

Filed August 8, 2002

In re John Joseph Hynes
Respondent-Appellee
No. 00 CH 51

**Synopsis of the Review Board Report and Recommendation
(August 2002)**

The respondent was charged in a one-count complaint with violations of the Illinois Rules of Professional Conduct, 8.4(a)(4), 8.4(a)(5) and Supreme Court Rule 771 because of his failure to disclose certain appellate decisions in an application for a position as an associate judge. Two members of the Hearing Board Panel recommended that the charges be dismissed. The dissenting member of the Panel recommended a reprimand believing that the respondent violated Rule 8.4(a)(5) and Supreme Court Rule 771.

The Administrator filed exceptions challenging the majority's findings with respect to misconduct and the Hearing Board's admission of testimony by the judge who authored two of the appellate opinions concerning the meaning and intent of those decisions.

The Review Board majority affirmed the findings and conclusions of the Hearing Board majority with respect to the misconduct charged. It concluded that none of the appellate opinions upon which the charges were based contained "unfavorable comment" on the "professional conduct" of the respondent such that they were required to be disclosed in response to the question at issue on the application. Although the majority also determined that the Hearing Board's admission of the testimony of the judge who authored several of those decisions was error, it found any such error to be harmless because the Hearing Board did not consider this testimony in making its findings.

One member of the Review Board concurred in part and dissented in part. She determined that these decisions did comment on the respondent's professional conduct and should have been disclosed by the respondent on his application. She concluded that the respondent had violated Rule 8.4(a)(5) and Supreme Court Rule 771 and recommended that the respondent be reprimanded for this misconduct. She concurred with the majority's finding concerning the admissibility of the testimony of the judge who authored two of the appellate decisions.

Filed August 8, 2002

**BEFORE THE REVIEW BOARD
OF THE
ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION**

In the Matter of:

JOHN JOSEPH HYNES

Commission No. 00 CH 51

Respondent-Appellee,

No. 6181978

Report and Recommendation of the Review Board

The Administrator filed a one count complaint against John Joseph Hynes charging violations of the Illinois Rules of Professional Conduct, 8.4(a)(4), 8.4(a)(5) and Supreme Court Rule 771 because of his failure to disclose certain appellate decisions in an application for a position as an associate judge.

The Administrator alleges a violation of these rules because of the respondent's answer to a written question (the question) on that application which asked:

"Has your professional conduct or ability been the subject of comment, favorable or unfavorable, in a written opinion of any judge, court, or other tribunal?"

___ YES ___ NO

If yes, state the facts and circumstances fully. (Attach additional pages, if necessary.)"

Respondent marked the space that said "No" and did not identify the appellate decisions which give rise to the charges now pending.

Two members of the Hearing Panel recommended that the charges be dismissed. The dissenting member of the Panel recommended a reprimand believing that the respondent violated Rule 8.4(a)(5) and Supreme Court Rule 771.

The Administrator challenges the majority of the Panel's conclusion and also challenges the Hearing Board's admission of the testimony of the author of two appellate opinions in one of the cases concerning the meaning and intent of those decisions. She asks the Review Board to recommend a six-month suspension. Respondent asks that the Report and Recommendation of the Hearing Board majority be approved.

BACKGROUND

The facts are not substantially in dispute but are summarized as follows.

The respondent was licensed to practice law in 1982. He was an assistant at the Cook County State's Attorney's Office until 1999 when he was appointed an associate judge. His career as a State's Attorney was spent primarily in the Gang Prosecution's Unit. Starting in 1991, he was a supervisor of that unit until shortly before his appointment as a judge.

The respondent tried approximately 350 criminal cases. Among those are the two murder cases which give rise to this proceeding. One of the cases was the prosecution of Edward Morales and a co-defendant on two counts of murder. (Morales I and Morales II). The second case was the prosecution of Johnny Walls and Charles Byrd for murder and attempted murder (hereinafter "Walls"). In both cases the defendants were convicted and sentenced to lengthy prison terms but both cases were eventually reversed by the Illinois Appellate Courts and new trials ordered because of the violation of the so-called Batson rule during jury selection.

