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November 5, 2003

Chair M. Ellen Carpenter
Board of Bar Overseers
Office of Bar Counsel
Review Department
75 Federal Street
Boston, Massachusetts 02110

Re: BBO File No. B1-03-0258DC (Mark W. Batten, Esq.)

Dear Chair Carpenter:

By this writing we wish to express appreciation for the timeliness of response to our joint complaint[1] dated October 7, 2003 alleging unethical conduct by Mark W. Batten, Esq., BBO #566211. Yet, we must convey our dismay over the questionable justification given by Bar Counsel Daniel C. Crane for his decision on behalf of the BBO to close the file "without disciplinary action."

We do therefore wish to exercise our right "to have this decision reviewed by a member of the Board," and hereby request a "judgment as to the merits of this matter," which, according to the Bar Counsel were not considered.

Crane explained in his letter of October 30, 2003, "The court is, in the first instance, a more appropriate forum for resolution of these issues," and observed that "... the same or closely related issues have also been raised in a currently pending court case."

The first of the two issues of misconduct alleged – to wit, that an attorney *"denied the existence of [an available document] requested in discovery, in violation of Rule 34 of Civil Procedure"* – was indeed raised in our tort action Beck v. DOE during discovery, but was *not resolved* anytime prior to the Superior Court's final order and decision of summary judgment, currently pending on appeal.

Presiding justice Thomas Connolly wrote in November 2000, "... the Court denied the motion [for sanction under Rule 37] *at this time* as being totally unwarranted and not called for in the circumstances of this case *at this time"* [italics supplied], thus deferring the matter indefinitely to another time and authority. Assistant Clerk John Deady of the Brockton Superior Court advised that we might in the future submit our complaint to the BBO.

Accordingly, the plaintiffs, who were finally in receipt of the long denied document obtained through the quasi-judicial procedures of the Public Records Division of the Office of the Secretary of State, did not re-allege or reference the discovery violation in the

[1] There are two complaints with identical content, submitted by Higgs and Young, respectively.

summary-judgment process, which culminated in a hearing held in November 2001 and decision and order signed in February 2002.

The second allegation of misconduct in our request for investigation relates to distortions of the record appearing in the decision and order of summary judgment, none of which, directly or indirectly, have ever been "raised in a currently pending court case," as Crane asserts. Beck v. DOE is now before the Appeals Court with no immediate recourse back to Plymouth Superior. *Briefs have yet to be filed.*

The purview of the Massachusetts Appeals Court, as defined in published guidance,[2] is exclusively to "... examine[] the 'record' of the trial court to determine if an error was made ...." Assistant Clerk Joseph Stanton of the Appeals Court informed appellant Young during the latter's visit to the Clerk's office on November 4, 2003 that the "record" before the Appeals Court consists of exhibits and transcriptions of proceedings *exclusive to the process and decision under appeal.*

Thus nothing outside the scope and judicial consideration of summary judgment in Beck v. DOE can be brought before the Appeals Court. In that regard Young reviewed with Stanton several key documents cited in the BBO request.

Stanton emphasized that judicial error, *not attorney misconduct,* generally is alleged and brought before the Appeals Court. He referred Young specifically *to the Board of Bar Overseers* for investigation of charges of attorney misconduct *occurring prior to* the appeal.

The Appeals Court guidance begins with the statement "This court is a reviewing court only." The complainants have alleged that an attorney "*... devised or condoned ex parte materials provided to the [Superior] Court."* The complainants as litigants never brought before the Superior or other court any "same or closely related issues," which possibly – *even if appropriately* – could then have been made subject of appellate review.

Stanton indicated that neither an alleged violation of discovery rules regarding a document [issue #1 in our request to the BBO] properly to be found *now in the record,* nor alleged *ex parte* influence over the lower court's decisions [issue #2] but to be reviewed and measured *now against the record,* would likely have no bearing on an appeal. Objections as to relevance made by counsel on behalf of the appellees probably would be forthcoming, and, if so, immediately allowed by the Appeals Court, according to Stanton.

Therefore, contrary to Bar Counsel Crane's inference that a "subsequent decision by [a] court suggest[ing] misconduct by an attorney" may occur, there apparently is no such realistic prospect – at least not at the appellate level – and therefore no viable recourse available to the complainants other than to the BBO.

We purport that an attorney violated not merely rules of *procedure,* but ethical standards critical to the functioning of our system of justice. SJC Rule 3:07, DR7-102 requires that a member of the bar "... represent[] [his] client within the bounds of the law," and never "... knowingly make a false statement of law or fact."

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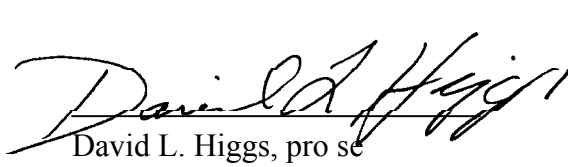
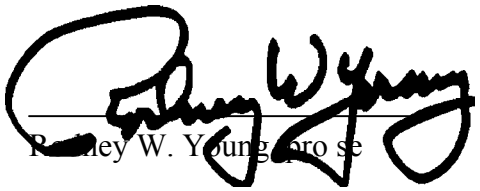
[2] "Appeals Court: PRO SE CIVIL APPEALS"

Given that our allegations of misconduct are found to have merit, the Board of Bar Overseers must not allow any attorney – no matter his Harvard pedigree or prestigious employment – to get away with it.

We look forward to serious review of our charges and our documentation by your designated board member.



David L. Higgs, pro se



Rodney W. Young, pro se