitant and unreasonable fees[.]" *Id.* at 4. He further alleges that his former attorney's misconduct "den[ied him] the opportunity of retaining a future skilled advocate, and negatively impact[ed] (hindering and deterring) [his] interest in pursuing [his] lawful claims and interests at law[,]" and ""cripple[d his] ability to pursue and exercise his right to a fair hearing." *Id.* at 8, 10.

OCAHO's rules do not specifically dictate the instant issue at hand, but there is a strong presumption against ex parte communications. *See* 28 C.F.R. § 68.36 (permitting sanctions for prohibited ex parte communications).

Under the pertinent provision of the Administrative Procedure Act, ex parte communications shall be disclosed. *See* 5 U.S.C. § 557(d)(1)(C); *State of N.C. Envtl. Policy Inst. v. EPA*, 881 F.2d 1250, 1257 (4th Cir. 1989).

> The disclosure of ex parte communications serves two distinct interests. Disclosure is important in its own right to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record. Disclosure is also important as an instrument of fair decisionmaking; only if a party knows the arguments presented to a decisionmaker can the party respond effectively and ensure that its position is fairly considered. When these interests of openness and opportunity for response are threatened by an ex parte communication, the communication must be disclosed. . . . If, however, the communication is truly not relevant to the merits of an adjudication and, therefore, does not threaten the interests of openness and effective response, disclosure is unnecessary.

Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 563–64 (D.C. Cir. 1982).

The Fourth Circuit has stated that "as a general rule, ex parte communications by an adversary party to a decisionmaker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." *RZS Holdings AVV v. PDVSA Petroleo S.A.*, 506 F.3d 350, 357 (4th Cir. 2007) (citations omitted). Ex parte communications implicate procedural due process, which is notice and an opportunity to be heard. *Id.* (citing *Simer v. Rios*, 661 F.2d 655, 679 (7th Cir. 1981)). To analyze an ex parte communication issue, the Fourth Circuit borrowed the Seventh Circuit's approach of "focus[ing], first, on the parties' opportunity to participate in the court's decision and, second, on whether the ex parte proceedings were unfairly prejudicial." *RZS Holdings AVV*, 506 F.3d at 357 (citing *Simer*, 661 F.2d at 679). The Fourth Circuit recognized that despite ex parte communications occurring, no prejudice arose when "the excluded party was accorded an opportunity to respond by way of oral argument and legal memoranda." *RZS Holdings AVV*, 506 F.3d at 357 (citing *Simer*, 661 F.2d at 679–80). Conversely, an excluded party's due process rights were violated when it was not given an opportunity to participate in the court's decision. *RZS Holdings AVV*, 506 F.3d at 357–58.

Here, the interests of fairness and opportunity to be heard dictate disclosure of Complainant's Ex Parte Motion to Respondent. *State of N.C. Envtl. Policy*, 881 F.2d at 1158. Moreover, applying the Fourth Circuit's analysis to the case presently before the Court,

withholding Complainant's Ex Parte Motion from Respondent risks violating Respondent's due process rights. Moreover, Complainant has not offered any cogent justification for withholding the information in the ex parte submission. To the extent that Complainant is relying on the attorney-client privilege, such privilege was: 1) not identified in the submission, and 2) in the Court's view not applicable based on the information provided. As a preliminary matter, "a party asserting a privilege has the burden of demonstrating its applicability." *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 502 (4th Cir. 2011) (citations omitted).

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

NLRB v. Interbake Foods, LLC, 637 F.3d 492, 502 (4th Cir. 2011). (citations omitted).

Complainant has failed to prove the applicability of the attorney-client privilege. Additionally, the privilege is not applicable because the communication regarding the withdrawal was not made for purposes of securing legal opinion, services, and/or assistance. Complainant also waived such privilege by disclosing these communications to the District of Columbia Office of Disciplinary Counsel as part of his bar complaint.

The Court cannot discern any other reason for withholding this information. The Court will therefore disclose Complainant's Ex Parte Motion to Respondent by way of attachment to this Order.