In Batson v. Kentucky, 476 U.S. 79 (1986), the court affirmed the general principle that the use of peremptory challenges in criminal cases to exclude potential jurors based solely on race is a violation of the Equal Protection Clause of the Fourteenth Amendment. Batson, however, rejected previous law that suggested that a defendant could only prove a constitutional violation by showing a repeated pattern of discriminatory strikes by the State over the course of a number of cases. Batson expanded previous doctrine and held that a defendant could make a claim of discrimination based on the State's exercise of its peremptory challenges in that defendant's own case and set forth a three-step procedure for evaluating claims of racial discrimination during the jury selection process. First, the court must determine that a *prima facie* showing has been made that the prosecution has exercised its peremptory challenges on the basis of race. If the court so decides, then the burden shifts to the prosecutor to articulate a legitimate race-neutral explanation for excluding the venire member in question. The last step in the analysis requires the court to determine whether the reasons given are sufficient to rebut the defendant's *prima facie* showing.

No bright line was set out in Batson as to when a *prima facie* case was established or what reasons would be legitimate race-neutral explanations for overcoming a *prima facie* case. That question was left to the courts to decide on a case-by-case basis. No other case has successfully articulated the bright line either.

Batson suggested that a defendant could only challenge the use of peremptory challenges against members of the defendant's own race but Powers v. Ohio, 499 U.S. 400 (1990), allowed a defendant to object to a race based exclusion of jurors even if the excluded jurors were of a race different from the defendant's.

The Morales case was tried in 1987, one year after the Batson decision. Morales and the co-defendant were Hispanic. During jury selection, the State used its first 10 peremptory challenges to strike nine potential minority jurors: five African-Americans; two Hispanics; one Arab; and one Pakistani. The trial court initially denied the defendant's Batson challenge but suggested that the State was "on the bubble" and thereafter it would require the State to justify

its exclusion of any additional minority jurors. The State countered by citing People v. Zayas, 159 Ill.App.3d 554, 510 N.E.2d 1125, 110 Ill.Dec. 94 (1987), which held that the defendant had to be of the same race as the excluded juror. The trial court then relieved the State from the requirement to explain its use of peremptory challenges.

On appeal Morales (Morales I) asked, among other things, that the case be remanded for a Batson hearing. For reasons not relevant here, that appeal was not decided until 1996 after the Powers decision.

In Morales I, the Appellate Court issued an unpublished opinion. People v. Morales, No. 1-88-2812, 278 Ill.App.3d 1137, 699 N.E.2d 608, 232 Ill.Dec. 831 (1st Dist. 1996)(unpublished order under Supreme Court Rule 23). Noting the intervening ruling in Powers, the Appellate Court concluded that the defendant had established a *prima facie* case under Batson with respect to the exclusions of Hispanic and African-American venire persons and remanded the case to the trial court "with directions to conduct a Batson hearing to determine whether the State can provide race-neutral explanations sufficient to rebut defendant's *prima facie* case." Slip op. at 17.

At the Batson hearing on remand, approximately ten years after jury selection in the original case, the State offered its explanation for its use of the peremptory challenges. The respondent testified that the explanations he offered at the hearing on remand were based on review of transcripts of the *voir dire* examination from the 1987 trial. The trial court judge determined that the State's reasons for the exclusions were race-neutral and denied the motion for a new trial.

A second appeal (Morales II) challenged the trial court's resolution of the Batson challenge. On September 30, 1999, in People v. Morales, 308 Ill.App.3d 162, 719 N.E.2d 261, 241 Ill.Dec. 400 (1st Dist. 1999), the Appellate Court reversed the trial court and remanded the case for a new trial based on Batson. With respect to most of the potential jurors, the Appellate Court rejected the defendant's Batson arguments and concluded that the State had met its burden of providing race-neutral reasons for its challenges. It did, however, find that with respect to one of the excluded African-American jurors and one of the excluded Hispanic jurors, the reasons offered by the State did not sufficiently rebut the defendant's *prima facie* case.

Walls was tried in 1988. The defendants raised a Batson challenge during jury selection after the State exercised four of its six peremptories to exclude four African-Americans from the jury. The trial judge concluded that the exclusion of the four African-American jurors established a *prima facie* case under Batson requiring the State to give its reasons for excluding those jurors. The judge denied the motion for a mistrial, noting that the reasons given by the State were reasons that might be appropriate. The trial judge saw nothing that led him to conclude that the potential jurors could not have been excluded for "good trial tactic" and for "reasons other than race."

The defendants appealed their convictions and challenged, among other things, the trial court's ruling on the Batson question. In 1991, the Appellate Court reversed the defendants' convictions based on Batson. People v. Walls, 220 Ill.App.3d 564, 581 N.E.2d 264, 163 Ill.Dec. 313 (1st Dist. 1991). As in Morales, the Appellate Court analyzed the reasons offered by the State for striking those potential jurors. As to the three jurors that were the basis for the defendant's Batson challenge, the court concluded that the State had failed to provide race-neutral reasons for the exclusions. In its decision, the Appellate Court was critical of the trial court for failing to fulfill its obligation to inquire into the sufficiency of the reasons for striking those jurors.

The respondent submitted his application for the position of associate judge of the Circuit Court of Cook County in December 1998. At that time, the opinion in Walls and the Rule 23 opinion in Morales I had been issued. Morales II, however, was still pending in the Illinois Appellate Court.

The respondent testified at the hearing that he was aware of those decisions at the time he answered the question. He did not list those cases in response to the question because he believed those decisions did not fall within the question's scope. Rather, he interpreted the question as asking about opinions that commented on his ethical or moral conduct and he believed that the opinions did not condemn or include a finding that he personally had engaged in racial discrimination. Respondent further testified that in answering the question he did not intend to conceal those cases because in good faith he believed those opinions were not responsive to the question.

On September 10, 1999, the respondent's name was placed on the ballot to be circulated to the circuit judges for

voting to fill 15 vacancies in the office of associate judge. Those ballots were sent out on about September 24, 1999 and had to be returned no later than October 8, 1999.

After the ballots had been sent out, but before the return date, the Appellate Court issued the opinion in Morales II. Respondent did not amend or supplement his application to reference Morales II.

On October 13, 1999, respondent was named as one of the 15 appointees to the position of associate judge and was sworn in on November 1, 1999.

Within days of the respondent taking the oath, a major Chicago newspaper reported that the respondent had been a prosecutor in two cases that had been reversed because of the State's improper use of peremptory challenges. The article suggested that the respondent had improperly failed to disclose these decisions on his judicial application. Those articles led to an investigation which resulted in these charges. Respondent has remained an associate judge but, after the filing of the charges, was reassigned to administrative duties.

In the complaint, the Administrator charged that the respondent's answer to the question was false and that the respondent knew or reasonably should have known this. She contends that the opinions in both Walls and Morales contain "comment" on the respondent's "professional conduct."

ANALYSIS

We start this analysis with an observation concerning the scope of the issues in this case. The Administrator conceded at oral argument that this case is not about racial discrimination or violating any of the provisions of the Rules of Professional Conduct that prohibit this activity. Therefore, the only issue is whether the respondent accurately answered the question.

The parties seem to agree that whether the respondent engaged in misconduct in this case involves the two-step analysis employed by the Hearing Board. The first step is whether the opinions in Morales and Walls fell within the scope of the question. If they did, then step two requires an assessment of the respondent's state of mind to determine whether his actions violated any of the disciplinary rules charged.