When an administrative law judge (ALJ) requires disclosure of ex parte communications, the ALJ "should give parties an adequate opportunity to review them, comment upon them, and if appropriate order any further disclosures that may appear warranted." *State of N.C. Envtl. Policy Inst.*, 881 F.2d at 1258. The Court will therefore provide Respondent fourteen days from the issuance of this Order for any supplemental filings in support of the Respondent's opposition to Complainant's Motion for Extension of Time.

SO ORDERED.

Dated and entered on February 24, 2021.

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Honorable John A. Henderson
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 8, 2021

DAVE O'BRIAN TINGLING Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	
	)	**OCAHO Case No. 19B00009**
CITY OF RICHMOND, VA Respondent.	)	

Dave Tingling, Complainant, OCAHO Case No. 19B00009, "Dave O'Brian Tingling v. City of Richmond, VA", respectfully approaches the Honorable Court to present a "Proposed *Ex Parte* Notice of Professional Conduct Violation(s)".

Proposed *Ex Parte* Notice of Professional Conduct Violation(s)

1. May it please the Court to permit me to first express deep gratitude for the Court's high regard for any allegation of a violation of professional standards so serious

as to interfere with due process. I likewise approach this topic very seriously and honestly.

2. May it also please the Court to permit me to humbly apologize that I mis-stated the Court's record regarding its position [1] on *ex parte* communication. I am sincerely grateful for this Court's patient correction and its reminder of its invitation to consider the situation in writing.

3. This written submission is the material that I propose as *ex parte*. I am not an expert in due process principles.

4. I had previously been non-specific (or silent) in an effort to respect and protect the reputation and dignity of my own attorney.

5. At least one violation of ethical and professional standards (and indeed, of standards of this Court, by my understanding) was made by my former attorney, Richard R. Renner, summarized as follows:

   (a) Mr. Renner prepared and presented to the Court (on July 23, 2020) a motion to withdraw from representing me, together with a proposed order approving his firm's withdrawal.

   (b) To accord impartiality and "fairness" to Mr. Renner's desired withdrawal, I did not oppose the motion on its face, also as a matter of "civility" [2].

   (c) Instead, I trusted the Court's judicial process. I trusted that Honorable Judge King's experience, insight, wisdom, and discernment—within the Court's

[1] Previously advised verbally

[2] The firm's withdrawal was not something I desired, nor did I consider it in my interest.

judicial process—would seek and acquire relevant facts to make a fair and appropriate decision, especially since there remained few (if any) further interactive proceedings anticipated before a *final* hearing[3].

(d) My trust was not misplaced: the Court scheduled a telephonic hearing on July 29, 2020. Undoubtedly, its purpose included gathering information from among the parties towards making the decision whether to grant or deny the proposed withdrawal. Otherwise, the Court would simply have ruled upon the motion without conference.

(e) During the conference, Honorable Judge King addressed a series of her pertinent questions to me.

(f) I do not remember the precise language of a certain question, but I clearly recall that *I* was asked by Honorable Judge King whether the case file had been transferred to me.

(g) Before I could speak an answer, Mr. Renner suddenly verbally intercepted and interjected his own preferred and desired answer: "Yes".

(h) **That response was false**.

(i) The falsehood of that response was almost certainly known to Mr. Renner. It is reasonable to infer this from the fact of his promptly speaking-up to avert my own answer, which he knew would have been "No".

(j) That response was misleading to the Court. If Mr. Renner had not interjected and instead had allowed me to answer the question presented to me,

[3]I may sometimes in my documents use the term "trial" to refer to a final hearing. I apologize if this not technically accurate or in harmony with this Courts proper and customary terminology.

I would have answered correctly and truthfully: "No" [4].

(k) The Court relied upon Mr. Renner's false statement during this hearing.

(l) The false indication served only:

- the interests of Mr. Renner and his firm (of which he is a partner), and
- the interests of Opposing Counsel and Respondent—for it is in Respondent's sole interest to leave me without skilled advocates, and simultaneously without the means to retain such.