Apparently, the Administrator's argument is not based on any particular passage or specific statements by the court in any of the opinions. Instead, she seems to argue generally that a decision reversing a criminal conviction based on Batson violations by the State during jury selection itself constitutes unfavorable comment on the professional conduct of the prosecutors in those cases. In other words, the result is the comment, not the language of the opinion. If so, then this type of analysis implies or comes very close to implying that reading the text of the opinion would be unnecessary since it would make no difference what a Court did nor did not say about a lawyer's conduct in the text of the opinion. Furthermore, this analysis puts a lawyer on the losing side of an appeal in the position of having to decide whether a Court has commented about a lawyer's conduct because of the type of case he lost.

Because we disagree with that position, we have reviewed the written opinions in Morales I, Morales II and Walls and conclude that the opinions do not fall within the scope of the question at issue.

The question asked on the application is a simple one that should be given a simple interpretation. It simply asks about any written opinions where a court or other tribunal has commented on the applicant's "professional conduct . . . favorable or unfavorable." Because there is no issue raised about the failure to disclose "favorable" comment, the issue here is what is "unfavorable comment" on a lawyer's professional conduct. The terms are not defined and there is no guidance in the application concerning the intended scope or meaning of the question. Thus, we accord the language its common and ordinary meaning and consider how a reasonable attorney in the respondent's position would interpret this language.

A reasonable attorney completing this application would interpret the language as calling for opinions which contain negative comment or criticism that is personalized or directed at an individual attorney's professional behavior in the case, such as remarks, statements or discussions that emphasize the attorney's behavior as being improper or having an ethical or moral taint. Examples of that language can be found in the cases cited by the Hearing Board majority.

See People v. Piscotti, 136 Ill.App.3d 420, 483 N.E.2d 363, 91 Ill.Dec. 81 (1st Dist. 1985)(Pincham, J., concurring); People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078, 82 Ill.Dec. 5 (1st Dist. 1984); People v. Meccia, 275 Ill.App. 3d 123, 655 N.E.2d 1113, 211 Ill.Dec. 730 (1st Dist. 1995).

In nearly every case that results in a written opinion, the "professional conduct" of the lawyers is involved and might arguably be characterized as negative or unfavorable. Not infrequently courts reject arguments of lawyers as "untenable" or "without merit," or the reliance on certain legal authorities by an attorney as "misplaced." The question, however, is not designed to require disclosure of every written opinion where a court has remarked about the strength of the attorney's legal arguments, the credibility of their positions or their legal acumen and a reasonable attorney would not read language in the question to require such disclosure absent a negative comment about the personal behavior of the individual attorneys involved.

The opinions in neither Walls nor Morales contain that type of "unfavorable comment" on the "professional conduct" of the respondent. In Walls and Morales, the issues addressed were the same.

The convictions of the defendants were reversed because the appellate courts determined that the State under Batson failed to rebut the *prima facie* case established by the defendant. In Morales II, the court held that the State failed to meet its burden as to two out of nine minority venire persons and in Walls, the court concluded that the State failed to rebut the defendant's *prima facie* case as to three of the four African-American venire persons.

While both of those decisions have language that might arguably be characterized as unfavorable to prosecutors in the abstract, those opinions do not contain unfavorable comment on the conduct of the individual prosecutors. Though the courts determined that the reasons offered by the State did not overcome the defendant's *prima facie* case, they did so based on an intellectual disagreement with the State over the sufficiency, under Batson, of the proffered race-neutral reasons for excluding potential jurors. In fact, the Appellate Court in Walls was more critical of the trial court for not fulfilling its Batson obligations.

Therefore, we conclude that the Walls and Morales opinions did not fall within the scope of the question and the respondent was not required to disclose those decisions on his application. Therefore, it is unnecessary to reach the second step in the analysis which involves the respondent's state of mind and intent.

It was, however, error to admit the testimony of Justice Buckley concerning his intent when he authored the Morales opinions. Inquiry into a judge's mental processes in formulating an opinion after the fact is generally forbidden. See Fayerweather v. Ritch, 195 U.S. 276 (1904); In re Cook, 49 F.3d 263 (7th Cir. 1995); Georgou v. Fritzshall, No. 93 C 997, 1995 WL 248002 (N.D.Ill. 1995). Illinois follows the same general principles. People ex rel. Waite v. Bristow, 391 Ill. 101, 62 N.E.2d 545 (1945); People ex rel. Pirola v. Lyle, 329 Ill. 418, 160 N.E. 742 (1928); People v. Denny, 238 Ill.App.3d 819, 605 N.E.2d 600, 178 Ill.Dec. 806 (4th Dist. 1992).

The respondent's reliance on Weidner v. Theiret, 932 F.2d 626 (7th Cir. 1991), is misplaced. The holding in that case was narrow and confined to a large extent on considerations unique to habeas corpus proceedings. The same can be said of the other cases relied on by the respondent which involved post-conviction proceedings concerning factual matters that took place in the judges' presence in the underlying criminal cases. None of those other cases involved testimony by a judge to explain the intent of a written opinion.

The testimony was also irrelevant. The question was answered by respondent in 1999 and all that was available to him were the written decisions. Furthermore, Judge Buckley's testimony in 2001 neither added to nor subtracted from what he had previously written.

In any event, admission of this testimony was harmless error because the Hearing Board made its findings "without regard to Judge Buckley's testimony." (Hearing Board Report at 18.) See In re Smith, 168 Ill.2d 269, 290, 659 N.E.2d 896, 213 Ill.Dec. 550 (1995). We will take the Hearing Board at its word, and will assume that this statement is not pretextual.

Finally, the Administrator expressed concern that upholding the majority report would be read by prosecutors or

other attorneys as sanctioning the improper exclusion of someone from a jury solely on the basis of his or her race. The Supreme Court has made it clear in Batson and its other decisions that that is not to be tolerated and the trial and appellate courts of this State can be relied on to enforce that mandate. We doubt that our decision, which is limited to the very narrow issue before us, will be construed otherwise.

CONCLUSION AND RECOMMENDATION

For the reasons set forth herein, we recommend that the charges in this case against the respondent, John Joseph Hynes, be dismissed.

Respectfully Submitted,

Leonard F. Amari
Martin H. Katz

Dated: August 8, 2002

In re Hynes, No. 00 CH 51

Concurring in part, dissenting in part.

The issue before us is whether the respondent committed an ethical violation by answering "No" to Question 1 (c) on his application for judicial office, in light of two cases, prosecuted by the respondent, in which Batson findings were made by the appellate court. The majority concludes that he did not, agreeing with the respondent that only opinions that contain negative comment or criticism that is personalized or directed at an individual attorney's professional behavior are responsive to the question. The respondent and the majority reason that the two Batson findings in his background result from positions taken strategically on behalf of the State in the Walls and Morales trials. They describe the subsequent appellate decisions as intellectual disagreements over the sufficiency of the proffered race-neutral reasons for excluding potential jurors. In reaching this conclusion, the majority compares the Batson violations in the respondent's background to other arguments that may be rejected by courts as "without merit" or "untenable." Unfortunately, Batson is not about a failing legal argument, but rather, racial discrimination, a fact that cannot be so easily swept aside.

The U.S. Supreme Court decision in Batson requires the reviewing court to determine whether the trial court's ruling that the State did not engage in purposeful discrimination was clearly erroneous. In both Walls and Morales, the reviewing court did so find. The effect of the majority's decision would be to exempt the conduct of the attorney, the choices made by the attorney, which led to the Batson findings and reversals. I find no authority within the Rules of Professional Conduct to support that position. Indeed, Rule 8.4(a)(5) prohibits adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. (Emphasis added.)