(m) At the close of that hearing, this Court verbally rendered its decision to GRANT the withdrawal of my attorneys, based on (at least in part) a false statement and its attendant false impression that firm's withdrawal was jointly planned, fully agreeable, welcomed, and well coordinated in anticipation.

(n) The Courts verbal decision was made instantly and directly following the misleading statement during the July 29, 2020 telephonic hearing.

(o) The Courts decision during its telephonic hearing was memorialized on or around August 7 or 8, 2020, by its ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL.

(p) Other ethical and professional standards violations directly material to this incident are (1) the fact and (2) the manner in which my attorneys extracted exorbitant and unreasonable fees [5] from me for services, after becoming very

[4] I trust that in this Court, there is no need to expand upon (or debate) whether substituting only "Yes" for a "No", or vice versa, is significant. Human lives have been lost or preserved depending on which of these words were indicated to a decision-maker.

[5] *Well* in excess of my annual take-home pay within the engagement time-period

familiar with my financial circumstances.

6. My understanding was that my temporary inability to pay his firm's fees was the reason for Mr. Renner's motion to withdraw.

7. As noted above, Mr. Renner obtained the Court's approval to withdraw by misleading the Court with a false statement.

8. Mr. Renner was acting in his capacity as partner of his law firm, and presumably acted in the interest of his firm; and not my own interests-at-law, nor in the interest of the Court's due process.

9. On January 7, 2021, a formal DC Bar complaint procedure was initiated. Preliminary documents and communication-records in support of my statements were submitted.

Just for extra clarity of this record, so as not to be misunderstood[6], my complaint here lies in the fact that an instantaneous false statement was used to influence this Court's July 29, 2020 decision to grant the attorneys' withdrawal.

For *this* expression of grievance of process, it is entirely irrelevant whether the false "Yes" statement eventually became true at some future time. The complaint I am setting forth is not whether or not I had ever received a "case file [7]"—timely or not. *When* I eventually received *what* is also of valid concern, but is not my focus in the foregoing.

[6]The managing partner of the law firm evidently misunderstood my complaint letter to her, based on her response.

[7]As it eventually turned out, the law firm ultimately provided me access to the exact set of documents that I had myself previously provided to them.

Whereas I do believe that this incident's seriousness is self-evident, I also respectfully present my perspective as to the severity of its taint in the context of the judicial process in my case. Motions to withdraw as counsel have been both denied and continued in this Court. I genuinely do not believe there will be any question as to the significant context and/or import of the above-mentioned incident.

The incident, taken together with other incidents involving my former representatives, has led me to seriously question the motives and once-trusted activities of the attorneys; essentially to take a closer and more careful review of their actions. My initial conclusions are disturbing.

In many professions, it is very possible for a highly skilled practitioner to present an outward appearance of working hard toward a commonly known and hoped-for objective, when in factual reality, the practitioner's skilled efforts subtly seek (and often meet with) different objectives from those expected and desired by lay-observers [8]. I believe this is possible here, and I fear it was occurring throughout this case's proceedings. That is, my attorneys evidently were busy NOT working to preserve and protect my best interests at law, and in fact were actively doing just the opposite—undermining my legitimate interests at law. I do realize this is a serious allegation, and I will not further present supporting details here (unless requested).

Beyond this example incident, I can further show that my former representatives:

- engaged in conduct prejudicial to the administration of justice;

- engaged in conduct that amounted to ineffective assistance of counsel, as can be

[8] Early 20^{th} century baseball provides some well-known examples of skilled players who could make fans believe they were playing diligently to win, but in reality, the players would play to lose because they became incentivized to do so.

found by this Court,

- failed to work in harmony with me as their client concerning the objectives of my representation, and

- failed to abide by my decisions their client concerning how to achieve those objectives; (for example, in declining to present proposed evidence, documents, or witnesses until or at trial).