Question 1(c) is a poorly worded question. Its inclusion on the judicial application has created the difficult situation that arises when Batson violations are within the record of a judicial candidate, whether intended by the drafters or not. I cannot concur with the majority's description of Question 1(c) as "a simple one that should be given a simple interpretation." And, to the extent that future applicants will look to the decisions of the Review Board for direction, we have an obligation to bring clarity to this issue. I fear the majority opinion fails to do so.

What is clear is the law that requires attorneys to "fully and accurately" respond to questions on applications for admission to the bar because the reviewing committees "are obliged to rely primarily on truthful answers by the applicants . . ." In re Ascher, 81 Ill. 2d 485, 499, 411 N.E.2d 1, 7, 44 Ill.Dec. 95 (1980). Inadvertent omissions have not been forgiven, nor avoided the obligation of completeness and accuracy. In re Mitani, 75 Ill.2d 118, 126-127, 387 N.E.2d 278, 281-2, 25 Ill.Dec. 622 (1979). Holding a candidate for judicial office to a lower standard, given the significance of the role played by a judge in society, would not make sense. The existing cases on bar admission would suggest that if one is uncertain about the breadth of Question 1(c), (or any other) one should err on the side of disclosure. The specific language of the question, requesting comment both "favorable and unfavorable" makes

obvious the intent to broaden the inquiry to find, essentially, all comment that may have been made about the candidate's conduct. That being the case, the Respondent committed, at least, a serious error in judgment in asserting an unreasonably narrow interpretation of the question.

The majority has reached the conclusion that the opinions in the Walls and Morales cases were not responsive to Question 1(c), and find no violation of Rule 8.4(a)(5). If a finding of a Batson violation, that is a failure of the attorney for the State to provide racially neutral reasons for excluding certain members of the venire, is not a showing that the attorney engaged in the conduct prohibited by Rule 8.4(a)(5), what would be? I cannot disconnect the attorney for the State from the conduct upon which the Batson findings were made.

It is equally difficult to accept that a finding that the State has failed to provide race-neutral reasons for excluding minority jurors is nothing more than an intellectual disagreement between the trial and appellate courts. The Batson decision is grounded on the principle that "[b]y requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice." Batson v. Kentucky, 476 U.S. at 99, 106 S.Ct. at 1724.

All parties agree that if the Batson findings were responsive to the question, Rule 8.4(a)(5) requires analysis of intent. The record below is not dispositive on this question as it did not go beyond finding that the Respondent did not have to disclose the Walls and Morales opinions. The Hearing Board, including the dissenting member, did intimate that it found the testimony of the Respondent, regarding his interpretation of the question, to be credible. However, the Witt case holds that even an innocent mistake can serve as a basis for a Rule 8.4(a)(5) violation. In re Witt, 145 Ill.2d 380, 583 N.E.2d 526, 164 Ill.Dec. 610 (1991). Further, the public nature of the events involved here also supports a finding that the conduct complained of here has been prejudicial to the administration of justice and brought the courts and legal profession into disrepute in violation of Rule 771.

Determining the appropriate sanction in this unique setting is difficult. The Administrator and the respondent agree no other cases concerning disclosures on judicial applications exist. Further, the respondent has been assigned to administrative responsibilities and prevented from other judicial functions during the pendency of this disciplinary process, which I believe is a factor to be taken into consideration. Therefore, I agree with the dissenting member of the Hearing Board that a reprimand is appropriate under these circumstances, and dissent from the majority opinion dismissing the charges against the respondent.

I concur with the well-reasoned conclusion by the majority that admitting the testimony of Judge Buckley was error. The law that a judge speaks only through the record, which "ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision" is well established. Fayerweather v. Ritch, 195 U.S. 276, 307, 25 S.Ct. 58 (1904). See also, In re Cook, 49 F.3d 263 (7th Cir. 1995); Georgou v. Fritzshall, No. 93 C 997, 1995 WL 248002 (N.D. Ill. April 26, 1995).

Respectfully submitted,

Cheryl Niro