I trust that this is clear enough for the purposes of this Honorable Court. If a copy of my January 7, 2021 complaint to the Office of Disciplinary Counsel at the D.C. Bar is required, I will provide it to the Court. Further, I do anticipate providing additional, future documents and evidence of more specific and clear allegations to the D.C. Bar. It is my understanding that Counsel at the DC Bar's office can *only* either:

1. dismiss my complaint, or

2. discipline the attorney(s) involved.

That is, I can see no option or opportunity to correct the situation which has arisen in this Honorable Court with respect to me, my lawful complaints, and the proceedings in this case before this Honorable Court. The DC Bar's possible administration of discipline for the attorney(s) cannot repair or restore the resulting and continued distortions.

Case Impact and Process Implications

As mentioned, I am certainly no expert regarding due process. But I surely must (and definitely do) object if I hear my own attorney present false information to this Honorable Court, to achieve an end which serves only his purpose and the Respondent's. Here are some of my observed effects and results of the attorneys' activity:

1. By sustaining a punishing debt to their firm, *and* by simultaneously withdrawing from my case at the crucial time (immediately prior to a final hearing), *and* by doing so in the fraudulent manner in which they did—a crippling effect was imposed on my lawful interest to fairly pursue my claims. Considered all together, these facts effectively deny me the opportunity of retaining a future skilled advocate, and negatively impact (hindering and deterring) my interest in pursuing my lawful claims and interests at law.

2. The fact of my former representatives' withdrawal has negatively impacted my prospective relationships with potential future attorneys (to become their Client), guaranteeing such future attorneys' inclination NOT to engage, adding deterrent factors in these way:

   (a) most attorneys will avoid last-minute, or hasty engagements to handle cases with looming deadlines already issued;

(b) most prospective attorneys would *not* wish to learn, "pick up the pieces" or follow-on, from a former attorney's strategy and case-approach; and

(c) as a prospective Client, I personally now appear to be a "red-flag" Client who should be avoided; such an undesirable Client appears unable to keep good relationships with attorneys, possibly even firing them frivolously.

3. without knowledge of the causative and proximate circumstances, a prospective attorney is pre-prejudiced (by the above-mentioned ways) to decline to represent me.

4. any opportunity to explain this background (transferring such knowledge as mentioned above) to a prospective attorney (in order to seek her decision to engage) comes at a market price of several hundred dollars per conversation, *per prospective attorney.*

5. It has taken me additional time, energy, and other valuable resources to prepare an appropriate attorney Complaint for the DC Bar. Instead of me having to highligh this serious matter (which I believe has subverted the "normal" due process), it seems that somehow the system and legal profession should "police" itself. I could have used the time I that expended to writing to the DC Bar, instead as time seeking the services of a new attorney or self-authoring an acceptable Motion for Summary Decision.

6. Both Mr. Renner and Opposing Counsel earn their living as full-time attorneys-at-law; whereas I seek my livelihood by other activities—efforts which were impacted by the Respondent's actions (or inaction), and later more severely im-

pacted by the Respondent's reactions to my complaint itself. My efforts to earn a living are now even more severely impinged upon because of the added burden and complexity of this "case within a case."

7. I am therefore unable to advance arguments at the same rate that the attorneys do. The workload now required directly of me (and not of my representative-at-law) to reasonably meet the Respondent's opposition claims has been significantly increased—undesirably so—by the former attorney's subversion and manipulation of process. The incident has introduced an unfair economic opportunity cost.

8. The former attorneys also extracted exorbitant fees, known to the attorneys to be well-beyond my means. This fact taken together with the false statements before this Honorable Court, has served the Respondent's interest in deterring this lawful complaint process, and cripples this Citizen's ability to pursue and exercise his right to a fair hearing.

It is true that professional attorneys have specialized knowledge of law and process. But having come to this point today where it has become necessary to explain these issues to this Honorable Court, and thinking as any reasonable person looking carefully would, one must ask whether the former attorneys had ever truly intended to present my case at an OCAHO hearing.

I acknowledge before this Honorable Court that in this matter I do not have any *right* to be represented by counsel, and that I bear the burden of proof to demonstrate retaliation. I thank the Court for its clarifications regarding the law on these points.